
(2014) 06 MAD CK 0247

In the Madras High Court

Case No : W.P. (MD) Nos. 5111 and 5112 of 2009 and M.P. No. 2 of 2009

S. Gurunathan

APPELLANT

Vs

Deputy Commercial Tax Officer

RESPONDENT

Date of Decision : 17-06-2014

Acts Referred:

Constitution of India, 1950 — Article 226, 265

Tamil Nadu General Sales Tax Act, 1959 — Section 17, 2, 2(1)(b), 2(aa), 22

Citation : (2014) 47 GST 199 : (2015) 77 VST 45

Hon'ble Judges : R. Mahadevan, J

Bench : Single Bench

Judgement

R. Mahadevan, J.—W.P. (MD) No. 5111 of 2009 has been filed challenging the proceedings of the second respondent, dated 31.03.2009, whereby the application under the Samadhan Scheme was rejected. W.P. (MD) No. 5112 of 2009 was initially filed challenging the proceedings of the first respondent, dated 26.04.2004. Subsequently, M.P. (MD) No. 1 of 2014 has been filed to amend the prayer so as to challenge the order of the second respondent, dated 12.09.2008, as well. The learned Additional Government Pleader appearing for the respondents has no objection to the amendment, and hence, the same is hereby allowed.

2. The Brief facts of the case are as follows:

The petitioner, being the proprietor, filed his returns and paid the taxes for the Assessment year 1984-1985. Even though tax and Additional tax were paid, the same were paid belatedly. Therefore, the respondent initiated proceedings under Section 24(3) of the Tamil Nadu General Sales Tax Act, 1959, [for brevity, "the Act"]. The same was challenged by the petitioner in a revision before the second respondent on the ground that unless there is a charging provision, no penalty and interest can be levied for belated payment of additional sales tax. The second respondent remanded back the matter before the first respondent for fresh consideration. The first respondent, once again, confirmed his proposal and

demanded Rs. 4,81,356/- as interest towards belated payment of tax under the Act, Rs. 2,09,700/- as interest towards belated payment of tax under the Additional Sales Tax Act and Rs. 5,39,532/- towards penalty.

3. Aggrieved by the same, the petitioner filed a revision before the second respondent, which was returned as non-maintainable. Since the first respondent initiated recovery proceedings by way of auction, the petitioner filed a Writ Petition before this Court in W.P. No. 4189 of 2004, which was dismissed holding that the petitioner can very well approach the first respondent for rectifying any errors without going into the applicability of the provisions. Questioning the correctness of the said order, the petitioner filed W.A. (MD) No. 454 of 2007. While disposing of the said Writ Appeal, a Division Bench of this Court directed the petitioner to deposit Rs. 4,00,000/- with the first respondent and furnish security for the balance amount. The Division Bench also directed the second respondent to take up the revision and decide the same on merits upon complying with the conditions. The revision petition was dismissed by the second respondent, on 12.09.2008, holding that the levy of interest is valid in view of the validating Act. Grieved, W.P. (MD) No. 5112 of 2009 has been filed.

4. In the meantime, the petitioner submitted an application under the Tamil Nadu Sales Tax (Settlement of Arrears) Act, 2008 [hereinafter referred to as the "Settlement of Arrears Act, 2008", before the second respondent. In the said application, the petitioner arrived the amount payable under the Samadhan Scheme at Rs. 3,07,647/- and wanted to set off the amount of Rs. 4,00,000/- paid as per the directions of the Division Bench with the amount payable. The said application was rejected by the second respondent. Challenging the same, W.P. (MD) No. 5111 of 2009 has been filed.

