
(1976) 03 MAD CK 0016

In the Madras High Court

Case No : Tax Case No"s. 258 and 259 of 1971

The State of Tamil Nadu

APPELLANT

Vs

India Pistons Limited

RESPONDENT

Date of Decision : 09-03-1976

Acts Referred:

Madras General Sales Tax Act, 1939 — Section 2(d)

Citation : (1978) 42 STC 134

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

Bench : Division Bench

Advocate : K. Govindarajan for Additional Government Pleader No. 1, for the Appellant; S.V. Subramaniam, for Subbaraya Aiyar and Padmanabhan, for the Respondent

Final Decision : Allowed

Judgement

V.Ramaswami, J.—These two tax revision cases relate to the assessment years 1965-66 and 1966-67. The assessing authority rejected the

claim of the assessee in respect of two items of turnover which alone need be mentioned here. One item was the turnover relating to sales of iron

scraps. The turnover in respect of this item for 1965-66 was Rs. 4,91,332.83 and for 1966-67 it was Rs. 6,80,138.20. The second claim related

to the includibility in the taxable turnover of certain amount representing sales return and bonus discount granted to the customers. In respect of

these two claims,` the assessee preferred appeals to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner held that the

assessee is a manufacturer and seller of automobile ancillary parts, industrial engine parts, tractor and agricultural parts and electrical components

of engines and the assessee was not a dealer in iron scraps. The sale of iron

scraps was also not in the course of their business and that, therefore, the turnover representing the sales of iron scraps had to be excluded from the taxable turnover. But the Appellate Assistant Commissioner rejected the claim relating to the turnovers representing sales returns and bonus discount granted to the customers. The assessee preferred two appeals to the Tribunal against the order of the Appellate Assistant Commissioner in so far as it rejected the turnover relating to sales returns and special bonus discount. The department filed an enhancement petition praying the Tribunal to bring to tax the turnover representing iron scraps which were wrongly excluded by the Appellate Assistant Commissioner.

2. The Tribunal confirmed the order of the Appellate Assistant Commissioner and dismissed both the appeal and the enhancement petition. The

State has filed these revision petitions so far as it related to the enhancement petition. In view of the decision of the Supreme Court in *State of*

Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another, the order of the Tribunal rejecting the enhancement

petition on the ground that the assessee was not a dealer in iron scraps, cannot be upheld. The assessee, though not a dealer in iron scraps, is

therefore liable to pay sales tax on the said turnover in view of the amended definition of the word "business" in Section 2(d) of the Madras

General Sales Tax Act (1 of 1959).

3. But it was contended by the learned counsel for the assessee that if the department was aggrieved by the order of the Appellate Assistant

Commissioner excluding the turnover relating to scrap, it ought to have filed an appeal as provided u/s 36 and could not have filed an application

for enhancement and that, therefore, no relief could be granted to the State in these revision petitions.

4. The question for consideration, therefore, is whether there was any right of appeal to the State against the order of the Appellate Assistant

Commissioner u/s 36 of the Madras General Sales Tax Act, 1959, hereinafter referred to as the Act.

5. The learned counsel for the assessee argued that "any person" objecting to an order passed by the Appellate Assistant Commissioner can file an

appeal within the period prescribed against such order to the Appellate Tribunal and the words "any person" are wide enough to comprehend

within it even the assessing authorities preferring appeals. In support of his argument, he also referred to Section 36(6) and Rule 29 and the form

prescribed for preferring appeals to the Tribunal. Under Clause (6) of Section 36 the appellant or the respondent may apply for review. According

to the learned counsel, if an appeal by the State is not provided in Section 36, the wording in Clause (6) should be the appellant or the State

instead of the words "the appellant" or "the respondent". Rule 29 relating to appeal to the Tribunal did not also specifically exclude the State and

merely stated that the appeal should be in form No. 3 and shall be verified in the manner specified therein. Form No. 3 is the form prescribed for

memorandum of appeal to the Appellate Tribunal. He referred to Clause 7, where it required the address to which notices may be sent to the

respondent. According to the learned counsel, this column is general in nature and if really the State could not file an appeal u/s 36, column 7

relating to address to which the notices may be sent to the respondent should refer to the address of the State Representative to whom notice is to

be issued. In addition to these provisions, the learned counsel also relied on an observation of the Supreme Court in *State of Madras Vs. Lateef*

Hamid and Co., . Before we consider these arguments and the decision, it is necessary for us to refer to the scheme of the Act relating to

assessments and appeals therefrom. Assessing authority is defined in Section 2(c) as any person authorised by the Government or by any authority

empowered by them to make any assessment under this Act. Appellate Assistant Commissioner and Appellate Tribunal are defined in Sections

