

(1995) 02 MAD CK 0037

In the Madras High Court

Case No : T.C.P. No. 18 of 1984 (Revision No. 16 of 1984)

State of Tamil Nadu

APPELLANT

Vs

K.M. Sultan Mohideen

RESPONDENT

Date of Decision : 27-02-1995

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12, 34, 36

Citation : (1995) 02 MAD CK 0037

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

Bench : Division Bench

Advocate : Mrs. Chitra Venkataraman, Additional Government Pleader Taxes, for the Appellant;

Judgement

Thanikkachalam, J.—The department is the revision-petitioner herein. The assessment year involved in this revision is 1981-82. This revision

is directed against the order passed by the Tribunal in a petition for enhancement filed by the department to restore the penalty levied by the assessing authority.

2. The assessee is a dealer in hides and skins. Since there was some discrepancy in the accounts, addition was made for suppressed turnover. On

appeal, the Appellate Assistant Commissioner reduced the addition equal to the actual suppression. Another item of addition relates to commission

sales on behalf of unregistered dealers. The assessing authority has levied the penalty at one and half times of the tax due on the actual stock

variation u/s 12(3) of the Tamil Nadu General Sales Tax Act (the TNGST Act). On appeal, the Appellate Assistant Commissioner following the

earlier decision of this Court in T.C. No. 1191 of 1979 held that the discrepancy in stock though suggestive of sales or purchase, omission

warranting rejection of the accounts and for estimation cannot be held to establish willful non-disclosure of a turnover. Since there was no willful non-disclosure of turnover, in the present case, according to the Appellate Assistant Commissioner, he deleted the penalty levied by the assessing officer.

3. Aggrieved by the order passed by the Appellate Assistant Commissioner in respect of certain items in quantum appeal, the assessee filed an

appeal before the Tribunal. In the said appeal, the department filed an enhancement petition, requesting the Tribunal to restore the penalty levied by the assessing authority.

4. After hearing learned counsel appearing for the assessee as well as the departmental representative, the Tribunal held that in view of the decision

reported in *The State of Tamil Nadu Vs. Jakthi Veliyeetakam*, there is no case for restoring the penalty which was completely deleted by the

Appellate Assistant Commissioner.

5. Aggrieved by this order dated July 7, 1983 the department is in revision before this Court.

6. Mrs. Chitra Venkataraman, learned Additional Government Pleader (Taxes) submitted as hereunder : Since there was suppression in sales

turnover as well as in commission sales, the assessing authority levied penalty u/s 12(3) of the TNGST Act, 1959 (hereinafter referred to as "the

Act"). The Tribunal was not correct in stating that when the Appellate Assistant Commissioner deleted the penalty in its entirety, no enhancement

petition can be filed by the department. It was further submitted that in view of the proviso contained in section 36(3)(a) of the Act, the department

is entitled to file an enhancement petition for restoration of penalty. Again, the learned Additional Government Pleader (Taxes) submitted that since

the appeal was filed by the assessee before the Tribunal, the revisional power u/s 34 of the Act cannot be exercised by the Joint Commissioner.

Under such circumstances, the only course open to the department is to file a petition u/s 36(3)(a) of the Act. In order to support this line of

argument, learned Additional Government Pleader (Taxes) relied upon the following two decisions in *Bhavani Mills Limited v. State of Tamil Nadu*

1994 94 STC 120 Mad and *M. Chokkalingam v. State of Tamil Nadu* 1994 94 STC 127 Mad

7. On the other hand, none was present on behalf of the assessee.

8. We have heard the learned Additional Government Pleader (Taxes) and perused the records carefully. The fact remains that since there was suppressed turnover on account of discrepancy in the accounts and suppression in commission sales, penalty was levied u/s 12(3) of the Act. The assessing authority levied the penalty at one and half times of the tax due on the actual stock variation of Rs. 1,28,410. This penalty was cancelled by the Appellate Assistant Commissioner on appeal by following an earlier decision of this Court rendered in T.C. No. 1191 of 1979. One of the reasons given by the Tribunal for dismissing the enhancement petition was that inasmuch as nothing was sustained by way of penalty by the Appellate Assistant Commissioner in his order, the petition to enhance the penalty would not lie. According to the Tribunal when some penalty was sustained by the Appellate Assistant Commissioner, then only a petition for enhancement of the penalty can be filed by the department. This view was taken in an earlier decision of this Court in *State of Tamil Nadu v. Jakthi Veliyeetakam* 1977 40 STC 466 referred to supra. According to the facts arising in that case, the penalty levied on the assessee u/s 12(3) of the Act was set aside by the Appellate Assistant Commissioner on appeal and when the assessee preferred a further appeal to the Tribunal, questioning the determination of the turnover itself, the State has filed a petition to restore the penalty levied. The Tribunal refused to restore the penalty. On reference this Court held that if the word "enhance" in section 36(3) of the Act is to apply, there must be something to be increased. Since the Appellate Assistant Commissioner had set aside the very order of penalty, there was no penalty to be increased. To increase the penalty already imposed is something different from restoring the penalty imposed by the original authority, which was set aside by the Appellate Assistant Commissioner. The subject-matter of the appeal before the Tribunal was the order of the Appellate Authority only and not the order of the original order passed by the assessing authority. Consequently, the contention for restoration of penalty would not come within the scope of section 36(3)(a)(i) of the Act and was therefore not competent.

