

(1994) 12 MAD CK 0050

In the Madras High Court

Case No : Tax Case No. 765 of 1983 (Revision No. 265 of 1983)

State of Tamil Nadu

APPELLANT

Vs

Kiran India Traders

RESPONDENT

Date of Decision : 14-12-1994

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 22

Citation : (1994) 12 MAD CK 0050

Hon'ble Judges : Raju, J;K.A. Thanikkachalam, J

Bench : Division Bench

Judgement

Thanikkachalam, J.—The department is the petitioner herein. The assessee Kiran India Traders is a dealer in ball-bearings. For the assessment year 1980-81 they disclosed a taxable turnover of Rs. 4,12,255.02 and Rs. 88,753.04 under the Tamil Nadu General Sales Tax Act, 1959. The accounts were called for and checked by the assessing officer. The assessee collected tax and surcharge on second sales at the rate of 8.4 per cent. by adding the amount with the price without mentioning as tax. Details of such collections were not furnished. Such collection on the second sales turnover of Rs. 3,04,118 works out to Rs. 23,566. Since it is an illegal collection of tax on the second sales, penalty u/s 22(2) of the Tamil Nadu General Sales Tax Act was levied. On appeal the Appellate Assistant Commissioner confirmed the levy of penalty u/s 22(2) of the Act. Aggrieved, the assessee filed an appeal before the Appellate Tribunal. The Tribunal deleted the penalty levied u/s 22(2) of the Tamil Nadu General Sales Tax Act. It is against that order the department is in revision before this Court.

2. The learned Additional Government Pleader (Taxes) submitted as under : The assessee collected sales tax and surcharge, but did not show the same as such in the return. In the return it was shown that the sale turnover of the second sales is not liable to tax. The assessee has separate second sales cash bills and first sale cash bills and each second sale bills carries a printed caption as second sales. The bills verified by the assessing authority would go to show that the

assessee used to add along with the price paid by it the tax and the surcharge due on the price fixed by the assessee. Even though the tax and surcharge were added with the price fixed by the assessee, it was not shown as such in the bills. According to the assessee what was collected by the assessee from its purchasers was not tax but as profits. What the assessee has done is along with the price at which the goods were purchased added the gross profit for the goods and fixed the higher price, which would also include the tax and surcharge on those amounts. Therefore, according to the learned Additional Government Pleader (Taxes) the assessee is collecting the sales tax and the surcharge under the camouflage of profit. It was further submitted that the assessee is not only collecting the tax and the surcharge paid by it to its sellers, but also added further amount by way of tax to its purchasers. u/s 22(1) of the Act, 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 the Act and no registered dealer shall make any such collection except in accordance with the provisions of this Act and the Rules made thereunder. According to the learned Additional Government Pleader (Taxes), what was collected by the assessee is purporting to be by way of tax under this Act. Therefore, the assessee is liable to penalty u/s 22(2) of the Act. According to the learned Additional Government Pleader (Taxes) it is not correct on the part of the assessee to state that the amount collected by it by way of tax and surcharge is nothing but part of profit. According to the Additional Government Pleader (Taxes) virtually it amounts to exact tax and surcharge payable on the sale price fixed by the assessee. In order to support the abovesaid contention, the learned Additional Government Pleader (Taxes), relied upon a decision of this Court rendered in *Steel Sales Organisation v. State of Tamil Nadu* [1993] 90 STC 243. The learned Additional Government Pleader (Taxes) further pointed out that even though the sales tax and surcharge were collected under different name, that would not absolve the assessee from paying penalty u/s 22(2) of the Act. The learned Additional Government Pleader (Taxes) further submitted that the decision reported in *Metal Sales Corporation Vs. Joint Commercial Tax Officer, Harbour III Assessment Circle*, would not be applicable to the facts of this case because, according to the facts arising in the present case, what was collected by the assessee was nothing but the sales tax and the surcharge payable on the price for the goods fixed by the assessee. For these reasons, it was submitted that the Tribunal was not correct in holding that what was collected by the assessee in the name of sales tax and surcharge are not the sales tax and surcharge, but only a part of profit. On verification, the assessing authority clearly found that the assessee collected 8.4 per cent. and 6.4 per cent by way of sales tax and surcharge respectively. The extra amount collected by the assessee over and above what was paid by the assessee is exactly the same as the amount equal to tax and surcharge at the rate of 8.4 per cent. and 6.4 per cent., hence it cannot be considered as a coincidence as alleged by the assessee. In view of the foregoing reasons the learned Additional Government Pleader (Taxes) submitted that the Tribunal was not correct in deleting the penalty levied u/s 22(2) of the Act.