5. Mr. N. Inbarajan, the learned counsel appearing for the petitioner submitted that the impugned order in W.P. (MD) No. 5111 of 2009 has been passed by the second respondent without providing any opportunity to the petitioner. The learned counsel further contended that if the amount paid already, as per the directions of this Court, is taken into account, the same would be sufficient compliance, as per section 7 of the Settlement of Arrears Act, 2008 and no further payment would be required. With regard to the impugned orders challenged in W.P. (MD) No. 5112 of 2009, the learned counsel submitted that unless there is any charging provision in the Tamil Nadu Additional Sales Tax Act, 1970, enabling the respondent to levy interest on Additional Sales Tax and on penalty, there cannot be any levy.

6. The learned counsel drew the attention of this Court and pointed out that the assessment year is 1985-1986 and the amendment was given effect to only from 01.01.1987. The learned counsel further, placing reliance upon the Judgments in Sumangalam Steels Pvt. Ltd. and Another Vs. State of Tamil Nadu and Others, , Eastern Electrics Vs. State of Tamil Nadu, .; and an order of this Court in Tvl. Karthik Roller Floor Milk (P.) Ltd. v. State of Tamil Nadu W.P. Nos. 6777 and 6778 of 2001, dated 14.08.2002, contended that in view of the fact that the

respondents lack jurisdiction to levy interest on Additional Sales Tax and Penalty, the Writ Petitions are maintainable. Similarly, the learned counsel for the petitioner, in support of his contention, relied upon the Judgment in The Assistant Commissioner (CT) and The Joint Commissioner (CT) Vs. M/s. Pamban Oil Mills (P) Ltd., , related to Samadhan Scheme.

7. Per contra, Mr. R. Karthikeyan, the learned Additional Government Pleader, placing reliance upon the written arguments, would contend that the amount, which remains unpaid on the date of application alone, has to be taken into consideration and since a sum of Rs. 4,00,000/- was paid prior to the application, the application was rightly rejected by the second respondent, as the petitioner has not tendered 25%, as per section 7(d) of the Settlement of Arrears Act, 2008. The learned Additional Government Pleader for the respondents further contended that W.P. (MD) No. 5112 of 2009 has been filed, without availing the alternative remedy, that too, after the period of limitation, and hence, it cannot be entertained. The learned Additional Government Pleader further contended that once an application has been filed for settlement under the Samadhan Scheme, the orders of the respondents 1 and 2 cannot be challenged. The learned Additional Government Pleader also placed reliance upon the Judgment in Sumangalam Steels (P.) Ltd. (supra) to contend that the Tamil Nadu Additional Sales Tax Act, 1970 is a part of the Tamil Nadu General Sales Tax Act, 1959, and has to be read with the same, and therefore, sought the dismissal of both the Writ Petitions.

8. I have considered the above submissions and perused the records carefully.

9. For the sake of convenience, W.P. (MD) No. 5112 of 2009 is, at first, taken up for consideration.

10. The Period of limitation has been provided under the Act for the assesseees to prefer or avail the statutory remedies under the Act and not for a Writ Petition under Article 226 of the Constitution of India. The right to levy tax is governed by Article 265 of the Constitution of India, which reads as follows:

"265. Taxes not to be imposed save by authority of law:- No tax shall be levied or collected except by authority of law."

11. Any levy of tax including interest or penalty under any taxing statute must be in consonance with the Act. Therefore, any claim questioning the jurisdiction of the authority to levy tax can be raised by way of a Writ Petition de hors the availability of alternative remedy, as it is only a self-imposed restriction of the Courts. In the present case, considering that the locus standi of the respondents to demand interest on Additional Sales Tax and penalty is questioned, the Writ Petition is held to be maintainable.

12. The relevant provisions of the Tamil Nadu Additional Sales Tax Act, 1970, are as follows:--

"Section 2: Levy of additional tax in the case of certain dealers-.

Section 2(1)(a) [.....]

Note 1: Clause (a) of sub-section (1) of Section 2 was omitted by Act 37/99 Gazette, dated 21.06.1999 - Effective from 21.06.1999.

