

(1973) 05 MAD CK 0013

In the Madras High Court

Case No : Tax Case No. 223 of 1969 Revision No. 148 of 1969

The State of Madras

APPELLANT

Vs

Bombay Ammonia Ltd.

RESPONDENT

Date of Decision : 04-05-1973

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12(3), 32

Citation : (1974) 34 STC 364

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

Bench : Division Bench

Advocate : K. Venkataswami, First Assistant Government Pleader, for the Appellant; C. Venkataraman, for the Respondent

Judgement

Ramanujam, J.—The assessees are dealers in refrigerators, spare parts, etc. For the year 1964-65, they reported a total taxable turnover of Rs. 6,41,031.77 to the assessing authority under the Madras General Sales Tax Act, 1959, in their monthly returns. The assessing authority checked the accounts of the assessee and determined the taxable turnover at Rs. 6,74,742.65 on 31st January, 1966, by making an addition of Rs. 33,710.88 to the reported turnover.

2. The assessees did not prefer any appeal against the said order of assessment. However, on 7th January, 1967, the Deputy Commissioner of Commercial Taxes, Madras Division, issued a notice to the assessees proposing to levy a penalty of Rs. 5,056 on the undisclosed turnover of Rs. 33,710.88, u/s 12(3) of the Act in exercise of his suo motu powers of revision u/s 32 of the Act. The assessees filed their objections on 23rd January, 1967, questioning the jurisdiction of the Deputy Commissioner to levy the penalty. In addition, they also pointed out that a turnover of Rs. 6,32,142 out of the turnover determined related to works contracts and that, therefore, if the Deputy Commissioner is inclined to revise the order of assessment, he should set right the illegality in the order of assessment by granting exemption from tax on the said turnover. The Deputy Commissioner, ignoring the objections filed by the assessees, revised the

assessment and ordered the levy of penalty of Rs. 3,371 u/s 12(3) of the Act for non-disclosure of a taxable turnover of Rs. 33,710.88 in their monthly returns. The Deputy Commissioner had refused to revise that portion of the assessment order relating to Rs. 6,32,142 on the ground that the assesseees did not file any appeal in the regular course as contemplated by the provisions of the Act.

3. The assesseees thereafter filed an appeal before the Tribunal questioning the propriety of the order of the Deputy Commissioner refusing to consider their claim for exemption in relation to Rs. 6,32,142 and levying a penalty of Rs. 3,371 for non-disclosure of the taxable turnover of Rs. 33,710.88. The Tribunal set aside the levy of penalty on the ground that though the turnover of Rs. 33,710.88 was not disclosed in the monthly returns filed by the assesseees, the same was disclosed in the accounts and that the assessment having been made on the basis of the book entries and not on the basis of any best judgment, the levy of penalty u/s 12(3) was not justified. The Tribunal also considered the claim for exemption in relation to the said sum of Rs. 6,32,142 and held that a turnover of Rs. 5,99,408 really related to works contracts and, as such, the same should be exempted from taxation. Aggrieved against the order of the Tribunal, the revenue has come up before us.

4. We can straightaway say that the decision of the Tribunal, in so far as it set aside the order levying penalty, cannot be taken exception to. The Tribunal is quite justified in holding that as the assessment was based on the book entries and not on the basis of best judgment, the provisions of Section 12(3) of the Act cannot be invoked. We have to, therefore, uphold that portion of the order of the Tribunal.

5. As regards the decision of the Tribunal relating to the deletion of the turnover of Rs. 5,99,468 from the taxable turnover on the ground that they related to works contracts, it is urged by the learned counsel for the revenue that the Tribunal is not justified in interfering with the discretionary order passed by the Deputy Commissioner u/s 32 and that, on the facts and circumstances of the case, the Tribunal was in error in embarking an original investigation for the first time of the facts for finding out whether the transactions related to works contracts. It is pointed out that the assessment on the said turnover was made on the assesseees' own returns showing it to be a taxable turnover, that the assesseees did not put forward any objections to the assessment on the said turnover either at the stage of the assessment or later after the assessment order was made, that the objection has been taken to the taxability of the said turnover only in reply to the show cause notice issued by the Deputy Commissioner for levy of penalty for non-disclosure of a separate and independent turnover of Rs. 33,710.88 and that the Deputy Commissioner, in the circumstances of this case, was quite justified in exercising his discretion in not considering the new claim for exemption put forward by the assesseees for the first time.

