
(1957) 09 AP CK 0012

In the Andhra Pradesh High Court

Case No : Original Suit No. 40 of 1948 (S.A. No. 100 of 1935)

Kondapalli Viraraju

APPELLANT

Vs

State of Andhra (Now Andhra Pradesh)

RESPONDENT

Date of Decision : 17-09-1957

Acts Referred:

Sales Tax Act — Section 8

Citation : (1958) 9 STC 42

Hon'ble Judges : Bhimasankaram, J

Bench : Single Bench

Advocate : G. Chandrasekhara Sastri and M. Seshachalapathi, for the Appellant;

Judgement

Bhimasankaram

1. The appellant, who was the plaintiff in the lower court, is a merchant carrying on business at Rajahmundry dealing in such commodities as ginger, onions etc. He obtained a licence as commission agent u/s 8 of the Madras General Sales Tax Act for the year 1944-45 which exempted him from the tax payable u/s 3(1) of that Act subject to the provisions of the Act and the conditions of the licence. He has also independent business but we are not concerned with it. According to him, his turnover in respect of his commission business as a selling agent for the year in question was Rs. 1, 71, 694-0-3 and his turnover in respect of similar business as a buying agent was Rs. 27, 424-9-3. The Deputy Commercial Tax Officer passed an order dated 29th January, 1946, described as the final assessment order and marked as Ex. A-2(a) (a certified copy of which is Ex. A-2) wherein he refused exemption to the plaintiff on the whole of his turnover as selling agent but granted exemption on the turnover of Rs. 27, 424-9-3 relating to his business as a buying agent. This order was however revised later by an order of the same officer marked as Ex. A-3(a) dated the 30th March, 1946 (whereof Ex. A-3 is a certified copy) whereby the exemption granted in respect of the turnover relating to the buying agency was cancelled. The appellant filed appeals to the Commercial Tax Officer against these orders, Exs. A-2(a) and

A-3(a), in vain. He could also obtain no relief from the Board of Revenue to which he took up the matter. The suit out of which this second appeal arises impeached the validity of both these orders and the appellant has failed in both the courts below.

2. I shall first deal with the appellant's contention relating to Ex. A-2(a). In the first place, he says that he was not served with the notice prescribed by rule 9 of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939. That rule provides that where any return submitted by a dealer appears to the assessing authority to be incorrect or incomplete, the assessing authority shall, before determining the turnover of the dealer to the best of his judgment after making such enquiry as he considers necessary as provided by rule 8, issue a notice to the dealer calling upon him to produce his accounts and approve the correctness and completeness of his return at a time and place to be specified in the notice. Ex. B-4 is the notice dated 29th January, 1946, which was actually served upon the plaintiff. This date, it will be noticed, is the date on which the final assessment order Ex. A-2(a) was passed. By that notice, he was intimated that his explanation in respect of his business was required and that he should appear "before the Sales Tax Officer immediately at the office of the Deputy Commercial Tax Officer." It is clear, as the learned District Judge observed that this notice does not use the language employed in rule 9 referred to above. The learned Appellate Judge was however of the opinion that the appellant was as a matter of fact informed by the assessing authorities that his return Ex. A-5 showing that the taxable turnover was only Rs. 1, 25, 537-11-3 was not complete or correct, that the items of business in respect of which he claimed exemption were also liable to tax and that the appellant was therefore asked to explain why he should not be taxed in respect of those items. It is to be observed that no specific form of notice has been prescribed by rule 9. The question is whether, in the circumstances, the assessment order could be invalidated merely on the ground that the notice does not in terms employ the language of rule 9. I find myself unable to agree with the contention of the learned Advocate for the appellant that the order of assessment becomes void merely because the notice does not use the language prescribed by rule 9. In the present case, the appellant went to the office of the Sales Tax Officer as required by Ex. B-4 and was asked a number of questions in respect of his accounts to which he gave answers. Further, he made no complaint in his appeal to the Commercial Tax Officer of the absence of any such notice. What is more to the point is that he does not say that he then had or has even now any material with him which could have influenced the judgment of the Deputy Commercial Tax Officer on the merits; that is to say, it is now clear that even if he had been given a notice in strict conformity with the provisions of rule 9 he could not have adduced any evidence to support his claim to the exemptions. If he had any such evidence, he could have produced it even before the Commercial Tax Officer on appeal. It is no doubt true that presumably the Deputy Commercial Tax Officer was ready with his order of assessment on 29th January, 1946, and after listening to the