Note 2: Prior to 21.06.1999, clause [a] of sub-section [1] of Section 2 was as follows:

Section 2(1)(aa) [The tax payable under the Tamil Nadu General Sales Tax Act, 1959 [Tamil Nadu Act 1 of 1959] [hereafter in this Section referred to as the said Act], in the case of a dealer including the principal selling or buying goods through agents] whose taxable turnover for a year exceeds twenty-five crores of rupees, be increased by an additional tax, calculated at the following rates, namely:

Explanation I. - "Taxable Turnover" for the purpose of this clause in respect of a principal selling or buying goods [....] through agents shall be the aggregate taxable turnover of all his agents relating to the sale or purchase of the goods of such principal within the State.

Provided that where in respect of declared goods as defined in clause [h] of section 2 of the said Act, the tax payable by such dealer under the said Act, together with the additional tax payable under this sub-section, exceeds four per cent of the sale or purchase price thereof, the rate of additional tax in respect of such goods shall be reduced to such an extent that the tax and the additional tax together shall not exceed four per cent of the sale or purchase price of such goods.

Explanation II - Notwithstanding anything contained in the said Act, for the purpose of this clause, "turnover" in respect of sugarcane excluding sugarcane sets purchased during the year, by the minimum price fixed under clause 3 and the additional price determined under clause 5-A, of the Sugarcane [Control] Order, 1966 and such turnover shall be included in the total turnover of the dealer and the taxable turnover shall be arrived at accordingly for the purpose of this clause:

Explanation III.- "Taxable turnover" for the purpose of this clause in respect of a dealer liable to pay under Section 3G of the said Act shall be the total turnover.

Explanation IV- "Taxable turnover" for the purpose of this clause does not include the turnover of resale taxable under Section 3H of the said Act.

Explanation V- "Taxable turnover" for the purpose of this clause in respect of a dealer liable to pay under Section 7C of the said Act for the financial years commencing on the 1st day of April 1993, shall be the total value referred to in the said Section.

Section 2(1)(aaa)-. On any amount of additional tax or penalty imposed by the assessing authority remaining unpaid under this Act, the dealer referred to in clause (aa) shall pay interest as specified in sub-section (3) of Section 24 of the

said Act, in addition to such amount of additional tax or penalty due.

Section 2(1)(b). The provisions of the said Act shall apply in relation to the additional tax payable [under clause [aa] and the interest payable under clause (aaa), as they apply in relation to the tax payable under the said Act.

Section 3- A Penalty for collection of additional tax by dealer [.....] - If any dealer [.....] collects any amount of by way of additional tax or purporting to be by way of additional tax, in contravention of the provisions of sub-section (2) of section 2[.....] the assessing authority concerned, may, after giving such dealer [.....] a reasonable opportunity of being heard, by order in writing impose upon him by way of penalty, a sum not exceeding one and a half times such amount.

Provided that no proceedings under this Section shall commenced after a period of five years from the expiry of the year in which the amount has been collected.

Provided further that no prosecution for an offence, under sub-section (3) of Section 2[[.....] shall be instituted in respect of the same facts on which a penalty has been imposed under this Section.

Section 3B. Levy and collection of penalty-All the provisions relating to offences and penalties of the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act 1 of 1959), hereafter in this section referred to as the said Act, shall, with necessary modifications, apply in relation to the assessment, reassessment, collection and the enforcement of payment of any additional tax required to be collected under this Act, or in relation to any process connected with such assessment, reassessment, collection or enforcement of payment as if the additional tax under this Act, were a tax under the said Act."

13. It is clear from the above that during the relevant assessment year, there was no provision to levy interest on belated payment of additional tax or in other words, there was no provision enabling the applicability of Section 24(3) towards tax due, under the Act.

