
(1976) 03 MAD CK 0018

In the Madras High Court

Case No : Tax Case No"s. 146 to 156, 160 to 168 and 170 to 179 of 1972, 23, 25 to 27 and 30 to 38 of 1973 (Revision No"s. 126 to 136 and 140 to 158 of 1972 and 11, 12, 13, 14 and 17 to 25 of 1973

Rajam Textiles and Others

APPELLANT

Vs

The State of Tamil Nadu and Another

RESPONDENT

Date of Decision : 03-03-1976

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 271

Tamil Nadu General Sales Tax Act, 1959 — Section 12, 16, 25, 9

Citation : (1977) 39 STC 124

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

Bench : Division Bench

Advocate : K. Srinivasan, for S.V. Desikan, in T.C. Nos. 146 to 156, 160 to 168 and 170 to 179 of 1972 and C. Natarajan, in T.C. Nos. 23, 25 to 27 and 30 to 38 of 1973, for the Appellant; K. Govindarajan, for the Additional Government Pleader No. 1, for the Respondent

Final Decision : Dismissed

Judgement

V. Ramaswami, J.—This is a batch of cases in which the facts are similar and the points arising also are the same, except that they related to

different assessment years and different parties. The assessees in all these cases were doing business in the manufacture and sale of handloom cloth

goods. Under the Export Promotion Scheme, they became entitled and were given certain import licences for various amounts for the import of art

silk yarn. The condition of the licences is that such art silk yarn imported was to be used by them in the manufacture of handloom cloth and the

manufacturers were prohibited from selling the art silk yarn so imported or transferring the licences themselves. The sales of handloom cloth are

exempt from the payment of sales tax. In the accounts maintained by them, the assessees had shown the import of the art silk yarn and the accounts were written as if they were used by them in the manufacture of handloom cloth. Some of the assessees submitted their returns and claimed exemption on the ground that the imported art silk yarns were utilised by them in the course of manufacture of handloom cloth and this was accepted by the assessing authorities and they were not assessed. The others did not submit any return in form A-1. But on the basis of the routine check of the accounts made during the year and on the basis that the assessees had written that the imported art silk yarns were utilised in the manufacture of handloom, no action was taken by the assessing officer. But, later on, on certain information gathered from the Special Police Establishment, which had raided the assessees' premises for contravention of the conditions of the import licences and the statements given by the assessees before the officials of the Income Tax department, the assessing officer initiated proceedings under the Sales Tax Act and issued notices to all the assessees to produce their accounts and prove that they have actually used the imported goods for manufacture of handloom cloth and that they actually sold such manufactured handloom cloth. Though sufficient opportunity was given to the petitioners, they did not produce the records or any proof to show that the imported goods were used in the manufacture of handloom cloth and sold as such handloom cloth locally or by export. The assessing officer accordingly assessed them to pay sales tax. In determining the turnover in each of these cases, the assessing officer had taken the face value of the import licences and added 1½ times that value towards the excise duty, commission, freight charges, etc. and profit and determined the total taxable turnover and levied tax at 1 per cent. In all those assessment orders, the assessing officer also levied penalty for not having reported the sales turnover, but quoted the provision under which the penalty is levied as Section 12(3) in all the cases.

2. The assessees preferred appeals to the Appellate Assistant Commissioner. Pending these appeals, they also filed writ petitions in this court

under Article 226 of the Constitution. Various contentions were raised in this court including a point that the levy of penalty u/s 12(3) was not valid

and that the assessing authority had no jurisdiction to levy the penalty under that provision. A Division Bench of this Court in the decision reported

in *Oveekee Textiles v. Deputy Commercial Tax Officer, Tiruchengode* [1971] 27 S.T.C. 439, while overruling all the other objections, held that in

cases where assessments could only be u/s 16 by reason of an earlier order of assessment u/s 12 or otherwise, that portion of the order levying

penalty was liable to be set aside on the ground that there was no finding in the assessment order and that the escapement of the turnover was the

result of an overt culpable act on the part of the assessee as required u/s 16(2). But in all cases where the proceedings were initiated u/s 12(2), the

Division Bench held that the penalty levied was valid and had to be sustained. When the assessee questioned the quantum of penalty levied, this

court declined to interfere with the quantum of penalty imposed u/s 12(3), on the ground that that could not be done in exercise of our jurisdiction

under Article 226 of the Constitution. The result of it was the penalty orders made in the proceedings initiated or shall be deemed to have been

initiated u/s 16 were set aside and in the appeals before the Appellate Assistant Commissioner, which were pending, only the merits of the

assessment and the quantum of penalty u/s 12(3) were left to be decided by the Appellate Assistant Commissioner.

