(1994) 10 MAD CK 0082

In the Madras High Court

Case No : Tax Case No. 2 of 1987 (Appeal No. 1 of 1987)

Lucky Mills APPELLANT

Vs

State of Tamil Nadu RESPONDENT

Date of Decision : 27-10-1994

Acts Referred:
Tamil Nadu General Sales Tax Act, 1959 — Section 2, 22, 34, 4

Citation : (1994) 10 MAD CK 0082

Hon'ble Judges : P. Shanmugam, J;K.A. Thanikkachalam, J

Bench : Division Bench

Judgement

Thanikkachalam, J.—The appellant herein is a dealer in groundnut oil, oil-cakes, etc. It was finally assessed for the year 1977-78 on a total and taxable turnover of Rs. 28,49,581 and Rs. 16,39,230 respectively. On verification of the assessment records of the dealers for the year 1977-78 it was found that exemption was allowed on the alleged second purchase of 151 bags and 64 kgs. of groundnut kernel effected from Parameswari & Co., Pudukottai for Rs. 41,056.28. It was later found that the above persons were decorticators acting as mediators between agriculturists who brought groundnut to their mills for decortication and the purchasers. Inasmuch as Parameswari & Co., were not dealers the next buyers-the appellants were considered as first sellers(?) in the State and were assessed to tax at 3 per cent. The Joint Commissioner of Commercial Taxes II, examined the above case with reference to the available records. It is seen from the records that collection of tax by the decorticators who is not a dealer is contrary to section 22(1) of the Tamil Nadu General Sales Tax Act. Hence the Joint Commissioner held that provisions of section 22(1) are attracted. Parameswari & Co. from whom the assessee had purchased was factually found to be a decorticator and mediators. The assessee was the first purchaser and therefore it is liable to pay tax. Therefore the Joint Commissioner held that exemption granted was not in order. Hence he upheld the revocation made by the assessing officer. The order of the Appellate Assistant Commissioner granting exemption was set aside and the order of the assessing officer was restored. It is against that order the present appeal has been preferred by the assessee-Lucky Mills.

2. Learned counsel appearing for the appellant submitted as under :

The tax leviable on the sale of groundnut is only single point tax. The Joint Commissioner failed to note that the appellant is only a second seller(?) in the State and, therefore, the appellant is entitled to claim exemption. Parameswari & Co. is a registered dealer from whom the appellant has purchased 141 bags of groundnut kernel for the value of Rs. 41,056. The said Parameswari & Co. is not a decorticator or a mediator between agriculturists and purchasers. The appellant produced the bills to show that Parameswari & Co. collected tax and paid the same to the Revenue. Without initiating penalty proceeding against Parameswari & Co. the tax paid by it cannot be converted as payment towards penalty in the proceedings initiated against the present assessee. In the case of Parameswari & Co. tax was paid since it happened to be the first seller and that the assessment made in the case of Parameswari & Co. was not disturbed and the assessment has become final. While so, in the suo motu proceeding initiated by the Joint Commissioner, it is not possible to hold that the said Parameswari & Co. is not a registered dealer and, therefore, the tax collected by it is illegal and the tax paid by it would be treated as penalty payable to the State. The Joint Commissioner was not correct in holding that the purchase by Lucky Mills is the first purchase and therefore Parameswari & Co., is liable to pay tax. Penalty u/s 22(1) and (2) of the Act was not levied by the authorities below, and the Joint Commissioner who is not the assessing authority cannot levy penalty on Parameswari & Co., who is not a party to the present proceeding. Without giving opportunity of being beard to the said Parameswari & Co. The tax paid by it cannot be treated as payment towards penalty in the proceedings initiated against Lucky Mills. For all these reasons, it was submitted that the Joint Commissioner was not correct in reversing the order passed by the Appellate Assistant Commissioner, in granting exemption.

3. On the other hand, learned Additional Government Pleader (Taxes) submitted as under :

Parameswari & Co. is not a registered dealer. It is only decorticators and mediators and the tax collected by it is illegal. There ore, Parameswari Co. is liable to pay penalty u/s 22(2) of the Act. Pararneswari & Co. was not assessed to tax. The amount paid by it was treated as penalty payable by it since the tax collected was by an unregistered dealer. So far as the sale to the Lucky Mills is concerned, it is the first sale. Therefore, Lucky Mills is liable to pay tax on the first sale. As per the provisions of section 4 and section 2(g) of the Act, the tax levied on Lucky Mills is in order. It was therefore submitted that the Joint Commissioner was correct in holding that the amount paid by Parameswari & Co. would be treated as penalty and the tax is payable by the Lucky Mills.