3. On the other hand, the learned counsel appearing for the assessee submitted as under : A perusal of the sale bills would go to show that what was collected by the assessee is not sales tax and surcharge. The assessee along with the sales tax and surcharge paid by it added the gross profit and thereafter, collected extra amount under the caption add. Therefore, according to the learned counsel, inasmuch as what was collected by the assessee is neither sales tax nor surcharge, it is not possible for the department to say that collection of such amount is illegal u/s 22(1) of the Act. u/s 22(1) of the Act if the registered dealer collects the tax which he is not authorised, then alone penalty is leviable. In the present case what was collected by the assessee is not the tax or the surcharge. In fact what was collected by the assessee is part of its profits. The department cannot delve deep into the facts and come to the conclusion that what was collected by the assessee is tax and surcharge, and in fact such a finding was arrived at by the authorities below on the basis of surmises and conjectures. In order to support this contention, the learned counsel appearing for the assessee relied upon a decision of this Court in Metal Sales Corporation's case [1983] 52 STC 392 wherein it was held that "if the second sellers erred on the safer side while recouping to themselves the tax borne at the stage of first sale and collected something more than the tax incident, then to the extent it was discovered that the amount collected showed an excess, the excess amount must necessarily be attributed to the second sellers" profit element in the transaction of second sale". Accordingly, it was submitted that the Tribunal was correct in holding that the levy of penalty u/s 22(2) of the Act is not justifiable.

4. We have heard the rival submissions.

5. According to the assessee, the penalty of Rs. 9,047 u/s 22(2) of the Act is not exigible, since the said provision does not provide the levy of penalty in the case as in their sales they have not collected any tax or surcharge. The assessee submitted that according to the contract between the assessee and the customers they have to pay the cost of the items and also the percentage of margin of profit and other incidental charges for which they had agreed. After the sales were materialised the bills were issued specifying the cost of materials and also for the percentage of profit margin and other charges shown separately. According to the assessee, since the profit added is just equal to the rate of percentage of tax, surcharge, etc., it cannot be construed as tax and surcharge as the case may be. They have purchased the goods and the same goods were sold locally as second sales with tax suffered by them. Their customers had agreed to pay extra amount towards profit and not against anything else. According to the assessee, the receipts were taken into profit account and not shown under sales tax or surcharge collections. Hence, the assessee submitted that the presumption or inference of the assessing authority that these additional amounts noted in the bills are only against sales tax and surcharge is baseless and not supported by any proof. Therefore, the assessee requested to cancel the penalty of Rs. 9,047.

6. A perusal of the bills and invoices issued by the assessee shows that bearing No. 11207 bearing 2 Nos. at Rs. 162.60 purchased for Rs. 325.20. In the sales invoice dated December 17, 1980, the assessee had sold these bearings at Rs. 165 for Rs. 990 and they have collected an addition of 8.4 per cent. on the sales amount. So also in respect of bearing No. 11208, 4 Nos. purchased under the same invoice at Rs. 238.48 were sold at Rs. 250. According to the department the additional amount recovered by the assessee is nothing but sales tax and surcharge. The department also pointed out that the assessee cannot say that the gross profit has been added as it is not a trade practice to show the actual gross profit charged on the sale of goods by a particular dealer. In another instance the assessee bought goods for Rs. 162.60 and sold at Rs. 165 and added at 8.4 per cent. and purchased at Rs. 238.48 and sold at Rs. 250. This shows that the assessee had a gross profit for the goods and fixed the price at Rs. 165 and at Rs. 250 and they are further adding 8.4 per cent. or 6.4 per cent. by way of sales tax and surcharge. According to the department, the assessee had collected the amount purporting to be sales tax and surcharge at the rate of 8.4 per cent. or 6.4 per cent. Therefore, the department pointed out that this collection of extra amount comes under the mischief of section 22(1) of the Tamil Nadu General Sales Tax Act, 1959.

7. A similar question came up for consideration before the Gujarat High Court in the case of *State of Gujarat v. Ilac Ltd.* [1982] 50 STC 24, wherein while considering the provisions of sections 37 and 46 of the Bombay Sales Tax Act, the Gujarat High Court held that the excess amount collected by the assessee by way of tax was liable to be forfeited.

8. In [1977] 40 STC 497 in the case of *R. S. Joshi, Sales Tax Officer, Gujarat v. Ajit Mills Limited*, while considering the principles of sections 37(1)(a), 46(2) and 64(1) of the Bombay Sales Tax Act, 1959, the Supreme Court held as follows :

"If a dealer merely gathered a sum by way of tax and kept it in suspense account because of dispute about its taxability or was ready to return it if eventually it was found to be not taxable, it was not collected within the meaning of section 37(1). The spirit of the provision lends force to the construction that collected" means "collected and kept as his" by the trader.

Under the section the Commissioner is vested with a discretion to forfeit the whole or any lesser sum or none at all. The meaning of the expression "shall be forfeited" should therefore be limited to "shall be liable to be forfeited". The forfeiture should operate only to the extent, and not in excess of, the total collections less what has been returned to the purchasers. The Commissioner should also consider any undertaking given by the dealer that he will return the amounts collected from purchasers to them. The State will thus be obliged not to forfeit sums already returned, undertaken to be returned and the like."