3. When the appeals were taken up for hearing by the Appellate Assistant Commissioner, it was argued on behalf of the assessees that they had

sold the import licences through brokers in Bombay, that they did not know the ultimate consumers and that, therefore, they could not be assessed.

They also contended that the goods had been imported in the Bombay Port and that there is no evidence to show that the goods were actually sent

to Tamil Nadu from Maharashtra State for the purpose of manufacture of handloom goods or for sale as such imported Art silk yarn. The

Appellate Assistant Commissioner pointed out that in the accounts maintained by the assessees they have written in all the years in question that the

imported Art silk yarns were utilised by them in the course of manufacture of handloom cloth and if the assessees wanted to contend that either

they had sold the import licences through the brokers at Bombay or did not bring the imported Art silk yarn into Tamil Nadu, it is for them to

prove that fact. In spite of sufficient opportunity given, they did not produce any record to show these facts. The appellate authority also pointed

out that originally the assessees have given statements before the assessing officers that they have brought Art silk yarn imported to Tamil Nadu

and utilised the same in the manufacture of handloom cloth. Accordingly, the Appellate Assistant Commissioner confirmed the assessment. In the view that the High Court has confirmed the penalties in the cases falling u/s 12(3), the Appellate Assistant Commissioner refused to interfere with the penalties as well.

4. The assessees preferred appeals before the Sales Tax Appellate Tribunal. The Tribunal dismissed the appeals, confirming the order of the Appellate Assistant Commissioner.

5. In this batch of cases, Mr. K. Srinivasan, the learned counsel appearing for some of the assessees contended that even with reference to the penalty in the cases falling u/s 12(3), a finding by the assessing officer that the escapement of the turnover was due to conscious or wilful non-

disclosure of the turnover was necessary and, in the absence of such a finding, the penalty could not be sustained. According to the learned

counsel, whenever a quasi-judicial authority is vested with a jurisdiction to levy penalty, it can be exercised only for contumacious conduct or wilful

or conscious defiance or disregard of the law and a mere omission will not give him the jurisdiction to levy such penalty. This court in the very case

of the assessees when it came on the prior occasion by way of writ petitions in the decision reported in Oveekee Textiles v. Deputy Commercial

Tax Officer, Tiruchengode [1971] 27 S.T.C. 439, had specifically held that only in the cases falling u/s 16, a finding as to wilful nature of the non-

disclosure was necessary and that the levy of penalty in the cases falling u/s 12(3) was valid and had to be sustained. In spite of the specific view

expressed on the earlier occasion, the learned counsel again raised the same contention. Though we could have disposed of this point merely on

the ground that so far as the petitioners are concerned, the point is already concluded, we decided to listen the arguments in view of the fact that

the learned counsel stated that two of the decisions, which, according to him, support his view, had not been considered on the earlier occasion.

6. Sections 12(3) and 16(2), as they stood for the relevant period, read as follows :

12. (3) When making any assessment under Sub-section (2), the assessing authority may also direct the dealer to pay, in addition to the tax

assessed, a penalty not exceeding one and a half times the amount of tax due on

the turnover that was not disclosed by the dealer in his return or, in the case of failure to submit a return, one and a half times the tax assessed, as the case may be.

16. (2) In making an assessment under Clause (a) of Sub-section (1), the assessing authority may, if it is satisfied that the escape from assessment is due to wilful non-disclosure of assessable turnover by the dealer, direct the dealer to pay, in addition to the tax assessed under Clause (a) of Sub-section (1), a penalty not exceeding one and a half times the tax so assessed.

