

(1991) 10 MAD CK 0060

In the Madras High Court

Case No : Tax Case (Revision) No. 1008 of 1984

State of Tamil Nadu

APPELLANT

Vs

Indian Silk Traders

RESPONDENT

Date of Decision : 09-10-1991

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12, 12(2), 12(3), 16(2), 43

Citation : (1991) 10 MAD CK 0060

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

Bench : Division Bench

Advocate : T. Pramodkumar Chopda, for the Appellant;

Judgement

Kanakaraj, J.—The respondents/assesseees are carrying on business in readymade garments. For the assessment year 1979-80 they filed returns declaring a total and taxable turnover of Rs. 3,04,295 and Rs. 78,935 respectively claiming exemption on a turnover of Rs. 2,25,360. Their accounts were called for and checked. The assessing authority found two defects on verification of accounts. (1) Purchase of hosiery goods under a brand name for a sum of Rs. 35,124.29 from outside the State of Tamil Nadu, had not been separately accounted for. The relative first sales turnover in respect of the said goods was arrived at as Rs. 42,990 taxable at 5 per cent. (2) A sum of Rs. 68,091 was found to relate to inter-State purchase of readymade goods and the same had been wrongly included in the total purchase of readymade goods. The sales turnover on this account was worked out as Rs. 83,341 taxable at 2 per cent. The assessing authority proceeds to say that it was proposed to "reject the returns and accounts as incorrect and incomplete" and to determine the turnover u/s 12(2) of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as "the Act") to the best of his judgment. In particular he referred to the fact that sales of readymade garments had been wrongly shown as second sales. It is also pointed out that they had not separately shown the taxable turnover of Rs. 42,990. The difference in tax as determined by the assessing authority worked

out to Rs. 1,290. It was therefore proposed to levy a penalty of Rs. 1,478 "being 50 per cent of the tax due on the turnover not declared in the return and also for the failure to declare the taxable turnover at 5 per cent". However, while dealing with the objections of the assessee the assessing authority says that section 12(4) and 12(5) of the Act was substituted by the Tamil Nadu Act 47 of 1979 with effect from December 3, 1979. He concludes by saying that the return submitted by the assessee was found to be incorrect and incomplete as per section 12(4)(iii) of the Act and therefore the penalty u/s 12(5)(iii) of the Act was attracted. He, therefore, confirmed the levy of penalty at 50 per cent of the tax due on the turnover not declared correctly in the return and also for the failure to declare the taxable turnover at 5 per cent.

2. On appeal, the appellate authority renders a finding which is as follows :

"It is equally patent that they have disclosed the transactions in the accounts, but failed to file a revised return in form A1 for the turnover of Rs. 5,49,653. It is only at the stage of check of accounts, the assessing officer has reduced their liability to tax at different rate out of the purchase of goods from out of the State."

He therefore held that the assessment had been made u/s 12(4)(iii) and the penalty u/s 12(5)(iii) was justified. On further appeal, the Tribunal says that the assessee had returned a total and taxable turnover of Rs. 3,04,295 and Rs. 78,935 respectively. But the books of accounts showed a total and taxable turnover of Rs. 5,49,653 and Rs. 1,62,276 and that the assessing officer found the book total turnover as correct. Proceeding further the Tribunal observes that action u/s 12(5) of the Act could be justified only if a deliberate concealment in the return is found out. The Tribunal observes as follows :

"Having regard to the facts and circumstances of the case, we find in the instant case that the appellants had not acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation and as such the penalty is not called for u/s 12(5) of the Act."

The Revenue is in revision before us.