9. So also in the case of *W. A. R. Arunachalam Chettiar & Co. v. State of Tamil Nadu* as reported in [1979] 44 STC 8, this Court while considering the provisions

of section 22 of the Tamil Nadu General Sales Tax Act (1 of 1959) held as under :

"(i) that as the status of a commission agent carries with it certain rights and also certain duties, it is for the person who projects such a status before the taxing officers to establish by acceptable evidence that he was acting as such. The circumstance that in the bills issued by the assessee at the time when he parted with the goods to his purchasers, he charged the same price as paid by him at the time of their purchase from his dealers would not by itself be sufficient to decide whether the assessee was a dealer or a commission agent;

(ii) that the bills issued by the assessee showed that he sold jaggery to the purchasers from whom he charged not only commission but also collected as tax an independent amount which represented tax at five per cent. of the total consideration shown in the bill, though jaggery was liable to tax only at the purchase point. Accordingly, it could reasonably be assumed that the assessee collected five per cent. as sales tax at the point of sale knowing that such tax was payable only at the point of purchase, as every dealer is expected to know the law. There was thus a clear violation of the statutory prescription of section 22(1) of the Act, and consequently, the levy of penalty for such violation was justified."

10. However, the learned counsel appearing for the assessee relied upon a decision of this Court reported in [1983] 52 STC 392 (Metal Sales Corporation v. Joint Commercial Tax Officer, Harbour III Assessment Circle) wherein it was held as under :

"that rule 24(16)(ii) of the Rules only prohibited collection of an amount by way of tax on a transaction not liable to tax under the Act. If the collection of tax was on a transaction which was liable to tax under the Act, such a collection could not be said to be in contravention of rule 24(16)(ii) of the Rules or of section 22(1) of the Act. The petitioners who had been penalised were registered dealers and they had collected only the tax which was payable on the first sale. That the tax on that first sale had already been paid to the State by the first seller or that it had already been collected by the first seller from his purchasers did not make it any different when the second seller collected it from his own purchaser. It was and it still remained, the tax on the first sale, which, by definition was a tax which could legitimately be collected by a registered dealer. It was true that the second seller would not be paying the collections to the State. But the Act, as it stood amended at the material time, nowhere required the collections to be paid over to the State. And in any case, the penalty u/s 22(2) was not for non-payment of collections into the Government Treasury, but for collection by way of tax from transactions not liable for tax. It was not the case of the taxing authorities that the petitioners had collected any tax per se on transactions which were second sales of the same goods. Hence, whether one called that collection as a recoupment, reimbursement, plusage or by any other name, such a collection only related to the transaction which was strictly taxable under the Act, and therefore, any collection of tax in respect of such transaction could not be

regarded as a collection in contravention of either rule 24(16)(ii) of the Rules or of section 22(1) of the Act. Therefore, it followed that penalty could not be levied for making such collections."

11. According to the tenor of the judgment, if the second seller while recouping to themselves the tax borne at the stage of first sale and collected something more than the tax incident, then to the extent it was discovered that the amount collected showed an excess, the excess amount must necessarily be attributed to the second sellers' profit element in the transaction of the second sale. For this purpose the assessee must show in the invoices and the bills issued by it that a particular goods was sold for a consolidated price without stating that the sales tax and surcharge were collected separately under the head sales tax and surcharge. But according to the decision reported in *M.A.R. Arunachalam Chettiar and Co Vs. State of Tamil Nadu*, if the assessee collected more than what was paid by him by way of tax and surcharge, then the excess collection would be deemed to have been collected not in accordance with the Act. In such a case penalty is warranted u/s 22(2) of the Act. According to the facts arising in the present case, the assessee issued invoices containing the price of the goods sold by way of second sales. It is the case of the assessee that a consolidated price was fixed which included the gross profit. Therefore, according to the assessee, he did not collect the sales tax and surcharge from the purchasers. On a scrutiny of the account, the assessing authorities found that the excess amount collected by the assessee on each second sale would go to show that the exact tax due on these goods, viz., 8.4 per cent. or 6.4 per cent. seems to have been collected. Therefore, the department came to the conclusion that the extra amount collected by the assessee was nothing but the sales tax and surcharge paid by the assessee to his sellers. Following the decision reported in [1979] 44 STC 8 (*M. A. R. Arunachalam Chettiar & Co.*), we have to hold that the extra amount collected by the assessee, which is over and above the sales tax and surcharge paid by the assessee to its sellers would amount to contravention of provisions of section 22(1) of the Act. On a scrutiny of the invoices, the assessing officer found that the extra amount collected by the assessee from the second sales is based upon the prices fixed by the assessee in the second sales. Inasmuch as the sales tax and surcharge collected by the assessee in the second sales is in excess of the sales tax and surcharge paid by the assessee to his sellers, the provisions of section 22(1) get attracted. This view, we have taken on the basis of the decision reported in [1979] 44 STC 8 (*M. A. R. Arunachalam Chettiar & Co. v. State of Tamil Nadu*) cited supra. Thus considering the facts arising in this case in the light of the abovesaid decision cited supra, we are of the opinion that the Tribunal was not correct in deleting the penalty levied u/s 22(2) of the Act. In that view of the matter, the order passed by the Tribunal in cancelling the penalty u/s 22(2) of the Act stands set aside.

12. In the result, the revision filed by the department stands allowed. There will be no order as to costs.

13. Petition allowed.