7. The legislature in the two provisions relating to levy of penalty had used two different languages. While in Section 16(2) a wilful nondisclosure of assessable turnover by the dealer is the gravamen of the offence, Section 12(3) refers to the fact of non-disclosure alone or the failure to submit the return. On the plain language used in Section 12(3), it could not be said that any contumacious conduct or wilful non-disclosure is necessary to attract the provisions of Section 12(3). This was also the view expressed in *Madras Metal Works v. State of Madras* [1973] 31 S.T.C. 566, to which one of us was a party. It is true that in this decision also this court followed the decision in *Oveekee Textiles v. Deputy Commercial Tax Officer, Tiruchengode* [1971] 27 S.T.C. 439, But this was the consistent view taken by this court.

8. The learned counsel for the assessee relied on a passage in *A.V. Meiyappan v. Commissioner of Commercial Taxes, Board of Revenue, Madras* [1967] 20 S.T.C 115 , in support of his argument that even in respect of Section 12(3), a finding as to the wilful non-disclosure is necessary. In that case, a film producer leased the right to exploit a cinematograph film produced by him, but did not include the amount received in the assessable turnover on the ground that they were not sales of any goods, but represented only realisations of the rights to exploit the films conferred upon him under the Copyright Act. It was also claimed that such rights in the films were not the corporeal or tangible rights, nor the films were goods which could be the subject-matter of any sale. The assessing officer, however, decided to include in the assessable turnover the amounts received by the assessee treating the same as representing the turnover of sales of films liable to a single point tax at 10 per cent. The

assessing officer also levied a penalty at 1½ times the quantum of tax on the amount u/s 12(3). The learned Judges held that copyright even

regarded as a species of movable property, the transaction did not connote a sale at all and it was, therefore, not liable to tax. On that ground

alone, the assessment could have been set aside. But the decision also went into the question of penalty. The learned Judges considered the scope

of Sections 12(3) and 16(2) and observed as follows :

Sub-section (2) of Section 16 provides for the imposition of a penalty and a penalty not exceeding 1½ times the tax so assessed is leviable in

case the assessing authority is satisfied that the escape from assessment is due to wilful non-disclosure of assessable turnover by the dealer. The

mere fact that the turnover has escaped assessment does not invite the imposition of the penalty. Under this provision, the assessing authority has to

find that there has been an evasion of the tax due to wilful non-disclosure of turnover which should have been disclosed. Section 12(3), on the

other hand, does not appear to require any such finding of wilful non-disclosure in the return. The mere fact that some item of turnover has failed to

be included in the return would appear to confer upon the assessing authority the jurisdiction to impose a penalty. It seems to us that even in the

case covered by Section 12(3) of the Act, a deliberate non-disclosure is really contemplated. The Section refers to the imposition as a penalty and

a penal provision of this nature cannot have been intended to apply to cases other than where a deliberate concealment by non-disclosure is

involved. But, on the question whether such a provision is unconstitutional, we are unable to agree with the learned counsel. It is well-recognised

that a power to penalise evasion of tax which is lawfully due is ancillary to the taxing power and the provision cannot therefore be struck down. On

the further part of the argument of the learned counsel that mere non-disclosure cannot invite the levy of penalty, we agree. Having regard to the

underlying intent of the Section, it is still necessary for the assessing authority to be satisfied that the non-disclosure is wilful and is designed to

evade the tax. It can hardly be that the legislature thought that an innocent omission by oversight or some such reason should still invite penal

consequences.

9. It is this passage which is extracted above that the learned counsel for the

assessee heavily relied on. But, we may see from the next paragraph that the question posed was whether the order of the assessing authority imposing the penalty in that case is a proper exercise of judicial discretion of that authority. It was contended in that case that the question of an assessment of the like nature came before the Sales Tax Appellate Tribunal in 1956 in respect of the same assessee but in respect of a different year and that the Sales Tax Appellate Tribunal took the view that it was not liable to be included in the taxable turnover. That order was not questioned in this court and it is because of that reason, the assessee did not include later on when he realised similar amounts on leasing the right to exploit the film. In fact, the learned Judges observed as follows :

But it is a point worthy of note that between 1956 when the Sales Tax Appellate Tribunal rendered its decision and the date on which these impugned orders were passed, everyone concerned, including the department, was under the view that turnovers of this description were not liable to be included in the turnover of the dealer. It is in that context that we have to examine whether the levy of the penalty for non-disclosure of the alleged turnover in the return is justified.

