

**(1973) 07 MAD CK 0011**

**In the Madras High Court**

**Case No :** T.C. No's. 123 to 127 of 1969 and Revision No's. 87 to 91 of 1969

The State of Madras

APPELLANT

Vs

Spencer and Company Limited

RESPONDENT

**Date of Decision :** 10-07-1973

**Acts Referred:**

Tamil Nadu General Sales Tax Act, 1959 — Section 36

**Citation :** (1974) 34 STC 249

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

**Bench :** Division Bench

**Advocate :** K. Venkataswami, First Assistant Government Pleader Tax, for the Appellant; K. Srinivasan and K.C. Rajappa, for the Respondent

## Judgement

V. Ramaswami, J.—M/s. Spencer and Company Limited, the respondents herein, are running two catering establishments, namely,

Connemara Hotel at Madras and Savoy Hotel at Ootacamund, in addition to the business as general merchants, tea estate owners, manufacturers

of aerated water, drugs, etc. For the assessment years 1958-59, 1980-61, 1961-62, 1962-63 and 1963-64 the assessee-respondents submitted

the returns under the Madras General Sales Tax Act, 1939, and the Tamil Nadu General Sales Tax Act, 1959. In respect of the turnover relating

to the two hotels they had adopted 50 per cent of the total receipts under apartment and board as representing sales of articles of food and drinks

and returned the following amounts as taxable turnovers in respect of each of the years treating the same as sale value of food and drinks:

2. In calculating the 50 per cent of the receipts under apartment and board as representing sales of articles of food and drinks, the assessees had

deducted a sum of Rs. 1,43,840 for the year 1958-59, Rs. 1,67,624 for the year

1960-61, Rs. 2,22,061 for 1961-62, Rs. 76,934 for 1962-63

and Rs. 15,390.50 for 1963-64 from the total receipts of apartment and board as relating to charges for air-conditioning and telephone facilities

provided in the rooms.

3. From the assessment year 1949-50 onwards 50 per cent of the apartment and boarding charges was taken as the taxable turnover representing

sale of food and drinks and the assessees were assessed accordingly up to 1957-58. The assessees while adopting 50 per cent of the receipts

from apartment and boarding charges as the taxable turnover, sought to deduct the above-said amounts as representing the charges for air-

conditioning and telephones installed sometime in 1956-57. The assessees claimed relief in respect of this item on the ground that while a single

room was charged at Rs. 30, an air-conditioned single room was charged at Rs. 37.50. Similarly, an air-conditioned double room was charged at

Rs. 70, while a non-air-conditioned room was charged only Rs. 52.50 and the difference in these rates represented the charges for air-conditioning

and telephones and that, therefore, they had to be deducted in arriving at the 50 per cent of the value of the taxable turnover as representing the

value of articles of food and drinks. This contention was not accepted by the assessing authority and the 50 per cent of the total receipts from

apartment and board was determined as the taxable turnover.

4. The assessees preferred appeals to the Appellate Assistant Commissioner for all these years, in respect of the disallowance of their claim

relating to air-conditioning and telephone charges alone. The Appellate Assistant Commissioner held that though the assessees were charging

enhanced rate for rooms with air-conditioning and telephone facilities, they had not shown any break-up figures in the bills for these facilities but

had made a consolidated charge. For these and other reasons, the Appellate Assistant Commissioner held that the disallowance of their claim for

air-conditioning and telephone facilities was in order. The assessees preferred further appeals to the Sales Tax Appellate Tribunal.

5. Before the Tribunal, the assessees not only claimed exemption for air-conditioning and telephone charges but submitted that the entire turnover

relating to apartment and board is not liable to tax and that, therefore, the 50 per cent of the consolidated apartment and board charges which was

returned as representing the sale value of food and drinks was also not liable to be taxed. In support of this contention, the assesseees relied on the

decision of the Punjab High Court in *State of Punjab v. Associated Hotels of India Ltd.* [1967] 20 S.T.C. 1 Following that decision, the Tribunal

upheld the claim of the assesseees and directed the deletion of the entire turnover relating to receipts from apartment and board. The State has

preferred these revisions against that order of the Tribunal.

