

(1975) 11 MAD CK 0026

In the Madras High Court

Case No : Tax Case No. 41 of 1971 (Revision No. 21)

S.A. Abdul Basheeth

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 27-11-1975

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12

Citation : (1976) 38 STC 590

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

Bench : Division Bench

Advocate : K. Ramagopal, for the Appellant; K. Venkataswami, Additional Government Pleader No. I, for the Respondent

Judgement

V. Ramaswami, J.—The assessee was a tanner and a registered dealer under the Tamil Nadu General Sales Tax Act. He informed the

commercial tax authorities that he had stopped business by his letter dated 21st March, 1964. But on a surprise inspection made on 9th July,

1966, it was found that the petitioner-assessee did not stop his business on 21st March, 1964, but continued the same even thereafter and was

actually carrying on business on the date of surprise inspection. The officer also recovered some anamath accounts from his place of business. The

petitioner did not file any return in form A-I for the assessment year 1965-66 in spite of the fact that his accounts were summoned from the

beginning of the year. As he did not produce the accounts in spite of repeated summons, a notice was issued on 7th September, 1966, proposing

to assess the petitioner on a taxable turnover of Rs. 7,27,501.14 on the basis of the anamath accounts recovered. Thereafter the petitioner filed a

return on 19th September, 1966, declaring a total and taxable turnover of Rs.

3,42,174.33. He also produced his accounts on 29th September, 1966. Finding that there were a number of defects in the accounts produced, the assessing officer made a best judgment assessment making some additions to the various items of turnover. He also issued a notice proposing to levy a penalty at one and a half times the tax u/s 12(3) of the Act. Rejecting the return, the assessing officer assessed the taxable turnover at Rs. 3,86,354.07 and levied a tax of Rs. 7,574.88. He also levied a penalty of Rs. 11,272 u/s 12(3) of the Act. The assessee preferred an appeal to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner, though he confirmed the best judgment assessment, reduced the penalty to Rs. 5,038.00. This was determined by him at one half of one and a half times the tax due on the turnover as returned by the assessee. On a further appeal, the Tribunal reduced the addition by a sum of Rs. 30,652.28 but confirmed the penalty.

2. In this petition, the learned counsel for the assessee contended that since the assessee had submitted a return before the actual order of assessment, the penalty could be levied u/s 12(3) only with reference to the amount of tax due on the turnover that was not disclosed in his return and not with reference to the tax due on the turnover disclosed by him in his return. The learned Government Pleader, on the other hand, contended that submitting a return after the period prescribed would amount to a case of failure to submit a return and that, therefore, u/s 12(3) a penalty not exceeding one and a half times the tax assessed could be levied. As the question depend upon the interpretation of the relevant provision it is necessary to extract the entire Section 12. That section, as it stood in the relevant assessment year 1965-66, reads as follows:

12. Procedure to be followed by the assessing authority. -- (1) The assessment of a dealer shall be on the basis of the prescribed return relating to

his turnover submitted in the prescribed manner within the prescribed period.

(2) If no return is submitted by the dealer under Sub-section (1) within the prescribed period, or if the return submitted by him appears to the

assessing authority to be incomplete or incorrect the assessing authority shall, after making such enquiry as it may consider necessary, assess the

dealer to the best of its Judgment;

Provided that before taking action under this sub-section the dealer shall be

given a reasonable opportunity of proving the correctness or completeness of any return submitted by him.

(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 half times the tax assessed, as the case may be.

3. Interpreting this provision, this court in *Data Shoe Company Private Limited v. Joint Commercial Tax Officer, Harbour Division II, Madras*

[1968] 21 S.T.C. 135., and in a number of other cases had held that if a return was submitted, though belated, but prior to the order of

assessment, the assessing officer could not ignore the return and treat it as if there was no return and unless he rejects the return filed on the ground

that it is incomplete or incorrect, he would have no jurisdiction to make a best of judgment assessment. Thus the jurisdiction of the officer to make

a best of judgment assessment could arise under the section in the following circumstances :

4. Firstly, when the assessee submits no return ; secondly, when he submits a return, but the assessing authority considers it incomplete or

incorrect; and thirdly, a return is submitted belatedly and that return is rejected by the assessing authority on the ground that it was also incomplete

and incorrect.

5. Sub-section (3) of Section 12 provides for penalty in all the three circumstances which enable the assessing authority to make a best of

judgment assessment. The first part of that sub-section deals with a case where the return filed by the assessee either in time or out of time was not

accepted by the assessing authority and, in such a case, he is authorised to levy a penalty not exceeding one and a half times the amount of tax due

on the turnover that was ""not disclosed"" and the latter half confers a jurisdiction on the assessing authority to levy a penalty when he makes a best

of judgment assessment in the case of ""failure to submit a return"". The learned counsel for the assessee contends that in this case a return was

submitted, though belatedly and that, therefore, the assessing authority could have levied a penalty with reference to the amount of tax due on the

turnover that was not disclosed by the assessee in his return and not with reference to the turnover that was disclosed by him in his return. But the learned Government Pleader contended that the words ""in the case of failure to submit a return"" in the latter portion of Sub-section (3) would also include a case where no return was submitted within the time prescribed or a belated return and that, therefore, the assessing authority had jurisdiction to levy a penalty not exceeding one and a half times the tax assessed. It is true that the words ""no return is submitted by the dealer within the prescribed period"" in Sub-section (2) would also include a case where ""no return at all was filed"". But when it came to the question of levying penalty, the legislature has treated the failure to submit a return as one category and submitting a return belatedly and submitting a return, though in time, but incomplete and incorrect as a different category. In both these cases, though the dealer had submitted his return belatedly, it has to be taken into account by the assessing authority. The best of judgment is made possible only by reason of rejecting the same by the assessing authority on the ground of incompleteness or incorrectness. That is dealt with clearly by the earlier part of Sub-section (3) of Section 12. We are, therefore, of the view that in a case where a return was filed though belatedly and that return was not accepted on the ground that it was incomplete or incorrect and a best judgment assessment was made, penalty could be levied only with reference to the amount of tax due on the turnover that was not disclosed by the dealer in his return and not at one and a half times the tax assessed. Since even the Appellate Assistant Commissioner levied the penalty only with reference to the amount of turnover returned by the assessee, the orders of all the authorities including that of the Tribunal are liable to be set aside in so far as they relate to penalty. The turnover not disclosed by the dealer in his account has now been determined by the Tribunal and that will have to be taken as final since we are not interfering with the finding of the Tribunal regarding the same.

6. The matter will have to be remanded to the assessing officer for fixing the penalty with reference to the turnover not disclosed by the dealer.

There will be an order accordingly. The assessee would be entitled to his costs. Counsel's fee Rs. 250 (rupees two hundred and fifty).