appellant's explanation saw no reason to alter it because his order is dated the same day as the date of the notice served upon the appellant. I agree however with the lower appellate court that in the absence of proof of any prejudice to the appellant he cannot impeach the validity of that order simply because the terms of Ex. B-4 are not in strict technical accordance with the language of rule 9. This contention must therefore be rejected. The second ground of attack directed against Ex. A-2(a) is that the reasons given by the Commercial Tax Officer on appeal - and it is those reasons which must be deemed to have governed the decision refusing the exemption - are not valid. In this order dated 9th February, 1947, marked as Ex. A-9 in the case, two principal reasons are given by the Commercial Tax Officer for rejecting the appellant's claim for exemption in respect of the sum of Rs. 1, 99, 118-9-6 which is the aggregate of the two sums claimed by him as commission turnover in respect of his buying and selling agencies. The first ground was that the appellant maintained only a common daybook and ledger for his own business as well as commission business and that as such he violated rule 12(3) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939. It is pointed out by Mr. Chandrasekhara Sastry that it is not correct to say that separate ledgers were not maintained though it is true that there is only a common daybook. He refers me to the following passage in paragraph 14 of the learned Subordinate Judge's judgment :-

"The plaintiff's Advocate argues that the maintenance of separate ledgers by the plaintiff is sufficient compliance of rule 12(3). The objection is answered by the argument that rule 12 of the M.G.S.T. Rules framed by the Provincial Government prescribes the manner of maintenance of the accounts and that the mere maintenance of separate ledgers based upon a common daybook for both the classes of transactions is not the maintenance of separate accounts as prescribed under rule 12(3)".

3. In the written statement filed on behalf of the Government in the present suit in paragraph 4, they stated that only a single daybook was maintained in respect of both kinds of the plaintiff's business, and do not say that there are no separate ledges. It may also be noted that no such objection was mentioned in the original order of assessment made by the Deputy Commercial Tax Officer. The lower Appellate Court has not recorded any finding on this point. In these circumstances it is clear that the objection is not that separate accounts were not kept but only that there were no separate account books for these transactions. It has been held by this Court that the requirement as to the maintenance of separate accounts is not violated merely by the fact that the dealer does not have two separate account books in respect of his personal business and his commission agency business. Therefore the assessing authorities were clearly wrong in holding that there was a violation of the terms of the licence on this ground. The other ground given by the Commercial Tax Officer on appeal for holding that the appellant had violated the terms of his licence was that he had made extra collections from the buyers in addition to the price of the goods and appropriated those amounts for himself without passing them on to his

principals. The extra collections so made are rusum, dharmam and kolagaram. The Appellate Assistant Commissioner found that such amounts were not passed on to the selling principal or the buying principal. In *Radhakrishna Rao v. Province of Madras* (1952 3 S.T.C. 121; 1952 1 M.L.J. 494) which was a case which arose from the West Godavari district, while the present case is from the neighboring district of East Godavari, the learned Judges remarked as follows as regards similar collections :

"The general evidence is that these charges are made by all the commission agents in the locality and have received the sanction of mercantile usage. Indeed, the learned Advocate-General did not address any argument in respect of these collections. The Government appear to have recognised this fact as is evident from condition 5 contained in the form which was substituted for the original form by a Government order dated 7th February, 1948."

4. In fact condition 5 contained in a later form which was substituted for the original form of the licence indicates that the Government recognised the practice in respect of some of these additional charges. The condition is in these terms :-

"The agreed commission or brokerage specified in the accounts shall be the entire remuneration of the agent and each legitimate incidental charge actually incurred by him in respect of insurance, transport, loading and unloading, godown rent, interest, correspondence, telegrams, the use of the telephone and the like shall be specified in the accounts separately."

