
(1977) 12 MAD CK 0022

In the Madras High Court

Case No : Tax Case No. 500 of 1974 (Appeal No. 15 of 1974)

Jeewanlal (1929) Ltd.

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 07-12-1977

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12, 14, 15, 16, 31

Citation : (1978) ILR (Mad) 40 : (1978) 42 STC 263

Hon'ble Judges : P. Govindan Nair, C.J.;Varadarajan, J

Bench : Division Bench

Advocate : C. Natarajan, for the Appellant; Additional Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

P. Govindan Nair, C.J.—The question arising in this tax revision case is not a very easy one to resolve, but the facility to answer that has been enhanced by almost unanimous decisions one way in favour of the assessee's contention. The question is whether after an appeal had been taken from an order of the Appellate Assistant Commissioner before the Tribunal by the assessee in regard to matters held against them by the Appellate Assistant Commissioner, the Board of Revenue purporting to act u/s 34 of the Tamil Nadu General Sales Tax Act can exercise its power of revision under that section, revise the order of the Appellate Assistant Commissioner and set aside that order in favour of the assessee holding that a certain type of turnover is not assessable to tax.

2. On the facts of this case, one of the four points taken by the assessee before the Appellate Assistant Commissioner was that the canteen sales were not taxable. This contention was accepted by the Appellate Assistant Commissioner. But the other three contentions raised by the assessee were negatived. The assessee, therefore, appealed to the Appellate Tribunal in regard to the three points which the Appellate Assistant Commissioner held against them.

3. Thereafter, purporting to act u/s 34, notice was issued by the Board of Revenue to the assessee and notwithstanding the objections of the assessee, an order has been passed by the Board of Revenue in exercise of the revisional power setting aside the order of the Appellate Assistant Commissioner and holding that canteen sales were also taxable. It is this order that is questioned before us in appeal u/s 37 of the said Act.

4. We shall first read Section 34, which is as follows :

34. Special powers of Board of Revenue.-(1) The Board of Revenue may, of its own motion, call for and examine an order passed or proceeding recorded by the appropriate authority u/s 4-A, Section 12, Section 14, Section 15 or Sub-section (1) or (2) of Section 16 or an order passed by the Appellate Assistant Commissioner under Sub-section (3) of Section 31 or by the Deputy Commissioner under Sub-section (1) of Section 32 and may make such inquiry or cause such inquiry to be made and subject to the provisions of this Act may pass such order thereon as it thinks fit.

(2) The Board of Revenue shall not pass any order under Sub-section (1) if-

(a) the time for appeal against that order has not expired ; or

(b) the order has been made the subject of an appeal to the Appellate Tribunal or of a revision in the High Court; or

(c) more than five years have expired after the passing of the order.

(3) No order under this section adversely affecting a person shall be passed unless that person has had a reasonable opportunity of being heard.

(4) In computing the period referred to in Clause (c) of Sub-section (2), the time during which the proceedings before the Board of Revenue remained stayed under the order of a civil court or other competent authority shall be excluded.

5. We think this section is linked with Section 36(3). Section 36(3) is as follows:

36. Appeal to the Appellate Tribunal.-(3) In disposing of an appeal, the Appellate Tribunal may, after giving the appellant a reasonable opportunity of being heard,-

(a) in the case of an order of assessment-

(i) confirm, reduce, enhance or annul the assessment or penalty or both;

(ii) set aside the assessment and direct the assessing authority to make a fresh assessment after such further inquiry as may be directed; or

(iii) pass such other orders as it may think fit; or

(b) in the case of any other order, confirm, cancel or vary such order:

Provided that at the hearing of any appeal against an order of the Appellate Assistant Commissioner or the Deputy Commissioner, the assessing authority

shall have the right to be heard either in person or by a representative:

Provided further that, if the appeal involves a question of law on which the Appellate Tribunal has previously given its decision in another appeal and either a revision petition in the High Court against such decision or an appeal in the Supreme Court against the order of the High Court thereon is pending, the Appellate Tribunal may defer the hearing of the appeal before it, till such revision petition in the High Court or the appeal in the Supreme Court is disposed of.

