
(1975) 08 MAD CK 0018

In the Madras High Court

Case No : T.C. No's. 452 and 453 of 1970 (Revisions No's. 308 and 309 respectively)

The Deputy Commissioner (C.T.)

APPELLANT

Vs

V.S.R. Ramaswami Chettiar and Bros.

RESPONDENT

Date of Decision : 28-08-1975

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12, 16, 31

Citation : (1976) 38 STC 382

Hon'ble Judges : V. Ramaswami, J;Sethuraman, J

Bench : Division Bench

Advocate : K. Venkataswami, Additional Government Pleader No. I, for the Appellant; S.V. Subramaniam, Amicus curiae, for the Respondent

Final Decision : Dismissed

Judgement

V. Ramaswami, J.—In T.C. (R.) No. 452 of 1970 the question relates to the jurisdiction of the assessing officer to impose penalty u/s 16(2)

of the Tamil Nadu General Sales Tax Act, 1959, by a separate and independent order. The facts leading to this petition may now be noted.

2. The respondent-assesseees are dealers in timber. For the assessment year 1959-60, they were assessed on a taxable turnover of Rs.

3,86,284.27 as against Rs. 3,20,554.36 reported by them. On a surprise inspection of their place of business on 4th August, 1964, certain

records were seized and on verification of these records, the assessing officer considered that the assesseees had suppressed taxable turnover to the

extent of Rs. 1,20,346.92. Proceedings accordingly were initiated u/s 16(1). After giving a reasonable opportunity to the assesseees by a revised

assessment order dated 18th December, 1964, the suppressed turnover of Rs.

1,20,346.92 was brought to assessment. In this assessment order the assessing officer has stated that separate orders will be issued with regard to the levy of penalty. Thereafter, on 27th March, 1965, a notice was issued u/s 16(2) proposing to levy a penalty of Rs. 5,714 on the ground that there was a wilful suppression of taxable turnover to the extent of Rs. 1,20,346.92. The penalty was calculated at 1-1/2 times the tax due on the suppressed turnover.

3. The assessee filed their objections in which they contended that the additions were made on estimates without accepting the explanations offered by them and that there was no suppression of the turnover at all. After considering these objections by an order dated 31st March, 1965, confirming the proposal, the assessing officer levied a penalty of Rs. 5,714 u/s 16(2). The assessee preferred an appeal against this order levying the penalty to the Appellate Assistant Commissioner who, by an order dated 31st October, 1966, confirming the finding of wilful suppression, dismissed the appeal.

4. On a further appeal, the Tribunal held that Section 16(2) does not contemplate an independent order of penalty and that, therefore, the impugned order of penalty was without jurisdiction. In support of this view, the Tribunal relied on the decision of this court in *State of Madras Vs.*

Sri V.P. Ramulu Naidu, . In this revision petition, the learned Government Pleader contended that u/s 16(2) an assessing officer could make either

a consolidated order of reassessment and levy of penalty and if it is necessary he could also make a separate order of penalty after making an

assessment order u/s 16(1). He further contended that the decision in *State of Madras Vs. Sri V.P. Ramulu Naidu*, was rendered with reference to

the provision in Section 12(3), which is not similar to the power of the assessing officer u/s 16(2) and that, therefore, that decision is not applicable.

5. In the decision reported in *State of Madras Vs. Sri V.P. Ramulu Naidu*, , this court, on a consideration of the provisions of Section 12, held that

the penalty contemplated u/s 12(3) depends on and follows a finding as to the incompleteness and incorrectness of the return submitted, and forms

part of the proceedings resulting in best judgment assessment. No independent enquiry was contemplated by that provision for the purpose of levy

of penalty and that, therefore, the order of penalty should also form part and

parcel of the assessment order itself.

6. The learned Government Pleader argued that there are two material differences in the penalty proceedings contemplated under sections 12(3)

and 16(2). Firstly, no separate notice proposing a levy of penalty is provided for u/s 12(3), while Section 16(2) requires that such a notice will

have to be issued to the dealer giving a reasonable opportunity of showing cause against such imposition. Secondly, while Section 16(2)

contemplates a specific finding of wilful non-disclosure by the dealer of assessable turnover by reason of which the turnover has escaped

assessment, Section 12(3) automatically invests a power on the assessing officer with jurisdiction to levy penalty when an assessment is made

under Sub-section (2) of that section. It is true that there is no specific requirement in Section 12(3) that a notice shall be issued to the dealer

before a penalty is levied and an express provision is made requiring such notice to be given u/s 16(2). But, we do not think that an assessing

officer would be entitled to make an order of penalty u/s 12(3) without such a notice to the dealer. Though in terms Section 12(3) had not required