6. The decision of the Punjab High Court relied on by the Tribunal has now been confirmed by the Supreme Court in *State of H.P. v. Associated*

*Hotels of India Ltd.* [1972] 29 S.T.C. 474 In that case, the assessee-company which carried on business as hoteliers, as part of its business,

received guests in its several hotels and charged an all inclusive rate for each day. The bill given to the guests did not contain different items in

respect of each of the amenities. The question for consideration was whether the company was liable to pay sales tax under the Punjab General

Sales Tax Act, 1948, in respect of the meals served in the hotel to the guests coming there for stay. Confirming the decision of the Punjab High

Court in *State of Punjab v. Associated Hotels of India Ltd.* [1967] 20 S.T.C. 1, the Supreme Court held that the transaction was essentially one

and indivisible and that it was one of service by the hotelier in the performance of which and as part of the amenities incidental to the service, the

hotelier served meals at stated hours. It was not open to the revenue to split up the transaction into two parts-- one of service and the other of sale

of food-stuffs--and to split up also the bill charged by the hoteliers as consisting of charges for lodging and charges for food-stuffs served to him.

There was no sale of food-stuffs and, therefore, the assessee-company was not liable to pay sales tax in respect of meals served to guests in its

hotel. This decision is applicable on all fours to the facts of the present case on merits.

7. The learned Assistant Government Pleader therefore could not challenge the decision of the Tribunal in this regard. But he submitted that the

Tribunal acted without jurisdiction in giving relief to this turnover which was not disputed before the Appellate Assistant Commissioner. As already

stated, the assesseees themselves opted to be assessed at 50 per cent of the consolidated receipts for apartment and board and submitted a return

on that basis to the assessing authority. Before the assessing authority the assessee disputed only that portion of the turnover which, according to them, related to the telephone and air-conditioning charges. This claim was rejected by the assessing authority. The appeal filed by the assessee to the Appellate Assistant Commissioner also related only to this claim of exemption for air-conditioning and telephone charges and the other turnover of 50 per cent of the board and apartment charges was not the subject-matter of appeal before that authority.

8. The learned Government Pleader therefore submitted that the Tribunal should not have entertained or allowed the turnover which was not in dispute before the Appellate Assistant Commissioner. We are of the view that the learned Counsel for the State is well-founded in his contention.

9. We had occasion to consider this question in T.C. Nos. 161 and 173 of 1988 (Richardson & Cruddas Ltd. v. State of Madras). In that case, the assessee was assessed on the taxable turnovers of Rs. 32,42,239-4-11 and Rs. 43,60,928.91 for the assessment years 1956-57 and 1957-

58 respectively. There was an appeal in respect of a portion of these turnovers on the ground that it represented either works contract or labour

contract. The Appellate Assistant Commissioner gave relief to a certain extent. The assessee took the matter in appeal to the Tribunal. Before the

Tribunal the assessee filed petitions seeking to raise additional grounds and by these grounds they challenged the liability to tax of certain items of

turnover which were not in dispute either before the assessing authority or before the appellate authority. The Tribunal held that since the liability of

the turnover raised in the additional grounds not having been agitated either before the assessing authority or before the appellate authority, it was

not possible for the Tribunal to go into the taxability or otherwise of the said turnover. Confirming this decision, this Court held:

Section 36 (Tamil Nadu General Sales Tax Act, 1959) opens with the words "any person objecting to an order passed by the Appellate Assistant

Commissioner". If a particular turnover was not brought before the Appellate Assistant Commissioner by way of an appeal by the assessee, he

cannot be said to have been aggrieved by the Appellate Assistant Commissioner not considering that item in his order. Therefore, the test for

finding out the powers of the Tribunal is to correlate the subject-matter of the appeal before the Tribunal to that of the Appellate Assistant

Commissioner.

10. Support for this view was also invoked, from the decisions in *Easun Engineering Co. Ltd. v. joint Commercial Tax Officer* [1970] 26 S.T.C.

486, *Central Camera Co. (P.) Ltd. v. Government of Madras* [1971] 27 S.T.C. 112 and *Panchura Estates Ltd. v. Government of Madras T. C.*

Nos. 86 and 87 of 1967, apart from other decisions.

11. In the present case also, the assessee did not dispute the taxability of 50 per cent of the receipts under apartment and board as representing

sales of articles of food and drinks either before the assessing authority or before the first appellate authority. In fact, they voluntarily included in the

taxable turnover 50 per cent of the total receipts as representing sales of articles of food and drinks. The only dispute before the assessing authority

and the Appellate Assistant Commissioner was relating to the claim towards air-conditioning and telephone charges which were also stated to have

been included in the bill charged to the guests. They having not agitated or questioned the inclusion of 50 per cent of the turnover as representing

sales of food and drinks, they cannot now state that either the assessing authority or the appellate authority had failed to consider any question

much less wrongly decided the taxability of that turnover. In this connection, it is also useful to refer to the decision in *Central Camera Co. (P.) Ltd.*