5. The learned Judges also pointed out that so far as rusum was concerned, the commission agents were really collecting an extra commission and they cited with approval a passage from the judgment of Biswanatha Sastri, J., in *Provincial Government of Madras v. Veerabhadrapa* (1950 1 S.T.C. 245; ILR 1951 Mad. 257) that such an amount really forms part of the commission charged. They observed that there was no secrecy about this charge and they also noted that the argument proceeded before them on the footing that this custom of commission agents collecting rusums from the buyers at a particular rate and appropriating them was well established and the sellers either actually knew or must be deemed to have known of this usage. In the present case, the trial court had not the benefit of the Full bench decision though it was available to the learned District Judge. But the learned District Judge does not seem to have derived much advantage from that decision though he refers to it in discussing the point as to whether the commission agent is a dealer or not within the meaning of section 8 of the Sales Tax Act. In considering the second point, which he framed in these terms, "If the plaintiff is to be considered a dealer, whether he is entitled to exemption in respect of that business u/s 8 of the Sales Tax Act", he contents himself by making the following observations :-

"He (the Subordinate Judge) also gives several reasons for holding that the plaintiff had violated the conditions of the licence granted to him for doing commission business. He refers to several items of rusum, dharmam etc., that

were collected and were not credited to the principals. He also refers to the non-maintenance of proper accounts as required by the rules. It is unnecessary to recapitulate the several grounds mentioned by him and in the orders Exs. A-2 and A-3. Suffice to say that the appellant's Advocate has not taken me through the evidence regarding these facts and he has not impeached the correctness of the findings of the lower court on these points. I am therefore of the opinion that it has been established that the appellant did not conform to the conditions of the licence granted to him and that he is not entitled to the exemption in section 8 of the Madras General Sales Tax Act."

6. Having regard to the observations of the Full Bench I think that these extra collections cannot be held to involve violation of the terms of the licence and there is no serious argument to the contrary. But it is argued by the learned Government Pleader that as pointed out by the learned Subordinate Judge there are several defects in the accounts and that by mixing up both the transactions, the plaintiff attempted to pass off his own business as commission business and that therefore he is not entitled to the benefit of the exemption. The learned Subordinate Judge observed in paragraph 15 of his judgment as follows :-

"The assessing authorities detected some defects in the accounts maintained by the plaintiff such as the maintenance of a single day-book in respect of both the transactions and the crediting of the amount which he realised by way of *rusum*, *dharma*m, commission etc. to the respective impersonal accounts without any possibility of ascertaining what portion of it related to his own business and what to his agency transaction etc., and held that, as the plaintiff did not observe the conditions of the licence, he is not entitled to the exemption claimed u/s 8 and taxed the entire turnover, even though a major portion of it is his agency business. It is up to the plaintiff to establish the exemption claimed u/s 8; the burden is upon the assessee to prove satisfactorily before the assessing authority how much of his turnover related to commission business and how much to his own. This he failed to do either before the assessing authority or even before this court. He did not move his little finger to prepare a tabular statement from the accounts showing the names of the known principals and how much business was done actually on agency business and how much was his own business. If he had done that, probably he could claim exemption for the portion of the turnover claimed by him as relating to agency business There is some force also in the plaintiff's contention that the assessing authority should, on examination of the accounts, take only the offending items out of the turnover for which exemption was claimed and tax only such of them and not the entire turnover, even though it contains a major portion of agency transactions. But since the burden is upon the plaintiff to establish clearly how much of his turnover is exempt u/s 8 and he failed to do so, I think the benefits of section 8 cannot be invoked in his favour."

7. In order to consider whether this view of the learned Subordinate Judge is right or not, it would be necessary to advert to the terms of the licence issued to

the plaintiff. It was in Form No. V (as it then was) prescribed by the rules framed under the Act which is in these terms :-

FORM NO. V.

Licence u/s 8, Madras General Sales Tax Act of 1939.

[See rule 6(5).]

WHEREAS, having their place of business in have said to him a licence fee of Rs. 10 (in words ten rupees only) a licence is hereby granted u/s 8 of the Madras General Sales Tax Act of 1939 subject to the following conditions :

1. The licence-holder shall submit to the undersigned as before the last day of every month, a return in from No. 6 for the previous month.
2. The licence-holder shall be exempt from the tax payable u/s 3(1) of the Madras General Sales Tax Act of 1939 only to the extent to which the goods bought or sold through him are included in the turnover of the principals or in the turnover of the dealers from whom purchases were made.
3. This licence shall not apply to the transactions of the licence-holder carried on otherwise than for an agreed commission or brokerage on behalf of known principals (including firms) in the province specified in his accounts, or to the transactions of the licence-holder on behalf of principals outside the province.

