

(1995) 04 MAD CK 0076

In the Madras High Court

Case No : The Case Petition No. 1311 of 1984

State of Tamil Nadu

APPELLANT

Vs

Ganesh and Company

RESPONDENT

Date of Decision : 03-04-1995

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12, 22

Citation : (1995) 04 MAD CK 0076

Hon'ble Judges : T. Jayarama Chouta, J;K.A. Thanikkachalam, J

Bench : Division Bench

Judgement

1. The State is the petitioner herein. According to the facts arising in this case, a deed of partnership was made on November 26, 1980, between five partners. According to which the firm was to carry on the business as dealers in colour films production and distribution of motion pictures and with the consent of all the partners to carry on any other business also. The profits and loss were to be shared equally. The partnership effected a single transaction of purchasing photograph films from India Photographic Company as can be seen from debit notes 237, 238 dated June 17, 1981 which was sold in a single transaction by invoice No. 1 dated August 4, 1981. One of the partner's house was inspected by the Enforcement Wing on October 29, 1981. The partner one M. Ganesan admitted in the statement on October 29, 1981 that there was a single sale transaction and that the sales tax was collected. An application form for registration was submitted and the Enforcement Wing Officers obtained two cheques towards taxes and registration fees due on the spot. On the basis of this investigation assessment was made on January 31, 1983. The total turnover was determined as Rs. 2,02,400. This is the amount which was accepted before the Enforcement officers by the partner of the firm. The assessee has collected sales tax on August 4, 1981, at the time of sale. The assessee was not a registered dealer. Therefore, the assessing officer levied maximum penalty of Rs. 50,094 u/s 22(2) of the Act. Another penalty was levied u/s 12(3) of the Act to the extent of Rs. 50,094. On appeal, the Appellate Assistant Commissioner confirmed the

penalty levied by the assessing officer u/s 12(3) and u/s 22(2) of the Act. Aggrieved, the assessee filed an appeal before the Appellate Tribunal. The assessee did not contest the appeal with regard to the assessment. But appeal was argued only for the cancellation of the penalties levied u/s 12(3) and section 22(2) of the Act. The Appellate Tribunal deleted penalty u/s 22(2) of the Act holding that the effect of obtaining registration fee and the application for registration at the time of inspection on October 29, 1981, would go to show that the assessee became a registered dealer from the date of commencement of the business following the decision in [1983] 52 STC 235 [State of Tamil Nadu v. Nava Bharath Enterprises (P.) Ltd.]. The Tribunal also deleted the penalty levied u/s 12(3) of the Act holding that there was no wilful failure to file the return as required u/s 12(3) of the Act since the Revenue had collected the tax from the assessee on October 29, 1981 itself that is even prior to May 1, 1982.

2. It is against this order the department is in revision before this Court. The learned Additional Government pleader (Taxes) submitted that the Tribunal was not correct in deleting the penalty levied u/s 12(3) as well as u/s 22(2) of the Act. It was submitted that for the purpose of levying penalty u/s 12(3) of the Act, it is not necessary to consider whether there is any element of wilfulness in not filing the return in time. In the case of levying of penalty u/s 22(2) of the Act it was submitted that the application for registration was filed beyond 30 days from the date of commencement of the business and therefore the non-issuance of the certificate by the department would not authorise the assessee to contend that the deemed certificate would operate from the date of the commencement of the business. For these reasons it was submitted that the penalties are exigible u/s 12(3) and section 22(2) of the Act.

3. On the other hand, the learned counsel appearing for the assessee, while supporting the order passed by the Tribunal contended that there was no element of wilfulness in not filing the return within the stipulated date. It was further submitted that inasmuch as the registration fees was collected by the Enforcement authorities on October 29, 1981 itself and inasmuch as no certificate for registration was issued it would be deemed that the assessee is a dealer from the date of the commencement of the business.

4. We have heard the learned counsel appearing on both sides. We have also gone through the relevant rules necessary for deciding the issues arising in this case.

5. In so far as the penalty leviable for non-filing of the return is concerned, it is an admitted fact in the present case that the return was not filed. Even the Tribunal in its order found that there is no necessity on record to show that the assessee has filed his return for the assessment year 1981-82 in which year the assessee had a single transaction in which the assessee collected tax to the tune of Rs. 30,360. u/s 12(4) of the Act "notwithstanding the fact contained in sub-sections (1), (2) and (3), the assessing authority may, if it is satisfied that the accounts maintained by a dealer are correct, assess such a dealer on the basis of

such accounts, if such dealer has -

(1) failed to submit the prescribed return; or

(2) failed to submit the prescribed return within such period as may be prescribed; or

(3) if the return submitted is found to be incorrect or incomplete.

