

(1979) 10 MAD CK 0024

In the Madras High Court

Case No : Tax Cases No"s. 253 and 254 of 1977 (Revisions No"s. 75 and 76 of 1977) .

L.Ar. Arunachalam Pillai and Sons

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 12-10-1979

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 31, 32, 33, 34

Citation : (1980) ILR (Mad) 400 : (1979) 92 LW 745 : (1980) 45 STC 109

Hon'ble Judges : T. Ramaprasada Rao, C.J;Venugopal, J;Natrajan, J

Bench : Full Bench

Advocate : S. Ramalingam, for the Appellant; K. Venkataswami, for the Respondent

Judgement

Venugopal, J.—The petitioner is a partnership firm with the father and son as partners, dealing in mundy goods. For the assessment year

1969-70, the petitioner reported a total turnover of Rs. 5,96,668.64, of which Rs. 3,48,320.10 was the taxable turnover. For the assessment year

1970-71, the petitioner reported a turnover of Rs. 3,42,991.64, The taxable turnover was Rs. 1,79,013.96. The petitioner failed to produce the

accounts for purposes of final assessment in spite of several notices issued by the assessing officer. The assessing officer made the best judgment

assessment fixing the total turnover at Rs. 7,23,083.66 and the taxable turnover at Rs. 4,81.848.24 for each one of the assessment years 1969-70

and 1970-71. Appeals were filed before the Appellate Assistant Commissioner, Tiruchy, after a delay of 694 days for the first assessment year,

and a delay of 433 days for the second assessment year. The Appellate Assistant Commissioner dismissed both the appeals on the ground that

they were not filed in time. There was a further appeal to the Sales Tax Appellate Tribunal, after a delay of 276 days. The Tribunal held that the

delay has not been satisfactorily explained and dismissed the appeal as time-barred. Revision petitions were filed before the Deputy Commissioner

u/s 32 of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter to be referred to as Act 1 of 1959), and they were dismissed on the ground

that there were no extraordinary circumstances to invoke the power u/s 32 of the Act. Against the order of the Deputy Commissioner, there was

an appeal to the Sales Tax Appellate Tribunal and the Tribunal held that the petitioner having not availed itself of the remedy of appeals under the

Act, the Deputy Commissioner has rightly refused to exercise the power u/s 32 of the Act. Against the order of the Tribunal, revision petitions

were filed before this Court. A Division Bench of this Court dealing with the revision petitions held:

The order in question before us proceeds on the basis that there must be some extraordinary circumstances made known to the Deputy

Commissioner in order that he might be persuaded to deal with the revision petition on the merits. This, indeed, is a very strange proposition of law

which we cannot support. That the Tribunal in its composite order under revision has done nothing better is clear from that part of the order of the

Tribunal which we have extracted above. The Tribunal would appear to have gained strength in dealing with the appeals in the manner it did from

the observations contained in the judgments of this Court which have been referred to by the Tribunal. If there is any ambiguity in those judgments,

we consider that those ambiguities must be removed so that the authorities may have a clear concept in regard to the exercise of jurisdiction by the

Deputy Commissioner u/s 32 of the Act. In view of the fact that the decisions referred to above are those of Division Bench of this Court, we

consider that the appropriate procedure to adopt would be to refer these tax cases to a Full Bench for laying down the principles to be applied in

the matter of exercise of powers by the Deputy Commissioner u/s 32 of the Act.

2. That is how the matter has now come before the Full Bench.

3. The first question to be considered is whether suo motu powers of revision u/s 32 of Act 1 of 1959 can be invoked by an assessee. A Division

Bench of this Court in *Raj Brothers Agencies v. Board of Revenue* [1972] 30

S.T.C. 410, while considering the scope of the suo motu powers of revision by the Board of Revenue u/s 34(1) of the Act, held:

Once the Board of Revenue is invested with the power to revise an order made by its subordinate, notwithstanding that the power is described as

a suo motu power, an assessee who is aggrieved by such an order would be entitled to bring it to the notice of the Board in order that it may invoke its powers.

