

PETITIONER:
THVL BOMBAY AMMONIA PVT. LTD.

Vs.

RESPONDENT:
STATE OF TAMIL NADU

DATE OF JUDGMENT 24/03/1976

BENCH:
SINGH, JASWANT
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SINGH, JASWANT
RAY, A.N. (CJ)
BEG, M. HAMEEDULLAH

CITATION:
1976 AIR 2136 1976 SCR (3) 856

ACT:

Madras General Sale Tax Act, 1959 s. 32-Suo Motu Power-Scope of exemption-Exemption not claimed before assessment-Appeal not preferred-If could plead mistake later.

HEADNOTE:

The appellant submitted a sales-tax return showing the taxable turnover. The assessing authority, while checking the accounts, discovered an undisclosed turnover. He added that sum to the turnover and then assessed sales-tax on that turnover. The appellant did not file any appeal against the assessment order. The Deputy Commissioner of Sales Tax issued a notice to the appellants in exercise of suo motu power of revision under s. 32 of the Madras Sales-tax Act to show cause why a penalty should not be imposed in respect of the undisclosed turnover. While challenging the exercise of this power the appellant alternatively prayed for exemption in respect of a sum representing works contracts which, they alleged, did not amount to sale of goods. The first ground was rejected. On the second ground it was held that since the appellants did not file an appeal in the regular course against the assessment order they were not entitled to exemption. On appeal, the Appellate Tribunal allowed the claim for exemption on the ground that it represented works contract.

The High Court in revision set aside the order of the Tribunal granting exemption.

Dismissal of the appeal,

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HELD : The suo motu power of revision of the Deputy Commissioner in s. 32 is wide and can be exercised both in favour of the revenue as well as the tax-payer in order to correct any error or illegality committed by the assessing authority in his order of assessment. [860D]

State of Kerala v. K. M. Cheria Abdulla and Company (1965) 16 S.T.C. 875 [1965] 1 S.C.R. 601 and The Swastik Oil Mills Ltd. v. H. B. Munshi Deputy Commissioner of Sales Tax, Bombay (1968) 21 S.T.C. 383 referred to.

But in the present case the Deputy Commissioner was right in refusing to exercise his revisional power in favour of the appellants and the High Court was right in reversing the order of the Appellate Tribunal. At no stage of the

proceedings before the assessing authority did the assessee bring it to the assessing authority's notice that a substantial portion of the turnover related to works contracts and as such exempt from liability to tax. Secondly, the appellants acquiesced in the order of assessment passed by the assessing authority and did not prefer any appeal. In face of the decision of this Court in State of Madras v. Gannon Dunkerley and Co. Ltd. [1959] SCR 379 the appellants cannot plead that they did not claim exemption under the mistaken impression that the transactions amounted to sale of goods. [860 E G; 861 B]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1699 of 1973.

Appeal by Special Leave from the Judgment and order dated 4-5-73 of the Madras High Court in T.C. No. 223 of 1969.

K. S. Ramamurthi and (Mrs) S. Gopalakrishna, for the appellant.

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P. Ram Reddy, A. V. Rangam and (Miss) A. Subhashini, for the respondent.

The Judgment of the Court was delivered by

JASWANT SINGH, J. This is an appeal by special leave against the judgment and order dated May 4, 1973 passed by the High Court of Madras in T.C. No. 223 of 1969.

It appears that the appellants who are dealers in refrigerators, spare parts etc. submitted a return for the year 1964-65 to the Joint Commercial Tax officer, Madras (hereinafter called the 'Assessing Authority') under the Madras General Sales Tax Act, 1959 (hereinafter referred to as 'the Act') showing a total taxable turnover of Rs. 6,41,031.77. On checking the accounts of the appellants, the Assessing Authority by its order dated January 31, 1966 made an addition of Rs. 33,710.88 to the turnover reported by the appellants and assessed the sales tax on the turnover of Rs. 6,74,742.65. The appellants did not choose to prefer an appeal against this assessment.

On January 7, 1967, the Deputy Commissioner, Commercial Taxes, Madras Division, in exercise of his suo motu power of revision under section 32 of the Act issued a notice to the appellants calling upon them to show cause why a penalty of Rs. 5,056/- on the aforesaid undisclosed turnover of Rs. 33,710.88 be not levied against them.