Under section 12(5) of the Act the assessing authority may in the order of assessment or by a separate order, direct that the dealer shall, in addition to the tax assessed under sub-section (4) pay by way of penalty a sum which in the case referred to in clause (1) of sub-section (4) shall not be less than 50 per cent, but which shall not be more than 150 per cent of the amount of tax payable.....".

Therefore, a plain reading of section 12(4) and 12(5) of the Act would go to show that if the assessee failed to file a return, the penalty is exigible u/s 12(5) of the Act. Considering the element of wilfulness in not filing the return as contemplated u/s 12(3) of the Act would not arise in the present situation. Therefore, we hold that the Tribunal was not correct in deleting the penalty depending upon section 12(3) of the Act.

However, the penalty was levied at 150 per cent on the tax payable. Considering the submissions made by the learned counsel appearing for the assessee and the facts arising in this case, namely there is only one single transaction we consider that penalty to the extent of 100 per cent on the tax payable by the assessee would meet the ends of justice u/s 12(3) of the Act. Accordingly, we refix the penalty at 100 per cent u/s 12(3) of the Act.

6. In so far as the penalty levied u/s 22(2) of the Act is concerned, penalty is leviable if any person or registered dealer collects any amount by way of tax or purporting to be by way of tax in contravention of the provisions of sub-section (1) of section 22. In the present case, the assessee collected tax on August 4, 1981 to the extent of Rs. 30,360. On that date the assessee was not a registered dealer. There was an inspection by the Enforcement Wing on October 29, 1981. On that date the assessee paid two cheques by way of registration fees. It is the case of the assessee that inasmuch as the registration fees on the registration application was handed over to the Enforcement authorities on October 29, 1981 and inasmuch as no registration certificate was issued by the department within 30 days from October 29, 1981, the assessee would have obtained a deemed certificate as contemplated under rule 24(8) of the Sales Tax Rules. If it is so, the certificate would enure from the date of the commencement of the business. The assessee also submitted that before the end of the assessment year, the assessee had also paid the tax to the department. Under such circumstances, according to the assessee, no penalty is exigible u/s 22(2) of the Act.

7. It remains to be seen that the first sale took place on August 4, 1981. The inspection was done on October 29, 1981. On August 4, 1981 the assessee

collected the tax amounting to Rs. 30,260. On October 29, 1981, according to the assessee, he paid the registration charges along with his application form to the Enforcement Officers. It means registration was applied for not within 30 days from the date of commencement of the business. If the application for registration was made on or before August 4, 1981 the assessee can say that the application was made in time and non-issuance of the certificate by the department would amount to having a deemed certificate as contemplated under rule 24(8) and in such a case, the certificate would enure from the date of the commencement of the business. In such a case, the tax collected would not amount to illegal collection. In the present case, the registration certificate was applied for beyond one month period. And no doubt the department has not issued any certificate for registration. Under such circumstances, it cannot be said that the certificate would have deemed to have been granted to the assessee as contemplated under rule 24(8) of the Rules. The learned counsel appearing for the assessee relying upon rule 24(8)(a)(i) contended that the deemed certificate would be applicable in the case of the assessee since the department has not issued the registration certificate within 30 days after the application for registration was made. But this provision would not be applicable in the case of the assessee because the application for registration was not filed within 30 days from the date of the commencement of the business. In the present case, inasmuch as the application was filed for registration beyond 30 days from the date of the commencement of the business, the non-issuance of the registration certificate by the department within 30 days from the date of application would amount to rejection of the application as per the provisions of rule 24(8) of the Tamil Nadu General Sales Tax Rules. In view of these facts that on the date that is on August 4, 1981, when the assessee collected the tax of Rs. 30,360 it is collected without the authority of the law. Therefore, penalty is exigible u/s 22(2) of the Act. Considering the submissions made by the learned counsel appearing for the assessee and the transaction carried out by the assessee being a single transaction we are of the opinion that penalty at the rate of 100 per cent of the tax payable by the assessee would be sufficient and would meet the ends of justice. Accordingly, we re-fix the penalty levied by the Tribunal at 100 per cent, namely, Rs. 30,360 on the tax payable by the assessee. In that view of the matter, the order passed by the Tribunal in deleting the penalties levied u/s 12(3) and u/s 22(2) of the Act stand set aside and the revision stands allowed. However, there will be no order as to costs.

8. Petition allowed.