14. In the Judgment in Sumangalam Steels (P.) Ltd. (supra), the Division Bench of this Court has held as follows:

"3. The Tamil Nadu Additional Sales Tax Act is an independent piece of legislation which provides for the levy of additional tax on dealers whose turnover exceeds the limits which are graded in Section 2(aa) of that Act. Dealers, whose turnover fall below the lowest limit specified in that section, are not required to pay additional sales tax, while dealer whose turnover exceeds the levels set out in the different sub-clauses therein are required to pay additional tax at higher rates. The Act also contains a proviso, which is, in the context of the facts of this case, significant. It states that,--"Provided that where in respect of declared goods as defined in clause (h) of Section 2 of the said Act, the tax payable by such dealer under the said Act, together with the additional tax payable under this sub-section, exceeds four per cent of the sale or purchase price thereof, the

rate of additional tax in respect of such goods shall be reduced to such an extent that the tax and the additional tax together shall not exceed four per cent of the sale or purchase price of such goods."

6. Learned counsel for the assessee submitted that the Tamil Nadu Additional Sales Tax Act, though independent law is still part of the general sales tax law of the State, and that the notification issued under the principal Act should be read as prescribing the maximum extent of the liability of the dealer. The fallacy of this argument is evident. If one were to look at a dealer who cannot claim any benefit under any notification granting concession, such a dealer would have to pay the tax at the rates specified in the principal Act, and also pay the additional sales tax at the rates prescribed in the Tamil Nadu Additional Sales Tax Act. That position does not change when a concession is under the principal Act by a notification issued under Section 17 of that Act."

15. The Division Bench rejected the argument that the Tamil Nadu Additional Sales Tax Act, 1970, has to be read as a part and parcel of the Tamil Nadu General Sales Tax Act, 1959 Act. The Division Bench also held that it is a part of the Tamil Nadu General Sales Tax Act, 1959 Act, which is an independent Act. In *Tvl. Karthik Roller Floor Mills (P.) Ltd. (supra)*, the Division Bench of this Court held as follows:

"7. The Tamil Nadu Additional Sales Tax Act by Section 2(1)(b), makes the provisions of the Tamil Nadu General Sales Tax Act applicable in relation to the additional tax payable, as they apply in relation to the tax payable under the said Act, Additional sales tax being a levy provided for in the special enactment relating to the levy of additional sales tax, the substantive provisions in relation to that levy have to be found in that enactment, and there being no substantive provision in the Tamil Nadu Additional Sales Tax Act for the levy of interest on additional tax, the provisions of the Tamil Nadu General Sales Tax Act providing for levy of interest on the sales tax payable under that enactment, cannot be construed as a source of power to the State to levy interest on the additional sales tax.

8. Having regard to the development of the law subsequent to the decision rendered in the case of *Deputy Commissioner (C.T.) v. M. Murugesan & Bros.* (58 STC 143) the law laid down in the decision rendered in W.P. No. 11632 of 1999, as also in W.P. No. 11631 of 1999, in our view is consistent with the law declared by the Supreme Court by the Constitution Bench in the case of *J.K. Synthetics* (94 STC 422) (*supra*), and in the case of *India Carbon* (106 STC 406) (*supra*) and does not require any reconsideration.

9. Applying the law laid down by this Court in those decisions, the petitioner is entitled to succeed. The impugned order which seeks to levy interest on the Additional Sales Tax Act is set aside. The Writ Petitions are allowed."

16. In yet another Judgment in *Eastern Electrics (supra)*, relied upon by the learned counsel for the petitioner, the Division Bench of this Court held as follows:

"16. It is well-known that when a statute levies a tax it does so by inserting a charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. Provision is also made for charging interest on delayed payments, etc. Ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same. (See *Whitney v. IRC* [1926] AC 37, (1940) 8 ITR 442 (Privy Council), *India United Mills Ltd. Vs. Commissioner of Excess Profits Tax, Bombay*, and *M. Ct. Muthiah and Another Vs. Deputy Controller of Estate Duty, Southern Zone*, . But it must also be realised that provision by which the authority is empowered to levy and collect interest, even if construed as forming part of the machinery provisions, is substantive law for the simple reason that in the absence of contract or usage interest can be levied under law and it cannot be recovered by way of damages for wrongful detention of the amount. (See AIR 1938 67 (Privy Council) and *Union of India (UOI) Vs. A.L. Rallia Ram*, . Our attention was, however, drawn by Mr. Sen to two cases.

