(1991) 10 MAD CK 0037

In the Madras High Court

Case No : Tax Case No''s. 1186 and 1187 of 1982

N.N. Subramaniam APPELLANT

Vs

State of Tamil Nadu RESPONDENT

Date of Decision : 23-10-1991

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12(3), 19A, 25(6), 30, 30(1)

Citation : (1991) 10 MAD CK 0037

Hon'ble Judges : Kanakaraj, J;A.S. Anand, J

Bench : Division Bench

Judgement

Kanakaraj, J.—M/s. Ramakrishna and Company, a partnership. Firm comprising of three partners, were dealers in peas, fried peas and

puffed rice. For the assessment year 1973-74, the firm reported a total and taxable turnover of Rs. 2,85,928.37 and Rs. 44,480.93. The assessing

authority issued summons for the production of the records. But the assessee failed to respond. After issuing a notice the assessing authority

proceeded to assess the firm for the year 1973-74 on a total and taxable turnover of Rs. 12,43,713.48, taxable at 3 1/2 per cent. For the

assessment year 1974-75 they had reported a total and taxable turnover of Rs. 39,833.23 and Rs. 19,144.25, respectively. However, when

summons was issued for the production of the accounts the assessee did not produce the accounts. Due to certain irregularities the returns were

rejected as incorrect and incomplete and the assessing authority proceeded to resort to best judgment assessment. The proposal notice was served

on two partners, but they did not respond. The assessing authority therefore assessed the firm on a total and taxable turnover of Rs. 88,568.21

and Rs. 73,132.46 for the assessment year 1974-75, which order was passed on

July, 16, 1976. A penalty of Rs. 639 was imposed u/s 12(3) of

the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as ""the Act"").

2. Against the said two orders of assessments the petitioner herein namely, N. N. Subramaniam filed two appeals before the Appellate Assistant

Commissioner. There was a delay of 2,428 days in firing the appeal against the assessment order dated February 21, 1975 (1973-74) and a delay

of 1883 days in filing the appeal against the assessment order dated July 15, 1976 (1974-75). The petitioner filed two petitions, M.P. Nos. 262

and 263 of 1981, for condonation of the delay in filing the appeals. The appellate authority dismissed these petitions and rejected the appeals as

time barred. Second appeals were therefore filed before the Tamil Nadu Sales Tax Appellate Tribunal and they were dismissed by the Tribunal on

September 4, 1982. These two tax revision cases are against the said common order of the Tribunal.

3. Mr. C. Natarajan, learned counsel appearing for the petitioner, contends that the partnership firm was dissolved on December 10, 1974 and

thereafter there was no relationship of agency between erstwhile partners. Argues, Mr. Natarajan that a proper compliance with the provisions of

the Act, requires that each of quondam partners should have been individually served with notice and also served with the assessment orders.

According to him neither section 19A of the Act, nor rule 52 of the Tamil Nadu General Sales Tax Rules (hereinafter called ""the TNGST Rules

detract from the necessity of serving each of the erstwhile partners. Inasmuch as the petitioner had not been served with the assessment orders, the

contention is that he is entitled to file an appeal and the alleged delay reckoned from the date of the service on the other partners cannot be held

against him. To elaborate the point Mr. Natarajan says that the fiction contemplated in section 19-A of the Act can he extended only to a logical

end and not beyond. The Legislature did mean to extend the fiction to the extent of holding that service on one erstwhile partner should he equated

with the service on the other erstwhile partners and that limitation will start running from the date of service on one of the erstwhile partners even

against the partners not served with the assessment orders. It is also contended that against an order of assessment made against a firm, every partner had a right to file an appeal. In any event a construction of the statute which avoids manifest injustice should be adopted and at least one

appeal against the order of assessment should be allowed. Therefore it is contended that the orders of the Tribunal and the Appellate Assistant

Commissioner are liable to be set aside and the appeals heard on merits.

