

(2009) 07 MAD CK 0444

In the Madras High Court

Case No : Tax Case (Revision) No. 2301 of 2008

State of Tamil Nadu

APPELLANT

Vs

A.N.S. Guptha and Sons

RESPONDENT

Date of Decision : 23-07-2009

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 10, 12(1), 12(3), 3, 3A
Tamil Nadu General Sales Tax Rules, 1959 — Rule 11, 12, 15(6), 18(2), 18(4)

Citation : (2011) 38 VST 45

Hon'ble Judges : F.M. Ibrahim Kalifulla, J;B. Rajendran, J

Bench : Division Bench

Advocate : K. Radhakrishnan, Government Advocate T, for the Appellant; C. Sivasubramanian, for the Respondent

Judgement

B. Rajendran, J.—The Assessee a dealer in silver articles and leg chains have reported a total and taxable turnover of Rs. 77,53,957 and Rs. 42,02,730, respectively for the year 1993-94 under the Tamil Nadu General Sales Tax Act, 1959. The assessing officer had disallowed the claim of exemption towards the sale of silver anklets at Rs. 12,25,023 and taxed the turnover at three per cent single point tax and also disallowed the bought note purchases of new silver anklets at Rs. 13,41,528 and this in turn has enhanced turnover of the Assessee to Rs. 25,68,258 with the tax of Rs. 50,217, surcharge of Rs. 7,533 and additional sales tax of Rs. 38,534 and penalty of Rs. 60,689. The Assessee disputed regarding such tax liability and the levy or penalty before the Appellate Assistant Commissioner, Salem in A.P. No. TNGST 367/95. The Appellate Assistant Commissioner on verification of facts allowed the appeal in full by its order dated March 8,1999.

2. Aggrieved by the order of the first Appellate authority, the Deputy Commissioner of Salem has preferred the State appeal before the Tribunal. Before the Tribunal, the Revenue mainly placed reliance on the inspection made by Enforcement Wing Officer in the Assessee's place of business on August 23,

1993 and the Revenue also relied on the fact that the dealers being a manufacturer had not maintained and produced manufacturing-cum-stock account in form XXX before the officers. The Revenue has also pleaded that on comparing the actual stock with book stock it was found that there was an excess stock of 31.5 gms and a deficit stock of 253 gms in certain items of silver articles and the Revenue has also found that there was no stock of silver anklets or the waist cord as on the date of inspection. The Assessee had claimed exemption towards the sale of silver anklets at Rs. 12,25,023 and to verify the genuineness, the Assessee was summoned to produce the accounts on three occasions. The accounts were produced subsequently, but not before the Enforcement Wing Officers. Regarding the bought note purchases, summons were issued at random by the Department to the 14 sellers, out of which, five summons were returned unserved with the endorsement "no such address" and nine summons on whom the notices were served did not reply to the same. On consideration of the fact that the five summons were returned unserved, the Department treated the bought note purchases as bogus. Similarly, in the sale bill of leg chains, the Department contended that only the weight and amount were mentioned and the name of the purchasers and address were not noted. The Department also contended that the non-availability of stock of leg chains and waist cord at the time of inspection proves that the dealers were in the habit of selling silver articles to customers by raising sales of leg chain bills to circumvent/utilize the exemption granted by the Department. Based on all these allegations, the Tribunal after elaborate discussion and completely going into the merits of the case ultimately dismissed the appeal of the Revenue and confirmed the order of the Appellate Assistant Commissioner, Salem, clearly giving a finding that there was no bogus activities. Aggrieved against the order of the Tribunal, the Revenue has come forward with the present appeal.

3. We have heard Mr. K. Radhakrishnan, the learned Government Advocate for the Petitioner and Mr. C. Sivasubramanian, the learned Counsel for the Respondent.

