

(1991) 07 MAD CK 0055

In the Madras High Court

Case No : Tax Case (Revisions) No"s. 553, 558, 560, 584, 656, 1014, 1015, 1017, 1018, 1167, 1168, 1429 and 1440 of 1982

State of Tamil Nadu

APPELLANT

Vs

K. Mohammed Ibrahim Sahib

RESPONDENT

Date of Decision : 30-07-1991

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 22, 22(1), 45

Citation : (1991) 07 MAD CK 0055

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

Bench : Division Bench

Advocate : D. Srinivasan, Additional Government Pleader Taxes, for the Appellant; K.J. Chandran, for the Respondent

Judgement

Dr. A.S. Anand, C.J.—Since an identical question of law arises for consideration in this batch of tax revision cases filed at the instance of the Revenue against a common order made by the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Madurai, dated 28th August, 1981, these cases are being disposed of by a common order.

2. The question that requires our consideration is, whether the Tribunal was justified in deleting the levy of the penalty u/s 22(2) of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter called "the Act") in the facts and circumstances of the case ? To answer the question, a brief reference to certain admitted and salient facts is necessary.

3. The Tribunal found, as a fact :

- (1) that the assessees are engaged in the business of decorticating groundnut;
- (2) that the assessees are millers owning decorticating mills carrying on business in Alangudi;
- (3) that the purchasers of groundnut kernel from the agriculturists were oil mill

owners;

(4) that the assesseees got themselves registered as dealers under directions of the Commercial Tax Officers, even though they were only decorticating millers;

(5) that it was at the instance of the commercial tax authorities that the decorticating millers had collected the sales tax from the purchasing oil millers, to be remitted to the Government on behalf of the purchasing merchants, for facilitating recovery of sales tax by the Revenue;

(6) that the tax so collected by the assesseees from the purchasers was not retained by the assesseees and was, in fact, remitted to the Government;

(7) that the assesseees as well as the purchasing merchants had given petitions, in writing, to the authorities that the tax had been collected and remitted by the assesseees on behalf of the purchasing merchants and should be adjusted against the tax due from the purchasing merchants;

(8) that the assesseees had also furnished to the sales tax authorities a list of the purchasing merchants together with their registration numbers and the amount of tax collected for and on their behalf, which had been remitted to the Government;

(9) that the assesseees had also furnished affidavits of the purchasing merchants to the sales tax authorities stating that the sales tax had been paid to the assesseee for remittance to the Government on behalf of the purchasing merchants;

(10) that on the directions of the sales tax authorities, an undertaking had also been furnished by the decorticating mill owners that they would not at any time ask for a refund of the tax paid by them, earlier on behalf of the purchasing merchants, and that the tax so remitted should be adjusted towards the tax due from the purchasing merchants;

(11) that the purchasing oil millers were the first purchasers and were liable to pay the sales tax.

4. None of these facts was controverted by the Revenue. On these admitted facts, the Tribunal came to the conclusion that the levy of penalty by the Appellate Assistant Commissioner and the assessing authority u/s 22(2) of the Act, in the facts and circumstances of the case, was not justified and deleted the same. The Revenue is in revision against this order.

Before proceeding further, it would be useful to notice the provisions of section 22(1) of the Act, which reads thus :

"22 (1). No person who is not a registered dealer shall collect any amount by way of tax or purporting to be by way of tax under this Act; and no registered dealer shall make any such collection except in accordance with the provisions of this Act and the Rules made thereunder :

Provided that nothing in this sub-section shall apply to the collection of an amount by a registered dealer towards the amount of tax already suffered under this Act, in respect of goods, the sale or purchase price of which is controlled by any law in force.

Explanation. - For the purposes of this sub-section, any State Government or the Central Government shall be deemed to be a registered dealer."

