

(1976) 02 MAD CK 0021

In the Madras High Court

Case No : Tax Case No"s. 143 and 144 of 1971

P.S. Subramania Chettiar and Sons

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 05-02-1976

Acts Referred:

Constitution of India, 1950 — Article 226, 329A

Income Tax Act, 1961 — Section 35

Tamil Nadu General Sales Tax Act, 1959 — Section 12, 16, 3

Citation : (1977) 39 STC 103

Hon'ble Judges : V. Ramaswami, J;Sethuraman, J

Bench : Division Bench

Advocate : R. Venkataraman, for V. Rajagopalan, C. Venkataraman and S. Chandrasekaran, for the Appellant; K. Venkataswami, the Additional Government Pleader No. I, for the Respondent

Final Decision : Dismissed

Judgement

V. Ramaswami, J.—The assessees are dealers in paddy and rice. For the assessment year 1961-62, they returned a total and taxable

turnover of Rs. 1,58,289.50 and Rs. 1,56,713.48 respectively. On a check of accounts, it was found that the account books disclosed a total

turnover of Rs. 2,91,462.28 and the assessing officer adopted this figure adding another sum of Rs. 8,761.20 in respect of some deficit amount

noticed. By an order dated 5th October, 1962, the assessing officer determined the total turnover at Rs. 3,00,223.48 and the taxable turnover at

Rs. 1,65,995.39. For the assessment year 1962-63, similarly the assessing officer adopted the turnover as disclosed in the accounts as against the

turnover returned adding a sum of Rs. 8,254.40 to the turnover disclosed in the accounts on account of some discrepancy in the stock noticed and

determined the total turnover at Rs. 4,55,529.67 and the taxable turnover at Rs. 3,40,327.14. This assessment order is dated 29th August, 1963.

In July, 1964, there was a surprise inspection of the residence of one K. Pitchaimuthu, which resulted in the discovery of 29 slips of which 8 were

held to refer to the appellants. Sometime later on, another surprise inspection of two individuals by name R. Perumal and Palaniandi Chettiar under

whom the said Pitchaimuthu was working as accountant resulted in 27 more slips being recovered, out of which 25 were said to relate to the

appellants. On the basis of these recovery of slips, the assessing officer issued a notice u/s 16 of the Tamil Nadu General Sales Tax Act, 1959,

requiring them to show cause why certain turnovers for each of these years should not be determined as having escaped assessment. After

following the prescribed procedure, by an order dated 15th December, 1964, the assessing authority by best of judgment determined the escaped

turnover at Rs. 26,68,229.92 for the assessment year 1961-62 and Rs. 41,34,821 for the assessment year 1962-63. The assessees preferred two

writ petitions against this order on the ground that Section 16 of the Tamil Nadu General Sales Tax Act authorised only the assessment of the

actual escaped turnover and did not authorise the assessing officer to determine the escaped turnover by best of judgment. The writ petitions were

originally dismissed by a learned single Judge ; but, on appeal, it was heard by a Full Bench. See P.S. Subramaniam Chettiar & Sons v. Joint

Commercial Tax Officer III, Dindigul [1966] 18 S.T.C. 357 . It was held by the Full Bench See P.S. Subramaniam Chettiar & Sons v. Joint

Commercial Tax Officer III, Dindigul (1966) 18 S.T.C. 357 . that Section 16 as it stood at the relevant time authorised only the assessment of the

actual escaped turnover and did not enable the assessing officer to determine the escaped turnover by best of judgment. They pointed out the

difference in the language used in Section 16 and the prior provision contained in Rule 17 of the General Sales Tax Rules and held that the

omission of the words ""determine the turnover by best judgment"", which were found in tax Rule 17, the predecessor of Section 16(1), disentitled

the assessing authority to determine such turnover by best judgment. Accordingly, the writ appeals were allowed and the reassessment orders

were quashed with an observation that the assessing authority was at liberty to proceed further u/s 16 in the light of that judgment. This decision

was rendered on 22nd August, 1966. Accepting the decision of this court, the Government proceeded to amend the provision by Tamil Nadu Act

No. 18 of 1966. By Section 2 of this amending Act, the original Section 16 was substituted by a new Section 16 with retrospective effect from 1st

April, 1959. This substituted provision clearly enabled the assessing officer to determine the escaped turnover also by best of judgment and the

amending Act thereafter validated the earlier assessments made and provided for consequential remedies by Section 3. The validating provisions,

the scope of which is now in question, may be extracted at this stage :