4. The learned Government Advocate wanted to make out a case on the following questions of law:

1. Whether, in the facts and circumstances of the case, the Tribunal is legally correct in having affirmed the order of the first Appellate authority while the Assessee had claimed exemption from tax on the purchase of silver leg chains for Rs. 13,41,528 and sales of silver leg chains for Rs. 12,25,023 and, therefore, the burden of proof that those transactions were not liable to tax shall be upon the dealers as enjoined u/s 10 of the Tamil Nadu General Sales Tax Act, 1959?

2. Whether the order of the Tribunal is not having restored the penalty levied u/s 12(3)(b) of the Tamil Nadu General Sales Tax Act, 1959, is legally sustainable?"

5. At the outset, we would like to state that the Revenue has come by way of an appeal against purely the questions of fact which has been correctly decided both

by the Appellate Assistant Commissioner, Salem and the Sales Tax Appellate Tribunal, Coimbatore. The main contention raised by the Department was that at the time of inspection by the enforcement wing, two discrepancies were noted, viz., (i) There was no stock available either of silver anklets or waist cord ; and (ii) In the purchase note maintained by the Assessee, though mention was made regarding the silver anklets as well as the waist cord, no stock was available on that particular date of inspection and above all these things, in the sale bill, which was given by the Assessee, the names of the purchasers have not been mentioned, only the weight and price of the article had been mentioned. The Department would contend that inspite of the notices issued to the persons mentioned in the purchase book, out of fourteen persons, only nine persons had been duly served and five persons had not been served and even the nine persons on whom the notices were served did not respond back and the other five persons since not served only a decision could be taken that the entire bought note purchases was a bogus transaction to utilize for the purpose of seeking exemption. It was contended by the Department that in the normal course/the Assessee will be utilizing the purchases of regular silver wares and to claim exemption, such bought notes were created and in view of the sales made, which was also again exempted from tax, the Assessee had not specifically mentioned the names of the purchasers. Therefore, the claim is totally bogus and exemption claimed by the Assessee can never be granted.

6. At this point of time, it is pertinent to cull-out from the Tribunal's order, which has gone in detail in respect of the factual aspects and the conduct of the Assessee in coming forward to even produce the concerned persons to establish his case, whereas, in the contrary, the Department's attitude that inspite of the fact that the Assessee was prepared to produce the concerned persons and also seeking for cross-examination of the concerned person was negatived is totally inconsistent in law, as rightly pointed out by the Tribunal that the Department has not followed the principles of natural justice, which is extracted below:

...The Department did not find any stock of silver anklets or waist cords, during inspection. This would not mean that there was no sales of silver anklets throughout the assessment year. The Department issued summons to 14 sellers of silver anklets and silver articles and the summons were served on 9 of them which is the strong proof as to the genuineness of the Assessee's purchases. Regarding the other five sellers also the addresses disclosed by the sellers were noted in the Assessee's records of purchases and the Department did not inform the Respondents about the summon returned by the five sellers which resulted in the denial of a fair opportunity to them so as to rebut the departmental findings. The dealers could have produced the sellers for an effective cross-examination. The assessing authority has not followed the principles of natural justice by giving an opportunity for cross-examination to the Assessee. The Appellate Assistant Commissioner in his order in page No. 12 has stated that "just because there was a nil position of stock in silver anklets and the waist cords as on the day of inspection, the Department cannot conclude that there was no sale of

those items all through the assessment year and the claim of sale of silver anklets and silver waist cords was altogether unacceptable.

7. The further finding of the Tribunal is as follows:

...The Assessee had asked for cross-examination and they have come forward to produce the sellers but the assessing authority had declined such an offer stating that he cannot conduct a court of law. This denial of the Assessee's right to cross-examination is by itself sufficient to make the assessment bad in law and liable to be struck down" according to the order of the Appellate Assistant Commissioner in paragraph 35. The assessment is not based on findings of truth but only on inferences and assumptions. "The assessing authority in the case is established to have been guided merely by the proposals received from the enforcement wing than by his judicial mind.