such notice to be given, that provision being penal in nature, in our opinion, the principles of natural justice would require a notice being given to the

dealer before the levy of penalty. Further, the levy of penalty u/s 12(3) is discretionary both with respect to levy and also the quantum of penalty. If

that is so, certainly the dealer should be given notice to show cause as to why an order of penalty should not be made u/s 12(3). Might be, if the

assessing officer is satisfied with the explanation, either he may omit to levy the penalty or impose such reasonable penalty, as he considers just and

necessary in the circumstances of the case. Having regard to these facts, we are of the view that the provision of Section 12(3) definitely

contemplates a notice being issued to the dealer before an order of penalty is made under that provision. But that is not to say that the notice

should be either separate or at any particular time. The notice to show cause against the levy may form part of the pre-assessment notice or could

be issued separately also. Therefore, there is no distinction between sections 16(2) and 12(3) on this question of notice.

7. We are also unable to agree with the learned counsel that the fact that a specific finding is required u/s 16(2) as to the wilful nature of the non-

disclosure makes any distinction. The scheme of Section 16 shows that a reassessment could be made for any reason where any whole or any part of the turnover of business of a dealer has escaped assessment to tax. But if the penalty is to be levied on the ground of escapement of the turnover, a finding is necessary as to the wilful nature of the nondisclosure. Though Section 12(3) does not contemplate a finding being given as to the wilful filing of the incomplete and incorrect return or not submitting a return, it is always open to the dealer to satisfy the assessing authority that he is not filing the return in time or filing of the return incompletely and incorrectly was bona fide and, therefore, the assessing officer should not impose any penalty or should impose only such penalty, as may be considered reasonable. It is true, as contended by the learned counsel for the revenue, that when once the assessing officer makes an assessment to the best of his judgment u/s 12(2), he is entitled to levy the penalty, even if he finds that the dealer was not blameworthy. But the levy of penalty, being discretionary, before he levies the penalty he will have to reject the explanation of the dealer, in which case, undoubtedly, he will have the power to levy the penalty on any figure he chooses. Even in cases where he accepts the explanation, still he may choose to levy the penalty, but the quantum of penalty will have to depend on the facts and the circumstances of each case, of course, subject to the maximum prescribed under that section. But, on the other hand, in cases falling u/s 16(2) unless there is a definite finding as to the wilful non-disclosure of taxable turnover, the assessing officer will have no jurisdiction to impose the penalty. Except for this difference, we do not find any other difference between Section 12(3), as it stood at the relevant period, and Section 16(2). As we have already seen, this court in *State of Madras Vs. Sri V.P. Ramulu Naidu*, held that the levy of penalty should form part of the assessment order itself. Thus, no separate order is also contemplated u/s 16(2). Thiru S.V. Subramaniam, whom we required to argue the case in the absence of the respondent brought to our notice Section 31 relating to the appeal to the Appellate Assistant Commissioner where, while Section 12 is referred to without any reference to the sub-sections in that section, subsections (1) and (2) of section 16 is specifically referred to. It was so mentioned because two separate orders were contemplated u/s 16(1) and (2). On the other hand, only a consolidated order was expected to be made in

Section 12 and, therefore, Section 12 is referred to without any reference to the sub-sections therein. We are unable to accept this argument of the learned counsel also. Section 16 has two more sub-sections [sub-sections (3) and (4)], which do not contemplate making of any orders under that provision; whereas in Section 12, each one of the sub-sections deals with orders and, instead of mentioning each one of the sub-sections, the totality of that section is mentioned in the appeal provision. Further, Section 12 contemplates two different types of orders, one accepting the return u/s 12(1) and another a best judgment assessment u/s 12(2). But Section 31 did not make any specific reference because every one of the orders made u/s 12 is appealable. We are, therefore, unable to hold that separate orders were contemplated u/s 16(2). In fact, it was not even the case of the Government Pleader that only separate orders could be made u/s 16(2), On the other hand, he contended that it was open to the assessing officer either to make a consolidated order or separate orders u/s 16(2). We are, therefore, of the opinion that the Tribunal was right in holding that no separate order of penalty could be made u/s 16(2).

8. Before we part with this case, we must express our grateful thanks to Thiru S.V. Subramaniam for the assistance rendered in the absence of the respondents in this case.

9. For the foregoing reasons, the tax revision petition is dismissed. But there will be no order as to costs.

10. T.C. (R.) No. 453 of 1970 -- The point involved in this case is covered by our decision in T.C. (R.) No. 452 of 1970. For the reasons contained therein, this tax revision petition is dismissed. But there will be no order as to costs.