In response to the notice, the appellants submitted their objections challenging the jurisdiction of the Deputy Commissioner to levy the proposed penalty and requested him to drop the proceedings. In the alternative, they prayed that they should be granted exemption in respect of Rs. 6,32,142/- which represented works contracts for complete fabrication, erection and installation or air-conditioning plants with their employers which did not amount to sale of goods.

The Deputy Commissioner negatived the contention of the appellant regarding his jurisdiction to levy the penalty, and revising the assessment levied a penalty of Rs. 3,371/- under section 12(3) of the Act. The Deputy Commissioner also declined to allow the aforesaid exemption claimed by the appellants on the ground that they 'did not file appeals in the regular course as contemplated by the provisions of the Act'.

The appellants went up in appeal from this order to the

Sales Tax Appellate Tribunal, Madras, who substantially allowed the appeal, cancelled the penalty and acting on the statements of transactions filed before him by the appellants allowed an exemption for tax on a turnover of Rs. 5,99,468/- as representing the works contracts holding that as suo motu power of revision could be exercised by the Deputy Commissioner both for the benefit of the State and the taxpayer, he should have gone into the question of exemption and set right the assessment by allowing the exemption on the turnover relating to works contracts.

Aggrieved by this order of the Sales Tax Appellate Tribunal, the respondent filed a petition under section 38 of the Act to the High Court of Judicature at Madras for revision of the order of the Sales

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Tax Appellate Tribunal. The High Court allowed the revision petition in part and set aside the order of the Tribunal in so far as it related to the deletion of the turnover of Rs. 5,99,468/-.

Counsel for the appellant has urged before us that as the suo motu power of revision under section 32 of the Act is wide enough and can be exercised both in favour of the revenue as well as the assessee regardless of the fact whether the latter has filed an appeal against the order of assessment or not, the High Court ought not to have reversed the order of the Sales Tax Appellate Tribunal in respect of the turnover of Rs. 5,99,468/- which related to works contracts.

Two questions arise for determination in this appeal. Firstly, what is the scope of the suo motu power under section 32 of the Act. Secondly, whether the Deputy Commissioner rightly refused to exercise discretion under section 32 of the Act in favour of the appellants.

For the determination of the first question, it is necessary to refer to section 32 of the Act which runs as follows:-

"32. Special powers of the Deputy Commissioner.-

(1) The Deputy Commissioner may, of his own motion, call for and examine an order passed or proceeding recorded by the appropriate authority under section 4-A, section 12, section 14, section 15, or sub-sections (1) and (2) of section 16 and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon as he thinks fit.

(2) The Deputy Commissioner shall not pass any order under sub-section (1), if-

(a) the time for appeal against the order has not expired;

(b) the order has been made the subject of an appeal to the Appellate Assistant Commissioner or the Appellate Tribunal, or of a revision in the High Court; or

(c) more than five years have expired after the passing of the order.

(3) No order under this section adversely affecting a person shall be passed unless that person has had a reasonable opportunity of being heard.

(4) In computing the period referred to in clause (c) of sub-section (2), the time during which the proceedings before the Deputy Commissioner remained stayed under the order of a Civil Court or other competent authority shall be excluded."

The language of this section makes it clear that the suo motu power conferred on the Deputy Commissioner in regard to the order or proceeding specified therein is quite

wide and he can, subject to the conditions laid down in sub-sections (2) and (3), exercise the

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same even at the instance of an assessee who has not filed an appeal against the order for the purpose of rectifying any illegality or impropriety therein.

This section has also been subject matter of interpretation in two decisions of this Court viz. State of Kerala v. K. M. Cheria Abdulla, and Company(1) and The Swastik Oil Mills Ltd. v. H. B. Munshi Deputy Commissioner of Sales Tax, Bombay(2). In the case of K. M. Cheria Abdulla and Company (supra) the majority held as follows in regard to the scope of the revisional power:-