8. Both the Appellate Assistant Commissioner and the Tribunal has rightly concluded that in establishing the falsehood, an opportunity should have been given to the Assessee and the refusal by the Department to give an opportunity of such cross-examination demanded by the Assessee, vitiates the order of assessment. When the Assessee has clearly produced the sale bills, which he is expected to maintain under law, the Department cannot go behind that and create a sinister motive in the very bill itself, merely because in the sale bills the names of the purchasers have not been mentioned, so as to throw the very document as a bogus document and treat the transaction as a bogus one and disallowing the exemption granted under law. When such findings of facts have categorically been held by both Appellate authorities in favour of the Assessee and also the said findings are very well balanced and in accordance with law and cogent and clear, we do not find any reason to interfere with the order of the Tribunal. At the same time, the questions of law, which is sought to be raised by the Department before this forum also cannot be treated as questions of law, because, it is purely questions of fact, which has been very well decided by the authorities in terms of the findings of both the Appellate authorities.

9. At this juncture, it is pertinent to point out here that the assessing officer has totally not taken into consideration the very legal perception in which they have got the right to decide on the merits of each case. First of all, the assessing officer, who is evaluating the question of fact--whether a particular person is liable to be taxed or exemption to be granted--acts in a quasi-judicial function in discharge of such function the authority has got every legal right to seek for evidence, take into consideration the material records and also after analysing the details of facts, applying the law in the strict sense as made out under the concerned provision of law. All these cumulative works are entrusted with the concerned officer. In short, the officer acts more like a judge in evaluating the proposition of fact and law. The very authority stated in its order that, he cannot conduct a court of law is palpably wrong. The authority has not at all considered the crux of the matter in the way it has to be decided by him.

10. In this context, we follow the decision of the honourable Supreme Court in *P. Sarathy v. State Bank of India* reported in AIR 2000 SC 2023, where in a question arose regarding a case under the Tamil Nadu Shops and Establishments Act, whether the authority, who has to consider the fact would be a "court" or a "civil court"? The honourable Supreme Court has categorically held though it may not be called as a civil court, the authority who is functioning under the Act in deciding the merits of every particular aspect, has got every legal authority to get in evidence, evaluate the same and apply the law and ultimately, come to a conclusion. In this aspect, he can ask for evidences to be examined and allowing them to be cross-examined.

11. In this connection, it is worthwhile to mention that the very Act itself has given wide powers and treated the authority to look into matters as that of a court. The quasi-judicial functions are granted to the competent authorities with all the powers granted to a court also. As held by the Supreme Court, it has got all ingredients of trappings of the court. The various Section and rules as found in the Act itself would prove beyond any reasonable doubt that the functions of the authority should be that of a quasi-judicial authority more akin to a court.

12. A reading of Sections 54, 54A, 55 of the Tamil Nadu General Sales Tax Act, 1959, is relevant for consideration.

54. Power to summon witnesses and production of documents. - (1) An assessing authority or an Appellate or revising authority (including the Appellate Tribunal) or any officer of the Commercial Taxes Department not lower in rank than an Assistant Commercial Tax Officer shall, for the purposes of this Act, have all the powers conferred on a court by the Code of Civil Procedure, 1908 (Central Act V of 1908)....

54A. Power to get information. - (1) Any assessing authority or Appellate or revising authority under this Act or any officer of the Commercial Taxes Department not lower in rank than an Assistant Commercial Tax Officer may by writing, require any person or authority to furnish such information, particulars or records available with that person or authority as will be useful or relevant to any proceeding under this Act.

55. Power to rectify any error apparent on the face of the record. - (1) An assessing authority or an Appellate or revising authority (including the Appellate Tribunal) may, at any time within five years from the date of any order passed by it, rectify any error apparent on the face of the record:

Note : The expression "five years" substituted for the expression "three years" by Act 78 of 1986--Gazette Notn., dated December 18, 1986--G.O.P. No. 1322 CT & RE dated December 29, 1986--Effective from January 1, 1987.