Sub-section (2) of section 22 reads thus :

"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), whether or not any tax is due from such person or dealer under this Act in respect of the transaction in which he collects such amount, the assessing authority may, after giving such person or dealer a reasonable opportunity of being heard, by order in writing impose upon him by way of penalty a sum not exceeding one and half times such amount :

Provided that no proceedings under this sub-section shall be commenced after a period of five years from the expiry of the year in which the amount has been collected :

Provided further that no prosecution for an offence under sub-section (1-A) of section 45 shall be instituted in respect of the same facts on which a penalty has been imposed under this sub-section."

5. From a perusal of the aforesaid provisions, it becomes apparent that the penalty may be levied by the authorities u/s 22(2) of the Act, after giving the affected party a reasonable opportunity of being heard by an order in writing, where there has been a contravention of the provisions of sub-section (1), implying thereby that any amount has been collected, by way of tax or purporting to be by way of tax under the Act by a person including a registered dealer, except in accordance with the provisions of the Tamil Nadu General Sales Tax Act and the Rules framed thereunder.

6. In the facts as noticed above, can it be said that the assessee had "collected" any amount by way of tax or purporting to be by way of tax under the Tamil Nadu General Sales Tax Act ?

The Supreme Court in *Joshi, Sales Tax Officer v. Ajit Mills Limited* [1977] 40 STC 497 had an occasion to consider the import of the expression "collected" by reference to sections 37(1)(a) and 46(2) of the Bombay Sales Tax Act, Section 37(1)(a) of the Bombay Sales Tax Act reads as follows :

"37(1)(a). If any person, not being a dealer liable to pay tax under this Act, collects any sum by way of tax, or being a registered dealer collects any amount by way of tax in excess of the tax payable by him, or otherwise collects tax in contravention of the provisions of section 46, he shall be liable to pay, in addition to any tax for which he may be liable, a penalty as follows :

(i) Where there has been a contravention referred to in clause (a), a penalty of an amount not exceeding two thousand rupees; and, in addition, any sum collected by the person by way of tax in contravention of section 46 shall be forfeited to the State Government.

.....".

Interpreting this section, the Supreme Court dealt with the expression "collected", an opinion:

"What does "collected" mean here ? Words cannot be construed effectively without reference to their context. The setting colours the sense of the word. The spirit of the provision lends force to the construction that "collected" means "collected and kept as his" by the trader. If the dealer merely gathered the sum by way of tax and kept it in suspense account because of dispute about taxability or was ready to return it if eventually it was not taxable, it was not collected. "Collected", in an Australian Customs Tariff Act, was held by Griffith, C.J., not "to include money deposited under an agreement that if it was not legally payable it will be returned". (Words & Phrases, page 274). We, therefore, semanticise "collected" not to cover amounts gathered tentatively to be given back if found non-exigible from the dealer."

It would be relevant to notice here that the above opinion was rendered by the Apex Court on terms of section 37(1) of the Bombay Act, wherein the expression used was "any sum collected by the person by way of tax shall be forfeited" Thus, even where the forfeiture was preceded by the use of the word "shall", the Court held that the expression "collected" must have reference to "collected illegally and retained" or "collected and kept as his", to attract the penalty of forfeiture. Thus, the circumstances under which the tax was "received" have to be considered by the authorities before imposing the penalty.

7. From the facts as noticed in the earlier part of this judgment, it would be seen that all that the assessee in the present case had done was to "receive" the tax due from the purchasing merchants who are the first purchasers and liable to pay the sales tax and remit it to the Government and that too, at the asking of the sales tax authorities. The sales tax collected was not retained by the assessee, but on the other hand, it was faithfully remitted to the Government to the account of the purchasing merchants as per the list furnished to the department. It has been the consistent case of the assessee, and it is not disputed by the Revenue at any point of time, that they collected the tax due from the purchasing merchants at the asking of the sales tax authorities only. The assessee had, both in the reply to the notice sent to them as well as in the grounds of appeal before the appellate authority maintained that it was at the instance of the Revenue only that the assessee got themselves registered and it was at the suggestion of the Revenue that they collected the tax and remitted the same for and on behalf of the purchasers, who are the first purchasers of the groundnut, so as to facilitate the collection of tax by the Revenue and the tax so