6. The following extract from the assessment order shows the stand taken by the

assesseees at the stage of the assessment:

Admitted taxable turnover at 10 per cent Rs. 6,74,742.65 The dealers have no objections to file. I therefore finally assess the dealers for 1964-65 on a taxable turnover of Rs. 6,74,742.65 taxable at 10 per cent.

Tax due Rs. 67,474.37 Tax paid Rs. 63,204.71 Balance Rs. 4,269.66.

7. The above extract shows that the assesseees offered the above turnover for assessment on their own accord in their monthly returns and paid tax thereon. Even at the stage of the assessment, they admitted the turnover to be taxable. They never put forward a claim that the transactions relating to the said turnover were works contracts and, as such, they are not liable to be taxed under the Act. The assessing authority, therefore, had no occasion to consider the question whether the transactions in question amounted to works contracts. As a matter of fact it was not brought to the notice of the assessing authority at any stage that the transactions were in the nature of works contracts. Even after the assessment, the assesseees did not choose to file an appeal challenging the assessment on the said transactions which are now claimed to be works contracts. It is nearly after an year, while submitting their objections to the show cause notice issued by the Deputy Commissioner proposing to levy a penalty u/s 12(3) of the Act, they came forward with practically a new case that part of the turnover assessed related to works contracts. In fact, in the objections filed, the assesseees prayed that the Deputy Commissioner should desist from levying any penalty for non-disclosure of a portion of the turnover, or 5n the alternative, delete the turnover of Rs. (3,32,142 from assessment as relating to the works contracts. The actual prayer of the assesseees in their objection petition dated 23rd January, 1967, is as follows:

In the circumstances we request that the Deputy Commissioner may either totally drop the proposal to levy penalty or in the alternative, totally cure the illegality of the assessment and render justice.

8. It is in the above circumstances the Deputy Commissioner declined to interfere with the assessment. Such orders of the Deputy Commissioner refusing to interfere with the assessment when the assesseees have not chosen to object to the assessment before the assessing authority or by filing an appeal before the appellate authority had been upheld by this court in W. P. Nos. 2157 to 2159 and 2180 of 1970. This court held that the Deputy Commissioner was right in declining to exercise the discretion in favour of the assessee on the particular facts of that case by observing:

We do not think that there is any error. The Deputy Commissioner was right in his view that the petitioner having not availed himself of the remedy of appeals under the Act in respect of the assessments made on 31st December, 1966, and 10th February, 1969, he could not, notwithstanding his failure, invoke the revisional jurisdiction. We are of the view that to such a case the principle of our decision in C M. P. Nos. 1329 to 1337 of 1969 in W. P. S. R. No. 3592 of 1969 (T.

I. and M. Sales Ltd. v. Joint Commercial Tax Officer, Harbour Division I, Madras) would apply. Apart from that, we are also in agreement with the view of the Deputy Commissioner on merits. The petitions are dismissed.

9. In this case, the Tribunal has chosen to take the view that the Deputy Commissioner should have entertained the new claim put forward by the assesseees that though the transactions were only in the nature of works contracts, they have been wrongly assessed and hence they should be excluded from the taxable turnover, and dealt with the claim on merits.

