
(1991) 10 MAD CK 0084

In the Madras High Court

Case No : Tax Case No's. 79 to 81 of 1983 (Appeal No's. 12 to 14 of 1983)

Sabari Foundry

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 10-10-1991

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 22(2), 31(1), 31(3), 34, 55

Citation : (1991) 10 MAD CK 0084

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

Bench : Division Bench

Judgement

Dr. A.S. Anand, C.J.—These three tax appeals arise out of a common order made by the Joint Commissioner on 27th September, 1982, in respect of the same assessee for the assessment years 1974-75, 1975-76 and 1976-77. Considering the nature of the controversy involved in the cases it is appropriate at this stage to notice the facts giving rise to the filing of these appeals.

2. The appellants are dealers in pumps and electric motors. For the assessment years 1974-75, 1975-76 and 1976-77 they had collected tax at the rate of 9 per cent and 12 per cent, respectively, from the customers on the sale of electric motors. The assessing authority, like the assessee, treated the electric motors as electrical goods falling under item 41 of the First Schedule to the Tamil Nadu General Sales Tax Act, 1959 and levied sales tax at the rate of 9 per cent and 12 per cent on the sales turnover in respect of the electric motors. It transpires that the Board of Revenue clarified on 23rd March, 1978, that the electric motors were taxable at 5 per cent with effect from 3rd March, 1975 to 20th February, 1978 and at 6 per cent from 21st February, 1978 under item 81 of the First Schedule. The assessee wanted to take advantage of the clarification of the Board of Revenue. They filed appeals before the Appellate Assistant Commissioner in respect of the assessments of all the three years. The Appellate Assistant Commissioner noticed the circumstances under which the appeals came to be filed before him and after finding that there was a clarification issued by

the Board on 23rd March, 1978, clarifying that the electric motors were taxable at 5 per cent with effect from 3rd March, 1975 to 20th February, 1978 and at 6 per cent from 21st February, 1978 under item 81 of the First Schedule, condoned the delay in filing the appeals and proceeded to dispose of the appeals on merits. The Appellate Assistant Commissioner noticed while disposing of the appeals that since the assessees as well as the assessing authority were labouring under a belief that electric motors would fall under item 41 till the Board of Revenue clarified the position on 23rd March, 1978, that they fell under item 81, with a view to do justice, the delay in filing the appeals should not be held against the assessees, and consequently condoning the delay disposed of the appeals on merits. The Appellate Assistant Commissioner also noticed that had the correct rate of tax been applied by the assessing officers for each of the assessment years, the need for filing the appeals would not have arisen. With a view to do justice between the parties, therefore, the appeals were allowed, and the electric motors were held taxable as per the clarification issued by the Board of Revenue and the assessing authority was directed to give effect to the order. The Appellate Assistant Commissioner also recorded a finding that since the assessee had collected taxes at 9 per cent under a bona fide impression, it was not a case for the levy of penalty u/s 22(2) of the Tamil Nadu General Sales Tax Act, particularly when the mistake was mutual between the assessees and the department and the assessees had claimed that they had refunded the excess tax to the customers. Subsequently however, the Appellate Assistant Commissioner on 9th July, 1980, issued an erratum and deleted the observation with regard to the levy of penalty, etc. in the last paragraph of the order dated 3rd July, 1980. The following direction was substituted :

"Since the fact of this excess collection and penalty has not been brought before the Appellate Assistant Commissioner by the appellants either in their grounds of appeal or at the time of hearing before the Appellate Assistant Commissioner, the Appellate Assistant Commissioner is not inclined to comment on it. Since the departmental representative in his written argument has requested that for the excess collection of tax and the subsequent levy of penalty u/s 22(2) of the Act cases are to be remanded back to the assessing officer with a direction to go through this aspect and proceed further in the case of excess collection and levy of penalty. The appellants did not counter this arguments of the departmental representative at the time of hearing. Hence, the assessing officer is directed to verify whether this excess collection has been refunded to the parties and whether there is any case for the department to levy penalty u/s 22(2) of the Act. In the end the cases are remanded."

3. The Joint Commissioner, however, proposed to revise the order of the Appellate Assistant Commissioner, and accordingly notices were issued to the assessees to show cause as to why the proposal be not confirmed. Objections were invited and received. Before the Joint Commissioner, the assessees raised the plea that an order condoning the delay in filing an appeal could be only an order u/s 31(1) of the Act, and such an order would not be revised by the Joint

Commissioner in exercise of his suo motu powers of revision u/s 34 of the Act. It was also pleaded that the Appellate Assistant Commissioner had condoned the delay after giving cogent reasons, and that in view of the clarification issued by the Board of Revenue, the order of the Appellate Assistant Commissioner particularly in view of the erratum used on 9th July, 1980, did not require any interference on merits. The Joint Commissioner, however elaborately dealt with the powers u/s 34 of the Act and rightly came to the conclusion that any order passed u/s 31(3) in respect of an appeal is revisable in exercise of the suo motu powers of revision u/s 34 of the Act. The Joint Commissioner noticed that the order made by the Appellate Assistant Commissioner was only an order u/s 31(3) and though delay had been condoned as envisaged by section 31(1) it did not render the order of the Appellate Assistant Commissioner which has been passed not only on the question of condonation of the delay but also on merits to be an order u/s 31(1) of the Act. In our opinion the Joint Commissioner was justified in coming to that conclusion. While exercising powers u/s 34 of the Act, the Joint Commissioner could revise an order made by the Appellate Assistant Commissioner u/s 31(3) of the Act, and while so revising, it was open to the Joint Commissioner to say whether the appeal on which an order had been made by the Appellate Assistant Commissioner was an appeal which had been presented within time or not. The Joint Commissioner therefore had jurisdiction to exercise the suo motu powers of revision in respect of the order made by the Appellate Assistant Commissioner. The argument of the assesseees that he lacked jurisdiction was rightly repelled by the Joint Commissioner.

