

(1964) 12 MAD CK 0035

In the Madras High Court

Case No : Writ Petition No. 1167 of 1962

H.H. Naeems and Co.

APPELLANT

Vs

The Additional Commercial Tax Officer

RESPONDENT

Date of Decision : 11-12-1964

Acts Referred:

Citation : (1965) 78 LW 494 : (1965) 16 STC 294

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Advocate : V. Balasubramanyam and V. Kunchithapatham, for the Appellant;
Additional Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Srinivasan, J.—For the assessment year 1952-53, the petitioner was assessed to sales tax on 15th February, 1956. It preferred an appeal and that appeal, which was pending by the date of passing of Act I of 1959, was taken on file and disposed of by the Assistant Commissioner of Sales Tax. The collection of tax was stayed pending appeal. The appeal was however dismissed on 15th October, 1960. Thereafter, a notice of demand was served upon the petitioner on 8th June, 1961, and the tax was paid on 24th August, 1962.

2. On 4th September, 1962, the Additional Commercial Tax Officer issued a notice purporting to be u/s 24(3) of the Act demanding a penalty of Rs. 6,368-89. The reason was that the payment of the tax as assessed was delayed by the assessee and the period for which the penalty was levied was from the date of passing of Act I of 1959. The legality of this levy is questioned in this writ petition and certiorari has been prayed for to quash the demand. It is claimed by the petitioner that the provision in the new Act, enabling penalty to be levied for delay in the payment of the assessed tax, is a new one, and it does not in terms apply to tax which was assessed under the repealed Act. In any event, it is claimed by the petitioner that since the collection of the tax was stayed pending disposal of the appeal and could be lawfully collected only on the issue of the

notice of demand on 3rd August, 1961, the authorities were incompetent to levy the penalty firstly, during the period when the order of stay of collection was in force, and secondly, for any date prior to the disposal of the appeal.

3. In the counter-affidavit filed on behalf of the State of Madras, the facts are not disputed. It is claimed that by virtue of Section 61 of Act I of 1959, the order of assessment made under the old Act is deemed to have been passed under the new Act, and that therefore the levy u/s 24(3) of the Act is legal. It is denied that the petitioner is entitled to the relief prayed for.

4. Section 24 of Act I of 1959 deals with the demand and recovery of tax. This provision purports to deal with the "tax assessed under this Act". Sub-section (3) reads thus:

If the tax under this Act or any instalment thereof is not paid by any dealer or person within the time specified therefore in the notice of assessment or in the order permitting payment in instalments the dealer or person shall pay by way of penalty, in addition to the amount due, a sum equal to....

5. Then follows the method of calculation of the quantum of penalty. It is the contention of the petitioner that unless the tax has been assessed under this Act, that is, Act I of 1959, this provision will have no application whatsoever. It is urged that the contention of the department that Section 61 confers power to levy a penalty is not correct. Section 61 of the Act, as it was originally passed by Act I of 1959, was amended by Act X of 1963 and was made retrospective in its operation. After providing by Sub-section (1)(i) for the repeal of the Madras General Sales Tax Act, 1939, Sub-section (1)(ii) reads thus:

The repeal of the said Act by Clause (i) shall not affect--

(a) anything done or any offence committed, or any fine or penalty incurred or any proceedings begun before the commencement of this Act; or

(b) the previous operation of the said Act or anything duly done or suffered thereunder; or

(c) any right, privilege, obligation or liability acquired, accrued, or incurred under the said Act; or

(d) any fine, penalty, forfeiture or punishment incurred in respect of any offence committed against the said Act; or

(e) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, fine, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such fine, penalty, forfeiture or punishment may be imposed, as if this Act had not been passed.

6. It is a significant feature of this provision that it contemplates, broadly speaking, any penalties or liabilities suffered under the old Act, and the last

portion of the above clause "any such fine, penalty, forfeiture or punishment may be imposed as if this Act had not been passed" emphasises the legal position that this sub-clause deals only with the liabilities under the old Act. Sub-clause (iii), which is virtually a reproduction of old Section 61(1), proviso, states generally that anything done or any action taken under the said Act, that is, the Act of 1939, shall be deemed to have been done or taken under the corresponding provision of this Act, that is, Act I of 1959. But that is subject to the provisions of Clause (ii) extracted above. It may be mentioned that Clause (ii) of Section 61(1) as put in by Madras Act X of 1963 is an entirely new provision; while Sub-clause (iii) as amended makes an order of assessment under Act IX of 1939, an order of assessment deemed to be one under the new Act, it does not proceed any further. Under the old Act, there was no provision for imposing a penalty for delay in payment of the assessed tax. Section 24(3) is a new provision and a penalty which the law, that is, Act IX of 1939, did not provide for, cannot be held to have any application to proceedings under that Act. The penalty in terms of Section 24(3) is incurred when the amount of tax is not paid within 21 days from the date of service of the notice. On the date of the assessment, which was in 1956, no penalty was incurred, whatever the extent of the delay in making the payment thereof. What Section 61(1)(ii) saves is only a fine, penalty or other liability which had been incurred under the old Act. The relevant clause of Section 61 cannot accordingly be so interpreted as to impose a new liability after the passing of Act I of 1959 in respect of something done under the old Act, when such an act of commission or omission did not invite any such penalty.

7. This question came up for consideration in M.A. Abdul Rahim and Mohamed Ibrahim and Co. v. Deputy Commercial Tax Officer, Gudiyatham W.P.No. 1391 of 1962 before Ramakrishnan, J. There the petitioner had been assessed to tax for the year 1950-51 under Act IX of 1939. After Act I of 1959 was passed, the department made an order on 3rd November, 1962, demanding penalty of an amount of Rs. 1,455 and odd under the provisions of Section 24, Sub-section (3). The contention of the petitioner was accepted by the learned Judge. The conclusion was expressed in these words:

In my opinion, no authority is really necessary for the clear position that the penalty levied in this case, which the new Act alone contemplates but not the old Act, cannot be imposed retrospectively in respect of an arrear of sales tax which became due before the new Act and that nothing in the, transitory provision in Section 61 will justify its levy.

8. It is noteworthy that the learned Judge dealt with the matter in the light of Section 61 before it was amended by Act X of 1963. In my view, the position has been made even clearer by this amendment. It follows that the levy of penalty is wholly unsupported by the provisions of law.

9. The petition is allowed. The petitioner will be entitled to its costs. Counsel's fee Rs. 100.