Even in those cases, *Commissioner of Income Tax, Andhra Pradesh Vs. M. Chandra Sekhar*, and *Central Provinces Manganese Ore Co. Ltd. Vs. Commissioner of Income Tax*, , all that the Court pointed out was that provision for charging interest was, it seems, introduced in order to compensate for the loss occasioned to the Revenue due to delay. But then interest was charged on the strength of a statutory provision, may be its objective was to compensate the Revenue for delay in payment of tax. But regardless of the reason which impelled the Legislature to provide for charging interest, the Court must give that meaning to it as is conveyed by the language used and the purpose to be achieved. Therefore, any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law. So construed and applying the normal rule of interpretation of statutes, we find, as pointed out by us earlier and by Bhagwati, J. in the *Associated Cement Co. case* [1981] 48 STC 466 (SC) that if the Revenues contention is accepted it leads to conflicts and creates certain anomalies which could never have been intended by the Legislature." From this, it is clear that the section providing for charging of penalty is a substantive provision.

(k) 106 STC 460 (cited supra)

"Now, the words charging or payment of interest in Section 9(2) occur in what may be called the latter part thereof. Section 9(2) authorises the sales tax authorities of a State to assess, reassess, collect and enforce payment of the Central sales tax payable by a dealer as if it was payable under the State Act;

this is the first part of Section 9(2). By the second part thereof, these authorities are empowered to exercise the powers they have under the State Act and the provisions of the State Act, including provisions relating to charging and payment of interest, apply accordingly. Having regard to what has been said in the case of Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra, , it must be held that the substantive law that the States sales tax authorities must apply is the Central Act. In such application, for procedural purposes alone, the provisions of the State Act are available. The provision relating to interest in the latter part of Section 9(2) can be employed by the States sales tax authorities only if the Central Act makes a substantive provision for the levy and charge of interest on Central sales tax and only to that extent. There being no substantive provision in the Central Act requiring the payment of interest on Central sales tax the States sales tax authorities cannot, for the purpose of collecting and enforcing payment of Central sales tax, charge interest thereon."

(1) 145 STC 137 (cited supra)

"Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to "explain" a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectivity is inapplicable to such legislations as explanatory and declaratory in nature."

12. It is clear from the above cases that the State is competent to impose tax on sale or purchase of goods (Entry 54 List II); and this would include levy of additional sales tax; the words sales tax law of the appropriate State includes AST, surcharge and additional surcharge; the General Sales Tax Act which is the principal Act and the AST Act must be read as if they are one so as to give effect to the provisions of the Act except where the later Act manifests an intention to modify the main Act; the charging provisions are substantive provisions; there can be no levy of penalty without a charging section. The rule against retrospectivity is not applicable to clarificatory legislation.

13. Bearing this in mind, we will go back to the S. 3B. Section 3B. Levy and collection of penalty-All the provisions relating to offences and penalties of the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act 1 of 1959), hereafter in this section referred to as the said Act, shall, with necessary modifications, apply in relation to the assessment, reassessment, collection and the enforcement of payment of any additional tax required to be collected under this Act, or in relation to any process connected with such assessment, reassessment, collection or enforcement of payment as if the additional tax under this Act, were a tax under the said Act." S. 3B says that all the provisions relating to offences and penalties in TNGST Act shall apply in relation to the assessment, reassessment, collection and the enforcement of payment of any additional tax under the AST Act, as if additional sales tax is a tax under the TNGST Act. Is this provision only clarificatory? Was it implicit in S. 2(1)(b)? Let us read that section as it originally stood. S. 2(1)(b). "The provisions of the said Act shall apply in

relation to the additional tax payable under clause (aa) as they apply in relation to the tax payable under the said sub-section." "The provisions of the said Act shall apply in relation to the additional tax payable under clause (aa) and the interest payable under clause (aaa) as they apply in relation to the tax and interest payable under the said Act." (as amended by Act 14 of 2005) If we paraphrase the above sections slightly they will read thus:-