10. The ratio of the judgment, in our opinion, therefore, is that though a power to impose a penalty for non-disclosure is conferred on the assessing authority, it should not be imposed as a routine matter ; but it is to be exercised with proper judicial discretion. But this could not be taken as an authority that a factual wilful non-disclosure is essential even for invoking Section 12(3). This was also the view expressed by a learned single Judge in *A.R.K. Perumal Chettiar v. Joint Commercial Tax Officer* [1974] 34 S.T.C. 310, with reference to the decision in *A.V. Meiyappan v.*

Commissioner of Commercial Taxes, Board of Revenue, Madras [1967] 20 S.T.C. 115.

11. The next decision relied on by the learned counsel for the assessee is the decision of the Supreme Court in *Hindustan Steel Ltd. Vs. State of Orissa*, . That was a case arising under the Orissa Sales Tax Act and the passage relied on by the learned counsel reads as follows :

Under the Act penalty may be imposed for failure to register as a dealer : Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer.

An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in-charge of the affairs of the company in failing to register the company as a dealer acted in the honest and genuine belief that the company was not a dealer. Granting that they erred, no case for imposing penalty was made out.

12. Question F, which was referred to the High Court, related to the levy of penalty u/s 12(5) of the Orissa Sales Tax Act. Section 9(1) of the

Orissa Sales Tax Act provided that "no dealer shall, while being liable u/s 4 to pay tax under this Act, carry on business as a dealer unless he has

been registered under this Act and possesses a registration certificate". Section 12(5), which related to the penalty, reads as follows :

12. (5) If upon information which has come into his possession, the Collector is satisfied that any dealer has been liable to pay tax under this Act in

respect of any period and has nevertheless without sufficient causes failed to apply for registration, the Collector shall, after giving the dealer a

reasonable opportunity of being heard, assess to the best of his judgment, the amount of tax, if any, due from the dealer in respect of such period

and all subsequent periods and the Collector may direct that the dealer shall pay, by way of penalty, in addition to the amount so assessed, a sum

not exceeding one and a half times that amount:

Provided that no penalty shall be levied for the quarter during which the dealer first or again becomes liable to pay tax under this Act.

13. It is only in considering this provision, the Supreme Court made the above

observations. We may mention that a reference to Section 25(1)(a) appears to be clerical error for Section 12(5). It may be seen that the language used in Section 12(5) calls for a finding that without a sufficient cause, the dealer failed to apply for registration. This is similar to the provisions in Section 271 of the Income Tax Act, which requires the animus or conscious disregard of the provision. But the language in Section 12(3) is clearly different. It is open to the legislature to impose penalties even in cases where the contravention was not deliberate or wilful. The decision of the Supreme Court is, therefore, of no assistance to the learned counsel. We are, therefore, of the view that a wilful non-disclosure is not essential for invoking the powers u/s 12(3) of the Tamil Nadu General Sales Tax Act.

14. This court in *Madras Metal Works v. State of Madras* [1973] 31 S.T.C. 566 has also taken a similar view that Section 12(3) of the Tamil Nadu General Sales Tax Act, 1959, empowers the assessing authority to levy penalty for suppressing turnover and it does not make it a condition that the assessee should have the necessary mens rea before he is found guilty of making the suppression.

15. It was next contended by the learned counsel for the assessees that there was no sale of the imported Art silk yarn ; but the licences themselves have been sold. But to a specific question, the learned counsel stated that he could not produce any evidence of sale and it is not possible for him to do that and that, in form, the import was effected as if it was by the assessees themselves. Further, we are unable to permit the assessees to contend that they have sold the licences or that the Art silk yarn imported had not been brought into this State. Once they have imported the Art silk yarn, it is for them to prove how it was disposed of in order to claim exemption. Since that has not been made, as held by this court even in *Oveekee Textiles v. Deputy Commercial Tax Officer, Tiruchengode* [1971] 27 S.T.C. 439, they are liable to be assessed.

16. In the result, all the tax revision petitions are liable to be dismissed and, accordingly, they are dismissed with costs. Counsel's fee Rs. 150 in each case.