

(1972) 07 MAD CK 0036

In the Madras High Court

Case No : Writ Petition No's. 152 and 153 of 1970

N. Kuppana Gounder

APPELLANT

Vs

The Appellate Assistant Commissioner (C.T.), Salem and
Another

RESPONDENT

Date of Decision : 04-07-1972

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 35
Tamil Nadu General Sales Tax Act, 1959 — Section 55

Citation : (1973) 32 STC 522

Hon'ble Judges : Ramaprasada Rao, J

Bench : Single Bench

Advocate : S.T. Srinivasan and K.C. Rajappa, for the Appellant; K. Venkataswami, First Assistant Government Pleader, for the Respondent

Judgement

Ramaprasada Rao, J.—For the assessment year 1966-67, the Deputy Commercial Tax Officer, Erode (Rural), determined the total and taxable turnovers of the petitioner at Rs. 32,65,157.57 and Rs. 7,79,293.69 respectively. The petitioner took up the matter in appeal before the Appellate Assistant Commissioner, Commercial Taxes, Erode, challenging certain additions and effectually complaining against the original order of assessment. The Appellate Assistant Commissioner passed an order on 15th December, 1967, determining the total and taxable turnovers at Rs. 32,06,520.39 and Rs. 7,14,144.43 respectively. The case of the petitioner is that the said taxable turnover, as is seen from the appellate order, includes the purchase turnover of raw hides and skins effected locally amounting to Rs. 2,80,149.12. His case is that during the year in question the raw hides and skins so purchased by him and which was subject to tax in accordance with the provisions of the Tamil Nadu General Sales Tax Act, were dressed and sold during the year in question and all such sales of dressed skins effected, but from and out of the pool of raw hides and skins brought to tax under the impugned order, are to be taxed differently under item 7(b) of the

Second Schedule to the Act. It is common ground that this contention was not raised by the petitioner before the Appellate Assistant Commissioner. Therefore, the appellate authority concluded the appeal by including the entire purchase turnover of raw hides and skins in the assessable turnover and brought them to tax under item 7(a) of the Second Schedule to the Act. The petitioner, after coming to know of a decision of this court in *Sadak Thamby & Co. v. Appellate Assistant Commissioner of Commercial Taxes* [1969] 24 S.T.C. 468, on which ratio apparently he based his further representations for rectification of the appellate order, filed before the appellate authority an application for rectification on 3rd October, 1969. On 23rd October, 1969, the Appellate Assistant Commissioner, Salem, returned the representation with the following endorsement :

The appellate order was passed on 15th December, 1967, that is, long before the judgment referred to above, was pronounced. Hence the question of revision u/s 55 does not arise.

2. It is as against this order, the present writ petitions are filed.

3. W.P. No. 153 of 1970 is for the issue of a writ of mandamus directing the 1st respondent to entertain the representation and deal with it as an application for rectification u/s 55 of the Act. W.P. No. 152 of 1970 is for removal of the said order on the ground that it poses an error apparent.

4. The main contention of the learned counsel for the petitioner is that when the original order was made and even so when the appellate authority decided and concluded the appeal, there was no judicial pronouncement which clearly laid down the *modus operandi* under which raw hides and skins and dressed hides and skins should be taxed. According to the petitioner, it was only in the decision returned by this court on 18th April, 1969, in *Sadak Thamby & Co. v. Appellate Assistant Commissioner of Commercial Taxes* [1969] 24 S.T.C. 468, the position has been made clear. He further urges that by reason of the judicial pronouncement as above, any levy contrary to the principle laid down in the said decision is illegal and as no authority can impose or collect taxes illegally, the petitioner has a right and the 1st respondent is bound legally and publicly to enquire into an application for rectification founded on such situations. One other argument that is pressed into service is that the power to rectify, which is ordinarily vested by statutes in Tribunals, ought not to be lightly equated to a discretionary power, but it ought to be understood as one vested in such authorities so as to render justice at all times. The learned Government Pleader, however, would say that factually the petitioner did not bring to the notice of the appellate authority or the original authority that during the accounting year he converted raw hides and skins into dressed hides and skins and, therefore, the levy of a tax treating the goods as raw hides and skins under item 7(a) of the Second Schedule to the Act is not illegal. He would also state that even in the application for rectification filed by the petitioner no such material has been furnished. Secondly, he would argue that a judicial pronouncement by a

competent court, after the conclusion of proceedings before the statutory authorities may not tilt the matter because that cannot be said to be a ground which is perceivable in the exercise of power u/s 55 of the Act. According to the learned Government Pleader, such a power is exercisable only if there is an error apparent in the record and, in the absence of such an error, the assumption of such a power is not warranted and hence the impugned order is justified.