4. We have heard the rival submissions.

5. The fact remains that Lucky Mills is the dealers in groundnut oil and oil-cakes, etc. It was finally assessed for the year 1977-78 on a total and taxable turnover of Rs. 28,49,581 and Rs. 16,39,230 respectively. According to the Revenue, Lucky Mills purchased groundnut from Parameswari & Co. Parameswari & Co. is not a registered dealer and, therefore, the tax collected by Pmameswari & Co. should be treated as penalty payable by it and since the sale in favour of Lucky Mills happened to be, the first sale, the tax is payable by Lucky Mills. On the other hand, the appellant submitted that Parmeswari & Co. sold groundnut to Lucky Mills and the tax collected on the same, paid to the Revenue. Therefore the sale between Parameswari & Co. and Lucky Mills is the second Sale. The tax on sale of groundnut is single point tax. According to the assessee Parameswari & Co. is not a decorticator or a mediator. They are the registered dealers who sold the goods to the appellant. For the first sale effected Parameswari & Co. has paid tax and the assessment made thereon has become final. That assessment proceedings were initiated against Parameswari & Co. In the case of Lucky Mills the Joint Commissioner under suo motu power on examination of the records came to the conclusion that Parameswari & Co. is only a decorticator and, therefore, the sale in favour of Lucky Mills is the sale at the first instance. Therefore the tax is payable by the appellant herein. The Joint Commissioner held that Parameswari & Co. is not a registered dealer and, therefore it has got no authority to collect the tax. Hence penalty is leviable u/s 22(2) of the Act. For this purpose, the tax paid by Parameswari & Co., was adjusted towards the payment of penalty. It remains to be seen that this was not done in the case of Pararneswari & Co. The assessment made on Pararneswari & Co., is not disturbed and no penalty proceeding was initiated against it. No opportunity was given to Parameswari & Co. to explain their case in the matter of levy of penalty. While so, in the case of Lucky Mills while exercising suo motu powers, the Joint Commissioner held that Parameswari & Co., is not a registered dealer, and therefore, the tax paid by it will be treated as payment of penalty.

6. In State of Tamil Nadu v. Chamundeswari Enterprises [1983] 52 STC 124 a Division Bench of this Court held as under :

".......... If the sale effected by the assessee is not the first sale, then under the provisions of the Act that sale cannot be brought within the net of taxation and it is for the revenue to search the first seller and levy tax on the first sale. It is not for the assessee, who is the subsequent seller, to show that the first sate has been taxed. Once it is found that the assessee''s sale is a subsequent sale and there has been a first sale in respect of the same goods earlier in the State, then it is for the authorities to proceed to levy that transaction of first sale, and the onus cannot be thrown on the assessee to show that the first sale has suffered tax. The onus on the subsequent seller is only to point out that there has been a first sale and the onus is not on him to show that the first sale has, in fact, suffered tax. This is the view this Court has taken in two earlier decisions reported in Govindan & Co. v. State of Tamil Nadu [1975] 35 STC 50 and Deputy Commissioner (C.T.) v. Vijayalakshmi Mills Ltd. [1977] 40 STC 463. Thus, the contention advanced by the learned Government Pleader in this case that the onus is on the assessee to show that the first sale has suffered tax cannot legally be sustained."

7. So also in Govindan and Co. Vs. The State of Tamil Nadu, it was held that "to claim the benefit of tax on the ground that the sales effected by the assessees are second sales, the assessees need not show that their sellers have in fact paid tax. It is enough for them to show that the tax is really payable by their sellers". This decision got the approval of the Supreme Court, as can be seen in [1994] 93 STC 185 (State of Tamil Nadu v. Raman & Co.).

8. In order to show that Parameswari & Co. was collecting the tax Lucky Mills produced bills issued by Parameswari & Co. which would go to show that taxes were collected by Parmeswari & Co. It is also admitted that Paranieswari & Co. paid tax to the Revenue. But according to the Revenue the said Parmeswari & Co. was not assessed. If it was not assessed, it is not known as to how the Joint Commissioner in the present case can treat the amount paid by Parameswari & Co. towards penalty payable by it. The Joint Commissioner while exercising his jurisdiction u/s 34 of the Act, levied penalty u/s 22(2) on Parameswari & Co., which is not a party to this proceeding. No separate penalty proceeding was initiated against Parameswari & Co. Assessing authority alone can have the power to levy penalty and not the Joint Commissioner. Without affording opportunity of being heard to Parameswari & Co., penalty cannot be levied by the Joint Commissioner against the said company, by treating it as unregistered dealer.

9. In the present case, u/s 34 of the Act the Joint Commissioner cannot treat the tax paid by the said Parameswari & Co. as the penalty paid by it when the assessment on the said company has become final. For all these reasons, considering the facts arising in this case" in the light of the judicial pronouncements cited supra, we hold that the Joint Commissioner II, while exercising his jurisdiction u/s 34 of the Act was not correct in setting aside the order passed by the Appellate Assistant Commissioner, who granted exemption. Accordingly, the order passed by the Joint Commissioner II stands set aside, and the order of the Appellate Assistant Commissioner stands restored. The appeal is allowed with costs.

10. Appeal allowed.