10. We are of the view that the Deputy Commissioner, in the circumstances of this case, is quite justified in refusing to revise the order of assessment on merits. Admittedly, the turnover in question was offered for assessment, and no plea was put forward that the transactions amounted to works contracts and, as such, not taxable. The assessing authority assessed the turnover on the basis of the returns submitted by them, offering the same to tax. At the stage of assessment no claim for exemption was put forward nor the attention of the assessing authority was invited to the real nature of the transactions. Even after assessment the assesseees did not choose to question the assessment by filing an appeal. A substantial portion of the tax has also been paid along with their monthly returns. Therefore, the assesseees cannot be said to have any grievance in relation to the order of assessment made by the assessing authority, at any time. It is only when the Deputy Commissioner issued a notice proposing to revise the order of assessment and to levy a penalty the assesseees came forward with the plea that the transactions in question were works contracts and, as such, not taxable. The Deputy Commissioner, in those circumstances, felt that the assesseees who have themselves offered the turnover for assessment, paid the tax provisionally along with their monthly returns and who felt satisfied about the order of assessment till the date of receipt of the show cause notice from him cannot be allowed to challenge the assessment on merits and that if they were really aggrieved they could have taken the matter in appeal to the appellate authority then and there. We cannot say that the refusal by the Deputy Commissioner to interfere with the order of assessment in those circumstances in exercise of his discretionary power u/s 32 is vitiated. The Deputy Commissioner has not rejected the assesseees' claim for exemption on the ground that he had no jurisdiction to deal with the matter. He has only refused to exercise his discretion in exercise of his powers u/s 32 in favour of the assesseees because of the peculiar facts in this case, where the assesseees have not challenged the assessment on the said turnover at any stage before. We, therefore, hold that the Tribunal is not justified in holding that the Deputy Commissioner was in error in not exercising his discretion in favour of the assesseees.

11. The learned counsel for the assesseees would contend that the suo motu power u/s 32 of the Act can also be invoked by the assesseees and that when the power under that section is invoked, it is imperative upon the Deputy

Commissioner to exercise his authority in a manner appropriate to the case and that he cannot refuse to exercise his authority merely on the ground that the assesseees have not chosen to file an appeal in relation to the matter brought before him. There cannot be any dispute that the revisional power of the Deputy Commissioner u/s 32 can be invoked also by the assesseees, after the decision of this court in *Raj Brothers Agencies v. Board of Revenue* [1972] 30 S.T.C. 410 and also the decision of the Supreme Court in *Board of Revenue v. Raj Brothers Agencies* [1973] 31 S.T.C. 434. But the question is whether the Deputy Commissioner has exercised his jurisdiction properly in rejecting the claim of the assesseees on the ground that they have not chosen to challenge the assessment in relation to the turnover at any stage before. The learned counsel for the assesseees refers to the following passage from the decision of the Supreme Court in *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, :

If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling the courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right--public or private--of a citizen.

12. The following passage in *K. Sengodan and Co. v. State of Madras* [1967] 20 S.T.C 416 is also relied on:

It is a general rule of law that where a power is vested by a statute in a public authority with a discretion restricted or otherwise, it is meant for exercise and the exercise of the power cannot be refused either capriciously or arbitrarily. The officer can refuse to exercise the power only if the conditions for the exercise are not fulfilled or satisfied.

13. The above passages relied on by the assesseees deal with the well-established principle of law that where a statute invests a public officer with authority to do an act in a specified set. of circumstances, it is imperative upon the officer to exercise his authority and that he cannot, refuse to exercise his authority arbitrarily or capriciously when called upon to exercise the same by a party interested. But the question in this case is whether the Deputy Commissioner has refused to exercise his jurisdiction here as alleged by the assesseees. We are of the view that the Deputy Commissioner has not rejected the assesseees' claim on the ground that he has no jurisdiction to deal with it. He has refused to give the relief to the assesseees on the ground that they have not chosen to question the assessment at any stage before, and that the assessment made was on their own invitation. We cannot say that the order of the Deputy Commissioner in this case amounts to a refusal to exercise the jurisdiction vested in him u/s 32.

14. In the result, we set aside the order of the Tribunal so far as it relates to the deletion of the turnover of Rs. 5,99,488. The tax case is, therefore, partly

allowed. There will, however, be no order as to costs.