
(1973) 01 MAD CK 0002

In the Madras High Court

Case No : Tax Case No. 144 of 1969 (Appeal No. 2 of 1969)

Khemchand Rajkumar

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 31-01-1973

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12, 12(2), 12(3)

Citation : (1973) ILR (Mad) 158 : (1974) 33 STC 78

Hon'ble Judges : V. Ramaswami, J;Ramanujam, J

Bench : Division Bench

Advocate : B. Rajagopalan, for the Appellant; K. Venkataswami, First Assistant Government Pleader (Tax) and P. Venkataraman, for the Respondent

Final Decision : Allowed

Judgement

Ramanujam, J.—This is an appeal filed by the assessee against the suo motu order passed by the Board of Revenue levying for the first time

a penalty of Rs. 22,665, which, according to the Board of Revenue, the assessing officer should have levied u/s 12(3) of the Tamil Nadu General

Sales Tax Act, while making the assessment. In the proceedings for assessment, the assessee's account books were rejected on the basis of

certain anamath books recovered from the assessee's place of business and a best judgment assessment was made. The said best judgment

assessment resulted in an addition of a sum of Rs. 7,60,500 to the turnover of Rs. 9,99,449.46 returned by the assessee. At the time of making the

best judgment assessment u/s 12(2), the assessing authority had not passed any order u/s 12(3). Even in the appeal filed before the Appellate

Assistant Commissioner by the assessee, the Appellate Assistant Commissioner did not consider the question of penalty leviable u/s 12(3). After

the appellate authority passed the order granting a relief on a turnover of Rs. 5,000, the Board of Revenue, in exercise of its suo motu powers,

called for the records of both the assessing authority as well as the appellate authority, and after due notice to the assessee, revised the order of the

assessing authority providing for a penalty of Rs. 22,665.

2. Before us, the learned counsel for the assessee, contends that the Board of Revenue had no jurisdiction to direct the levy of penalty u/s 12(3) in

exercise of its suo motu powers. According to the learned counsel, the Board of Revenue in exercise of its suo motu powers cannot pass any

original order of assessment or an original order of penalty, which the assessing authority is expected to pass u/s 12. It is also pointed out that the

assessing authority having failed to exercise its power u/s 12(3) at the time of making the original assessment, there cannot be any levy of penalty at

a subsequent stage either by the appellate authority or by the revisional authority. The learned counsel seeks support for this submission from two

decisions of this court.

3. In *State of Madras v. Ramulu Naidu* [1965] 16 S.T.C. 865, the assessing authority at the time of making the assessment order u/s 12(2) did

not impose any penalty, but later, the succeeding assessing authority levied the penalty on the ground that an order u/s 12(3), which should have

been passed at the stage of assessment, had not been passed. This order was objected to by the assessee by filing an appeal before the Appellate

Assistant Commissioner, but without success. But the Tribunal set aside the said order levying penalty on the ground that it had been passed

without jurisdiction. This court affirmed the said view of the Tribunal expressing that the whole scheme of Section 12 suggested that the levy of

penalty on the grounds comprehended by Sub-Section (3) of Section 12 is part of the assessment proceedings under Sub-section (2), that,

therefore, the penalty that is contemplated by Sub-section (3) depends on and follows a finding as to the incompleteness or incorrectness of the

return submitted and forms part of the proceedings resulting in the best judgment assessment, and that there could be no independent enquiry

contemplated by Sub-section (3) for purposes of levy of penalty alone. It was, therefore, held in that case that the succeeding assessing authority

would have no jurisdiction to reopen an earlier assessment order or act

independently of the assessment for purposes of levying penalty.

4. In *Abdul Waheed v. Commissioner of Commercial Taxes* [1972] 30 S.T.C. 277, a somewhat similar question as the one arising in this case

came up for consideration. There, while passing an assessment order on an assessee u/s 12(2), the assessing authority did not consider the

question whether the order for the levy of penalty should be made u/s 12(3) or not. Subsequently, the assessing authority invoked that power and

levied penalty u/s 12(3). On appeal, the Appellate Assistant Commissioner set aside the order levying penalty on the ground that an independent

order levying penalty long after the assessment had been completed was not valid. Therefore, the Board of Revenue exercised its suo motu

revisional power and set aside the order of assessment so as to enable the assessing authority to invoke the power u/s 12(2) and (3)

simultaneously, and to pass fresh orders both in relation to assessment and penalty. On appeal against that revisional order of the Board of

Revenue, this court held that the order of assessment passed u/s 12(2) was alone the subject-matter of revision by the Board, and the Board not

having found any error in the order of assessment, it could not set aside that assessment order merely on the ground that the assessing officer

overlooked the provisions of Section 12(3) and failed to exercise that power while making the assessment. This court, therefore, held that the

order of the Board of Revenue setting aside the order of assessment is not legal. As already stated, the assessing authority has not purported to

exercise his power u/s 12(3) while making the assessment u/s 12(2). Though the circumstances of this case may call for the imposition of penalty

u/s 12(3), the assessing authority has not in fact chosen to invoke his power u/s 12(3). What the Board has done is to exercise that power, which

the assessing authority should have exercised, but, actually did not exercise. According to the learned Government Pleader, the Board can pass

any order in revision which the assessing authority should have passed. But we are of the view that where the assessing authority has failed to pass

a statutory order, the Board cannot itself assume the power and pass the original order. If the assessing authority has passed an order, which,

according to the Board of Revenue, is erroneous, it can revise that order and pass any order that is deemed fit in the circumstances of the case.

But, where the assessing authority has not passed an order, the Board cannot be said to have an order which could be revised in exercise of its suo motu power. In *M. Ramaswamy Pillai v. State of Madras* [1968] 22 S.T.C. 224, it has been held that to attract the revisional jurisdiction u/s 32(1) there should be an order either express or implied. In this case, the assessing authority neither in the show cause notice nor in the assessment has proposed to pass any order u/s 12(3) . In these circumstances, it cannot be said that there is any order by the assessing authority levying penalty either impliedly or expressly. Section 34 specifically refers to ""an order passed"" by any authority subordinate to the Board which could be the subject-matter of revision under that section. Therefore, there should be an order passed by a subordinate authority, either express or implied, so as to attract Section 34. We have already held that there is no order by the assessing authority even by implication in the matter of levy of penalty. For the reasons set out above, the order of the Board of Revenue has to be set aside, and is accordingly set aside. The tax case is allowed. There will be no order as to costs.