"The Deputy Commissioner is thereby invested with power to satisfy himself about the legality or propriety of any order passed or proceeding recorded by any officer subordinate to him, or the regularity of any proceeding of such officer, and to pass such orders with respect thereto as he thinks fit. For exercising this power, he may suo motu or on application call for and examine the record of any proceeding or order. There is no doubt that the revising authority may only call for the record of the order or the proceedings and the record alone may be scrutinised for ascertaining the legality or propriety of an order or regularity of the proceeding. But there is nothing in the Act that for passing an order in exercise of his revisional jurisdiction, if the revising authority is satisfied that the subordinate officer has committed an illegality or impropriety in the order or irregularity in the proceedings, he cannot make or direct any further enquiry..... It is, therefore, not right baldly to propound that in passing an order in the exercise of his revisional jurisdiction, the Deputy Commissioner must in all cases be restricted to the record maintained by the Officer subordinate to him, and can never make enquiry outside that record..... Jurisdiction to revise the order or proceeding of a subordinate officer has to be exercised for the purpose of rectifying any illegality or impropriety of the order or irregularity in the proceeding."

The limitations to which the revisional power is subject were indicated by the majority thus :-

"It would not invest the revising authority with power to launch upon enquiries at large so as to trench upon the powers which are expressly reserved by the Act or by the Rules to other authorities or to ignore the limitations inherent in the exercise of those powers. For instance, the power to reassess escaped turnover is primarily vested by rule 17 in the assessing officer and is to be exercised subject to certain limitations, and the revising authority will not be competent to make an enquiry for reassessing a taxpayer. Similarly, the power to make a best judgment assessment is vested by section 9(2) (b) in the assessing authority and has to be exercised in the manner provided. It would not be open to the revising authority to assume that power."

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The above view was affirmed by this Court in the case of The Swastik Oil Mills Ltd. (supra). In regard to the limitations to which the revisional power is subject, this Court went on in that case to observe:-

"In fact, when a revisional power is to be exercised, we think that the only limitations, to which that power is subject, are those indicated by this Court in K. M.

Cheria Abdulla & Co's case (1965) 16 S.T.C. 875. These limitations are that the revising authority should not trench upon the powers which are expressly reserved by the Acts, or by the Rules to other authorities and should not ignore the limitations inherent in the exercise of those powers."

In view of the above, we are of opinion that the suo motu power of revision of the Deputy Commissioner is of wide amplitude and can be exercised in favour of the Revenue as well as the taxpayer in order to correct any error or illegality committed by the assessing authority in his order of assessment.

With regard to the second question relating to the refusal by the Deputy Commissioner to exercise his revisional power in favour of the appellants, we are of the view that the order does not suffer from any infirmity. It is true that money paid under a mistake of law common both to the assessee and the taxing authority can be got refunded [See the decision of this Court in *The State of Kerala v. Aluminium Industries Ltd.*(1)]. But in the instant case, the appellants themselves submitted a return showing taxable turnover of Rs. 6,41,031.77. At no stage of the assessment proceedings before the assessing authority did they bring it to his notice that a substantial portion of the turnover related to works contracts and was as such exempt from liability to tax. The appellants not having raised the question by claiming the exemption, the Assessing Authority had no occasion to consider it. It cannot, therefore, be said that the order of assessment suffered from any illegality. It is also significant that the appellants acquiesced in the order of assessment passed by the assessing authority and did not prefer any appeal against it nor did they take any other step to have it modified. Even in the objections filed by them to the show cause notice issued by the Deputy Commissioner in regard to the levy of penalty, they made a half-hearted attempt to claim exemption. It will be relevant in this connection to advert to the prayer made by them which is couched in the following terms:-

"In the circumstances we request you that the Deputy Commissioner may either totally drop the proposal to levy

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penalty or in the alternative totally cure the illegality of the assessment and render justice."

The plea put forth by the appellants that they did not claim exemption under the mistaken impression that the transactions amounted to sale of goods cannot also be countenanced in view of the fact that as far back as in 1954 it was held by the Madras High Court in *Gannon Dunkerley and Co. Ltd. v. State of Madras*(1) that works contracts did not involve any element of sale of materials and the levy of sales tax thereon was unlawful. This ruling was affirmed by this Court in *State of Madras v. Gannon Dunkerley and Co. Ltd.*(2) We are, therefore, of the view that the Deputy Commissioner rightly refused to exercise his revisional jurisdiction in favour of the appellants and the High Court was right in reversing the order of the Appellate Tribunal in so far as it related to the appellants' claim to the aforesaid exemption.

For the foregoing reasons, we do not find any merit in this appeal which is dismissed with costs.

P.B.R.

Appeal dismissed

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JUDIS