
(1987) 01 MAD CK 0044

In the Madras High Court

Case No : Tax Case (Appeal) No. 613 of 1978. Appeal No. 40 of 1978

Hindustan Import Export Corporation

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 07-01-1987

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 13(5), 22, 22(1), 22(2), 3

Citation : (1988) 69 STC 195

Hon'ble Judges : Swamikkannu, J; Bhaskaran, J

Bench : Division Bench

Advocate : D. Trilokchand Chopda, for the Appellant; K.S. Bakthavatsalam, Additional Government Pleader, for the Respondent

Judgement

Swamikkannu, J.—This is an appeal preferred by the appellant, Messrs. Hindustan Import Export Corporation, Madras-1, u/s 37 of the

Tamil Nadu General Sales Tax Act, 1959, against the order of the Board of Revenue dated 30th June, 1978 made in its B.P. Rt. No. 2185 of

1978, with respect to the assessment year 1973-74.

The appellant was assessed on the reported total and taxable turnovers of Rs. 49,11,678 and Rs. 49,04,126 respectively under the Tamil Nadu

General Sales Tax Act, 1959 (hereinafter referred to as "the Sales Tax Act") for the assessment year 1973-74, by order of the assessing authority

T.N.G.S.T. No. 11080 of 1973-74 dated 11th June, 1976. The levy of tax was as detailed below :

Rs. 45,33,628 was taxed at 3 1/2 per cent

Rs. 3,49,442 was taxed at 7 per cent

Rs. 28,759 was taxed at 9 per cent.

It was noticed by the assessing authority that the dealer had collected surcharge amounting to Rs. 3,276.67 on the sales effected in its branch at

Sivakasi. The sales do not attract levy of surcharge under the Tamil Nadu Sales Tax (Surcharge) Act, 1971 (hereinafter referred to as "the

Surcharge Act"). Therefore, the assessing officer concluded that the appellant-assessee had contravened section 22(1) of the Sales Tax Act read

with section 3(2) of the Surcharge Act. The assessing officer levied a penalty of Rs. 4,914 calculated at one and a half times the tax collected by

the dealer u/s 22(2) of the Sales Tax Act read with section 3(2) of the Surcharge Act.

2. In the appeal filed by it before the Appellate Assistant Commissioner, the dealer disputed two items, viz., disallowance of exemption claimed by

it on the goods returned amounting to Rs. 4,736.31 taxed at 3 1/2 per cent and levy of penalty of Rs. 4,914. As regards the first item disputed,

relying on the decision of this Court in *Madras Radiators and Pressings v. State of Tamil Nadu* [1976] 37 STC 123, the appellate authority

allowed the claim for exemption of Rs. 4,308.28 out of Rs. 4,736.31. The Appellate Assistant Commissioner also cancelled the penalty of Rs.

4,914 holding that the dealer bona fide believed that it was acting in accordance with the law and had not exhibited any culpable negligence or

deliberate disregard of its duties and that there was no mens rea in its action.

3. The order of the Appellate Assistant Commissioner was examined by the Board of Revenue and, for the reasons stated in its notice dated 17th

March, 1978, the Board considered that the order of the Appellate Assistant Commissioner allowing exemption on the claim of deduction for sales

return and in cancelling the penalty levied is not correct. The sales took place during the year 1972-73 while the goods were returned in 1973-74.

In *Traders and Traders v. State of Tamil Nadu* [1977] 40 STC 289 a Full Bench of this Court has held that any claim for deduction in respect of

goods returned should be preferred within the time-limit specified in section 13(5) of the Sales Tax Act, and that too, in the year in which the sale

took place. In the instant case the relevant sales took place in 1972-73 and the Appellate Assistant Commissioner had allowed the deduction in

the assessment relating to 1973-74. As regards the levy of penalty, it was cancelled by the Appellate Assistant Commissioner on the ground that

the assessee was under a bona fide belief and that there was no mens rea.

4. The sales were effected in Sivakasi where the provisions of the Surcharge Act do not apply. Hence the Board held that so far as penalty was

concerned, the contention that there is no provision in the Surcharge Act to levy penalty cannot be accepted and that according to section 3(2) of

the Surcharge Act, the provisions of the Sales Tax Act would be applicable in relation to surcharge payable under that section, as they apply in

relation to tax payable under the Sales Tax Act. Though the assessing officer had levied by way of penalty one and a half times the sum collected

as surcharge by the dealer, the Board proposed to restrict the penalty to the actual collection of surcharge made by the assessee. The order of the

Appellate Assistant Commissioner was accordingly cancelled in so far as it related to the grant of exemption of Rs. 4,308.28 and the cancellation

of penalty levied u/s 22(2) of the Sales Tax Act read with section 3(2) of the Surcharge Act, and the order of the assessing officer was restored to

that extent. The penalty was, however, restricted to Rs. 3,277, viz., the actual collection of surcharge made by the assessee.