No correction in this licence shall be valid unless it is ordered and attested by the undersigned.

Licensing Authority."

8. We are at present concerned only with the meaning and effect of condition No. 3, read in the light of section 8 of the Act the material portion of which is as follows :-

"The Provincial Government may on the application and on payment of such fee as may be prescribed in that behalf, license any person under this section who for an agreed commission or brokerage buys or sells on behalf of known principals specified in his accounts in respect of each transaction and may exempt from the tax u/s 3, such of his transactions as are carried out in accordance with the terms and conditions of his licence."

9. It appears to me that the licence granted enables the licensee to seek exemption from tax in respect only of "such of his transactions as are carried out in accordance with the terms and conditions of his licence, " i.e., transactions carried out "for an agreed commission or brokerage on behalf of known principals specified in his accounts" or such transactions "on behalf of principals outside the province". If from the accounts it is possible to separate the transactions of this nature, then surely the dealer could claim the exemption. The mere fact that there are other transactions in respect of which no such claim could be made or made could be sustained, cannot be a ground, in my opinion, for denying him

exemption in respect of transactions of this class. A tabular statement such as is referred to by the learned Subordinate Judge could easily have been prepared from the accounts and there is no question in my view of any burden of proof in regard to the preparation of such a statement. The assessing authorities also could have asked for such a tabular statement and could have limited the exemption to such transactions. But they did nothing of the sort because they were of the view that non-maintenance of separate accounts and appropriation of extra collections struck at the root of the plaintiff's claim for exemption. But as I have taken a different view on these matters and as I am also inclined to hold that the plaintiff is entitled to exemption in respect of transactions falling within the terms of clause (3) of the licence, the matter will go back to the trial Court for determination of the turnover entitled to exemption. This will only apply to the plaintiff's claim for exemption as a selling agent because I shall be presently dealing with his claim for exemption as a buying agent in respect of the sum of Rs. 27, 424-9-3. The plaintiff's claim for exemption as a buying agent in respect of the above-mentioned turnover was originally allowed as appears from Ex. A-2(a). That order dated 29th January, 1946, was however revised as already stated by another order dated 29th March, 1946, the original of which is marked as Ex. A-3(a). Mr. Chandrasekhara Sastry for the appellant contests the validity of the subsequent order by the Deputy Commercial Tax Officer on two grounds. He contends in the first place that the original assessing authority has no power under rule 17 of the Madras General Sales Tax Rules, 1939, to revise his own order merely because he has changed his previous view in regard to the claim for exemption. Before proceeding to discuss the question of jurisdiction, it may be stated that Ex. A-3 purports to proceed upon the basis of a re-check of the plaintiff's accounts. In the officer's own words, "The accounts have again been checked by the Special Deputy Commercial Tax Officer and the following irregularities in accounts have been noticed which call for a revised assessment on the entire turnover." It is to be remarked that the irregularities mentioned were always there and it cannot be said that they were overlooked at the time when Ex. A-2(a) was passed. Now, rule 17 as it stood at the time in so far as it is relevant is as follows :-

"17. (1) If, for any reason, the whole or any part of the turnover of business of a dealer or licensee has escaped assessment of the tax in any year the assessing authority may at any time within the year..... next succeeding that to which the tax relates, determine to the best of his judgment the turnover which has escaped assessment and assess the tax payable on such turnover after issuing a notice to the dealer and after making such enquiry as he considers necessary."

10. In support of his submission as to the proper construction of this rule, Mr. Chandrasekhara Sastry relies upon a Full bench decision of the Madras High Court in *State of Madras v. Louis Dreyfus & Co., Ltd.* (1955 6 S.T.C. 318; ILR 1956 Mad. 1285). In that case, their Lordships were contrasting the provisions of rule 17, as it now stands, with the provisions in rules 14(2) and 14-A also as

they now stand. It may be stated that the changes introduced by the subsequent amendment of these rules are not substantial from the point of view with which we are concerned in the present case. The material portions of rules 14 and 14-A must be quoted in order to appreciate the reasoning of the Full Bench :

"14. The following authorities may exercise the powers of the nature referred to in section 12(1) :-

1. The Deputy Commissioner of Commercial Taxes; and
2. The Commercial Tax Officer :

Provided that the Deputy Commissioner of Commercial Taxes shall not revise an appellate order of a Commercial Tax Officer acting u/s 11 in respect of cases involving a turnover exceeding Rs. 20, 000.