4. Before we deal with the arguments of the learned counsel for the petitioner we must, refer to section 19A of the Act and rule 52(3) of the

TNGST Rules. Section 19A(a) of the Act says that even after a dissolution of a firm the tax payable under the Act by the firm for the period up to

the date of such dissolution shall be assessed as if no such dissolution had taken place and all the provisions of the Act shall apply accordingly.

Section 19A(b) of the Act provides that every person who was a partner of a firm at the time of the dissolution, shall notwithstanding such

dissolution, be jointly and severally liable for the payment of tax, penalty or other amount payable under the Act by the firm, whether the

assessment was made prior to or after such dissolution. Rule 52(1) of the TNGST Rules provides for manner of service of any notice, summons or

order under the Act. Rule 52(2) of the TNGST Rules with which we are concerned is as follows :

Where any Hindu undivided family, firm or other association of persons is partitioned, dissolved or discontinued, notice, summons or orders

issued under the Act or these Rules may be served on any member of the Hindu undivided family, any person who was a partner (not being a

minor) or member of the association, as the case may be, immediately before such partition, dissolution or discontinuance.

5. We will now turn to the factual findings regarding service of notice on the firm and/or on the erstwhile partners of the firm. The firm, M/s.

Ramakrishna and Company, had three partners, namely, the petitioner N. N. Subramaniam, one R. Angamuthu and one K. Jayaraman. It was

dissolved on December 10, 1974. For the assessment year 1973-74 notice had been served on Angamuthu for the production of document and

account books. But pre-assessment notice dated January 21, 1975 was served on the petitioner himself on January 30, 1975. It also transpires

that notices were served on the other partners as well. The assessment order was made on July 21, 1975. The assessment order was served by registered post and the said Angamuthu had acknowledged the same on March 12, 1975. The receipt of the notice by Angamuthu is not disputed

and his evidence by postal acknowledgment is available in the file. Coming to the year 1974-75 the notice sent to the firm at its address 90, Nehru

Street had been returned because the shop had been vacated. However notices were served on Angamuthu on June 7, 1976 and Jayaraman on

June 8, 1976. The notice sent to the petitioner was returned unserved. The other two partners sent replies which were not of any assistance to the

assessing authority. The assessment order was made on July 15, 1976 in the name of the partnership. The assessment order was served on

Angamuthu on July 19, 1976 and on K. Jayaraman on July 18, 1976. The order was also sought to be served on the petitioner, but the postal

cover was returned unserved. Any person objecting to an order passed by the appropriate authority may within a period of 30 days from the date

on which the order was served on him in the manner prescribed appeal to the Appellate Assistant Commissioner. In this case the assessment is on

the registered firm and any one of the partners could file an appeal on behalf of the firm. Therefore a plain reading of rule 52(2) of the TNGST

rules, 1959, shows that the order made against the firm could be served on any person who was a partner immediately before the dissolution.

Inasmuch as for both the assessment years the assessment orders have been served on one of the partners on March 12, 1975 for the assessment

year 1973-74 and on August 18, 1976 for the assessment year 1974-75, it follows that the period of limitation starts running from those dates.

The contention of the petitioner is contrary to the very teeth of the rule.

6. Since most of the decisions relied on by the learned counsel for the petitioner arise under the Income Tax Act, 1922, it would do well to refer to

the relevant provisions of the Income Tax Act as it stood at the relevant time, before dealing with the decision. Section 2(2) of the Act defines the

assessee as a person by whom Income Tax is payable. Section 30(1) provides for the appeal to the Appellate Assistant Commissioner against an

order of assessment. The proviso to section 30(1) of the Act is as follows :

Provided further that where the partners of a firm are individually assessable on their shares in the total income of the firm, any such partner may

appeal to the Appellate Assistant Commissioner against any order of an Income

Tax Officer determining the amount of the total income or the loss

of the firm or the apportionment thereof between the several partners, but in respect of matters which are determined by such order may not

appeal against the assessment of his own total income.

Section 44 of the Act provides for assessment of the erstwhile partners after dissolution and their joint and several liability for the tax payable under

the Act. Section 25(6) equivalent to the present section 284 is more or less akin to rule 52(2) of the present Tamil Nadu General Sales Tax Rules.

