

(1971) 07 MAD CK 0008

In the Madras High Court

Case No : Writ Petition No's. 1112 and 1113 of 1967

Murugan Soap Works and Another

APPELLANT

Vs

Assistant Commercial Tax Officer

RESPONDENT

Date of Decision : 28-07-1971

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 42, 44, 45, 46

Citation : (1973) 30 STC 468

Hon'ble Judges : Ramaprasada Rao, J

Bench : Single Bench

Advocate : C. Natarajan, for the Appellant; K. Venkataswami, the First Assistant Government Pleader, for the Respondent

Judgement

Ramaprasada Rao, J.—In these two writ petitions common questions arise. It is agreed that the facts in Writ Petition No. 1112 of 1967

may be noted. The petitioner effected purchases of a variety of goods between 29th December, 1966, to 31st December, 1966, at Madras and

was transporting such goods by lorry MSW 4595 to Salem. The Assistant Commercial Tax Officer, Cross Road Check Post, Chinna Salem,

intercepted the lorry at 10-10 A.M. on 2nd January, 1967, and found that the goods were not covered by bills and delivery notes which were

required under such circumstances u/s 44 of the Tamil Nadu General Sales Tax Act. Therefore, he gave two memos, both of the same date,

namely, 2nd January, 1967. The first one was to call upon the petitioner to compound the offence u/s 46 of the Act, the offence itself being a

contravention of one of the provisions of the Act which is treated as an offence u/s 45(2)(d). He was asked to compound the offence by paying a

sum of Rs. 1,000 and for failure to pay the same, the petitioner was threatened

with prosecution. In the second memo, the petitioner was called upon to pay advance sales tax u/s 42(3) of the Act read with Rule 35 of the Tamil Nadu General Sales Tax Rules, 1959. The petitioner's case is that the goods were detained by the Check Post Officer and the respondent would not release the goods unless the petitioner paid the advance tax as demanded. The petitioner having had information of such interception and detention of goods sent his representative who admitted that the transit was in the circumstances stated in the first memo and he admitted the violation as indicated therein. But when the representative sought for the release of the goods on payment of the compounding fee, it is stated that the officer insisted upon the payment of the advance tax before the goods could be released. In those circumstances, the advance tax was also paid and the goods were then released. The petitioner earlier came to this court for quashing the two memos referred to above. In Writ Petition No. 290 of 1967, this court while dismissing the writ petition observed that the officer should strictly follow the decisions of this court and thereafter pass an order which could be sustained in law and that too after granting the petitioner an opportunity of being heard. The petitioner would further state that he was given liberty to renew the writ petition if the Check Post Officer failed to follow up the directions given as above by this court. The petitioner through his counsel wrote a letter dated 5th March, 1967, to rectify the mistakes and calling upon the Check Post Officer to rescind the order basing his case on the earlier decisions of this court. But the representation made by the petitioner through his counsel was returned with the following endorsement:

The representation should be from the party affected or from the person duly authorised. It is open for the party affected to seek remedies provided under the M. G. S. T. Act from the appropriate authority.

2. Being fortified by the earlier order granting liberty to file appropriate writ petitions to quash the order of the Check Post Officer, the petitioners have filed these writ petitions to quash the order dated 2nd January, 1967.

3. Learned counsel for the petitioner raised two contentions before me. The first one is that the levy of the composition fee by itself is not justified and there should have been an enquiry into the matter as to the circumstances under which the bill of sale or delivery note or the goods vehicle

record or trip sheet or such other documents prescribed u/s 44 were not available while the goods were in transit. In the instant case, the representative of the petitioner in a written statement given by him to the officer, when he sought for the release of the goods, admitted that there were no such documents as prescribed u/s 44. This by itself is sufficient to negative the contention raised by the petitioner that the compounding fee levied was not justifiable. As a matter of fact in A.R. Manickam v. Assistant Commercial Tax Officer [1970] 26 S.T.C. 409 a Division Bench of this court to which I was a party expressed the view that the marginal note to the section is suggestive of the fact that the records contemplated therein should be in the possession of the owner or the person-in-charge of the goods vehicle, and if such records are not possessed and subsequently submitted, it will be a wilful contravention of the said section and it would be punishable u/s 45(2)(d) of the Act. A composition of such an offence is available u/s 46 of the Act. The prescribed authority may, whether on application made to it in this behalf or otherwise, give any person who has committed an offence under this Act option to pay within a specified period by way of composition of such offence an amount as indicated in Section 46(1)(a) and (b). It is in exercise of such a power that the Check Post Officer, who found that the transport was without the relative documents being in possession of either the owner or the person-in-charge of the vehicle transporting the goods, found the petitioner guilty of an offence u/s 45 and gave him an option to compound such an offence. This is a provision which is not challenged before me. As the composition of an offence under certain stated circumstances as prescribed under the statute is a power which could be vested in an appropriate authority by the Legislature and as it has" nothing to do with the sale or purchase of goods, I am unable to agree that the power itself could be questioned in these proceedings in such a summary manner. The proceedings to compound the offence are intended to cut short the long process which is invariably involved in charge-sheeting a person for an offence under the Act and finally awaiting the result of such trial by a criminal court. It is only to snap the longevity of such a process, the provision to compound has been made, and this being in the interest of the trade and as it also subserves public interest, in the sense that a person ought not to transgress the provisions of law unless he is prepared to suffer a penalty therefor,

