

**(2011) 12 MAD CK 0194**

**In the Madras High Court**

**Case No :** Writ Petition No's. 14826 and 14827 of 2002

M/s. Tamil Nadu Traders, 43, Vallalar Street, Erode 3

**APPELLANT**

**Vs**

Joint commissioner (SMR) Office of the Special Commissioner  
and Commissioner of Commercial Taxes, Chepauk, Chennai 5

**RESPONDENT**

**Date of Decision :** 16-12-2011

**Acts Referred:**

Banking Companies Act, 1949 — Section 150(1), 275, 45(O), 45(O)(1), 45(O)(2)  
Tamil Nadu General Sales Tax Act, 1959 — Section 12, 12A, 14, 15, 16(1)  
Wealth Tax Act, 1957 — Section 18

**Citation :** (2013) 61 VST 431

**Hon'ble Judges :** P.P.S. Janarthana Raja, J;P. Jyothimani, J

**Bench :** Division Bench

**Advocate :** P. Rajkkumar, for the Appellant; Sivaraman, Spl. Govt. Pleader, for the Respondent

**Final Decision :** Allowed

## **Judgement**

P. Jyothimani, J.—These writ petitions have been filed by the assessee challenging the order passed by the respondent in exercise of its suo motu power of revision, in respect of the business of the petitioner relating to circulation sales for the assessment year 1974-75 and 1975-76. Regarding the assessment year 1974-75, the Assessing Authority has passed orders on 24.06.1976, imposing tax on the turnover. On appeal by the assessee to the Appellate Assistant Commissioner, the same was allowed on 27.04.1977 in favour of the assess. Likewise, in respect of the assessment year 1975-1976, as against the levy of tax by the Assessing Officer on circulation sales, by order dated 15.02.1977, the appeal of the assessee filed before the Appellate Assistant Commissioner was allowed on 27.4.1977.

2. Admittedly, at the relevant point of time, there was no further right of appeal available to the revenue against the order of the Appellate Assistant Commissioner. In fact, the Appellant Assistant Commissioner while passing the

orders in the appeal in favour of the assessee has relied upon the judgment of this Court dated 03.03.1976 in Sri Srinivasa Sales Circulation VS State of Tamil Nadu reported in (1976) 38 STC 359. As against the said judgment of the Madras High Court dated 03.03.1976, an appeal has been filed to the Supreme Court in the year 1977 and ultimately, the Hon"ble Apex Court has allowed the appeal filed by the Government by judgment dated 04.10.1996 reported in (1996) 103 STC 485, holding against the assessee.

3. In the meantime, as per the original Section 34(2) of the TNGST Act, the period of limitation to pass orders expired on 27.04.1982, in respect of both the assessment years. In the meanwhile, an amendment Act 22 of 1982 was brought in, by which, an amendment was effected to Section 34 of the TNGST Act with effect from 01.11.1982. Under the amended provision to Section 34, instead of the period of limitation of five years being given for the purpose of passing orders, the term "initiation" has been used. In addition to it, a proviso has been incorporated under the amended Act to the effect that the period from the date of judgment of the High Court till the date of judgment by the Supreme Court should be excluded for the purpose of calculating the limitation, while passing orders.

4. The Government has issued a show cause notice after the judgment of the Supreme Court in reversing the judgment and the show cause notice in both the cases was issued against the petitioner on 03.06.1997. Ultimately, the impugned order came to be passed by the respondent by suo motu revising the earlier order of the Appellant Assistant Commissioner dated 27.04.77 and imposing the tax liability on the assessee and that has been challenged by the petitioner in these writ petitions on various grounds, including the one that the proviso which has come into effect from 01.11.1982 cannot be given effect to in respect of the petitioner's case, since the assessment has already been completed before the expiry of the period of limitation of five years, i.e. on 27.04.1982, and therefore, based on the judgment of the Supreme Court, the show cause notice would not apply to the petitioner's case in respect of these two assessment years. It is with the above said averments, these writ petitions have been filed challenging the impugned orders of the respondent, which has been passed in exercise of the suo motu powers, in revising the assessment.