Provided that no such rectification which has the effect of enhancing an assessment or any penalty shall be made unless such authority has given notice to the dealer and has allowed him a reasonable opportunity of being heard.

13. A reading of Rules 12, 15(6) and 18(6) of the Tamil Nadu General Sales Tax Rules, 1959, is relevant for consideration.

12. Where any return submitted by a dealer appears to the assessing authority to be incorrect or incomplete, the assessing authority shall, before taking action under Rule 11, issue a notice to the dealer calling upon him to produce his accounts, registers, records and" other documents and prove the correctness and completeness of his return at a time and place to be specified in the notice. If no return is submitted by a dealer, the assessing authority, before taking action under Rule 11, shall issue a notice to the dealer and make such enquiry as he considers necessary.

15(6) If no return is submitted or if the return submitted appears to the assessing authority to be incorrect or incomplete, the assessing authority may, after following the procedure prescribed in rules 11 and 12, finally assess the tax or taxes payable under Sections 3, 3A, 3B, 3C, 3D, 3E, 3G, 3H, 3I, 3J, 4, 4F, 5, 7A, 7C, 7D or 7E according to the best of his judgement:

Provided that before making assessment under this rule, the assessing authority shall obtain the concurrence of the Deputy Commissioner having jurisdiction if the assessment results in imposition of tax of one lakh rupees and above or enhancement of tax due to the extent of one lakh of rupees over and above the tax due as reported in the returns.

18(6) After the close of the year in which the tax due is provisionally determined in accordance with Sub-rule (3) or Sub-rule (4) or in the course of the year to which a return submitted under Sub-rule (5) relates, unless the dealer is eligible for self-assessment specified in the proviso to Clause (a) of Sub-section (1) of Section 12 or the rules relating thereto, the assessing authority shall, subject to the provisions of Sub-rule (5A) of Rule 15 after such scrutiny of the accounts, registers, records and other documents and after such enquiry as he considers necessary, satisfy himself that the returns filed are correct and complete, and finally assess under a single order on the basis of the returns, the tax or taxes payable under any of the Sections 3, 3A, 3B, Sub-section (1) of Section 3D and Sections 3H, 3I, 3J, 4, 5 or 7A for the year to which the returns relate:

Provided that if no return or returns have been submitted by the dealers as required by Sub-rule (2), or if any return or returns submitted by him appear to the assessing authority to be incorrect or incomplete, the assessing authority shall, after making such enquiry as he considers necessary, and after giving the dealer notice as prescribed in Rule 12, determine the turnover to the best of his judgment and finally assess under a single order the tax or taxes payable under Sections 3, 3A, 3B, Sub-section (1) of Section 3D and Sections 3H, 3I, 3J, 4, 5 or 7A.

14. A reading of Sections 54, 54A and 55 of the Act would clearly indicate that the authority is vested with all the powers including invoking of the provisions of CPC in summoning the witnesses; compelling production of documents and also

examining and cross-examining the parties in this regard by the Assessee and above all these, the assessing officer is vested with a special power to collect or get information u/s 54A of the Act. These two sections are clearly intended for utilising for the benefit of both the Assessee and the Department to gather evidence or information from third parties, which will not otherwise be available for the purpose of assessment. The power under these Sections (54, 54A and 55) may be used to establish, obtain accounts and other documents in the custody of other Departments like the Income Tax Department or other Departments and above all these things, further power is also granted to the authorities concerned, to rectify any error apparent on the face of the record.