9. u/s 36(3)(a)(i) of the Act, while disposing of an appeal, the Tribunal may confirm, reduce, enhance (restore fully or partially, as the case may be)

or annul the assessment or the penalty or both. According to the Tribunal, the enhancement petition cannot be filed since there is nothing to

enhance from the order of the Appellate Assistant Commissioner. But the provisions in section 36(3)(a)(i) of the Act would clearly go to show that

the State can file an application to enhance the penalty or the tax payable by the assessee, wherein the State can also ask to restore fully or

partially the assessment or the penalty made by the authorities below. In The State of Tamil Nadu Vs. Jakthi Veliyeetakam, it was pointed out that

what was before the Appellate Tribunal for consideration is only the Appellate Assistant Commissioner's order and not the order of assessment

made by the assessing officer. Therefore, the restoration of penalty levied by the assessing authority is not possible. This view is not correct. It

remains to be seen that what was questioned before the Tribunal was the order passed by the Appellate Assistant Commissioner in cancelling the

penalty levied by the assessing officer. After the order passed by the Appellate Assistant Commissioner the order passed by the assessing officer

will set merged with the order passed by the Appellate Assistant Commissioner. Therefore when the order of the Appellate Assistant

Commissioner is questioned in an appeal before the Tribunal, the orders passed by both the authorities are the subject-matters. In the appeal, the

Tribunal can confirm the order passed by the Appellate Assistant Commissioner or modify the same or set aside the order passed by the Appellate

Assistant Commissioner and restore the order passed by the assessing officer. u/s 34 of the Act, the Joint Commissioner cannot exercise the

revisional power against the order passed by the Appellate Assistant Commissioner when an appeal has been filed before the Appellate Tribunal,

by the assessee.

10. A plain reading of section 36(3)(a) of the Act would go to show that the State can file an enhancement petition or a petition for restoration of

the assessment or penalty or both, fully or partially as the case may be within the period prescribed under the said provision. The Tribunal after

filing the petition for enhancement is bound to hear the parties concerned and deliver the order on the issue raised by the aggrieved party. So also,

a plain reading of the provision contained in section 36(3)(a)(i) of the Act and the proviso contained thereunder would go to show that in disposing

of the appeal, the Tribunal can either confirm, reduce or annul the assessment or penalty or both. The Tribunal has the jurisdiction to go into the correctness or otherwise of the order passed by the Appellate Assistant Commissioner. When once an appeal was filed by the assessee before the Tribunal, then it is open to the State to file an enhancement petition before the Tribunal. If the assessee has not preferred an appeal before the Appellate Tribunal, then the Joint Commissioner has got revisional jurisdiction u/s 34 of the Act to interfere with the order passed by the Appellate Assistant Commissioner when such an order is erroneous and prejudicial to the interest of the revenue. When the order of the Appellate Assistant Commissioner is challenged before the Tribunal the order of the assessing officer is also challenged since the order passed by the assessing officer has already got merged with the order passed by the Appellate Assistant Commissioner. When the order passed by the Appellate Assistant Commissioner cancelling the penalty remained unchallenged without any remedy before the Tribunal then that would create an anomalous situation which is not intended by the Legislature. It is significant to note that the word "enhance" occurring in section 36(3)(a)(i) would mean also to restore fully or partially as the case may be either the assessment or the penalty. This interpretation is supported by the words occurring within the brackets as stated in section 36(3)(a)(i) of the Act. The views expressed by us in the present decision are also in accordance with the views expressed by this Court in *Bhavani Mills Limited v. State of Tamil Nadu* 1994 94 STC 120 and *M. Chokkalingam v. State of Tamil Nadu* 1994 94 STC 127, referred to supra. In view of the foregoing reasons, we consider that the order passed by the Tribunal in holding that the department is not competent to file the enhancement petition, when the Appellate Assistant Commissioner deleted the penalty in its entirety is not correct. Therefore, we set aside that finding rendered by the Tribunal.

11. In the result, the revision filed by the department is allowed and the issue relating to the levy of penalty raised in the enhancement petition by the department is restored to file of the Appellate Tribunal with a direction to consider and dispose of the same on merits and in accordance with law, after giving opportunity of being heard to both parties concerned. No costs.

12. Petition allowed.