5. The learned Special Government Pleader would contend that when the amendment has come into effect, in as much as the proviso makes it clear that the period from the date of judgment of the High Court till the date of judgment of the Supreme Court has to be excluded, the period between 03.03.1976 and 04.10.1996 has to be excluded and therefore, the issuance of show cause notice on 09.04.1997 is well within the period stipulated even under the amended Act. In effect, it is his contention that even in cases where the assessment has already been completed, the same can be reopened by the virtue of the proviso, which has been effected by way of amended Act 22 of 1982.

6. The said contention has been retaliated by the learned counsel for the

petitioner on the ground that inasmuch as the period for passing orders as per Section 34 of the Act, expires on 27.4.1982 itself, any amendment which has come into effect only subsequently, i.e. 1.11.1982, cannot have any applicability to the facts. According to the learned counsel, the proviso can be made applicable retrospectively only in pending cases and in cases where the tax effect has come to an end, and there is no question of applying the said proviso for those cases.

7. We have heard the learned counsel for the petitioner and the learned Special government Pleader and we have given our anxious thought to the issues involved in these cases.

8. On the above said admitted facts, it is relevant to find out the position of Section 34 of the Act, before and after the amendment. The relevant section, which has to be considered in these writ petitions, is Sec. 34 of the TNGST, which reads as follows:

Section 34:(1) Special Powers of Board of Revenue: (1) The Board of Revenue may, of his 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 (3) of Section 31-A or 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 subsection (1) if-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 subsection (2), the time during which the proceedings before Board of Revenue remained stayed under the order of a Civil Court other competent authority shall be excluded.

9. It was amended by Act 22 of 1982. After the amendment, by Act 22 of 1982, which came into effect from 1.11.1982, Section 34 of the Act stood as follows:

Section 34: Special Powers of Joint Commissioner of Commercial Taxes:(1) The Joint Commissioner of Commercial Taxes may, of his own motion, call for and examine an order passed or proceeding recorded by the appropriate authority u/s 4-A, Section 12, Section 12-A, 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 Appellate Deputy Commissioner under sub-section (3) of Section 31-A or by the Deputy Commissioner under subsection 91) of section 32 and if such order or proceeding recorded is prejudicial to the interests of revenue, may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may initiate proceedings to revise, modify or set aside such order or proceeding and may pass such order thereon as he thinks fit.

Section 34(2) The Joint Commissioner of Commercial Taxes shall not initiate proceedings against any such order or proceeding referred to in 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 (Special Tribunal) or
- (c) More than (five years have expired after the passing of the order;

Provided that if the order passed or proceeding recorded by the appropriate authority. Appellate Assistant Commissioner or Deputy Commissioner referred to in sub-Section (1) involves an issue on which the High Court has given its decision adverse to the revenue in any other proceedings, and an appeal to the Supreme Court against the order of the High Court is pending, the period of time between the date of the above said order of the High Court and the date of the order of the Supreme Court shall be excluded in computing the period referred to in clause (c);

Section 34(3) No order under this section adversely affecting a person shall be passed unless that person has had a reasonable opportunity of being heard;

34(4) In computing the period referred to in clause (c) of subsection (2), the time during which the proceedings before (the Joint Commissioner of Commercial Taxes) remained stayed under the order of a Civil Court other competent authority shall be excluded.

10. On a comparison of these two Sections before amendment and after amendment, it is very clear that as it is seen in Section 34(1) of the Act, after it was amended, a specific clause, viz., "prejudicial to the interests of revenue" has been included. That provision was not available under the original Section 34(1). That apart u/s 34(2) of the Act, power was given to the Board of Revenue for the purpose of passing orders, while under the amended Section 34(2) of the Act, the power has been given to the Joint Commissioner of Tax in respect of the "initiated proceedings". In addition to that, the proviso, as elicited above, has been incorporated in the amended Act, which was not available in the original Section. Therefore, on a reference to the objects of passing such amended Act, especially, by effecting the changes as stated above u/s 34 of the Act, the Law makers have given reasons, which are as follows:

The Committee has recommended that Section 34 of the Act should be amended

to specifically provide that suo motu revision can be restricted to cases where the order or proceeding recorded by the appropriate authority or appellate authority is prejudicial to the interests of revenue and the exercise of suo motu revision by the Commissioner of Commercial Taxes shall not become time-barred as a result of pendency of an appeal before the Supreme Court against the decision of the High Court adverse to the department. The Government have decided to accept the recommendations of the Committee and to amend Section 34 of the Act and to make similar amendments to Section 32 of the Act also relating to the exercise of suo motu revision by the Deputy Commissioner.

