

(1991) 04 MAD CK 0053

In the Madras High Court

Case No : Tax Case (Appeal) No. 89 of 1982

Reliance Motor Company Private Ltd.

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 12-04-1991

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12, 14, 15, 16, 16(1)

Citation : (1991) 04 MAD CK 0053

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

Bench : Division Bench

Advocate : C. Natarajan, for the Appellant; Mrs. Chitra Venkataraman, Additional Government Pleader (Taxes), for the Respondent

Judgement

Dr. A.S. Anand, C.J.—This appeal by the assessee is directed against the order of the Joint Commissioner, Commercial Taxes, Madras, made in exercise of the powers u/s 34 of the Tamil Nadu General Sales Tax Act, 1959, hereinafter referred to as "the Act".

2. Learned counsel for the assessee has, before questioning the order on merits, raised two preliminary objections to the order of the Joint Commissioner. According to him, firstly the Joint Commissioner failed to appreciate that the turnover of Rs. 1,84,985 was allegedly the escaped turnover, which was neither part of the return nor of the book sales or even the subject-matter of the appeal before the appellate authority, and the Joint Commissioner could not, in exercise of the powers u/s 34 of the Act bring to tax, for the first time, the alleged escaped turnover while exercising suo motu revisional powers. Secondly, it was argued that the order of the Joint Commissioner was barred by limitation prescribed u/s 16 of the Act to bring an escaped turnover to tax.

3. With a view to appreciate the preliminary objections, a short reference to the facts of the case is necessary. The appellant was assessed on a total and taxable turnover of Rs. 1,45,62,950.96 and Rs. 1,31,49,069.77, respectively, by the assessing authority vide order dated 30th of October, 1976. An appeal was

preferred before the Appellate Assistant Commissioner disputing only a turnover of Rs. 19,123.50 which related to discounts at price difference. The appellate authority vide order dated 6th of October, 1978 allowed the appeal and the total and taxable turnover was redetermined. It appears that there was an inspection of the business premises of the assessee on 17th of July, 1980. During the inspection, the Officers found that the assessee had purchased motor parts by issuing form C and supplied those parts as free supply during the warranty period to the customers for their cars but the cost of the parts was reimbursed to the assessee by the manufacturers, M/s. Hindustan Motors Ltd. The value of those parts amounted to Rs. 1,84,985. The Joint Commissioner, in exercise of the suo motu powers of revision proposed to levy tax on the estimated escaped turnover of Rs. 1,84,985 at 15 per cent single point. Objections were invited and considered. The Joint Commissioner confirmed the proposal and brought the amount of Rs. 1,84,985 to tax for the first time, after the assessment and appellate proceedings were over, at 15 per cent single point. The relevant assessment year is 1974-75.

4. To appreciate the preliminary objections raised by Mr. Natarajan, the first point that arises for consideration is : Can powers u/s 34 of the Act be exercised by the Joint Commissioner to pass an order relating to an escaped turnover specifically dealt with u/s 16 of the Act ?

5. Section 34 of the Act reads :

"Special powers of Joint Commissioner of Commercial Taxes. - (1) The Joint Commissioner of Commercial Taxes may, of his own motion, call for and examine an order passed or proceeding recorded by the appropriate authority u/s 4-A, section 12, section 12-A, section 14, section 15 or sub-section (1) or (2) of section 16 or an order passed by the Appellate Assistant Commissioner under sub-section (3) of section 31 or by the Deputy Commissioner under sub-section (3) of section 31-A or sub-section (1) of section 32 or sub-section (3) of section 33 and if such order or proceeding recorded is prejudicial to the interests of Revenue, may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may initiate proceedings to revise, modify or set aside such order or proceeding and may pass such order thereon as he thinks fit;

(2) The Joint Commissioner of Commercial Taxes shall not initiate proceedings against any such order or proceeding referred to in sub-section (1) if -

(a) the time for appeal against that order has not expired; or

(b) the order has been made the subject of an appeal to the Appellate Tribunal or of a revision in the Special Appellate Tribunal; or

(c) more than five years have expired after the passing of the order :

Provided that if the order passed or proceeding recorded by the appropriate authority, Appellate Assistant Commissioner or Deputy Commissioner referred to in sub-section (1) involves an issue on which the Special Appellate Tribunal has

given its decision adverse to the Revenue in any other proceedings, and an appeal to the Supreme Court against the order of the Special Appellate Tribunal is pending, the period of time between the date of the abovesaid order of the Special Appellate Tribunal and the date of the order of the Supreme Court shall be excluded in computing the period referred to in clause (c).

(3) No order under this section adversely affecting a person shall be passed unless that person has had a reasonable opportunity of being heard.

(4) In computing the period referred to in clause (c) of sub-section (2), the time during which the proceedings before the Joint Commissioner of Commercial Taxes remained stayed under the order of a Civil Court or other competent authority shall be excluded."