14-A. Where the tax as determined by the initial assessing authority appears to the appellate or revising authority to be less than the correct amount of the tax payable by the dealer, the appellate or revising authority shall, before passing orders, determine the correct amount of tax payable by the dealer after issuing a notice to the dealer and after making such enquiry as such appellate or revising authority considers necessary."

11. The learned Judges contrasted the language of the rules and laid down that the scope of rule 17 was limited to escaped turnover. They further observed at page 1297 as follows :

"No doubt in a general sense both rule 14(2) as well as rule 17(1) serve a common purpose, viz., to gather revenue which has improperly escaped but while rule 14(2) is directed to the correction of improper or illegal assessment orders which have levied less or more tax than justified, rule 17(1) lays emphasis on escaped turnover. The distinction between the two provisions might be expressed by saying that rule 14(2) deals with escaped assessments and rule 17(1) with escaped turnovers, notwithstanding that the latter also would mean that a lesser amount of tax has been levied. So understood the two provisions would be completely reconcilable and the two jurisdictions - to revise assessments and to reopen them - would each be assigned to the proper authority. The language of rule 17(1) is consistent with this construction. The escape that serves as the foundation of the jurisdiction to reopen an assessment is that of turnover and not, be it noted, an assessment. Turnover escapes when it is not noticed by the officer either because it is not before him by reason of an inadvertence, omission or deliberate concealment on the part of the assessee or because of want of care on the part of the officer, the turnover, though in the books, has not been taken notice of. This would be the natural and normal meaning of the expression turnover which has escaped in rule 17(1)."

12. I am in respectful agreement with the view embodied in the above passage. Applying this test, it is clear that there was no question of any escaped turnover in the present case. In the original order, this turnover was dealt with and

exempted. The assessing authority had therefore no power to revise the original order. The order Ex. A-3(a) setting aside the earlier exemption in respect of this turnover must be held to be ultra vires and therefore void.

13. In this view, it is unnecessary to deal with the second point raised by Mr. Chandrasekhara Sastry. I shall merely state it. As required by rule 17(1), the Deputy Commercial Tax Officer purported to give the assessee a notice before exercising his powers of revision. That notice is Ex. A-7 and is dated 29th March, 1946. In that notice, the plaintiff was informed thus :-

"You are hereby required to show cause on or before 30th March, 1946, at 1 P.M. before the undersigned, why your turnover amounting to Rs. 3, 24, 656-4-9 should not be taxed failing which it will be considered that you have no objection to file and the assessment will be revised."

14. Now Ex. A-3(a), as already remarked, which is the order passed on revision, is itself dated 29th March, 1946, the date of this notice. Although the plaintiff was asked to appear on the 30th of March, 1946, it would seem that this order was passed even before the plaintiff appeared to show case. It has however been attempted to be explained on behalf of the Government, by the evidence of the Deputy Commercial Tax Officer who has since retired but who came into the witness box on behalf of the Government, that the dated noted in Ex. A-3(a) was wrong, and that it was really passed on the 30th of March, 1946, after hearing the plaintiff. Mr. Chandrasekhara Sastry contends that this evidence cannot be acted upon as against the evidence (sic) deemed to have been passed before the expiry of the date fixed for the appearance of the plaintiff and as such invalid. I do not propose to deal with this argument in view of the fact that I have upheld the plaintiff's first contention. The assessment in so far as it relates to the turnover of Rs. 27, 424-9-3 will be set aside.

15. The case will therefore go back to the trial Court for ascertainment as above indicated of the transaction of the plaintiff, as selling agent which are entitled to exemption under the terms of the licence. The amount to which those transactions aggregate will be deducted from the total turnover on which he paid the tax, excluding also the above sum of Rs. 27, 424-9-3.

16. The plaintiff is entitled to the costs of this second appeal. As regards costs in the Courts below, they will abide and follow the result. No leave.