3. Validation of levy and collection of certain taxes.-Notwithstanding anything contained in any judgment, decree or order of any court or other

authority, no assessment, reassessment, levy or collection of any tax or penalty made or purporting to have been made under the provisions of

Section 16 of the principal Act before the date of the publication of this Act in the Fort. St. George Gazette shall be deemed to be invalid or ever

to have been invalid on the ground only that such assessment, reassessment, levy or collection was not in accordance with law and such tax or

penalty assessed, reassessed, levied or collected or purporting to have been assessed, reassessed, levied or collected shall, for all purposes, be

deemed to be and always to have been validly assessed, reassessed, levied or collected and accordingly-

(a) all acts, proceedings or things done or taken by the State Government or by any officer of the State Government or by any other authority in

connection with the assessment, reassessment, levy or collection of such tax or penalty shall, for all purposes, be deemed to be and to have always

been, done or taken in accordance with law,

(b) no suit or other proceeding shall be maintained or continued in any court against the State Government or any person or authority whatsoever

for the refund of any tax or penalty so paid and

(c) no court shall enforce any decree or order directing the refund of any tax or penalty so paid.

2. It may be mentioned that the assessee when they filed writ petitions challenging the order u/s 16 also preferred regular appeals against those

orders to the Appellate Assistant Commissioner and they were pending disposal when the amending Act came into force. Relying on the amending

Act and the validating provision, the Appellate Assistant Commissioner confirmed the reassessment made u/s 16 in his orders dated 19th

February, 1968 and 20th February, 1968. On a further appeal, the Tribunal also held that, in view of the amending Act, the assessing authority had

the necessary jurisdiction to determine the escaped turnover by best of judgment, but reduced the estimate to 50 per cent of that determined by the assessing authority. It is against this order, the present tax revision petitions have been filed.

3. The learned counsel for the petitioners contended that on the date when the amending Act was enacted there was no assessment order in

existence, as it had already been quashed and removed out of existence by the order of this court in writ appeals and that, therefore, the validation

provision contained in Section 3 of the amending Act could not have validated a non-existent order. He also relied on the fact that the judgment of

this court had been accepted and only on the basis that Section 16, as it stood originally, did not authorise the determination of the escaped

turnover by best of judgment, the amending Act was passed and the judgment of this court was allowed to become final. Therefore, the validating

provision would not apply to the case which was disposed of by this court. On the other hand, the learned Additional Government Pleader

contended that by reason of the retrospective operation given to the substituted Section 16, the lack of jurisdiction to make the reassessment order

and determine the turnover on best of judgment basis had been removed and all orders, therefore, shall be deemed to have been made validly. The

validating provision is necessary only where there is an order of court relating to any particular assessment. Apart from that, the learned Additional

Government Pleader also contended that even on the language of the validating provision in Section 3 of the amending Act, it would apply to even

cases where the court has removed the order on the ground that such assessment order was not in accordance with law. The learned Additional

Government Pleader had relied on a number of decisions in support of his argument.

4. Section 16, as already stated, was substituted by the amending Act with retrospective effect from 1st April, 1959. Therefore, in cases where the

assessment order was made on a best of judgment basis u/s 16, as it originally stood, though the assessing authority had no jurisdiction to make

that order and, therefore, the order was without jurisdiction, by reason of the retrospective operation, that order became a valid order and shall be deemed to have been validly made in exercise of the amended provision. This is a necessary corollary of giving retrospective effect to the provision. In *M.K. Venkatachalam, I.T.O. and Another Vs. Bombay Dyeing and Mfg. Co., Ltd.*, the Supreme Court considered the effect of retrospective operation. In that case, the Income Tax Officer in the original order of assessment of a company for the assessment year 1952-53 gave credit for a particular amount being the interest at 2 per cent on the tax paid in advance u/s 18A(5) of the Income Tax Act. Later on, Section 13 of the Indian Income Tax (Amendment) Act, 1953, which was passed subsequently, inserted a proviso to Section 18A(5) that an assessee was entitled to interest not on the whole tax paid in advance, but only on the difference between the tax so paid and the amount of tax determined on regular assessment. After this amendment, which was given retrospective operation, the Income Tax Officer purported to rectify the mistake in his assessment u/s 35. This was objected to on the ground that the assessment order originally made was a correct order as per the provisions then existing and that an order, which was valid, could not have become a wrong order or an illegal order by reason of a subsequent amendment. The Supreme Court held relying on the decision in *East End Dwellings Co. Ltd. v. Finsbury Borough Council* [1952] A.C. 109, that the effect of retrospective operation of the amendment was that the proviso inserted by the said amendment in Section 18A(5) of the Act would, for all legal purposes, have to be deemed to have been included in the Act as from April, 1952 and that the argument that the retrospective operation was not intended to affect completed assessment was not acceptable. Accordingly, the Supreme Court held that the Income Tax Officer was justified in exercising his power u/s 35 and rectifying the mistake. The present is a converse case. The original order of assessment was made at a time when the assessing authority had no jurisdiction to determine the turnover on the best of judgment and, therefore, it was illegal. But, the amending provision conferred a jurisdiction on the assessing authority to determine the turnover on the best of judgment and this provision was given retrospective operation. Therefore, the order shall be deemed to have been made under the amended provision, which was given retrospective

