

(1997) 01 MAD CK 0095

In the Madras High Court

Case No : Tax Case No. 15 of 1985 (Reference No. 14 of 1985)

State of Tamil Nadu

APPELLANT

Vs

Blue Mountain Hosieries

RESPONDENT

Date of Decision : 29-01-1997

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 31
Tamil Nadu General Sales Tax Rules, 1959 — Rule 52, 52(1)

Citation : (2003) 133 STC 80

Hon'ble Judges : N.V. Balasubramanian, J; Abdul Hadi, J

Bench : Division Bench

Advocate : The Additional Government Pleader Taxes, for the Appellant;

Final Decision : Dismissed

Judgement

Abdul Hadi, J.—Only a short question is involved in this tax case, preferred by the State of Tamil Nadu. The question is, whether the Tribunal is right in setting aside the order of the Appellate Assistant Commissioner dated February 23, 1982 and allowing M.P. No. 255 of 1981 on the file of the Appellate Assistant Commissioner (CT) Pollachi, which was filed by the assessee for excusing the delay in filing the appeal before the said authority against the assessment order dated April 29, 1971.

2. The contention of the assessee is that the said assessment order was not served on it at all and it came to know of the assessment order only when the sum due under the assessment order was sought to be recovered by the Revenue, after a period of about ten years. The assessee's further case is that after coming to know of the assessment order, when the distraint was effected, it got the certified copy on June 30, 1981 and the appeal before the Appellate Assistant Commissioner was filed on July 23, 1981.

3. The contention of the Revenue is that the assessment order was served on the assessee by affixture, as provided under Rule 52(d) of the Tamil Nadu General

Sales Tax Rules, 1959 (hereinafter referred to as "the Rules").

4. The Tribunal in its order dated May 20, 1983 observed that made of service by affixture prescribed under Rule 52(1)(d) of the Rules can be resorted to only after the other modes prescribed under Rule 52(d) of the Rules have been exhausted.

5. The relevant observations of the Tribunal are as follows :--

"There are no materials to show that other modes of service were resorted to by the department before serving the assessment order on the appellants by affixture. Thus the other modes of service have not been exhausted by the department. Basing on the case law referred to above, we are of the view that the service of the assessment order on the appellants by affixture is not valid in law. For the abovesaid reasons we come to the conclusion that the alleged service of the order by affixture on August 19, 1971 on the appellants in both the cases is not valid. Hence the delay in filing the appeals is reasonably explained by the appellants. There are valid and sufficient grounds to condone the delay in filing the appeals. ..."

6. Learned counsel for the Revenue, relying on the decision reported in A. Sanjeevi Naidu Vs. The Deputy Commercial Tax Officer and Others, submits that even without resorting to the other modes prescribed in Rule 52(1)(a) to (c) of the Rules, affixture of service prescribed in Clause (d) therein can be resorted to. He also points out that at the time when the assessment order was passed, the assessee's factory was on strike and so the other modes prescribed under Clauses (a) to (c) of Rule 52(1) of the Rules could not be resorted to. He also points out that when the affixture was sought to be made, the assessee was not found at the relevant address, as can be seen from the endorsement of the process server.

7. The respondent/assessee remains unrepresented. So we have heard only the learned counsel for the Revenue.

8. In our view, there is absolutely no merit in the submission made by the learned counsel for the Revenue. Rule 52(1) of the Rules runs as follows :--

"1. The service on a dealer of any notice, summons or order under the Act or these Rules may be effected in any of the following ways, namely :--

(a) by giving or tendering it to such dealer or his manager or agent or the legal practitioner appointed to represent him or to his authorised representative ; or

Explanation : Endorsement by person who delivers the notice etc., of having tendered or given it will be proof for the purpose of this sub-rule.

(b) if such dealer or his manager or agent or the legal practitioner appointed to represent him, or his authorised representative is not found, by giving or tendering it to any adult member of his family ;

(c) if the address of such dealer is known to the assessing authority by sending it to him by registered post ; or

(d) if none of the modes aforesaid is practicable, by affixing it in some conspicuous place at his last known place of business or residence." (emphasis* supplied)

Though in the main part of Rule 52(1), it is stated that service should be "effected in any of the following ways", the said main part should be read subject to what is contained in Clause (d) of Rule 52(1) namely if none of the modes aforesaid is practicable, affixture can be resorted to. In the present case, admittedly not even the mode prescribed in the above said Clause (c) viz., service by registered post has been resorted to.

9. In *A. Sanjeevi Naidu Vs. The Deputy Commercial Tax Officer and Others*, the assessing officer initially resorted to the above said service prescribed in the above said Clause (c). In other words, notice was served by registered post in the above case. Only when by adopting that mode, service could not be effected, affixture mode prescribed in Clause (d) was resorted to. Only in that context, this Court observed as follows :

"The modes of service referred to in Clauses (a) to (c) are only alternative and not cumulative and, therefore, it cannot be said that all the above three modes have to be exhausted before the service by affixture can be effected under Clause (d). It is not in dispute that one of the modes of service contemplated under Clause (c) is service of notice by registered post, and such service has been found to be ineffective in this case. Therefore, the assessing authority was justified in proceeding to serve the assessment order by affixing it in the petitioner's place of business under Rule 52(d)." (emphasis* supplied)

Thus, the said decision is quite distinguishable and to the present facts the said decision cannot be applied, since here none of the mode prescribed in Clauses (a) to (c) has been resorted to. Before resorting to affixture service there must be a finding by the assessing authority that the other mode prescribed in Clauses (a) to (c) was not practicable, in the circumstances of the case. Admittedly, there is no such finding by the assessing authority in the present case, before affixture service was resorted to.

10. That apart, even when the above said M.P. No. 255 of 1981 was filed by the assessee before the Appellate Assistant Commissioner for excusing the delay in filing the appeal, there was no finding in the order of the Appellate Assistant Commissioner dated February 23, 1982 therein that affixture service was resorted to, only because the other modes prescribed in the above said Clauses (a) to (c) were not practicable. We must also point out that Section 31 of the Tamil Nadu General Sales Tax Act, 1959 provides for appeal to the Appellate Assistant Commissioner. While prescribing the period of 30 days for preferring the appeal, the above said section states that the said period will begin from "the date on which the order (assessment) was served on him (assessee) in the

manner prescribed." (emphasis* supplied) and not by any other manner. Learned counsel or so even the submission of learned counsel for revenue that the assessee has secured the certified copy of the assessment order on June 30, 1981 will not in any way improve his case. In other words, even if the above said thirty days period has to be computed from that date, viz., June 30, 1981, there is no delay at all, since on July 23, 1981 itself, the appeal has been filed.

11. Further, we must also point out that Section 31 of the Tamil Nadu General Sales Tax Act, 1959 specifically provides that service must be in the manner prescribed, i.e., prescribed in Rule 52(1) of the Rules. As already pointed out, there is no proper service as per Rule 52(1) of the Rules. Therefore, there is no delay at all. In fact, the abovesaid M.P. No. 255 of 1981 is unnecessary, since there is no delay at all.

12. For all the above reasons, this tax case is dismissed. No costs.