5. Aggrieved by the above order of the Board, the appellant has now come forward with the present appeal. The appellant contended inter alia

that the surcharge is leviable at five per cent on the tax due on all sales, that the place of sales, viz., Sivakasi, lies outside the specified limit of

Madurai, that the assessee had collected surcharge on the sales in Sivakasi to the extent of Rs. 3,276.67, and that this collection cannot be held to

be against law, since on a combined reading of section 3(2) of the Surcharge Act together with section 22(1) and (2) of the Sales Tax Act, the

amount collected by the appellant cannot give rise to an action for penalty. In this regard, the Board had relied on R.S. Joshi, Sales Tax Officer,

Gujarat and Others Vs. Ajit Mills Limited and Another, wherein it was held that it was not necessary to prove mens rea to levy penalty for illegal

collection of tax. Mr. Trilokchand Chopda, learned counsel for the appellant, would rely on the decision in The State of Tamil Nadu Vs. P.M.A.

Mathurai Veerasamy and Co., and would contend that section 3 of the Surcharge Act does not empower levy of penalty by the Board and that it

cannot be said that the Surcharge Act has adopted all the provisions of the Sales Tax Act. During the course of arguments, learned counsel took us

through the judgment in Ashok Service center and Others Vs. State of Orissa, and said that it is distinguishable and as such, the ratio therein is not

applicable to the facts of the instant case. In the instant case, he pointed out that the Surcharge Act, 1971, came into force from 29th June, 1971

and the amendment to section 22 of the Sales Tax Act, 1959, by way of Tamil Nadu Act 31 of 1972, came into effect on 1st December, 1972.

He also submitted that the validity of this amendment to section 22 was upheld in Metal Sales Corporation Vs. Joint Commercial Tax Officer,

Harbour III Assessment Circle, . He further pointed out that the assessment involved in this appeal is with respect to the year 1973-74. Further, a

succinct distinction, according to learned counsel, is that section 3(2), at the first blush, would reveal that it is enforceable only in the area specified

in the section, and not to other places, but yet, there is no provision of the words ""all the provisions of the Sales Tax Act"" or the word ""penalty"" in

the Surcharge Act, and that therefore, the levy of penalty on the collection made by the appellant, is not correct and in accordance with law.

6. The learned Additional Government Pleader took us through the provisions of section 3(2) of the Surcharge Act as well as section 22(2) of the

Sales Tax Act and also referred to the ratio of the decisions in S. Rajamani Vs. The State of Tamil Nadu, and The State of Tamil Nadu Vs.

P.M.A. Mathurai Veerasamy and Co., and also in Deputy Commissioner (C.T.), Coimbatore Division, Coimbatore Vs. M. Murugesan and Bros.,

, and contended that the order of the Board in retaining the penalty, though modified as imposed by the assessing officer and reversed by the order

of the Appellate Assistant Commissioner, so far as the penalty is concerned, is correct and in accordance with law. In this regard, he took us

through the decision in R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, and contended that mens rea need

not necessarily be proved for a contravention of a specific provision in the enactment and, when once a provision of a special fiscal enactment is

transgressed, the effect is that, as night follows the day, penalty has to be imposed on the person who has so transgressed. He also submitted that

the argument advanced on behalf of the appellant, viz., that because section 3(2) of the Surcharge Act does not contain the words ""all the

provisions"" in it, it cannot be held that the provisions of the main Act, namely, the Sales Tax Act, especially section 22 thereof, are not applicable,

is not acceptable. In other words, he submitted that there is no question of illegal penalty at all levied in the instant case and as one and a half times

the collection penalty can be imposed, it is only after having considered carefully the facts of the case, the Board has levied the penalty on the basis

of the penalty imposed by the assessing officer and that the quantum of penalty also is correct. He also brought to our notice that the turnover

involved is Rs. 50 lakhs. While replying, the learned counsel for the appellant took us through the decisions in *Manganese Ore (India) Ltd. Vs. The*

Regional Assistant Commissioner of Sales Tax, Jabalpur, and The State of Madras Vs. M. Angappa Chettiar and Sons, and also submitted that

Ashok Service center and Others Vs. State of Orissa, is distinguishable.

7. The point for consideration in this appeal is, whether the penalty imposed by the Board is in accordance with law.

8. It admits of no doubt that the provisions regarding collection of surcharge are not extended to the limits of Sivakasi wherein the appellant's sale

transactions have taken place. Section 3(2) of the Surcharge Act, 1971, reads as follows :

Save as otherwise provided in this Act, the provisions of the said Act (Tamil Nadu General Sales Tax Act, 1959) shall apply in relation to the

surcharge payable under sub-section (1) [of section 3 of the Tamil Nadu Sales Tax (Surcharge) Act, 1971] as they apply in relation to tax payable

under the said Act.