operation and, if so considered, the order will be valid and legally made. That apart, the validating provision contained in Section 3 also, in our

opinion, validates all assessments irrespective of the fact whether they were the subject-matter of judicial consideration or otherwise. The language

used in Section 3 shows that no assessment made under the provisions of Section 16 of the principal Act before the date of publication of the Act

shall be deemed to be invalid or ever to have been invalid on the ground only that such assessment was not in accordance with the law. But the

learned counsel for the petitioners contended that in order to deem an order to be invalid or as not invalid, there should be an assessment order

and, in case where by a writ of certiorari, the order has been quashed and removed from the record, the validating provision could not be applied.

The matter is not *res integra*. Number of cases have considered similar arguments. Discussing about the validating statutes in general, the Supreme

Court in *Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others*, , made the following oft-quoted observations :

When a legislature sets out to validate a tax declared by a court to be illegally collected under ineffective or an invalid law, the cause for

ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that

the legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative

competence, it is not sufficient to declare merely that the decision of the court shall not bind, for that is tantamount to reversing the decision in

exercise of judicial power which the legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it

is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be

invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction.

Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact

removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before.

Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand

under the re-enacted law. Sometimes the legislature gives its own meaning and interpretation of the law under which the tax was collected and by

legislative fiat makes the new meaning binding upon courts. The legislature may follow any one method or all of them and while it does so it may

neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must

be within the competence of the legislature and legal and adequate to attain the object of validation. If the legislature has the power over the

subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively, so as to bind even past

transactions. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the

subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate

provisions in the validating law for a valid imposition of the tax.

5. In that case, the Broach Municipality levied property tax on certain lands at a particular rate of the capital value. The provisions, which enabled

the municipality to levy, stated that it, could levy "'a rate on buildings or lands or both situate within the municipal borough'". In *Patel Gordhandas*

Hargovindas Vs. Municipal Commissioner, Ahmedabad, , the Supreme Court held that a rate on building or land could be levied only on the basis

of a rental income or notional rental value and could not be levied on the basis of capital value, because the word "'rate'" as used in the section has

to be understood in a special sense. Only if the legislature authorises the levy of taxes on buildings and lands, it could be levied on capital value as

well. After this decision, the Gujarat Municipalities Act was amended with retrospective operation providing for "'taxes'" to be levied on lands and

buildings based on annual letting value or the capital value or a percentage of the capital value. Relying on this provision, the Supreme Court held

that the assessments made on the basis of the capital value under the original provision shall be deemed to have been made under the amended

provision, which was given retrospective operation and the validating provision also saved all the assessments so made under the original provision.

This decision was followed in *The Municipal Corporation of The City of Ahmedabad and Another, Vs. The New Shrock Spg. and Wvg. Co. Ltd.*

etc. etc., . In *Sri Sadasib Prakash Brahmachari Vs. The State of Orissa*, , the Supreme Court upheld the validity of a scheme, which was held to

be void by courts, on the basis of an amendment, which was given retrospective operation. The following passage, which is relevant for our

purpose, may usefully be quoted :

Section 79-A in terms purports to revive the invalid scheme notwithstanding any judgment, decree or order of any court which means that though a

court may have pronounced the scheme as void still that is deemed to be alive. It has been suggested that this is directly flouting the decision of this

court and that the legislature has no power to declare as valid and constitutional what was decided by this court as invalid and unconstitutional.