3. Elaborate arguments have been advanced on the scope of section 12(4) and 12(5) of the Act. While it is the contention of the Revenue that deliberate concealment or wilful suppression is not necessary for the purpose of levying penalty u/s 12(5) of the Act, it is the contention of the assessee that a bona fide belief that a particular turnover is exempt or is assessable at a particular rate does not call for a penalty merely because the authorities think otherwise about the bona fide belief of the assessee. Elaborating the contention it is argued on behalf of the Revenue that the provisions of sections 12(3) and 16(2) of the Act have been differently enacted. Notions of wilfulness or a deliberate intention to conceal do not come into play while dealing with section 12(5) of the Act. By claiming a particular turnover as being exempt and thus avoiding payment of tax on such turnover, loss is caused to the Revenue. Therefore, but for the

verification of the accounts by the taxing authorities the loss of revenue could not have been avoided. According to the Revenue it is immaterial whether this mistake on the part of the assessee is bona fide or unintentional. Argues the counsel for the Revenue, that it was precisely the reason why section 12(5) of the Act was introduced in the Act. It would be interesting to note that section 12(4) and 12(5) of the Act was introduced by the Tamil Nadu Act 49 of 1979 with effect from December 3, 1979, sometime after the decision of the Supreme Court in *State of Madras v. Jayaraj Nadar & Sons* [1971] 28 STC 700. It would therefore be appropriate to peruse the said judgment carefully. In that case the assessee returned a turnover of Rs. 42,09,912.12 for the assessment year 1961-62. The assessing authority, on scrutiny of accounts determined the turnover at Rs. 68,06,331.49. The Board of Revenue in suo motu proceedings held that the failure of the assessee to disclose the turnover in question was deliberate and called for no lenient treatment. On appeal, the High Court of Madras set aside the order of the Board of Revenue in respect of two items. The matter having been taken up to the Supreme Court of India, the following question was posed for consideration :

"The question is whether penalty can be levied while making the assessment under sub-section (2) of the above section merely because an incorrect return has been filed."

The view of the High Court was that if the assessing authority resorts to best of the judgment assessment the question of penalty would come into play. The Supreme Court pointed out that, if the account books are accepted along with other records there can be no ground for making a best judgment assessment. The deletion of the penalty in respect of two items was on account of the fact that the turnover in respect of those two items were based on assessee's account books. This judgment was rendered on September 16, 1971. By the Tamil Nadu Act 47 of 1979 sub-section (3) was modified and sub-sections (4) and (5) were introduced. For the applicability of the sub-section (4), the sine qua non is the satisfaction of the assessing authority that the accounts maintained by a dealer are correct and the assessment of such dealer is on the basis of such accounts. In such an event if the assessing authority finds that the return submitted by the assessee is incorrect or incomplete section 12(5)(iii) provides for penalty which shall not be less than 50 per cent but which shall not be more than 150 per cent of the difference in tax payable on the turnover disclosed in the return and that determined by the assessing authority. While section 12(3) (a) and (b) refers to "turnover that was not wilfully disclosed" and "wilful failure to submit a return", such phraseology is absent in section 12(5) of the Act. Therefore from a plain reading of section 12 of the Act, as a whole it appears to us that if the assessment is made on the basis of the accounts, and it is found that the return does not truly reflect the accounts, levy of penalty is called for. In other words, it will not be an answer to plead that the assessee had maintained the accounts properly, and in filing the returns he had either omitted or incorrectly shown the total and taxable turnover.

4. The above interpretation based on the plain reading of section 12 of the Act does not solve the problem. This is because a diverse set of situations arise while dealing with various assessment orders. There is a line of cases arising out of the Madhya Pradesh General Sales Tax Act, 1958, where the provisions of law is slightly different as will be seen below. In *Dadabhoy's New Chirimiri Ponri Hill Colliery Company Private Ltd. Vs. Commissioner of Sales Tax*, the assessee disclosed all the sales made by it during the relevant period. The assessee, however, claimed exemption from payment of tax in respect of sales to electrical undertakings. There was an exemption in respect of sales to electrical undertakings which had not been subsequently incorporated in the Madhya Pradesh Act. A penalty was imposed on the assessee on the ground that it had filed false returns, the falsity being that it claimed exemption in respect of sales to electrical undertakings. It was held that the assessee had taken only a legal plea that the sales to electrical undertakings were not taxable. It was held that the mere fact that the assessee put forward a legal plea in the return, which legal plea could not be sustained, did not amount to making a false return. Though the words used in the Madhya Pradesh Act relate to falsity of returns, whereas the words used in the Tamil Nadu Act relate to "incorrect and incomplete" returns, the point to be noticed is that when an assessee makes a bona fide legal plea, should he meet with penal consequences if the plea is found to be incorrect by the statutory authorities. In *Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others*, the Supreme Court held that a return cannot be said to be false within the meaning of section 43 of the Madhya Pradesh Act unless there is an element of deliberateness in it. The question was whether the amount of freight formed part of the sale price and was properly includible in the taxable turnover. The assessee thought that the freight charges were not includible in the taxable turnover. The Revenue thought otherwise. A penalty was levied on the assessee because he had failed to disclose in its return the amount of freight as forming part of the turnover. The question was whether the assessee had filed a "false" return. The following observations of the Supreme Court are not only apposite but also provide the key to unlock the problems posed by section 12(4) and 12(5) of the Tamil Nadu Act, and as to the circumstances in which a return can be said to be incorrect or incomplete :