collected was not retained by the assesseees but remitted to the Government treasury. In view of the law laid down by the Apex Court, as noticed above, and on the admitted, established and uncontroverted facts, it cannot, therefore, be said that the assesseees had "collected" any amount by way of tax or purporting to be by way of tax, so as to be held liable for contravening section 22(1) of the Act. The assesseees had filed affidavits and statements before the department to state that the tax remitted by them was on the account of the purchasing merchants, and that they had no claim over it, nor would they claim any refund of that amount. It is not, therefore, possible to hold that the assesseees had "collected" any amount in contravention of the provisions of section 22(1) of the Act. Having itself directed the assesseees to recover the tax from the purchasing merchants and remit it to the Government, it ill-behoves the Revenue to now turn round and charge the assesseees for having contravened section 22(1) of the Act by collecting the sales tax at its behest. Since the uncontroverted findings of fact, as noticed above, were arrived at on the basis of the material on record, the conclusion is inescapable that the assesseees had not contravened section 22(1) of the Act by carrying out the directions of the department to collect sales tax from the purchasing merchants and to remit the same to the Government treasury. The provisions of section 22(1) of the Act have to be construed with reference to the context, and in the context of the facts as established in this case, the view of the Tribunal that the assesseees did not contravene the provisions of section 22(1) of the Act is quite sound and commends to us.

8. That apart, we find from the plain reading of section 22(2) of the Act that the levy of penalty for contravention of section 22(1) of the Act is a matter for discretion of the assessing authority. The expression used in section 22(2) of the Act is "the assessing authority may impose by way of penalty ...". The section, therefore, gives a discretion to the assessing authority to consider the facts and circumstances of each case and determine whether or not penalty should be levied and if so, the extent of that penalty. The section fixes the maximum limit of penalty as one and a half times the amount.

9. In *The State of Tamil Nadu Vs. Selvakumar Timber Traders*, , the assessing authority had levied a penalty for violation of section 22(1) of the Act. The Appellate Assistant Commissioner, in appeal, had reduced the quantum of the penalty. The Tribunal considered the second appeal of the assesseees as well as the department's enhancement petition asking for the restoration of the penalty as originally levied by the assessing authority and held that there was no case for restoration of penalty, as levied by the assessing authority and that the Appellate Assistant Commissioner was justified in reducing the quantum of penalty. The enhancement petition of the State was accordingly dismissed. The High Court upheld the order of the Tribunal and dismissed the revision petition filed by the Revenue.

10. Again, in *The State of Tamil Nadu Vs. Sasman and Company*, , it was found that where there was a mutual mistake on the part of the assessing authority

and the assessee as to the rate of tax payable, the assessee could not be said to have intentionally violated the provisions of section 22(1) of the Act and the penalty provisions u/s 22(2) of the Act were not attracted.

11. Similar view was also taken in *The State of Tamil Nadu Vs. Jaya Pharmacy*, . It was found that where both the assessee as well as the assessing authority had acted under a mutual mistake and collection at the higher rate of tax by the assessee was as a result of the mutual mistake, it could not be said that section 22(2) of the Act would be attracted.

12. The above judgments, therefore, unmistakably show that depending upon the facts and circumstances of each case, it is a matter for the discretion of the assessing authority to determine whether the penalty provisions u/s 22(2) of the Act are attracted in a case even where collections have been made in violation of section 22(1) of the Act, and that the imposition of penalty is not automatic. The discretion indeed, has to be exercised judiciously, properly and bona fide.

13. On the established facts of the present cases and the peculiar circumstances, therefore, it must be held that the deletion of the penalty by the Tribunal u/s 22(2) of the Act was in proper exercise of the discretion. The discretion was both judiciously and reasonably exercised. No error can, therefore, be found with the course adopted by the Tribunal in each one of these cases.

14. Thus, in view of what we have said above, we find that the order of the Tribunal does not require any interference. Consequently, these tax revision cases fail and are dismissed. There shall, however, be no order as to costs.

15. Petitions dismissed.