But it is to be observed that the legislature does not purport to do anything of the kind. What it does is not to deem the schemes previously settled

as having been validly settled on those very dates, under the then existing law. This of course is beyond legislative competence since the legislature

has not the power to override unconstitutionality as such. But what the legislature has purported to do is to take up those very schemes and deem

them to have been settled "under the provisions of the present Act" and thereby to lay them open to any attack available under the present law.

Such a provision is not uncommon in legislative practice and is enacted in order to avoid the public inconvenience of having to re-do what has

previously been done.

6. The Supreme Court has also occasion to consider the question with reference to a sales tax provision of the U. P. Sales Tax Act. Section 3 of

that Act provided for levy of multi-point sales tax. Section 3-A provided for single point tax on the first sales and Section 3-D provided for a single

point tax at the stage of first purchase by a dealer in respect of foodgrains and certain other goods. By a notification dated 1st October, 1964,

foodgrains were specified u/s 3-D for single point tax at the stage of first purchase. The sales tax authorities sought to tax the first purchase of

processed or split foodgrains u/s 3-D on the ground that they constituted a separate item independent of the unprocessed or unsplit foodgrains. In

the decision reported in *Tilok Chand Prasan Kumar v. Sales Tax Officer* [1970] 25 ST.C. 118, the Allahabad High Court however held that such

levy was invalid. After the decision, the U. P. Sales Tax (Amendment and

Validation) Act, 1970, was passed and explanation II was added to Section 3-D providing that split or processed foodgrains shall be deemed to be different from unsplit or unprocessed foodgrains. It also provided that nothing in that section shall be construed so as to prevent the imposition of levy or collection of the tax in respect of the first purchase of split or processed foodgrains merely because tax has been imposed, levied or collected earlier in respect of the first purchase of those foodgrains in their unsplit or unprocessed form. Section 7 also validated the earlier levies and declared the notification issued u/s 3-D to be deemed to have been issued under the Act as so amended. An assessee who succeeded in getting the assessment order set aside by the High Court under Article 226 of the Constitution of India, challenged the right of the Government to levy sales tax on the purchases made by him of split or processed foodgrains subsequent to the amendment. One of the contentions raised by him was that the newly added explanation to Section 3-D read with Section 7 of the amending Act, which validated the earlier levies, amounted to unlawful usurpation of judicial power of the legislature. Repelling this argument, the Supreme Court held that the legislature had not purported to either directly or by necessary implication, overrule the decision of the court; but, on the other hand, it had accepted the decision as correct and sought to remove the basis of that decision by retrospectively changing the law. The Supreme Court also pointed out the distinction between the encroachment on judicial power and the nullification of the effect of judicial decision by changing the law retrospectively and held that while the former was outside the competence of the legislature, the latter was within its permissible limits. A Full Bench of the Karnataka High Court in Gill and Co. (P.) Ltd. v. Commercial Tax Officer [1973] 31 S.T.C. 336 considered the scope of the validating provision which was identical with that contained in Section 3 of the amending Act, which is now under consideration. In that case, on the basis of a decision of the Supreme Court in State of Mysore Vs. Yaddalam Lakshminarasimhaiah Setty and Sons, , the assessee succeeded in setting aside an assessment order made on him in respect of sales of cotton in inter-State sales. Later on, by the Central Sales Tax (Amendment) Act, 1969, the inter-State sale of cotton was made liable to tax and this provision was given retrospective operation. A validating provision, similar

to Section 3 of the amending Act here, was also made. When the assessing authorities relying on the amended provision and the validation section sought to recover back the tax refunded to the assessee in pursuance of the earlier order of the court invalidating the assessment, the assessee challenged the action on the ground that the decision rendered in his case on the prior occasion could not have been interfered with by the amending provision. The Full Bench held that the amending provision rendered effective and valid the original assessment orders as if they have been made under the amended provision and that notwithstanding the fact that the original order of assessment was set aside and the tax was refunded to the assessee, by reason of the validating provision, the assessment order shall be deemed to be valid and the assessee will be liable to pay back the amount refunded. A similar view was taken by the Andhra Pradesh High Court in *State of A. P. v. Shah Jamnadas Amichand* [1975] 35 S.T.C. 281 and the decision of the Full Bench in *Gill and Co. (P.) Ltd. v. Commercial Tax Officer* [1973] 31 S.T.C. 336 was followed in another decision of the same court in *Rajshekarappa v. Commercial Tax Officer* [1975] 35 S.T.C. 379.