*v. Government of Madras* [1971] 27 S.T.C. 112. In that case, on appeal before the Appellate Assistant Commissioner, the assessee gave up his

claim for a concessional rate of tax on a portion of the turnover relating to inter-State sales, which called for C forms, and restricted his claim in

respect of the turnover relating to inter-State sales covered by D forms. The Appellate Assistant Commissioner noted this concession in his order

and considered the argument relating to the turnover which are to be covered by D forms. The concession appeared to have been made on the

view of the High Court then prevailing relating to concessional rate of tax. The assessee preferred a further appeal to the Tribunal. In that appeal,

taking advantage of a decision of this Court, which was rendered subsequent to the decision of the Appellate Assistant Commissioner, the

assessee claimed concessional rate of tax in respect, of a turnover, the liability to tax of which he conceded before the Appellate Assistant

Commissioner. The Tribunal refused to go into that question which was conceded

by the assessee before the Appellate Assistant Commissioner

and restricted the discussion to the other disputed turnover. The assessee filed a petition in this Court challenging the Tribunal's order. A Division

Bench of this Court to which one of us was a party held:

When an assessee voluntarily gives up a portion of his claim before the hierarchy of tribunals constituted under the enactment for the adjudication

of rights as between the assessee and the State, then it creates, as it were, an estoppel, which is far superior to the estoppel that is ordinarily

created in a civil dispute. An assessee in a taxing statute is fully aware, or, at any rate, is conscious of the burden which is likely to be imposed on

him by reason of the pending proceedings and if, in such a context, he gives up a quantum of the turnover for reasons known to him, then he cannot

take advantage of the supervening judicial precedents which might favour him and urge that the still higher hierarchy should hear him on the

question whether the turnover voluntarily given up by him also can at all be brought into the net of taxation. One cannot approbate and reprobate is

a well-established principle. Here is a case where an assessee was not prompted by any one excepting himself to give up a portion of the disputed

turnover before the appellate authority. In those circumstances we are unable to agree with the contention of the learned Counsel for the assessee

that Section 36 of the Madras General Sales Tax Act, 1959, could be of any assistance to him.

12. The present case is an a fortiori case. In the decision in Central Camera Co. (P.) Ltd. v. Government of Madras [1971] 27 S.T.C. 112, the

turnover was disputed in the appeal grounds. But at the time of argument the claim was given up. But, in the present case, no claim was made even

in the grounds of appeal before the Appellate Assistant Commissioner. In fact, as already stated, it was not disputed either before the assessing

authority or before the Appellate Assistant Commissioner. Clearly, therefore, the Tribunal acted without jurisdiction in permitting the assessee to

raise that question for the first time which they did not raise before the assessing or appellate authority.

13. It was then contended by the learned Counsel for the assessee that, with reference to the assessment years 1958-59 and 1963-64, the

assessee raised the question of assessability of the entire turnover even before

the Appellate Assistant Commissioner. The appeals relating to these assessment years were heard separately on different dates by the Appellate Assistant Commissioner. Though the appeals in these cases were restricted, as already stated, to the exemption claimed in respect of the charges for air-conditioning and telephones, it appears, as seen from the order of the Appellate Commissioner that at the time of arguments the representative of the assessee brought to the notice of the Appellate Assistant Commissioner the decision of the single Judge of the High Court of Punjab in *Associated Hotels of India Ltd. v. The Excise and Taxation Officer, Simla* [1966] 17 S.T.C. 555. With reference to this decision the Appellate Assistant Commissioner stated in his order that:

Incidentally they have referred to a judgment, dated 14th January, 1966, of the Delhi High Court in *Associated Hotels of India Limited v. The Excise and Taxation Officer, Simla* [1966] 17 S.T.C. 555, where it is held that such entire receipts can be taken only as service charges. But this is with reference to the conditions and provisions of the Act obtaining in Simla and this cannot be applied to this State.

14. We are unable to see how the assessee would have raised that question in the fashion in which they have made in these two assessment years.

Neither the memorandum of appeal before the Appellate Assistant Commissioner included the turnover relating to food and drinks nor any amendment of the grounds either by addition or otherwise was sought for or granted. We are, therefore, of the view that the turnover relating to food and drinks was not properly before the Appellate Assistant Commissioner and, therefore, he could not have considered or decided that issue.