Though this section has undergone a number of amendments, for the question under consideration, we need not detain ourselves to consider the amendments. On its plain meaning, the section confers on the Joint Commissioner or the Board, powers of suo motu revision. This section authorises the Joint Commissioner to find out whether the order of the appellate authority, Appellate Assistant or Deputy Commissioner, is reasonable and legally sound. It, therefore, follows that the power can be exercised to revise an order which is in existence and it cannot extend to revise an order which the statutory authority had not at all made. The Joint Commissioner cannot exercise the power, which the assessing authority should have exercised but did not so exercise. The power to bring an escaped turnover to tax is the power of an assessing authority u/s 16 of the Act. The Joint Commissioner or the Appellate Assistant Commissioner can however get the escaped assessment brought to tax within the period of limitation only. The question posed by us above has been answered by a Division Bench of this Court in *Velayutha Raja v. Board of Revenue (C.T.)* [1970] 26 STC 176, which relied upon the law laid down by the Supreme Court in *State of Kerala v. Cheria Abdulla & Co.* [1965] 16 STC 875, and the safeguards provided in the said judgment by the Apex Court. The Division Bench held that the revisional powers exercised u/s 34 of the Act are subject to the other provisions of the Act and, therefore, the best judgment assessment or an original assessment on the ground of escapement of turnover, cannot be made in exercise of the powers u/s 34 of the Act. The Bench opined :

"We are, therefore, of the view that the impugned order of the Board which is extrovertly an original assessment, is fallacious as the Board exceeded its powers to pass such an assessment order."

6. The first preliminary objection, therefore, must succeed and we hold that the Joint Commissioner exceeded his powers while exercising jurisdiction u/s 34 of the Act to bring to tax the alleged escaped turnover, for the first time when it was neither the subject-matter of assessment proceedings nor the appellate proceedings, in exercise of the revisional powers u/s 34 of the Act.

7. Even the second preliminary objection, according to the learned counsel for

the appellant has been answered by the same Division Bench in *Velayutha Raja v. Board of Revenue (C.T.)* [1970] 26 STC 176 . Dealing with the powers of the Board of Revenue, now exercisable by the Joint Commissioner u/s 34 of the Act and the relevant provisions of the Act, the learned counsel referred to the following observations of the Bench :

"We have noticed that section 34 is made subject to the provisions of the Act. Section 16 is one such provision. If section 16 stood alone like any other section such as sections 12, 14, 15, 31, or 32 the position would be different. But section 16(1) adumbrates a substantial rule of limitation. If the assessing authority could not bring into the net of taxation escaped turnover, beyond a period of five years from the date of the year of escape, can the Board, which is expected to revise the order of the assessing authority, make an order so as to defeat the substantive legislative provision as to limitation u/s 16(1) of the Act ? We are of the view that the Board cannot pass such an order.

The effect of such a period of limitation envisaged in section 16(1) is wide enough and cannot be said to be limited to assessment of escaped turnover under that sub-section by the assessing authority only. In our view, it is to be invoked in all cases where a statutory functionary under the Act assumes jurisdiction to assess escaped turnover. One such case is when the Board exercises its special powers u/s 34 of the Act."

8. In the instant case, the relevant assessment year is 1974-75. The assessment order was made on 30th of October, 1976. The appellate order of the Assistant Commissioner, on the limited appeal, is dated 6th of October, 1978. Inspection which led to the discovery of the alleged debit notes regarding replacement of parts by the manufacturers, thereby bringing to light the escaped turnover of Rs. 1,84,985 was on 17th of July, 1980. Notice u/s 34 of the Act was issued to the assessee on 21st of October, 1981. To bring an escaped turnover to tax, section 16 provides that the assessing authority may act at any time within a period of five years from the expiry of the year to which the tax relates. The assessing authority could, therefore, act to bring the alleged escaped turnover to tax till the end of 1980 and even the assessing authority could not start the proceedings to bring the escaped turnover to tax on 21st of October, 1981, when the Joint Commissioner issued the notice u/s 34 of the Act. The period of limitation prescribed u/s 16(1) of the Act would apply to the cases of escaped assessment. Learned Additional Government Pleader (Taxes) does not dispute that in the facts and circumstances of the case, the provisions of section 16(4) to 16(6) of the Act are not attracted.

9. Thus, we find that not only the Joint Commissioner lacks jurisdiction in exercise of the powers u/s 34 of the Act to bring the alleged escaped turnover to account for the first time, he could not have done it even otherwise, since it was beyond the period of limitation prescribed u/s 16(1) of the Act. Both the preliminary objections, therefore, succeed and are allowed. The order of the Joint Commissioner under appeal is set aside. Since we have disposed of the matter

only on the preliminary objections, we have refrained from expressing any opinion on the merits of the case. No costs.

10. Preliminary objections allowed.