2(a) and 2(b) as meaning the person appointed as an Appellate Assistant Commissioner u/s 28 and the Tribunal appointed u/s 30 respectively. The

assessment order is made u/s 12. If the assessment order is on the basis of the return submitted, the assessment order is made u/s 12(1). If no

return is submitted or if the return submitted was considered by the assessing authority as incomplete or incorrect, a best judgment assessment is

provided u/s 12(2). In cases falling under Clause (2) of Section 12, the assessing authority also has jurisdiction to levy penalty u/s 12(3). Where a

turnover of a dealer has escaped assessment, assessment of such escaped turnover is provided u/s 16(1) of the Act with a power to levy penalty in

such cases u/s 16(2). An assessee who was assessed on best judgment basis may also apply to the assessing authority for reassessment u/s 14 of

the Act, if he complied with the provisions of that section. Section 15 provides for assessment on the legal representative of a dealer. These are the normal provisions of assessment. Against every one of these orders, an appeal is provided u/s 31 to the Appellate Assistant Commissioner at the instance of any person objecting to such an order. There is a further right of appeal u/s 36 to the Tribunal against the order of the Appellate Assistant Commissioner. These appeal provisions enable the assessee to file appeals. So far as the State is concerned, if an appeal had been preferred to the Appellate Assistant Commissioner, the Appellate Assistant Commissioner by virtue of his powers under Sub-section (3) of Section 31 could enhance the assessment. When an appeal is preferred to the Tribunal, the Tribunal also could enhance the assessment under Clause (3) of Section 36. But the basic requirement in both these cases for enhancement is the filing of an appeal by the assessee u/s 31 or u/s 36, as the case may be. In cases where no appeal has been preferred, the Deputy Commissioner u/s 32 could call for and examine the order passed by the assessing authority and pass such orders thereon as he thinks fit. This order of the Deputy Commissioner is again subject to revision by the Board of Revenue. The order of the Appellate Assistant Commissioner made u/s 31(3) also could be revised by the Board of Revenue u/s 34 if no appeal had been preferred to the Appellate Tribunal or a revision in the High Court. Against the order of the Board of Revenue u/s 34 revising an order of the Appellate Assistant Commissioner made u/s 31(3), an appeal is provided to this court u/s 37. Thus while giving a right of appeal to the assessee against the order of assessment to the Appellate Assistant Commissioner and from the Appellate Assistant Commissioner to the Tribunal, in cases where no appeal has been preferred, the revenue is given a right of revision under Sections 32 and 34. But if the assessment order becomes the subject-matter of consideration by the Tribunal, thereafter the revenue has no right to revise the order except to ask for a review of the Tribunal's order or to take it in revision to the High Court.

6. Though Sections 11 and 12A of the Madras General Sales Tax Act, 1939, provided for appeals ""by an assessee"", Sections 31 and 36 refer to an appeal by ""any person"" objecting to the order. That is because the appeal provided u/s 31 is not only against the assessment orders under

Sections 12, 14, 15 and 16(1) and (2) but also against orders under Sections 22(2), 23, 27 and 42. As may be seen from those sections, they relate to levy of penalties on persons who are not assessee. Section 22(2) enables the authorities to levy penalty on any person who is not a registered dealer if he collects any amount by way of tax. Section 23 makes the person purchasing the goods to give a declaration that it was intended for use by him as component part of any other goods mentioned in the First Schedule. If he fails to make use of the same for the declared purpose, he is liable for the levy of penalty. Section 27 provided for the recovery of any amount due from an assessee where the business of the dealer is transferred. Similarly, certain penalties are provided for the contravention of the provisions u/s 42. All these orders which are made on persons who are not assessee could also be made the subject-matter of an appeal u/s 31 and a further appeal u/s 36 and it is because of this reason that the legislature had used the words "any person" in both the Sections in contrast to the words "any assessee" in Sections 11 and 12A of the Madras General Sales Tax Act, 1939. Further, if really Section 36 provides for an appeal at the instance of the revenue, we are unable to understand the significance of the power conferred on the Tribunal to enhance the assessment. We consider that the power of enhancement provided under Sub-section (3) of Section 36 is inconsistent with a right of appeal in favour of the revenue. It is true that the words "appellant" or the "respondent" are used in Clause (6) of Section 36 relating to review. But that, in our opinion, could not be interpreted as to mean that the revenue could be an appellant u/s 36. Rule 29(2) and form IV make it clear that the State also could file a petition for review. We may also point out that both Section 36(5) and Rule 29(c) require the undisputed tax to be paid in accordance with the order of assessment. This points only to the situation that the assessee or any other person and not the State that is contemplated within the words "any person". The proviso to Section 36(3) is also significant. That states that at the hearing of the appeal against the order of an Appellate Assistant Commissioner, the assessing authority shall have the right to be heard either in person or by a representative. If really an appeal was contemplated by the assessing authority or the State, the proviso to Section 36(3) is redundant as, under Regulation 11A, the appellant shall ordinarily be heard in respect of his appeal. It

may also be mentioned when it came to a question of filing a revision petition to this court, Section 38 specifically authorised the Deputy