11. Therefore, it is clear that the purpose of amendment which was brought in with effect from 01.11.1982, was to protect the revenue, and therefore, there has been a total change in the approach in respect of the implementation of Section 34 before its amendment and after its amendment. It is patently clear that after amendment, the law makers wanted to focus upon the more powers given to the Revenue, with which background the proviso has to be read.

12. On the facts and circumstances of the present case, it is not in dispute that the assessment proceedings were initiated under the un-amended Section 34 of the Act and the final order has also been passed by the Appellate Assistant Commissioner on 27.04.1977 itself. Though u/s 34(2) of the Act the limitation for passing any further orders has been made as five years, as it has been elicited above, while applying that, the expiry of five years period, as per un-amended Section 34, is admittedly on 27.04.1982. While so, the amendment of Section 34(2), which has come into effect from 01.11.2000, can never be made applicable to the case of the petitioner. The effect of proviso in which event would be that the saving of the period from the date of judgment of the High Court till the date of judgment by the Supreme Court i.e. from 3.3.1971 to 04.10.1996, would apply only in cases where assessment has not been completed. The assessment process if completed, there is no purpose in contending that the proviso would still be made applicable so as to reopen the case. This concept has been well established in the legal parlour, as seen from the earlier judgment in Ramanathan Chettiar Vs Kandappa Gounder reported in 1950, 2 M.L.J. 624, wherein the Hon"ble First Bench of this Court has held as follows:

It is well settled that the law of limitation being procedural law its provisions operate retrospectively in the sense that they apply to causes of action which arose before their enactment and that it is equally well established that if a right to sue had become barred by the provisions of the Act then in force on the date of coming to force of a later enactment, then such a barred right is not revived by the application of the new enactment.

13. The said narration of the law by this Court in the earliest judgment squarely applies to the facts of the present case and answers the contentions of the learned Special Government Pleader. That has been subsequently, followed in N.K.C. Syed Mohammed Ravoothar Vs The Deputy Commercial Tax Officer, Tirukoilur reported in 1958 9 STC 1, wherein by following the judgment of the

Division Bench in *Km. Kr. Ramanathan Chettiar Vs. N.M. Kandappa Goundan* (died) and Others, , and also placing reliance on the judgment of the Division Bench in *Muhamad Hussain Nachiar VS Commissioner of Income Tax*, madras reported in *Janaba Muhamad Hussin Nachiar Ammal Vs. The Commissioner of Income Tax*, the Division Bench reiterated the said legal principle once again.

14. That view has been affirmed subsequently in another Division Bench judgment of this Court in *Chettinad Corporation (P) Ltd Vs Commissioner of Income Tax*, Madras reported in *Chettinad Corporation (P) Ltd. Vs. Commissioner of Income Tax*, Madras, That was a case where there was a ratification after two years of assessment order by imposing penalty based on the amended law which extended the time limit. It was held on the facts and circumstances of that case that inasmuch as the amendment has come into existence, within a period of expiration of the limitation under the original Act, the amended Act would apply by relying on the judgment in *S.C. Prashar, Income Tax Officer, Market Ward, Bombay and Another Vs. Vasantsen Dwarkadas and Others*, In fact, the Bench has relied upon an earlier judgment reported in *Chettinad Corporation (P) Ltd. Vs. Commissioner of Income Tax*, Madras, . It is appropriate to extract some of the passages in the said judgment, which are as follows:

We considered a similar question in *CWT Vs G. Savithri* (T.C. Nos. 165 to 167 of 1975, judgment dated 17.12.1979) reported as Appendix at p.697 *infra*). In that case a similar amendment had been made to S. 18 of the W.T. Act by the Finance At of 1969. In accordance with the provisions in force at the time when the assessment was completed, the order levying penalty could have been passed only by 26th April, 1972. The penalty order was, however, made after the said date. There was an amendment of the law before the expiry of the period of limitation and therefore, taking that fact into account it was pointed out (see p. 699 *infra*) "it is now well settled that if before the limitation period expired, the period of limitation is extended, the limitation provision, being a procedural one, the extended period of limitation would apply to such proceedings".