6. In a very brief order in Tax Case No. 269 of 1977 (Revision No. 82 of 1977) (Deputy Commissioner of Commercial Taxes, Tiruchirapalli Division, Tiruchirapalli v. S. Gnanapatham, Proprietor: Sri Balasubramaniam Oil Mills, Arni Road, Ammayapet Village, Wandavasi, North Arcot Dist.) [1978] 42 S.T.C. 262, this Bench said, on a similar question arising, that when the order of the Appellate Assistant Commissioner has been appealed against before the Tribunal, the Board will have no jurisdiction to deal with that order in revision albeit that very point dealt with by the Board is not a matter covered by the appeal grounds taken by the assessee before the Tribunal. We said then:

The order has been made the subject-matter of appeal to the Appellate Assistant Commissioner. The question is not whether every part of that order has been the subject-matter of appeal. Such a contention is not justified by the wording of the section....

7. A Bench of this Court dealt with it far more elaborately in a decision in C. Gnanasundara Nayagar Vs. The Commissioner of Income Tax, . Raja-gopalan, J., speaking for the Bench, dealt with the matter and held that when an order has been appealed against before the Tribunal, the power of revision u/s 33A(2) of the Income Tax Act, 1922, cannot be exercised by the Commissioner. The analogy between the sections construed in that decision and the provisions with which we are concerned here is very evident. The learned Judge observed therein :

...To accept the plea of the learned counsel for the petitioner, that the appeals the petitioner preferred to the Tribunal did not prevent the Commissioner from exercising the revisional jurisdiction vested in him by Section 33A(2), we have to construe the word "order" in Clause (c) of the proviso, as the "relief claimed" and to read Clause (c) as if it ran :

"provided that the Commissioner shall not revise any order under this Sub-section if the relief claimed has been made the subject of an appeal to the Appellate Tribunal."

Such an interpretation is not permissible. The scheme underlying the proviso to Section 33A(2) bars such a narrow interpretation being placed on the word "order" in Clause (c) alone of the proviso....

8. We are in respectful agreement with this view and we feel that Section 34(2) (b) is a complete ban preventing the Board of Revenue in acting and exercising

the power of revision u/s 34 once an appeal had been taken from the order of the Appellate Assistant Commissioner which is the order with which we are concerned in this case. We also accept the argument of counsel for the assessee Thiru C. Natarajan that Section 34(2)(a) throws light on the interpretation that we should place on Section 34(2)(b). During the period provided for an appeal, the hands of the Board of Revenue are tied as is seen from Section 34(2)(a). This temporary ban becomes a permanent ban once an appeal has been taken under that section. We would like to add another reasoning in support of the view that we have expressed and that turns on the interpretation that we have to place u/s 36(3), which we have already extracted. It is clear that the power of the Appellate Tribunal extends to the enhancement of the turnover. The words used are wide enough to include the enhancement by bringing within the clutches of taxation a part of the turnover which has been exempted and which related to a specific class of turnover apart from general enhancement of a single type of turnover. The question arises whether this enhancement could be done at the instance of the revenue. The matter was dealt with by this court in the decision reported in *T. V. S. Iyengar and Sons (P.) Ltd. v. State of Madras* [1970] 25 S.T.C. 160 and *Veeraswami, J.*, elaborately considered the question and came to the conclusion that the power of enhancement u/s 31(3)(a)(i) of the Madras General Sales Tax Act, 1959, has to be construed by giving to the word "enhancement" in the section a wider amplitude. We are in respectful agreement with this decision. From what we have stated above, it appears that the scheme of the Act is clear that though the revenue cannot appeal from the order of the Appellate Assistant Commissioner in regard to a part of it which is against the revenue, once an appeal has been taken from that order by the assessee on points held against the assessee, the revenue can approach the Tribunal for enhancement of the assessment by setting aside the decision of the Appellate Assistant Commissioner against the revenue which is not really the subject-matter of the appeal. In such a case, the power of the Board of Revenue is taken away. If there is no appeal, the ban u/s 34(2)(b) will not be attracted and the Board will be free to exercise revisional power and rectify a mistake committed by the Appellate Assistant Commissioner and save the revenue. There cannot be a simultaneous exercise of the power by the Board as well as by the Appellate Tribunal.

9. In the light of the above, we set aside the order of the Board of Revenue and allow this tax revision case with costs. Counsel's fee Rs. 300.