"What section 43 of the Madhya Pradesh General Sales Tax Act, 1958, requires is that the assessee should have filed a "false" return and a return cannot be said to be "false" unless there is an element of deliberateness in it. It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no reasonable explanation forthcoming from the assessee for such want of care, the court may, in a given case, infer deliberateness and the return may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable so to include it, it would not be right to condemn the return as a "false" return inviting imposition of penalty."

On the facts of the case the Supreme Court held that the assessee could not be said to have filed a "false" return when it did not include the amount of freight in the taxable turnover in the returns filed by them. In *Hindustan Steel Ltd. Vs. State of Orissa*, the Supreme Court had pointed out that "even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute ...". In *Commissioner of Sales Tax Vs. Shivandas Tekchand*, the dealer had shown some purchases under a wrong head and the error was only one of misclassification and not of suppression of any material fact relating to the purchases. It was held that the return could not be said to be false within the meaning of section 43 of the Madhya Pradesh Act. It was held that the dealer did not include a particular item in the taxable turnover under a bona fide belief that he was not liable so to include it. The explanation given by the dealer was found to be plausible and therefore, there was no case for imposition of penalty.

5. We have already noticed the difference between the word "false" used in the Madhya Pradesh Act and the words "incorrect and incomplete" used in the Tamil Nadu Act. The words "false return" connotes certain amount of deliberateness or wilfulness, or an element of suppression on the part of the assessee. On the other hand, the words "incorrect and incomplete" do not imply such deliberateness, suppression or wilfulness in making a return. But even to come to a conclusion that a return is incorrect or incomplete, the assessing authority has to take note of the exceptional cases where an assessee bona fide believes that he is not liable to include a turnover in the return or whether a particular turnover attracts duty under one or other of the entries in the First Schedule to the Act or whether the item is taxable as a multi-point item, etc. To this extent we are of the opinion that the observation of the Supreme Court in *Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax* [1980] 45 STC 197, which we have extracted above, do apply even in the case of an incorrect or incomplete return. The conclusion therefore is inevitable that each case will depend upon its own facts. It is said that in the game of chess, no two games are the same after the fifth or sixth move. So also, the cases of assesseees which are brought to the portals of courts of law, are not always identical.

6. Any attempt to define the limits of section 12(4) and 12(5) of the Act and lay down a universal formula for the imposition of the penalty would, in our attempt be improper and would not be adequate to meet the diverse situations which may arise on the facts of the particular case. We have already noticed a few cases under the Madhya Pradesh Act. We may also notice in this connection that, in several cases, this Court has taken the view that where an assessee files a revised return and pays the tax on such revised return, before the assessment is completed, penalty cannot be levied u/s 12(5) of the Act. In this connection, reference may be made to the recent judgment of this Court in *Bhavani Mills Ltd. v. State of Tamil Nadu* [T.C. (R) No. 1297 of 1982 dated October 3, 1991

[Reported in [1994] 94 STC 120 (Mad.) supra.]], Kalyani Agencies v. State of Tamil Nadu (1984) 10 STC 151 (Mad.) and State of Tamil Nadu v. P. S. Srinivasa Iyengar & Sons [1993] 89 STC 349 (Mad.); (1989) 10 STC 155 (Mad.) (T.C. No. 77 of 1989 dated April 19, 1989). The exceptions, we have noticed where the assessee can escape the penal consequences of section 12(5) of the Act are only illustrative and not exhaustive.