4. Against this decision, there was an appeal to the Supreme Court (Board of Revenue v. Raj Brothers Agencies [1973] 31 S.T.C. 434. and,

affirming the decision of the Madras High Court, it was held:

The power of revision u/s 34 of the Madras General Sales Tax Act, 1959, is conferred on the Board to remedy any injustice. It is, therefore, open

to an assessee or the revenue to bring to the notice of the Board any error made by the subordinate authorities.

5. The above two decisions are with reference to the suo motu power of revision by the Board. Whether the suo motu power of revision by the

Deputy Commissioner u/s 32 can be invoked by an assessee came to be considered by this Court in Mahalakshmi Textile Mills Limited v. Deputy

Commercial Tax Officer [1972] 30 S.T.C. 412. It was contended for the revenue that the power of the Deputy Commissioner u/s 32 cannot be

invoked by an assessee or an aggrieved person, as the section provides for the exercise of such power voluntarily by the authority. Repelling the

contention of the revenue, Ramaprasada Rao, J. (as he then was), held:

I am unable to agree with the contention that suo motu powers are exercisable only if the authority vested with the power is subjectively satisfied

about the exercise of such power or if he minds to do so. Circumstances may arise when such authorities vested with judicial functions might

inadvertently or by a mistake avoid the exercise of power to call for the records of the subordinate officer whose order projects an illegality or an

irregularity. There is nothing wrong in such circumstances for an aggrieved assessee requesting the quasi-judicial tribunal to exercise the power

vested in him which he failed to do so voluntarily and by himself.

6. The learned Government Pleader for the revenue contended that the power u/s 32 of Act 1 of 1959 is limited to orders passed under certain

specified sections therein whereas the power of revision u/s 33 at the instance of the assessee is in respect of any order for which no appeal has

been provided u/s 31, and, in view of this specific provision contained in Section 33, the suo motu power of revision u/s 32 cannot be invoked at

the instance of the assessee and the decision of this Court in Mahalakshmi Textile Mills Limited v. Deputy Commercial Tax Officer [1972] 30

S.T.C. 412, holding that the power of revision u/s 32 can be invoked by the assessee requires reconsideration.

7. If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is his duty to exercise that power which is

invested in aid of enforcement of a right. The suo motu power of revision u/s 32 of the Act is conferred on the Deputy Commissioner to ensure that

injustice to the assessee or to the revenue is avoided. The exercise of that power by the Deputy Commissioner is not discretionary, and if

conditions for exercise of that power are shown to exist, the Deputy Commissioner cannot decline to exercise that power. Otherwise, he can be

compelled to exercise that power by issue of a writ of mandamus by this Court. Such being the scope, extent and width of the power of the

Deputy Commissioner u/s 32, it is incorrect to state that the power can be exercised only by the authority vested with that power. Any party

aggrieved could move the Deputy Commissioner to exercise the suo motu power of revision. If the Deputy Commissioner fails to exercise his

jurisdiction u/s 32, any person aggrieved could move the Deputy Commissioner to exercise the suo motu power of revision. There is nothing in law

preventing an assessee from drawing the attention of the Deputy Commissioner to any defect present in the order of the authorities specified u/s 32

of the Act. When the suo motu power of revision by the Board u/s 34(1) can be invoked by an assessee, there is no reason why the suo motu

power of revision by the Deputy Commissioner cannot be invoked by an assessee, when the circumstances for the exercise of that power are

shown to exist. The attempt to draw a distinction between the suo motu power of revision by the Board and by the Deputy Commissioner can

hardly be justified when the language used in Section 34(1) is in pari materia with the language used in Section 32(1). Hence, the contention that

the suo motu power of revision u/s 32 cannot be invoked by an assessee is accordingly negated.