may be in the nature of a compounding fee, that this provision has been introduced. It is, therefore, a salient feature in the Act having regard to the objects of the Act, and this provision relating to imposition of compounding fee in the circumstances stated in Section 46 read with Sections 44 and 45 of the Act is certainly a provision which is justifiable as it subserves public interest besides advancing the objects provided for in the main enactment itself.

4. As regards the second memo in which a demand for the advance tax is made, it appears to me that it is not justifiable under the provisions of the

Act. A tax is levied under the authority of law. There can be no levy on assumptions, however equitable they may be. Certainly no tax can be

levied based on expectancy and surmises. Particularly, when sales tax is demanded under the garb of advance tax, the law such as the provisions

of the Tamil Nadu General Sales Tax Act should authorise the authority demanding such a tax to impose the levy, notwithstanding the fact that no

sale or purchase is involved at or about the time when the levy is called for. The preamble to the Tamil Nadu General Sales Tax Act, 1959, says

that it is an Act to consolidate and amend the law relating to the levy of a general tax on the ,sale or purchase of goods in the State of Tamil Nadu.

Therefore, it follows that it is only in a situation where a sale or purchase is effected, that sales tax could be levied. In the absence of definite proof

or cogent material to support such a sale or purchase of goods at or about the time when a statutory officer levies tax on such goods in the

possession of another, it ceases to be sales tax. The tax demanded in the instant case as advance tax is not an authorised levy and that too under

the Tamil Nadu General Sales Tax Act. A fortiori, a demand for such an advance tax by the Check Post Officer as a condition precedent for

release of the goods detained by him in transit due to the absence of documents required u/s 44 of the Act is prima facie one which is not

authorised in law or justified under the Act. The Supreme Court in Check Post Officer v. K. P. Abdulla & Bros. [1971] 27 S.T.C. 1 had occasion

to consider the validity of Section 42 of the Madras General Sales Tax Act, 1959. The Supreme Court held in the above case that the power to

legislate on a specified topic includes power to legislate in respect of matters which may fairly and reasonably be said to be comprehended therein.

The court further held that Sub-sections (1) and (2) of Section 42 are intended to set up machinery for preventing evasion of sales tax ; but the power to confiscate goods carried in a vehicle cannot be said to be fairly and reasonably comprehended in the power to legislate in respect of taxes on sale of purchase of goods. Even so, referring to Sub-section (2) of Section 42, the court said that in any event power conferred by Sub-section (3) to seize and confiscate and to levy penalty in respect of all goods which are carried in a vehicle whether the goods are sold or not is not incidental or ancillary to the power to levy sales tax. The court also referred to the decision of that court in Commissioner of Commercial Taxes and Others Vs. Ramkishan Shrikishan Jhaver and Others, wherein it struck down the power conferred under the Madras General Sales Tax Act, 1959, upon the officer of the Government to seize such accounts, registers, records or other documents of the dealer as he may consider necessary, if he has reason to suspect that any dealer is attempting to evade payment of any tax, fee or other amount. No doubt, this was incidentally referred to by the Supreme Court though it was not applicable to the facts in The Check Post Officer and Others Vs. K.P. Abdulla and Bros., The point, however, is that the law is now settled that unless there is a sale, no sales tax is leviable. Any provision deeming such vesting of authority in a statutory functionary cannot be recognised and enforced by courts as such a power is completely alien to the legislative intent and object of the Act and as it is not expressly provided as well. In this view of the matter, a demand for advance tax in the instant case which certainly means a demand for sales tax, in a situation where no sale or purchase is involved, is certainly a demand which cannot be sustained as it is not authorised or provided for.

5. In so far as the demand for advance tax was made and collected by the Check Post Officer pursuant to his second memo dated 2nd January, 1967, the rule nisi is made absolute and the petitioner automatically would be entitled to obtain refund of the tax paid, if it has been not otherwise adjusted so far. There will, therefore, be a direction to the above effect. In other respects, the writ petitions are dismissed. There will be no order as to costs.