Section 247 of the Income Tax Act, 1961, equivalent to second proviso to section 30(1) of the Income Tax Act, 1922, is a provision which

requires special attention and we have already extracted the same. With this background, we will now refer to the decisions cited at the Bar.

Commissioner of Income Tax Vs. Sri S.K. Bose, is relied on for the proposition that the words ""any such partner"" in the proviso to section 30 of

the Income Tax Act, 1922, meant ""any of such partners"" and not the partner who was the first to prefer an appeal on behalf of the firm. In that

case five separate appeals were filed by five ex-partners against the order of assessment on the firm. The question was when an appeal had

already been heard and decided by the Tribunal on behalf of one of the partners whether another appeal by another partner on behalf of firm was

or was not maintainable and whether the latter appeal was barred by the principles of constructive res judicata. The Tribunal held that there was no

bar against each partner filing an appeal and the question of res judicata will not also apply. The High Court of Calcutta on a reference from the

decision of the Tribunal held that the appeal was maintainable, but held that the second proviso to section 30 of the Income Tax Act, 1922, was

not applicable to the facts of that case. The High Court of Calcutta also held that in respect of an appeal by a second partner the principles of res

judicata or estoppel will not apply on the basis of the findings given in the earlier appeal filed by another partner. We are of the view that the

peculiar provisions of law noticed by us under the Income Tax Act impelled the High Court of Calcutta to render those findings. The position of a

partner under the Income Tax Act is totally different from the position of a partner in respect of an assessment under the sales tax law. Rule 27 of

the TNGST Rules, which is also relied on by the learned counsel for the petitioner for the purpose of contending that any person aggrieved by an

original order of the appropriate authority may file an appeal to the Appellate Assistant Commissioner, does not help the petitioner in this case.

This is because we are concerned with an order of assessment made against a partnership firm. There can be only one appeal against such an

order and since an appeal can be feed by any of the partners under rule 27 of the TNGST Rules. There is no provision equal to the second

proviso to section 30 of the Income Tax Act, 1922 or section 247 of the Income Tax Act, 1961, in the TNGST Act. On the facts of the present

case it is not even necessary to go to that extent because, admittedly, no other partner had filed an appeal and the only appeal against the

assessment of the firm had been preferred by the petitioner herein. The only question before us is whether this appeal is barred by limitation or not.

7. In The Chief Inspector of Mines and Another Vs. Lala Karam Chand Thapar etc., the question related to the prosecution of the directors of a

company for offences u/s 73 and 74 of the Mines Act, 1952. Section 76 of the Mines Act, 1952, provides for the prosecution of ""any of the

directors"". The contention was that prosecution of all the directors was not permitted under the Act. It is in this context that the Supreme Court

held that the expression ""any of the directors"" meant ""everyone of the directors"". The Supreme Court itself pointed out that the intention of the

Legislature had to he decided by the courts on a consideration of the context in which the words appear and in particular, the scheme and object

of the legislation. We do not think that the context in which rule 52(2) of the TNGST Rules, uses the words that the assessment orders may be

served on ""any person who was a partner"" should be interpreted to mean that the service must be on all the erstwhile partners. The argument of

Mr. Natarajan, however, is that rule 52(1)(a) provides for service of notice on any agent of the dealer appointed to represent the dealer. The

further contention is that once the partnership is dissolved, the agency between the partners ceased by virtue of the common law. But it is precisely

to provide for such a contingency, that a fiction was created u/s 19A of the TNGST Act and rule 52(2) of the TNGST Rules was introduced

making it clear that the assessment against a firm can be served on any person who was a partner of the firm before dissolution. The argument that the fiction created by law is only for the purpose of making the order of assessment and cannot extend beyond the assessment order, does not

appeal to us. We are clearly of the opinion that the fiction created by section 19A of the Act extended to the mode of service of the order of

assessment on the dissolved firm and rule 52(2) is precisely to provide for such a contingency.