Section 22(2) of the Sales Tax Act, 1959, reads as follows :

If any person or registered dealer collects any amount by way of tax or purporting to be by way of tax in contravention of the provisions of sub-

section (1), whether or not any tax is due from such person or dealer under this Act, in respect of the transaction in which he collects such amount,

the assessing authority may, after giving such person or dealer a reasonable opportunity of being heard, by order in writing, impose upon him by

way of penalty a sum not exceeding one and a half times such amount.

9. *Mens rea*, is a concept in criminal law, which enables the court to scrutinise what had passed in the mind of an accused person during the

commission of an offence, so as to find him guilty or not guilty. This doctrine has been now very much reduced in its ambit and scope and the law, as

it stands, now, so far as the penal law of the land is concerned, is more governed

by the specific provisions of the penal enactments. During the time when the Indian Penal Code had been drafted by Macaulay this concept had been very much in his mind, since India was under the foreign domination then (vide Trevelyan's Life of Macaulay). Subsequent to the attainment of freedom and when our country has been declared to be a Sovereign Democratic Republic now, we are governed by the Organic law of the Land, namely, the Constitution. The provisions of the penal laws including the Indian Penal Code, are now followed more with strict adherence to the letters of the provisions of the enactments than giving much importance to the doctrine of mens rea, since mens rea recedes to the background in view of the special enactments regarding various offences including white collar offences. Imposing of penalty cannot be construed as a punishment as contemplated by the criminal law. In fiscal laws, it is an eye-opener for the assessee concerned, as well as others to see that they comply with the provisions of the relevant enactments strictly in their dealings. In other words, the dealer has to place all the materials before an inspecting and assessing authority or any other authority concerned regarding the collection of tax under the fiscal Act and does not become a victim to the accusation that he had suppressed any material. Just as an investigating officer, in an offence, acts promptly and in accordance with the procedure established by the law, namely, the Criminal Procedure Code, so also an authority empowered to investigate into as well as to impose the appropriate tax in accordance with law, has to be furnished with all the particulars. If there is any withdrawal or an attempt of withdrawal, certainly the dealer concerned comes within the quasi-offence of suppression. Since an argument had been advanced in this case by the learned counsel that there had been no mens rea on the part of assessee and that it had collected the surcharge inadvertently and not with any motive, the above observations have been necessitated.

10. Now, coming to the facts of this case, it is common ground that the appellant had collected a sum of Rs. 3,276.67 as surcharge. It is also not disputed that Sivakasi, wherein the transactions had taken place, is not one notified as an area where surcharge can be levied. Under the circumstances, the assessing officer had imposed a penalty on the amount collected as surcharge. The learned Appellate Assistant Commissioner

has introduced the doctrine of mens rea to the transaction and has held that penalty need not be imposed and had reversed that portion of the order of the assessing authority. What the Board has done in this case in restoring the order of the assessing authority imposing penalty for such collection of surcharge, is in accordance with law. The argument advanced that section 3(2) of the Surcharge Act cannot be taken as a general provision so as to involve section 22(2) of the Sales Tax Act also, cannot be upheld, because none of the authorities referred to by the learned counsel for the appellant is applicable to the facts of the case before us. On the other hand, we find that the learned Additional Government Pleader is correct in drawing our attention to the ratio in S. Rajamani Vs. The State of Tamil Nadu, though the said case had been dismissed at the time of admission and in favour of the Revenue. The ratio involved in that case is applicable to the facts of the instant case. Though The State of Tamil Nadu Vs. P.M.A. Mathurai Veerasamy and Co., was also decided ex parte and in favour of the assessee, yet in view of the specific provisions of section 3(2) of the Surcharge Act and section 22(2) of the Sales Tax Act, and inasmuch as Deputy Commissioner (C.T.), Coimbatore Division, Coimbatore Vs. M. Murugesan and Bros., has considered the decision of the Supreme Court in Ashok Service center and Others Vs. State of Orissa, , we are of the view that the suo motu restoration of the penalty imposed by the assessing authority, by the Board, is correct and in accordance with law. The absence of either the words ""all the provisions of the Tamil Nadu General Sales Tax Act"" or the word penalty"" in section 3(2) of the Surcharge Act, cannot be a ground to hold that all the provisions of the General Sales Tax Act, 1959, are not applicable to the Sales Tax (Surcharge) Act, 1971. Hence we hold that the contention of the learned counsel for the appellant in this regard is not sustainable. We hold that the provision in section 3(2) of the Surcharge Act would apply to all the provisions of the Sales Tax Act.

11. In the result, we dismiss the appeal with costs. Counsel's fee Rs. 500 (rupees five hundred only).

12. Appeal dismissed.