15. A similar question came up for consideration before this Court in *Easun Engineering Co. Ltd. v. Joint Commercial Tax Officer* [1970] 26

S.T.C. 486, to which one of us was a party. In that case the assessee who did not raise any ground in respect of a particular turnover before the

appellate authority raised that point and argued the same claiming relief at the time of hearing of the appeal. But the Appellate Assistant

Commissioner did not consider that question and the order was silent regarding the same. The assessee filed an appeal to the Tribunal. In that

appeal also the assessee did not raise the particular point which he argued before the Appellate Assistant Commissioner, but restricted the appeal

grounds to the subject-matter which was agitated before the appellate authority. Some time later, relying on the decision of this Court in *Larson*

and *Toubro Ltd. v. Joint Commercial Tax Officer* [1967] 20 S.T.C. 150, the assessee sought to raise additional grounds and filed a petition before

the Tribunal for reception of the additional grounds. The Tribunal allowed the petition to amend the grounds of appeal, but refused to consider the

same on the ground that it was not the subject-matter of appeal before the Appellate Assistant Commissioner. It was contended before this Court

that since he was permitted to argue before the Appellate Assistant Commissioner, though he did not raise any specific ground relating to the

particular turnover, the subject-matter of appeal before the Appellate Assistant Commissioner should also be deemed to have been included with

the disputed turnover. Rejecting this argument, this Court held:

A mere argument by a counsel at or about the time when an appeal is taken up for hearing before the Appellate Assistant Commissioner but which

argument does not have any bearing upon the subject-matter of the appeal, cannot be said to have been dealt with by the Appellate Assistant

Commissioner or not dealt with by him. Such arguments might have been addressed for reasons known to the petitioner, but in so far as they have

no impact upon the controversy raised in the appeal, they should be deemed to be non est in the eye of law. Any further appeal on the ground that

the appellate authority did not advert itself to such contentions, which could not be raised in the further appeal is, therefore, not maintainable.

16. This Court also held that, merely by reason of the Tribunal allowing the application to amend the grounds of appeal, the scope of jurisdiction of

the Tribunal could not be enlarged.

17. It is true that, in the present case, the Appellate Assistant Commissioner noted the argument of the assessee in his order, but that does not

affect the applicability of the ratio of the decision in *Easun Engineering Co. Ltd. v. Joint Commercial Tax Officer* [1970] 26 S.T.C. 486. The

Appellate Assistant Commissioner is a creature of the statute and he has no inherent powers apart from those that are specifically conferred on him

under the Act or the Rules framed thereunder. He could not have considered any matter which was not properly brought before him for

consideration. Any casual reference to the development of the law and the

liability to tax of a particular turnover in the order of the Appellate

Assistant Commissioner could not be construed as bringing within his jurisdiction any turnover which was not specifically included in the grounds of

appeal. We are, therefore, unable to accept the argument of the learned Counsel for the assesseees that, at least in respect of the assessment years

1958-59 and 1963-64, the Tribunal was within its jurisdiction in giving relief to the assesseees in respect of the turnover relating to food and drinks.

18. The Supreme Court in *State of H.P. v. Associated Hotels of India Ltd.* [1972] 29 S.T.C. 474, above referred to, had held that the entire

receipts under apartment and board are not liable to sales tax. The assesseees in the present case deducted specified amounts from the total

receipts as representing charges for air-conditioning and telephones and showed 50 per cent of the remaining as the taxable turnover. The

assesseees had been agitating for this position before the assessing as well as the first appellate authorities. Therefore, the turnover which was not in

dispute before the assessing and the appellate authorities was only that 50 per cent of the remainder after deducting the charges for air-conditioning

and telephones. Since the Tribunal was allowing the entire turnover as exempt from tax, no distinction has been made relating to the charges for

air-conditioning and telephones and the amounts mentioned in the order showed 50 per cent of the total amount as amounts not liable to be

included. Since we have held that the assesseees were not entitled to dispute before the Tribunal any turnover which was not disputed by them

before the assessing or the appellate authority and it is only on that ground we hold that the turnovers which were not disputed are liable to be

assessed, the turnover relating to air-conditioning and telephones is liable to be excluded from the taxable turnover. We accordingly modify the

order of the Tribunal and restrict the relief to be given to the assesseees only in respect of air-conditioning and telephone charges. In other words,

the taxable turnover returned by the assesseees is liable to tax and not liable to be deducted.

19. It is also necessary to point out that, in respect of the assessment year 1958-59, the assesseees were originally assessed at 2½ per cent on the

taxable turnover returned by them. It has been held in a number of cases that the rate of 2½ per cent in respect of sales of food and drinks in a

hotel was discriminatory and only 2 per cent is leviable as tax. Therefore, the taxable turnover returned by the respondent-assessee is liable to tax

only at 2 per cent and not 2½ per cent. The Tribunal had adverted to this fact also. The State also had not disputed this finding of the Tribunal in

the grounds of appeal. We, therefore, hold that the turnover relating to apartment and board is liable to be taxed only at 2 per cent. The petitions

are allowed to the extent noted above. But there will be no order as to costs.