

(1983) 11 MAD CK 0031

In the Madras High Court

Case No : Tax (Revision) Case No. 166 of 1978

The State of Tamil Nadu

APPELLANT

Vs

Sasman and Company

RESPONDENT

Date of Decision : 02-11-1983

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 22(2), 22(3)

Citation : (1984) 57 STC 160

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

Bench : Division Bench

Advocate : K.S. Bakthavatsalam, for the Appellant; C.S. Chandrasekara Sastry, C. Venkataraman and C. Natarajan, for the Respondent

Judgement

Ramanujam, J.—This revision filed by the State is directed against the order of the Tribunal dated 28th October, 1977, in T.A. No. 567 of 1977.

2. The assessee in this case is a manufacturer and dealer of cloth bags. During the assessment year 1975-76, the assessee has collected sales tax

on the sale of the cloth bags at 4 per cent. While finalising the assessment for the assessment year, the assessing authority held that the assessee

having collected 4 per cent tax on the sale of cloth bags as against 2 per cent provided under the Tamil Nadu General Sales Tax Act, he should be

taken to have collected at the excess rate contravening the provision of the Act, and therefore, the penalty is leviable in respect of the excess

collection of tax to the extent of Rs. 2,176. In the assessment order, though the assessee has submitted his objections to the levy of penalty in

answer to the show cause notice issued by the assessing authority, the assessing authority did not consider any of the objections raised by the

assessee, but merely passed a cryptic order which is as follows :

I also levy a penalty u/s 22(3) of the Tamil Nadu General Sales Tax Act, 1959.

He had passed the above order after dealing with the turnover to be assessed.

3. The assessee took the matter in appeal to the Appellate Assistant Commissioner both on merits as well as on the levy of penalty. The Appellate

Assistant Commissioner also without properly considering the objections raised by the assessee to the levy of penalty held that since 4 per cent tax

has been collected instead of 2 per cent, penalty is leviable and that the quantum of penalty levied by the assessing authority is fair and reasonable.

4. The assessee took the matter in appeal to the Tribunal. Before the Tribunal, the assessment order was challenged on merits as well as against

the order levying penalty. The Tribunal after dealing with the merits of the assessment proceeded to consider the penalty levied u/s 22(2) of the Act

in a sum of Rs. 2176. The Tribunal taking the fact that whether the transactions on the sale effected by the assessee should be tax at 4 per cent or

at 2 per cent, was the subject-matter of controversy between the assessee and the Department and that controversy was resolved only on 24th

November, 1976, by the Tribunal accepting only the case of the assessee that the tax is to be levied at 2 per cent and rejecting the case of the

Revenue that tax is payable at 4 per cent on cloth bags. According to the Tribunal, since the Revenue was asserting that the transactions of sale

effected by the assessee should be taxed only at 4 per cent and not at 2 per cent, the assessee bona fide charged the tax at 4 per cent on the sales

of cloth bags taking note of the stand taken by the Revenue. Taking those circumstances into account the Tribunal has held that no penalty could

be levied when the assessee has collected the tax at 4 per cent taking note of the stand taken by the Revenue. It is also pointed out by the Tribunal

that in all the earlier years the assessee has collected tax at 4 per cent and the same has been remitted to the Department and the assessing

authority also proceeded on the basis that the tax leviable is at 4 per cent and did not levy any penalty.

In this view, the Tribunal set aside the order of penalty as the assessee has acted though bona fide in charging tax at 4 per cent.

The question is whether the view taken by the Tribunal could legally be sustained ?

5. As pointed out by the learned Government Pleader, the Tribunal has expressed the view that in the absence of mens rea, the penalty u/s 22(2)

of the Act cannot be levied and that such a view is not consistent with the various decisions rendered by this Court as well as by the Supreme

Court. The learned counsel for the assessee would however contend that the levy of penalty being a penal provision, the presence of mens rea is

sine qua non before the application of the penalty provisions. However, on the special facts of this case, we consider it unnecessary to go into the

general question as to whether mens rea is to be necessarily established on the part of the assessee before the penalty provision is to be invoked.

6. In this case, the following facts are not in dispute. In all the earlier years, the assessee has collected sales tax at the rate of 4 per cent on the sales

of cloth bags and he has deposited the entire collections into the treasury. In the final assessment made in the earlier years, the assessing authority

has finalised the assessment on the basis that the cloth bags are taxable at the rate of 4 per cent. Only in the year 1974-75 the assessee after

coming to know of the exemption notification G.O. Press No. 4435, Revenue, dated 30th November, 1962, as amended by G.O. No. 1328,

Revenue, dated 30th March, 1963, reducing the rate of tax from 4 per cent to 2 per cent in respect of ready-made cloth, contended before the

assessing authority that the tax payable in respect of sales of cloth bags is only at 2 per cent and not at 4 per cent. The assessing authority,

however, rejected the assessee's contention and finalised the assessment holding that the cloth bags are taxable only at 4 per cent and not at 2 per

cent as contended by the assessee. When an appeal was filed by the assessee, the Appellate Assistant Commissioner affirmed the order of the

assessing authority holding that the cloth bags are taxable at 4 per cent. Thereafter, the assessee took the matter in appeal to the Tribunal and the

Tribunal by its order dated 24th November, 1976, held that in view of the notification referred to above, the cloth bags are taxable only at 2 per

cent and not at 4 per cent as contended by the Revenue.

Long before the decision of the Tribunal the assessee had made the collections up to August, 1975, at the rate of 4 per cent and this has resulted in

an excess collections of Rs. 2176 as per the said decision of the Tribunal. Thus, it is clear while the assessee was contending that the cloth bags

can be taxed at 2 per cent and not at 4 per cent, the Department was resisting the said claim contending that the cloth bags are taxable at 4 per cent and the controversy was resolved only by the Tribunal, by its order dated 24th November, 1976, relating to the assessment year 1974-75. In this case, the collections have not been made after the decision of the Tribunal. In view of the stand taken by the Revenue that tax is payable only at 4 per cent, the assessee cannot take up the risk of collecting the tax at 2 per cent and therefore his collection of tax at the rate of 4 per cent should be taken to be by way of abundant caution. Having resisted the assessee's claim that the cloth bags are taxable only at 2 per cent, the assessing authority is not justified in finding fault with the assessee for collecting the tax at the rate of 4 per cent, which according to the assessing authority is the correct rate, but according to the Tribunal is not the correct rate. Thus, on the facts and the circumstances of this case, the penalty is sought to be levied on the assessee for approaching the Tribunal and getting a decision that the turnover relating to the sales of cloth bags is taxable only at 2 per cent. The Department having right through proceeded on the basis that the rate of tax on the sale of cloth bags is only at 4 per cent and having resisted the assessee's claim that it is taxable only at 2 per cent and having driven the assessee to go before the Tribunal to get a decision and the Tribunal having given a decision in favour of the assessee though for the earlier years, it cannot now turn round and say that the assessee has wrongly collected the tax at 4 per cent instead of 2 per cent. There appears to be a mutual mistake as to the rate of tax payable on the sale of cloth bags. Even the Department has been proceeding on the basis, till the Tribunal has rendered its decision on 24th November, 1976, that the sale is taxable only at 4 per cent. When the assessing authority himself was of the view that the turnover relating to cloth bags is taxable at 4 per cent, the assessee cannot be said to have intentionally violated the provisions of the Act. On the special circumstances of this case, we are inclined to agree with the Tribunal that the penalty provisions will not stand attracted in this case.

7. The tax case is dismissed. There will be no order as to costs.