5. I shall now take up the second contention of the learned Government Pleader on the scope of the power of rectification. Section 55 authorises the assessing authority or the appellate or revisional authority (including the Appellate Tribunal) to rectify any error apparent on the face of the record, but within the time prescribed in Sub-section (1) of Section 55. In the instant case, the application has been made in time. The question is as to what is an error apparent on the face of the record. The expression "error apparent on the face of the record" appears in various statutes including the Constitution of India. But the expression has to be understood in the context in which it is used and its interpretation varies according to the force and import of such context. In a case where a rectification is sought, it is not for the authorities to lightly discountenance such a request without giving any reason or without adverting to the representations made by the aggrieved party seeking for rectification. Though the verb used in Section 55 is "may" and therefore enabling, yet the power vested by the statute on the appropriate authority cannot be always equated to a discretionary power or a power which could be exercised according to the whims and fancies of such a statutory authority. If circumstances do exist for the exercise of power, it ceases to be a discretionary power but transforms itself into a mandate by statute to exercise that power in public interest and particularly for the avoidance of injustice in taxation matters. A subject cannot be lightly burdened with a tax if he can legally and lawfully avoid it. and particularly by having recourse to the specified statutory authorities requesting them to rectify an error so as to avoid an illegal assessment; then it cannot be said that even in such a situation the word "may" has to be understood as "may"; on the other hand, it should be understood as "shall". It is this view which reflects in the judgment of the Supreme Court in *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, . Quoting the well-known passage of Lord Chancellor Cairns in *Julius v. Bishop of Oxford* (1880) 5 App. Cas. 214, the Supreme Court said that "exercise of power to rectify an error apparent from the record is conferred upon the Incometax Officer in aid of enforcement of a right. The Income Tax Officer is an officer concerned with assessment and collection of revenue and the power to rectify the order of assessment conferred upon him is to ensure that injustice to the assessee or to the revenue may be avoided. It is implicit in the nature of the power and its entrustment to the authority invested with quasi-judicial functions under the Act, that to do justice it shall be exercised when a mistake apparent from the record is brought to his notice by a person concerned with or interested in the proceeding.

6. If, therefore, the power vested in the authorities in Sub-section (1) of Section

55 is not always a discretionary power, but is normally to be understood as a duty with which the concerned authority is enjoined, then the next question is when shall the power be exercised. The learned Government Pleader would say that the interception of a judicial pronouncement between the concluded appellate, original or revisional order and the memorandum for rectification would not enable the authorities, even though bound to do so, to exercise such a power. Here again there is a fallacy. Of course, at one time this court took the view that such supervening judgments of courts, whether of the High Court or the Supreme Court, cannot by themselves form the foundation for the exercise of power to rectify an assessment order when the appropriate authority is asked to do so. But, in view of the decision in *S.A.L. Narayana Row, Commissioner of Income Tax, Bombay City, and Another Vs. Model Mills Nagpur Ltd.*, it is difficult to hold that view. The Supreme Court in that case was considering the scope of the power of rectification vested in the Income Tax Officer u/s 35 of the Income Tax Act. The short facts are : The respondent-company was subjected to, among other things, pay an additional tax on the excess dividends declared by it. The order was complied with. Thereafter, in *The Khatau Makanji Spg. and Weaving Co. Ltd. Vs. Commissioner of Income Tax, Bombay City, Bombay*, the Bombay High Court held that the levy of tax on excess dividends was illegal. The view of the Bombay High Court was confirmed by the Supreme Court in *The Commissioner of Income Tax, Bombay City Vs. The Khatau Makanji Spinning and Weaving Co. Ltd., Bombay*. Soon after the Bombay High Court rendered the above judgment, the respondent-company applied to the Income Tax Officer for refund of the tax paid and incidentally sought for a rectification of the original order. This was negatived by the Income Tax Officer as well as the Commissioner of Income Tax in revision. The Bombay High Court, however, on an application made to it under Article 226 of the Constitution directed the Income Tax Officer to revise the order in the light of the judgment in *The Khatau Makanji Spg. and Weaving Co. Ltd. Vs. Commissioner of Income Tax, Bombay City, Bombay*. The department took up the matter in appeal to the Supreme Court. The learned Judges said:

There is no doubt that, in view of the judgment of this court in *The Commissioner of Income Tax, Bombay City Vs. The Khatau Makanji Spinning and Weaving Co. Ltd., Bombay*, the levy of an additional tax was illegal.... The High Court was right in making the order directing the Commissioner to refund the amount of tax which was illegally collected.

7. This decision is, therefore, authority for the proposition that if a levy is found to be illegal or becomes illegal by reason of a subsequent decision of the court, even the exercise of power by an authority under the provisions governing the rectification of assessments is justified and legal. In the light of this, the application for rectification made on 3rd October, 1969, by the petitioner ought to have been entertained by the 1st respondent and he should have dealt with it in accordance with law and, in particular, in accordance with the principles laid down in *Sadak Thamby & Co, v. Appellate Assistant Commissioner of Commercial*

Taxes [1969] 24 S.T.C. 468. This has not been done. On the other hand, the application for rectification has been returned without being entertained. There is, therefore, an avoidance of public duty on the part of the 1st respondent when he was obliged in law not only to entertain the same but also deal with it so as to render justice and avoid injustice. In this view of the matter, Writ Petition No. 153 of 1970 is allowed.

8. No particular orders are necessary in W.P. No. 152 of 1970 because, the order challenged is only an administrative order and not an order passed by the 1st respondent as a quasi-judicial Tribunal. W.P. No. 152 of 1970 is, therefore, dismissed. There will be no order as to costs in both the writ petitions.

9. It is for the petitioner to place such material as would fit in with the formula and the data laid down by this court in *Sadak Thamby & Co. v. Appellate Assistant Commissioner of Commercial Taxes* [1969] 24 S.T.C. 468 and satisfy the authorities that the earlier appellate order has resulted in an illegal levy. For this purpose the 1st respondent is directed to take on file the application for rectification dated 3rd October, 1969 and deal with it in accordance with the principles indicated in this judgment and in *Sadak Thamby & Co. v. Appellate Assistant Commissioner of Commercial Taxes* [1969] 24 S.T.C. 468.