15. It is also pertinent to point out that the Legislature has thought it fit correctly to include in Section 54 of the Act that an assessing authority or Commercial Tax Officer or any officer of the Commercial Tax Department not lower in the rank of Commercial Tax Officer for the purpose of this Act have all the powers conferred on a court by the Code of Civil Procedure. Such a power was granted and given by the Legislature only with the intention that the authority, when deciding the factor, whether a return filed by the Assessee is correct and to decide whether it is correct, all the necessary ingredients to be made available and which can be brought forward by the authority to ultimately to come to a correct conclusion that the assessment is in fact valid under law. Such wide power has been granted by the Legislature, so that such finding of fact by the first authority or latter, thus accepted or reviewed by the Appellate authorities, who are also empowered to seek such further information so that, ultimately the facts are established beyond any reasonable doubt. When such is the intention of the Legislature in granting these powers even to the assessing authority, the assessing authority should exercise that power with utmost confidence with all the trappings of the court and decide the matter in the manner known to law. It is not correct to say or simply brush aside that such evidences, cross-examinations, production of documents or summoning the witnesses at the threshold, which can avoid all these multiplicity of proceedings, if such a simple exercise has been completed by the assessing authority himself without saying that the authority cannot act like a court. Therefore, the Legislature had given all these powers to all the fact-finding authorities that at least the Assessee and the Revenue should be confident that every material is available before coming to a final conclusion. Hence, as held by the Supreme Court, we can only say that the assessing authority should be more cautious and give ample opportunity to the Assessee so that the final decision is arrived at, at the earliest point of time.

16. At this juncture, we are also governed by another judgment of this Court in T.M. Rajaganapathi Traders v. Commercial Tax Officer reported in (2005) 142 STC 130 where one among us (honourable Justice F.M. Ibrahim Kalifulla), while deciding in respect of the powers vested u/s 54 of the Act has categorically held as follows (page 131 in 142 STC):

Section 54 of the Tamil Nadu General Sales Tax Act, 1959 discloses that the

assessing authority is vested with all the powers conferred on a court by the CPC for the purpose of summoning and enforcing the attendance of any person and examining him on oath or affirmation as well as compelling the production of any document. The said provision also enables the Respondent to take action in the event of the summoned person failing to attend or produce the document called for.

17. We are also governed by a decision of the Division Bench of this Court in K.S. Shivji & Co. v. Joint Commercial Tax Officer reported in (1965) 16 STC 769:

...We need hardly observe that the assessment proceedings are quasi-judicial in nature and therefore the assessing authority has an independent duty to carefully scrutinise the materials for assessment and satisfy himself, thoroughly uninfluenced by any direction of superior officers, and assess the tax payable on that basis.

18. We are completely in agreement that the assessment proceedings are quasi-judicial in nature and therefore, the assessing authority has an independent duty to carefully scrutinize the materials for assessment and satisfy himself thoroughly, uninfluenced by any direction of superior officers and assess the tax payable on that basis. In the present case, as rightly pointed out by the Tribunal, the assessing officer cannot simply taking into consideration the report of the Enforcement Wing has not applied its mind, but simply has been carried away by the report of the Enforcement Wing and has come to the conclusion. As stated earlier, the assessing officer should have decided the matter on the merits, independently unbiased and uninfluenced by any other subsequent factors and also should not have stated that it is not a court of law.

19. When all these functions of summoning of witnesses, recording of evidences are allowed to be done, such an authority has got the trappings of the court. Hence, the authorities are governed under the Act and empowered under the Act to do certain acts, especially, in deciding the very application of law. The finding of such an authority would tantamount to trapping of the court and therefore, such authority, who first of all take into consideration that they are an authority and the power is to be exercised in similar function as it should be exercised by court of law. Therefore, the authority, i.e., assessing officer has basically committed a mistake in stating that it cannot conduct a court of law. Rightly this has been set aside both by the first Appellate authority and the second Appellate authority, who are also actual fact-finding authorities, rightly concluded that such an attitude of the assessing authority in totally rejecting the contentions of the Assessee without applying the basic principles of law, is not legal and valid in law. Hence, the reasoning of the Appellate authority is valid in law and we do not find any reason to interfere with the said findings. The question of law is answered against the Revenue.

20. This tax case, therefore, fails and the same is dismissed.