

(1972) 06 MAD CK 0021

In the Madras High Court

Case No : Tax Case No"s. 286 and 287 of 1966 (Revision No"s. 208 and 209)

R.E.M. Ramakutty Nadar

APPELLANT

Vs

The State of Madras

RESPONDENT

Date of Decision : 19-06-1972

Acts Referred:

Citation : (1973) 31 STC 44

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

Bench : Division Bench

Advocate : A. Devanathan, for the Appellant; K. Venkataswami, First Assistant Government Pleader (Tax), for the Respondent

Judgement

Ramanujam, J.—The petitioner in both these cases, admittedly a dealer in salt, did not submit returns for the years 1962-63 and 1963-64 u/s 12(1) of the Madras General Sales Tax Act, 1959, presumably on the basis that the transaction in salt did not attract the levy of sales tax. However, there was a surprise inspection of the petitioner's place of business on 26th July, 1964, by the sales tax authorities and certain slips and pocket-note books had been recovered, in the presence of the petitioner's agent one Kalyanasundaram and also another clerk by name Velayudham. A surprise inspection of the residence of Kalyanasundaram was also made on the same date and some slips and pocket-note books were also recovered. Statements were taken from the said Kalyanasundaram as well as Velayudham at the time of the seizure of the slips and pocket-note books. In the statement given by Kalyanasundaram, he has admitted that the slips and anamath note books related to the transactions of the petitioner in goods other than salt. A similar statement was also made by the clerk Velayudham. Based on these slips and anamath note books recovered from the place of business of the petitioner as well as the residence of Kalyanasundaram, the assessing officer estimated the turnover of the petitioner for 1962-63 at Rs. 5,51,891.82 and for 1963-64 at Rs. 5,36,104.45. He issued pre-assessment notices for these two years calling upon the assessee to put

forward his objections to the proposed assessment. After hearing the objections of the assessee, final assessments were made for both the years on 30th September, 1964, whereunder the petitioner was assessed to tax on the said turnover on the basis of the best judgment and also penalty of Rs. 10,461.00 was levied for 1962-63 and Rs. 9,815 for 1963-64 u/s 12(3) of the Act. These assessments were unsuccessfully challenged by the petitioner before the Appellate Assistant Commissioner of Commercial Taxes as well as before the Sales Tax Appellate Tribunal. The petitioner seeks to challenge the said assessments before this court on various grounds.

2. Firstly, the learned counsel for the petitioner contends that the assessments could not be justified on merits and that the authorities below have erroneously proceeded to make the best judgment assessments on the basis of the slips and pocket-note books which do not concern his business at all and that he is dealing only in salt and not in any other commodity. It is also urged that the authorities below should not have accepted the statement given by Kalyanasundaram as it was not voluntary and that the affidavits filed by the various dealers who are said to have purchased the commodities from the petitioner should have been accepted on their face value as the veracity of the statements made in those affidavits had not been controverted by examination of the deponents of the affidavits. We are not in a position to accept the contention of the petitioner that the best judgment assessments made in respect of these two years cannot be justified on merits. It is not in dispute that the petitioner did not make any return in respect of the commodities said to have been covered by the slips and note books recovered as a result of surprise inspection. The petitioner's case that he was dealing only in salt and not in any other commodity has rightly been rejected by the authorities in view of the recoveries of the slips and note books from his place of business. It is also not established that the petitioner's agent Kalyanasundaram was under any duress when he made the statement on 26th July, 1964, at the time of the recovery of the anamath slips and pocket-note books. The statement of Kalyanasundaram made at the earliest possible opportunity cannot be said to have been non-voluntary as alleged by the petitioner. The finding given by the authorities below including the Tribunal that the slips and the note books recovered as a result of surprise inspection related to the petitioner's business is one of fact and the various circumstances pointed out by the learned counsel for the petitioner do not convince us that the finding is not based on a proper material. We are not, therefore, inclined to differ from the finding of the Tribunal that the turnover culled out from the anamath slips and note books related to the petitioner's business in commodities other than salt.

3. So far as the quantum of turnover is concerned, the learned counsel for the petitioner contends that the authorities below have given their best judgment arbitrarily and that it has not been properly calculated even if the anamath slips and note books are taken into account. But it is seen from the order of the Tribunal that the petitioner did not challenge the quantum of turnover arrived at

on the basis of the said slips and account books. Whether the quantum of turnover has been properly determined in accordance with the slips and note books is a matter which could have been agitated before the authorities below. Therefore, it is not possible for us to go into each of the entries in the slips and note books and find out whether the turnover as fixed by the authorities was properly determined. We, therefore, find that the turnover as determined by the assessing authority and confirmed by the Tribunal could not be challenged here on merits.