8. It was next contended by the learned Government Pleader that since appeals were filed before the Appellate Assistant Commissioner and the Sales Tax Appellate Tribunal, the jurisdiction of the Deputy Commissioner to exercise his power u/s 32 is taken away. The learned counsel for the assessee contended that since the appeals filed before the Appellate Assistant Commissioner and the Tribunal were dismissed on the ground of limitation, these are not effective appeals and as the bar u/s 32(2)(b) is not attracted, the Deputy Commissioner is competent to entertain the revision petition. This Court in *Erode Yarn Stores v. State of Madras* [1963] 14 S.T.C. 724. held that the expression ""the order has been made the subject of an appeal"" appearing in Section 34(2)(b) means that the order must be the subject of an effective appeal and the appeal which was dismissed by the Sales Tax Appellate Tribunal on the ground of limitation was not an appeal, and the jurisdiction of the Board to exercise the powers of revision u/s 34(2)(b) cannot be held to be taken away by the assessee filing an ineffective appeal. This decision of the Madras High Court was affirmed by the Supreme Court in *Board of Revenue v. Raj Brothel's Agencies* [1973] 31 S.T.C. 434, on the principle of stare decisis. The above decision of the Supreme Court will apply to Section 32(2)(b) in view of the similarity of the language employed. In view of the decision of the Supreme Court, an appeal contemplated u/s 32(2)(b) must also be an effective appeal and not one which was rejected or refused to be entertained on the ground of limitation.

9. Since the appeals before the Appellate Assistant Commissioner and the Tribunal were dismissed on the ground of limitation, it cannot be said that the orders have been made the subject of an appeal to the Appellate Assistant Commissioner or the Appellate Tribunal within the meaning of Section 32(2)(b) of the Act. The appeals in question were ineffective appeals as they have been dismissed on the technical ground of delay. As the appeals were dismissed on the technical ground of limitation, there were no effective appeals - either before the Appellate Assistant Commissioner or before the Tribunal and the Deputy Commissioner will have, therefore, jurisdiction u/s 32 to entertain a revision against the original assessment orders.

10. The learned counsel for the assessee contended that the appeals before the

Appellate Assistant Commissioner and the Tribunal were dismissed

on the ground of delay and the Deputy Commissioner cannot refuse to exercise his jurisdiction u/s 32 of the Act, solely on the ground that the

assessee had not been diligent enough to prefer appeals before the Appellate Assistant Commissioner and the Tribunal. In *State of Tamil Nadu v.*

R. Palani [1977] 39 S.T.C. 303, the assessee, who had not preferred an appeal against the order of assessment to the appellate authority, invoked

the jurisdiction of the Deputy Commissioner u/s 32 of the Tamil Nadu General Sales Tax Act, 1959, but the Deputy Commissioner refused to

exercise his powers of revision u/s 32 solely on the ground that the assessee had not been diligent in preferring an appeal. Setting aside the order of

the Deputy Commissioner, this Court pointed out:

The Deputy Commissioner refused to exercise jurisdiction solely on the ground that the assessee had not been diligent in preferring an appeal. In

our opinion, that ground is totally irrelevant. If the assessee had preferred an appeal, there will be no occasion for the assessee invoking the

jurisdiction of the Deputy Commissioner u/s 32 of the Act, because the Deputy Commissioner can exercise his power of revision only so long as

the original order had not been made the subject-matter of appeal to the Appellate Assistant Commissioner of Commercial Taxes and further to

the Tribunal. Therefore, to say that, simply, because the assessee had not preferred an appeal, the Deputy Commissioner would not exercise the

power of revision is to refuse to exercise the jurisdiction on a totally irrelevant ground which will have the effect of denying the very jurisdiction

itself. It will be an entirely different matter if the Deputy Commissioner had declined to interfere by exercising the suo motu power of revision on the

facts of the particular case which may also include want of diligence on the part of the assessee. But, that is far different from saying that the

Deputy Commissioner can refuse to exercise his powers of revision solely on the ground that the assessee had not been diligent in preferring an

appeal.

11. So, the Deputy Commissioner cannot decline to exercise his revisional jurisdiction u/s 32 on the ground that the assessee was not diligent in

filing an appeal. If he was diligent in preferring an appeal, there would have been no occasion or need for the assessee to invoke the jurisdiction of

the Deputy Commissioner u/s 32. As an appeal excludes the jurisdiction of the Deputy Commissioner u/s 32, and as the appellate power and revisional power of the Deputy Commissioner are mutually exclusive, the exercise of the revisional power u/s 32 cannot be declined on the ground of lack of diligence in filing an appeal. Having refused to entertain the appeal as time-barred, the same ground cannot be again availed of to refuse to exercise the revisional jurisdiction, thus shutting out the remedy of appeal as well as revision on the same ground of filing belated appeals. The orders of the Deputy Commissioner are, therefore, set aside and the cases are remitted back to him for disposal according to law.