
(1983) 11 MAD CK 0039

In the Madras High Court

Case No : T.C. No. 1449 of 1980 and W.P. No's. 11618 to 11621 of 1981

The State of Tamil Nadu

APPELLANT

Vs

Jaya Pharmacy

RESPONDENT

Date of Decision : 30-11-1983

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 22(1), 22(2)

Citation : (1984) 57 STC 164

Hon'ble Judges : Ratnam, J;G. Ramanujam, J

Bench : Division Bench

Advocate : K.S. Bakthavatsalam, Additional Government Pleader and C. Venkataraman, for the Appellant;

Judgement

Ramanujam, J.—Since all the matters are interconnected, they are dealt with together. One Jaya Pharmacy, Dindigul, the assessee in this case are dealers in arishtams. They have been collecting sales tax on their sales of arishtams at 30 per cent from 4th March, 1974, treating the arishtams sold by them as coming under item 135 of the First Schedule to the Tamil Nadu General Sales Tax Act, 1959. The sales tax collections made at 30 per cent were paid over to the State. In the assessment made against the assessee by the assessing authority, 30 per cent tax collected by the assessee was taken to be the rate of tax and the assessment was completed on that basis. However, from 30th September, 1977, the assessee collected tax at 8 per cent on the sale of arishtam treating the arishtam sold by them as drugs, which is taxable at 8 per cent under the provisions of the Act. Later, in the assessee's own case, the Tribunal in T.A. No. 382 of 1978, held that the articles sold as arishtam by the assessee are not arishtams prepared in accordance with the ayurvedic formula, and therefore, the articles should be treated as cheap intoxicant, and therefore, it should be taxed only at 4 per cent multi-point. This decision was rendered by the Tribunal on 31st July, 1978. Then onwards the assessee has been collecting tax on the sale of arishtam only at 4 per cent. The amounts collected at 30 per cent and at 8 per cent have, in fact, been remitted to the State by the assessee. Subsequently,

after the decision of the Tribunal, the assessee claimed refund of the tax paid by them in excess of 4 per cent which has been found to be the correct rate of tax payable on the assessee's goods under the provisions of the Act. The Commercial Tax Officers have withheld the refund of the excess tax on the ground that they proposed to levy penalty u/s 22(2) of the Act for contravention of section 22(1) of the Act, and therefore, there is no question of any refund of any portion of the tax paid by the assessee. Subsequently, the dealers have been levied penalty u/s 22(2) for violation of section 22(1) in a sum of Rs. 2,12,832 being 1 1/2 times the excess collection made by the assessee, by an order dated 3rd March, 1979. The said order of the assessing authority levying penalty u/s 22(2) was taken in appeal by the assessee to the Appellate Assistant Commissioner, who, while holding that the goods warrant levy of penalty, reduced the tax from Rs. 2,12,832 to Rs. 1,41,866. Not satisfied with the relief granted by the Appellate Assistant Commissioner, the assessee went before the Tribunal. The Tribunal has deleted the penalty levied on the assessee by the Appellate Assistant Commissioner. Aggrieved against the order of the Tribunal, the State has come before us by way of this revision petition.

2. According to the Revenue, the order of the Tribunal in holding that there was no mens rea or guilty mind when the assessee collected the excess tax as the excess collection was made under a bona fide mistake, the levy of penalty u/s 22(2) of the Act cannot legally be sustained has to be set aside. The learned counsel for the Revenue referred to certain decisions of this Court and of the Supreme Court in support of his submission that the question of mens rea or guilty mind is irrelevant for the application of section 22(2) of the Act, that the said section can be invoked even if the tax has been collected in excess under a bona fide mistake and that in this case, since the assessee has in fact collected excess tax, not authorised by the Act, he is clearly liable for the levy of penalty u/s 22(2). We are of the view that in this case it is unnecessary to go into the question as to whether the presence of mens rea is a condition precedent for invoking the power u/s 22(2). For, we are of the view that on the said facts of this case, the assessee cannot be taken to be guilty of collecting the excess tax.