7. We may now refer to two judgments of this Court arising under the Tamil Nadu Act. The first is in Devendran & Co. v. State of Tamil Nadu [1983] 53 STC 229. In that case the assessing authority had not accepted the turnover returned by the assessee. The argument was that section 12(4) and 12(5) of the Act will not apply to such a case. The Division Bench pointed out that the assessee had failed to disclose a huge turnover in the A-2 returns, though it found its place in the accounts. The assessment was completed on the basis of the turnover figures found in the accounts after rejecting the returns. The assessing authority found that there was a discrepancy in the turnover between the book figures and the figures as returned by the assessee. It was therefore a case of assessment based on the account books of the assessee and therefore section 12(4) and 12(5) did apply to the case. The Division Bench interpreting section 12 of the Act held as follows :

"A conjoint reading of sub-sections (2), (3) and (4) of section 12 would indicate that section 12(3) will come into operation when no return is filed within the prescribed period, or when the return filed is found to be incorrect or incomplete. But sub-section (4) of section 12 will come into play only when the return filed by the assessee, which is found to be incorrect or incomplete, is inconsistent with the entries found in the accounts which are accepted as correct. Thus sub-section (4) of section 12 covers a different situation and is intended to apply to a case where there is discrepancy between the returns submitted, which are found to be incorrect or incomplete, and the entries made in the accounts which are found to be correct."

In State of Tamil Nadu v. O. A. Abdul Samak Sahib Sons [1984] 57 STC 68 the assessee submitted a return, but the assessing authority found that the return was incorrect and incomplete and proceeded to make a best judgment assessment, after ignoring the turnover as disclosed in the books of accounts. The Division Bench observed as follows :

"Therefore, the assessment cannot be said to have been made under sub-section (4) of section 12. The penalty u/s 12(5) can be levied only if the assessment is made under sub-section (4) of section 12, that is, when the assessment is made on the basis of the entries found in the books of account of the assessee, and not when the assessment is made de hors the accounts and after rejecting the same. Thus, the Tribunal in this case appears to be right in holding that the penalty u/s 12(5) cannot be justified on the facts of the case."

8. We are in respectful agreement with the view expressed in the last two

judgments of this Court. In our view section 12(2) and 12(3) of the Act operates in a particular field where the assessing authority resorts to best of judgment assessment. Section 12(4) and 12(5) operates in a different field where the assessment is made on the basis of the books of account rejecting the return submitted by the assessee as incorrect and incomplete. We have already indicated that once an assessment is made on the basis of the books of accounts the penalty u/s 12(5) of the Act will be attracted. While the element of deliberateness, wilfulness or a blameworthy conduct on the part of the assessee may not be necessary for invoking section 12(5) of the Act, we are clearly of the opinion that the bona fides of the assessee have to be gone into before imposing penalty. The guidelines given by the Supreme Court in *Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax* [1980] 45 STC 197 which we have extracted above should be kept in mind by the assessing authority. At the risk of repetition we reiterate that the facts of each case have to be carefully analysed before coming to the conclusion whether a particular return is incorrect or incomplete and whether the assessee returned an incomplete or incorrect return, more with a view to postpone the tax legitimately due to the Government, or under a bona fide belief that his return was in accordance with law.

9. Having devoted our attention to the legal principles involved in applying section 12(4) and 12(5) of the Act if we now turn to the facts of the present case we find that there is total confusion of facts on the relevant question whether the assessment was made on the basis of the books of accounts or de hors the books of accounts. In one place the assessing authority says that both the return as well as the books of accounts were incorrect and incomplete. There is a specific reference to the fact that the assessment was to the best of its judgment u/s 12(2) of the Act. Towards the end of the order he says that the return was found to be incorrect and incomplete as per section 12(4)(iii) of the Act and penalty u/s 12(5)(iii) of the Act was called for. Since a finding on this crucial aspect is necessary to find out whether penalty can be levied u/s 12(3) or 12(5) of the Act, we are constrained to remand the case back to the assessing authority to render a finding on this aspect as to whether the assessment is based on the books of accounts or de hors the books of accounts. The revision is accepted and the matter remitted back with the assessing authority to render a finding in that light of the observations made in the above order and pass fresh orders the question of levying penalty.

10. Petition allowed.