8. Section 19A of the Act was introduced apparently, after the decision of the Supreme Court in Additional Tahsildar v. Gendalal [1968] 21 STC

263. It was held in that case that on the dissolution of a firm, it ceased to he a legal entity and unless there is a statutory provision permitting the

assessment on a dissolved firm there was no scope of assessing a firm which had ceased to have any legal existence. Now that section 19A of the

Act has been introduced there is nothing illegal about the assessment having been made after the dissolution of the firm. Mr. C. Natarajan, with his

usual fairness, cites before us two decisions, arising under the Income Tax Act on the liability of quondam member of a dissolved firm which are

against the petitioner. In COMMISSIONER OF Income Tax, ANDHRA PRADESH Vs. RAJA REDDY MALLARAM., , the Income Tax

Officer issued notice calling upon one of the members to file a return for the association for and on behalf of the assessment. Since there was no

response, the Officer made an exparte assessment. The amount was sought to be recovered from another quondam member of the assessee. The

matter having come up to the Supreme Court of India, it was held that the assessment made on the association after its dissolution was valid u/s 44

of the Indian Income Tax Act, 1922. It was also held that the regular procedure for the purpose of assessment was applicable in respect of a

dissolved association also, as if it had continued. What is more, the Apex Court laid down that a notice to the appropriate person under the Act

would be sufficient to enable the authority to assess the dissolved association. The plea of the other member who had not been served personally

that he could not be held to be liable to pay the tax assessed, failed. In a K.L. Parvathamma Vs. Income Tax Officer and Others, an assessment

was made on a dissolved firm after notice to one of the quondam partners. It was argued that the words ""any person"" found in sub-section (2) of

section 283 of the Income Tax Act, 1961, should be construed to mean ""all persons"" who were the partners of the firm. It was held that the notice in such a case could he served on any one member of the firm. The contention that it should be served on all the members was rejected. In Indira

Chemical Agency Vs. Commissioner of Income Tax, the very same section 283(2) of the Income Tax Act, 1961, was interpreted to mean that

service on one of the members of the dissolved firm would he binding on all the partners of the firm, which had been dissolved. It was also held

that section 283(2) did not restrict itself either to assessment or to penalty and is wide enough in its amplitude to cover all the proceedings under

the Act and hence the service of notice with reference to penalty proceedings on one of the partners was held to be enough compliance with the

provisions of the Act.

9. The judgment of a Division Bench of this Court in K. Balarama Naidu v. State of Tamil Nadu (Writ Appeal No. 851 of 1988 dated November

12, 1990) (See [1992] 86 STC 284 supra) needs to be noticed while interpreting section 19A of the Act and rule 52(2) of the TNGST Rules.

The Division Bench not only upheld the said provisions as being intra vires the Constitution of India but proceeded to say that a bare reading of the

rule unmistakably shows that service of notice, summons or orders issued under the Act on any member of the Hindu undivided family, any partner

(not being a minor) and any member of the association would be deemed to be proper service in accordance with law provided the service is on

any such person or partner who had that status before the partition or dissolution.

10. The last mentioned, three decisions relating to service of notice under the provisions of the Income Tax Act will apply so far as the service of

the notice under the provisions of rule 52(2) of the TNGST Rules are concerned. To this extent, we have already noticed that the provisions of the

Income Tax Act and the Sales Tax Act and Rules are in pari materia. We therefore reject the argument of the learned counsel for the petitioner,

that the appeals filed by him to the Appellate Assistant Commissioner against the orders of assessment were not barred by limitation. Therefore,

service on one of the quondam partners should be deemed to be service on all the quondam partners. The period of limitation runs from the date of

service on any one of the quondam partners of a dissolved firm. We have already noticed that for both the assessment years 1973-74 and 1974-

75, one of the quondam partners had been served long before and reckoned from that date, the appeals were hopelessly barred by limitation. The

tax revision cases therefore fail and they are accordingly dismissed. There will, however, be no order as to costs.

11. Petitions dismissed.