"The provisions of the TNGST Act as they apply to tax in the said Act shall apply in relation to additional tax payable under clause (aa) of the AST Act." Similarly, the new Section (as amended by Act 14 of 2005) will read like this:

"The provisions of the TNGST Act as they apply to tax and interest in the said Act shall apply in relation to additional tax and interest payable under clause (aa) of the AST Act." Therefore, the reference to the said Act (namely TNGST Act) in S. 2(1)(b) was to the provisions of the said Act "in relation to tax". Nothing more. Even in Ashok Service Center, the Supreme Court had only said that the Provisions of the Principal Act applied mutatis mutandis to the levy under the Additional Sales Tax Act.

The word levy has to be understood in the context of levy of tax alone. That is why after Karthik Roller Mills case the Legislature amended 2(1)(b) to include the words "and interest".

14. 52 STC 131 (cited supra) had rightly held that if it was the intention of the legislature that the entire gamut of the provisions of the principal Act were to be applied to the later Act then it could very well have said so: and that if the S. 3(2) had been so worded then, there would have been no difficulty to hold that S. 22 of the TNGST Act was also attracted by reference. We respectfully think that this is the correct way to understand the Section. We have to read S. 2(1)(b) in an identical way. If so, then the AST Act as it reads before the amendment had no charging provision. A charging section is substantive law as seen in 94 STC 422 (cited supra). Therefore, there can be no levy of penalty without the charging section. This is in accordance with India Carbon and J.K. Synthetics. The judgments, which deal with clarificatory sections are of no help since the S. 3B is not a clarificatory section, it introduces for the first time the power to levy penalty. Karthik Roller Mills case correctly hold that in the absence of the substantive provision, in the AST Act itself, relating to levy of interest, the provisions of the TNGST Act cannot be the source of power of such levy. Similarly, unless there is a charging section for levy of penalty, there can be no automatic reading of the power to levy penalty. The levy of penalty cannot be sustained. We are in agreement with 2004 (136) STC 606 (cited supra). In our view, therefore, we see no reason to refer the matter for reconsideration."

17. The above Judgments are squarely applicable to the case on hand. From the above Judgments, it is clear that the interest cannot be demanded for belated payment on Additional Sales Tax, as there is no substantial provision in the TNGST Act itself and similarly, no penalty can be levied, as there is no charging

Section under the TNAST Act to levy penalty for the relevant Assessment year. The provisions of the TNGST Act cannot be extracted or read upon for the purpose of levy of interest or penalty under the TNAST Act. The validating Acts are applicable only to the assessment under TNGST Act. The argument of the learned Additional Government Pleader for the respondents that the petitioner having submitted the application under Samadhan Scheme cannot question the orders levying and confirming interest and penalty also does not hold water, for the simple reason that the question of jurisdiction, being legal point, can be raised at any time. Further, in view of the bar under Article 265 on the state, the question of waiver is not applicable to a taxing statute.

18. In view of the above, the proceedings of the first respondent, dated 26.04.2004, confirmed by the proceedings of the second respondent, dated 12.09.2008, are set aside insofar as the levy and demand of interest of Rs. 2,09,700/- and Rs. 5,39,532/- towards penalty on the additional sales tax payable by the petitioner. The respondents are hereby directed to pass fresh orders, giving appropriate relief, as indicated above.

19. As the levy of interest on Additional Sales Tax and Penalty are set aside, this Court feels that there is no necessity to pass further orders in W.P. (MD) No. 5111 of 2009. In the result, W.P. (MD) No. 5111 of 2009 is closed and W.P. (MD) No. 5112 of 2009 is allowed, as indicated above. No costs. Consequently, connected Miscellaneous Petition is closed.