Commissioner to prefer a revision against the order of the Tribunal on any question of law. On a plain reading of the provisions, therefore, there is

no warrant for holding that Section 36 enables also the State to file an appeal against the order of the Appellate Assistant Commissioner. It now

remains to consider the decision of the Supreme Court in *State of Madras Vs. Lateef Hamid and Co.*, which was referred to by the learned

counsel for the assessee. The question for consideration in that decision was whether the Appellate Assistant Commissioner was competent to

enhance the assessment of an assessee in a case where the assessment related to 1958-59, the liability in respect of which was under the Madras

General Sales Tax Act, 1939. But the order of assessment and the appeal to the Appellate Assistant Commissioner were made subsequent to the

passing of the Tamil Nadu General Sales Tax Act, 1959. The Supreme Court held that under the old Act, the Commercial Tax Officer had both

the powers of the appellate authority as well as the special powers of suo motu revision. By the exercise of these two powers, he could have

confirmed, altered, amended or enhanced the assessment made. The power conferred on the Appellate Assistant Commissioner under the 1959

Act was wider than that of the Commercial Tax Officer under the 1939 Act and that, therefore, the 1959 Act does not adversely affect in any

manner the right of appeal of an assessee under the 1939 Act. The Supreme Court further held that so long as the new procedure laid down in the

1959 Act did not interfere with any of the vested rights of an assessee, he had no right to claim that his case must be dealt with under the

provisions of the repealed Act, as no one can have a vested right in a mere procedure. The Supreme Court, therefore, upheld the powers of the

Appellate Assistant Commissioner in enhancing the assessment of the assessee. While so holding, the Supreme Court proceeded to consider two

decisions of the High Court reported in *Deputy Commissioner of Commercial Taxes, Madras Division v. Sri Swami & Co.* [1962] 13 S.T.C. 468

and *Deputy Commissioner of Commercial Taxes, Madras Division v. M. Balasundaram and Co.* [1963] 14 S.T.C. 996. So far as Deputy

Commissioner of Commercial Taxes, Madras Division v. M. Bala-sundaram and Co. [1963] 14 S.T.C. 996 is concerned, the Supreme Court

held that it was wrongly decided. But so far as Deputy Commissioner of Commercial Taxes, Madras Division v. Sri Swami & Co [1962] 13

S.T.C. 468 is concerned, though the Supreme Court approved the ultimate decision of this court, it found that some of the observations of this

court were not correct. The decision in Deputy Commissioner of Commercial Taxes, Madras Division v. Sri Swami & Co. [1962] 13 S.T.C. 468

was that even in respect of a case arising under the old Act when the matter is dealt with by the Tribunal under the new Act, it can entertain an

application for enhancement at the instance of the revenue. This view was upheld by the Supreme Court. But, while making a distinction in respect

of certain observations in the decision in Deputy Commissioner of Commercial Taxes, Madras Division v. Sri Swami & Co. [1962] 13 S.T.C.

468, the Supreme Court observed "it may be noted that under the 1939 Act, only an assessee could have the right to appeal to the Tribunal

against the order of the Appellate Assistant Commissioner. But under the 1959 Act both the assessee as well as the Deputy Commissioner can

appeal against his order". This observation was made in passing and their Lordships were not called upon to decide whether the Deputy

Commissioner had any right to appeal u/s 36 of the 1959 Act. We are unable to hold that this decision is in any way an authority for the position

that an appeal is also provided to the State u/s 36. We have no doubt that u/s 36 only an assessee or such of those persons who are referred to in

Sections 22(2), 23, 27 and 42 alone can prefer an appeal and not the State. The petition for enhancement filed by the revenue was therefore

maintainable, since we have held that on the merits the enhancement ought to have been allowed in view of the decision of the Supreme Court in

State of Tamil Nadu v. Burmah Shell Co. Ltd. [1962] 31 S.T.C. 426 (S.C.). The order of the Tribunal, in so far as it dismissed the enhancement

petition, is liable to be set aside. We, accordingly, allow the revision petitions, set aside the order of the Tribunal and direct the inclusion of the

turnover relating to iron scrap also in the taxable turnover. The petitioners will be entitled to costs. Counsels' fee Rs. 150 in each.