4. The Joint Commissioner, however, we find, after dealing with the jurisdiction u/s 34 of the Act, did not advert to or consider the other pleas raised on behalf of the assesseees in the reply to the proposal and set aside the order of the Appellate Assistant Commissioner and restored that of the assessing authority. It was an obligation on the Joint Commissioner while disposing of the revision in exercise of the suo motu powers of revision to have dealt with the objections raised by the assesseees and also consider whether or not the discretion had been properly exercised by the Appellate Assistant Commissioner in condoning the delay in filing the appeal. The Joint Commissioner did not advert to those aspects at all and only after recording a finding that the suo motu powers of revision could be exercised by him in the facts and circumstances of the case, against the order of the Appellate Assistant Commissioner, set aside the order of the Appellate Assistant Commissioner. That is clearly erroneous and the order of the Joint Commissioner on that aspect cannot be sustained and we have to set it aside to the extent indicated above.

5. Though the setting aside of this order might have impelled us to remand the matter to the Joint Commissioner we find that the proceedings in this case are more than 15 years old and it would not be appropriate to send the case back to the Joint Commissioner for a fresh look. We have therefore proceeded to examine the order of the Appellate Assistant Commissioner and hear learned counsel for the parties.

6. In so far as the appeal relating to the assessment year 1975-76 is concerned, the Appellate Assistant Commissioner clearly fell in error in entertaining the appeal. It is seen that against the order of assessment relating to the assessment year 1975-76, the assessees had filed an appeal before the Appellate Assistant Commissioner and thereafter taken the matter before the Sales Tax Appellate Tribunal also in second appeal. After the matter was finalised by the Sales Tax Appellate Tribunal, the assessees did not further agitate the matter through revision in this Court. They instead took recourse to filing another appeal before the Appellate Assistant Commissioner against the same order of assessment, the proceedings in which had been finalised by the order of the Tribunal. This the assessees could not do. The Appellate Assistant Commissioner did not apply his mind to this aspect of the case at all. Therefore the order of the Appellate Assistant Commissioner with regard to the assessment year 1975-76 cannot be sustained. We, accordingly confirm the order of the Joint Commissioner relating to the assessment year 1975-76.

7. Coming now to the appeals relating to the assessment years 1974-75 and 1976-77 the Appellate Assistant Commissioner condoned the delay and decided the appeals on merits. For condoning the delay, the Appellate Assistant Commissioner took note of the clarification issued by the Board of Revenue on 23rd March, 1978. The Appellate Assistant Commissioner also considered that the position with regard to the correct entry under which electric motors would fall got clarified only in 1978, and therefore the assessees filed appeals in 1978 and there were sufficient causes to condone the delay. The discretion was thus, exercised by the Appellate Assistant Commissioner to condone the delay for cogent reasons and the discretion was also exercised judiciously and properly. There is no denial of the fact that even a petition u/s 55 of the Tamil Nadu General Sales Tax Act would have been competent in view of the clarification issued by the Board of Revenue subject to the limitations contained in section 55 itself. We are therefore satisfied that the Appellate Assistant Commissioner was justified in condoning the delay in respect of the appeals relating to the assessment years 1974-75 and 1976-77. The reasons given by the Appellate Assistant Commissioner for interfering with the assessment orders are also sound and cogent. We, therefore, uphold the orders of the Appellate Assistant Commissioner in respect of the assessment years 1974-75 and 1976-77. Since it was the case of the assessees that they had refunded the excess tax collected from the customers to the customers, the direction issued by the Appellate Assistant Commissioner on 9th July, 1980; through the erratum has done substantial justice between the parties and the interest of the Revenue has been adequately protected. We do not find any cause to interfere with the order of the Appellate Assistant Commissioner in that behalf also. Thus setting aside the order of the Joint Commissioner we restore the order of the Appellate Assistant Commissioner in respect of the assessment years 1974-75 and 1976-77. Thus in Tax Case (Appeal) Nos. 79 and 81 of 1983 the appellants succeed to the extent indicated above. The assessing authority shall consider the matter in the light of

the directions given by the Appellate Assistant Commissioner in the erratum order dated 9th July, 1980 and in the light of the observations made by us hereinabove.

8. So far as the assessment in respect of the assessment year 1975-76 is concerned, the order of the assessing authority, which stood confirmed up to the Tribunal is not interfered with, and the order of the Joint Commissioner in respect of that assessment year is upheld. Hence Tax Case (Appeal) No. 80 of 1983 is dismissed.

9. We, however, leave the parties to bear their own costs in these appeals.

T.C. No. 80 of 1983 dismissed.

10. T.C. Nos. 79 and 81 of 1983 partly allowed.