Applying the principles laid down by the Supreme Court, we may state that the period prescribed in the unamended s. 275 cannot be described as statutes of repose. The idea was to see that penalty was levied without any undue delay in the case of persons who had committed defaults in making returns or payments envisaged by the law. While there was a fixed rigid time-limit under the original provision, the time limit was altered under the amended provision so as to take into account the period of pendency of the appeal. In fact, the amendment cannot be described as one motivated in the interest of the Revenue. It was often the case previously that as soon as an assessment was made, penalty had to be levied, as otherwise, the period of limitation would expire while the matter was pending on appeal. In order to see that any harassment to the assessee did not arise by an order levying penalty having to be independently appealed against, the Legislature has provided a time limit which would taken into account only the final order after the assessment was made.

There are several decisions which have taken the view that the amended provision would alone apply so long as the period of limitation had not expired on April 1 1971, when the new provisions was brought into force. The decisions are too numerous and all of them take a uniform view. Therefore, we do not think it necessary to detail them here.

15. In *Sree Bank Ltd (in liquidation) Vs Sarkar Dutt Roy and Co.*, reported in *Sree Bank Ltd. Vs. Sarkar Dutt Roy and Co.*, while dealing with Section 45(O)(1) of the Banking Companies Act, relating to filing of the suit or application for which the limitation has been prescribed and the effect of such limitation before enforcement of an amendment Act, the Supreme Court has, by following the above said ratio laid down consistently, reiterated the well settled principle that subsequent amendment cannot be given effect to, to an act which has already been completed.

16. In respect of the said Banking Act 1949, relating to the same Section 45(O), the Supreme Court, in the subsequent judgment rendered in *Official Liquidator, Supreme Bank limited Vs P.A. Tendolkar (dead) by L.Rs and others* reported in *Official Liquidator, Supreme Bank Ltd. Vs. P.A. Tendolkar (Dead) by Lrs. and Others*, has held that retrospective effect cannot be given effect to the amendment Act. The relevant portion reads as follows:

In any case, the amendment of Section 45-O(2) of the Banking Companies Act, 1949, Act had conferred a new right of counting the period of limitation from the first appointment of the liquidator. The exercise of that right by the liquidator, acting on behalf of the Company certainly took place after the commencement of Act XXXIII of 1959. There was no question here of giving any retrospective operation to any right whether procedural or substantive. We, therefore, think that the claims against the Directors, which were prima facie made within time, were not shown to have been barred by limitation.

17. In fact, the Hon"ble Apex Court has referred to a large number of English as well as Indian Cases, thereby to add such conclusion to hold that the said legal stand is well settled.

18. In a recent judgment in *K.M. Sharma Vs. Income Tax Officer, Ward 13(7), New Delhi*, the Supreme Court has held that in a fiscal statue, the provision relating to limitation has to be considered strictly. By reiterating that, any subsequent amendment cannot be made applicable to a case which has already been disposed, unless the same is pending consideration. Further, it has held as follows:

On a proper construction of the provisions of Section 150(1) and the effect of its operation from April 1, 1989, we are clearly of the opinion that the provisions cannot be given retrospective effect prior to April 1, 1989, for assessments which have already become final due to the bar of limitation prior to April 1, 1989. The taxing provision imposing a liability is governed by the normal presumption that it is not retrospective and the settled principle of law is that the law to be applied

is that which is in force in the assessment year unless otherwise provided expressly or by necessary implication. Even a procedural provision cannot in the absence of clear contrary intendment expressed therein be given greater retrospectively than is expressly mentioned so as to enable the authorities to affect the finality of tax assessments or to open up liabilities, which have become barred by lapse of time. Our conclusion, therefore, is that sub-section (1) of Section 150, as amended with effect from April 1, 1989, does not enable the authorities to reopen assessments, which have become final due to bar of limitation prior to April 1, 1989, and this position is applicable equally to re-assessments proposed on the basis of orders passed under the Act or under any other law.

19. For the reasons stated above, we have no hesitation to hold that the orders of the respondent impugned in these writ petitions have no legal basis. Accordingly, the Writ petitions stand allowed and the impugned orders are set aside. No costs.