4. Secondly, the learned counsel for the petitioner contends that the assessing authority has proceeded to assess the petitioner u/s 12(2) of the Act on best judgment basis on the ground that no return has been submitted by him, that in a case where no return is submitted, the assessment should properly have been made u/s 16 and, that therefore, the assessments made in these cases u/s 12(2) could not be sustained. The learned counsel refers to the decision of the Supreme Court in *R.A. Commissioner of Sales Tax v. Malwa V. and C. Co. Ltd.* [1968] 21 S.T.C. 431, in support of his plea that where the assessee submits no return it should be taken to be a case of escaped assessment and Section 16 alone could be invoked by the assessing authority. In that case, their Lordships of the Supreme Court while construing Sections 7, 8 and 10 of the Madhya Bharat Sales Tax Act of 1950 expressed their view thus:

There is no doubt that where the dealer has not filed the prescribed return of his turnover, the case is clearly one of "escaped assessment" and the proceedings for assessment must commence in respect of that turnover within the period prescribed by Section 10.

5. Section 10 referred to therein corresponds to Section 16 of the Madras Act 1 of 1959. Though that decision was rendered with reference to the question as to the period within which the assessment should have been made, the judgment proceeds on the basis that the turnover not covered by any return should be dealt with only as a turnover escaping assessment. In view of this decision, we have to hold that in the circumstances of this case, where the petitioner has not submitted any return for the years in question, the assessing officer has got power to proceed u/s 16. But the question here is whether the order passed by the assessing authority could be nullified merely on the ground that it purports to be an order u/s 12. It is well-established that where the authority who passes the order has the requisite power, a mere reference to a wrong provision of law in the order will not invalidate the same. That is very well-settled in various decisions of the Supreme Court as well as of the High Courts. In this connection, we need refer only to two decisions of this court, one in *Mariappa Nadar v. State of Madras* [1960] 11 S.T.C. 215 and *Oveekee Textiles v. Deputy Commercial Tax Officer* [1971] 27 S.T.C. 439. Therefore, we have to find out whether the assessment orders passed in this case could be justified as having been passed u/s 16. We find the power to assess escaped turnover u/s 16 and the power to assess the turnover returned by the assessee u/s 12(2) of the Act are exactly the

same, except in respect of two matters. One is that the power u/s 16 is to be exercised within a specified period while Section 12(2) does not impose any limitation as to time. The other matter is in relation to penalty. While passing an order u/s 12(3) levying a penalty, the assessing officer is not required statutorily to give any finding as to whether there was any wilful nondisclosure of the assessable turnover by the dealer, Section 16 insists that such a finding is necessary before the penalty is levied. Except in respect of the above two matters, the assessing officer's power of making an assessment u/s 12 or 16 is the same. This exactly is the view taken by this court in *Oveekee Textiles v. Deputy Commercial Tax Officer* [1971] 27 S.T.C. 439. While dealing with the relevant scope of Sections 12 and 16, a Division Bench to which one of us was a party had expressed thus:

But it is undeniable that both Sections 12 and 16 deal with the power of the authority to assess to its best of judgment and impose a penalty according to the circumstances appearing in a given problem. In the ultimate analysis, if the power of the authority to bring to tax the escaped turnover, which escape may be for any reason whatsoever is indisputable and if the power to levy penalty also follows, then the consequential rights to enforce such power might assume protean shapes. Under the Madras General Sales Tax Act, such ways and shapes are reflected in Sections 12 and 16. Both the Sections provide the machinery for the same purpose and vest the authority with the requisite power to act. If the import of Sections 12 and 16 is thus understood, then the authority is not tied down to a particular section, if it notices the escapement of tax as is ordinarily understood. If an authority has the necessary power and particularly statutory power to deal with the subject and pass necessary orders which is only a faculty to decide legally, justly and truly, then an erroneous invitation to or quotation of a wrong provision of law in the notice whereunder the proceedings are initiated does not matter at all. It is the substance that matters and not the form.

6. With due respect, we are inclined to adopt the reasoning in that case and hold that though the authority purported to pass an assessment order u/s 12, it is in effect an order passed u/s 16 and could be justified as such. We have, therefore, to reject the petitioner's contention that the assessments in these cases are invalid. Even though the orders have been made u/s 12(2) and not u/s 16, we construe the same as having been made u/s 16.

7. Thirdly, the learned counsel for the petitioner contends that the levy of penalty cannot, in any event, be justified for there is no specific finding that there has been a wilful non-disclosure of the assessable turnover by the petitioner in the order of assessment and that such a finding is absolutely essential if an order of penalty is to be justified u/s 16. We are inclined to agree with the learned counsel for the petitioner in this regard. In *T.P.S.R. Factory P. Ltd. v. Deputy Commercial Tax Officer* [1967] 20 S.T.C. 419 and *Hindustan Steel Ltd. v. State of Orissa* [1970] 25 S.T.C. 211, it has been clearly laid down that the power to levy the penalty being a discretionary one, the authority should give reasons before

proceeding to levy penalty and that the finding on the non-disclosure of the assessable turnover by the dealer is a sine qua non for the authority levying penalty u/s 16(2). We find in these cases that the assessing officer has not given any such finding. Now, that we have construed the order of assessment as one made u/s 16 , the order levying the penalty without a finding of wilful non-disclosure by the petitioner could not be upheld.

8. In this view, we set aside the order as regards the penalty alone in respect of both the assessments. In other respects, the assessment orders are upheld. The tax cases are partly allowed. There will be no order as to costs.