3. As already stated, the assessee under the bona fide belief that the arishtam sold by him comes under item 135 of the First Schedule, collected sales tax at 30 per cent, practically for about a period of three years, i.e., from 4th March, 1974, to 30th September, 1977, and paid over the collection to the State. In all the three years, the assessing authority has assessed the turnover at 30 per cent, accepting the stand taken by the assessee. Thus for those years the assessee as well as the assessing authority proceeded on the basis that the arishtam sold by the assessee came under item 135 of the First Schedule, and therefore, it is taxable at 30 per cent. If the assessee has committed a mistake in treating the articles sold by him as coming under item 135 of the First Schedule, the assessing authority could have pointed out the mistake and informed him about the correct rate of tax. The assessment made on the assessee proceeded on the basis that the articles sold by the assessee are taxable only at 30 per cent.

However, subsequently the assessee has been contending that the tax payable on the arishtam sold by him is at 4 per cent multi-point and this was disputed by the assessing authority and the assessee had to ultimately go before the Tribunal and get a decision in his favour holding that the arishtam sold by him being cheap intoxicant is taxable only at 4 per cent. The said decision of the Tribunal has led to become final by the State. Therefore, the correct rate applicable to the assessee's goods can only be taken at 4 per cent. That the correct rate of tax applicable to the assessee's goods is only 4 per cent was known to both the parties only after the Tribunal rendered its decision in the assessee's own case in T.A. No. 382 of 1978. Originally, the assessee was collecting at 30 per cent on the goods sold by him and that was accepted to be the correct rate by the assessing authority. When the assessee chose to claim that the goods sold by him is taxable at 4 per cent at a later stage, the assessing authority did not accept that stand, as a consequence of which the assessee had to go before the Tribunal to get a ruling in his favour that the goods sold by him are taxable only at 4 per cent. Therefore, from what has been stated above, both the assessee as well as the assessing authority were under a mutual mistake. Both at the original stage when the assessee collected tax at 30 per cent and at a later stage when the assessee wanted to charge tax at 4 per cent, the assessing authority did not allow him to do so and the assessee was forced to go before the Tribunal to get a ruling in his favour. Under those circumstances, since the collection of the tax at 30 per cent has been as a result of a mutual mistake, it cannot be said that section 22(2) will stand attracted.

4. As a matter of fact, in more or less similar circumstances, this Court held in T.C. No. 166 of 1978 (*State of Tamil Nadu v. Sasman and Company* - judgment dated 2nd November, [1984] 57 STC 160) that if the excess tax has been collected as a result of mutual mistake between the assessee and the assessing authority, then penalty u/s 22(2) cannot be levied. There also, this Court, without going into the question as to the presence or otherwise of the mens rea, set aside the penalty on the ground that the assessee alone was not responsible for the collection of the higher rate of tax, but the assessing authority was also responsible for the assessee collecting higher rate of tax. For the same reasons, we have to hold in this case that the assessee's collection at the higher rate of tax is due to the mutual mistake, and therefore, section 22(2) cannot be invoked for the purpose of levying penalty. In this view of the matter we are inclined, though for different reasons, to agree with the order of the Tribunal. Hence, the tax revision is dismissed. There is no order as to costs.

5. Coming to the writ petitions, referred to above, we find that they have been filed by way of abundant caution if the decision in the tax case were to go against the assessee. As a result of the levy of penalty the assessee, Jaya Pharmacy, was not able to refund the excess tax collected to its buyer. As a result of the Tribunal's judgment that the arishtam is taxable only at 4 per cent multi-point, the assessing authority proceeded to assess the purchaser of arishtam from the assessee at 4 per cent. It is at this stage, this purchaser,

Dharmasingh, for various assessments, filed these writ petitions for issuing a writ certiorarified mandamus thereby directing to forbear the respondents Nos. 3, 4 and 5 from proceeding further and from doing any act detrimental to the interests of the petitioner in pursuance of the order of the second respondent dated 2nd November, 1981, in T.A. Nos. 747, 724, 723 and 722 of 1981. In view of the assessee succeeding in T.C. No. 1449 of 1980, these writ petitions have become infructuous. Hence, these writ petitions are dismissed. No costs.