7. But the learned counsel for the petitioners, relying on the decision in *Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another*, , argued that the effect of validating an assessment, which had already been set aside by the court, would amount to setting aside the judgment of this court itself and that it was not open to the legislature to encroach on the judicial field. The learned counsel referred to the relevant portions, where Clause (4) of Article 329A of the Constitution inserted by the Constitution (Thirty-ninth Amendment) Act, 1975, was considered. That clause reads as follows :

(4) No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election of any such person as is referred to in Clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any grounds on which such election could be declared to be void or has, before such commencement, been declared to be void under any such

law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respect and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

8. Each one of the learned Judges of the Supreme Court who held that provision unconstitutional gave different reasons, but suffice it for our

purpose to say that the provision is not analogous to the one we are now considering. Section 3 of the amending Act had not rendered or declared

the decision of this court void. But only it had made the decision ineffective after removing the basis of the decision. As already pointed out, the

Supreme Court had in the earlier judgments clearly pointed out the distinction between reversing a judicial decision and making the decision

ineffective. In fact, in validating provisions, the legislature takes the decision of the court as correct and only removes the vice or the defect pointed

out in the judgment. It could not, therefore, be said that the decision itself is interfered with or reversed. In the opinion of the Supreme Court

Clause (4) of Article 329A, in fact, made a judgment void and it was not of the latter category of making it ineffective as in a case of retrospective

legislation and validation. The decision is, therefore, not applicable to the present case.

9. The learned counsel also relied on the decisions of this court in *M. M. Muthukaruppan Chettiar v. Deputy Commercial Tax Officer* [1960] 11

S.T.C. 220, Sundaram Iyengar and Sons v. Deputy Commercial Tax Officer [1960] 11 *S.T.C. 443* and *Ceylon Thowfeck Hotel v. State of*

Madras [1961] 12 *S.T.C. 238*. All these cases related to the right of the authorities to recover the amount refunded in the absence of a specific

power conferring such a right in the validating provision. We are not concerned with a case of recovering back the amount refunded. The case is

still in the stage of assessment and collection and no question of refund and recovery arises. We are, therefore, of the opinion that in view of

Section 2, which retrospectively amended Section 16 and Section 3, which validated the assessments, the original order of assessment made u/s

16 had been made valid and effective.

10. Coming to the merits, as already pointed out, in the assessment order made

u/s 16, the turnover was estimated on best of judgment at Rs.

26,37,640.30. This was on the basis that the slips recovered during surprise inspection, which related to the assessee, disclosed sales and that

one partial disclosed a suppression to the tune of Rs. 20,312. With reference to the serial numbers found in the various partials recovered in such

surprise inspection, the assessing officer was of the view that there should have been at least 909 partials during the year of assessment. He

accordingly multiplied 20,312 by 909 (sic) and arrived at the figure 26,37,640.30. In so far as the assessment year 1962-63 was concerned, the

assessing officer found that one slip revealed a sale to the extent of Rs. 5,442.70, but in the regular accounts only a sum of Rs. 447.83 was

disclosed in respect of this sale bill. The turnover assessed originally u/s 12 with reference to the accounts produced by the assessee was Rs.

3,40,327. In the view of the assessing authority, therefore, the estimate should be 5,445 by $448 \times 3,40,327$ and on that basis estimated

suppressed turnover at Rs. 41,34,821. The Tribunal pointed out that it could not be said that a businessman always suppressed at a uniform basis

and that the suppression also should not be assumed to be throughout the year and, on that basis, the Tribunal considered that one half of the

figures adopted by the assessing authority would be more reasonable and, accordingly, reduced the estimated turnover to 50 per cent. Though it

could not be said with any amount of certainty that the estimate made by the Tribunal was inaccurate or palpably unreasonable, we consider that,

on the facts and circumstances of this case, the estimate should be further reduced to one half of the figures that was determined by the Tribunal

especially when even under the original assessment made u/s 12, the assessing authority had included a small amount in respect of the probable

escaped turnover. Subject to this reduction, the estimate itself is confirmed.

11. The assessing authority also levied penalty. But this was on the basis of the actual suppression found, but not on the basis of the estimated

turnover of the suppression. We are, therefore, unable to interfere with the order levying penalty.

12. The tax revision petitions accordingly are dismissed, subject to the reduction in the total turnover estimated, with costs. Counsel's fee Rs. 150

in each.