
(1986) 09 RAJ CK 0068
In the Rajasthan High Court
Case No : Civil Writ Petition No. 827 of 1979

Alcobex Metals (P) Ltd.

APPELLANT

Vs

CTO

RESPONDENT

Date of Decision : 04-09-1986

Acts Referred:

Central Sales Tax Act, 1956 — Section 12, 9
Constitution of India, 1950 — Article 14
Income Tax Act, 1961 — Section 34

Citation : (1986) RLW 645 : (1987) 2 WLN 877

Hon'ble Judges : Ashok Kumar Mathur, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Ashok Kumar Mathur, J.—The petitioner by this writ petition has challenged the notice dated 7-7-1978 (Annexs. 7 & 8). He has also challenged the validity of Section 12 of the Rajasthan Sales Tax Act, 1954.

2. The petitioner is a company incorporated under the Indian Companies Act, 1956 having its registered office at Delhi and Head Office and Factory at Jodhpur. The petitioner company purchased the running business carried on by a registered partnership firm known as M/s Alcobex Metal Corporation, 24, Heavy Industrial Area, Jodhpur (here in after referred to as "the firm"). The firm had fine partners Sarva Shri G.G. Kanunga, Laxmi Chand Kanunga, Shri Asuram Kanunga, Hansraj Kanunga and Shri Ganga Dass Vyas (since dead). The firm was registered under the Indian Partnership Act, 1932 and it stood dissolved on 1-8-1971 on transfer of its running business to the petitioner company. The firm was registered both under the Rajasthan Sales Tax Act, 1954 (here in after referred to as the Act of 1954") and the Central Sales Tax Act, 1956 (here in after referred to as "the Act of 1956"). The present writ petition relates to the period commencing from 10-11-1969 and ending on 31-7-1970. The firm submitted its returns for the aforesaid period before the Commercial Taxes

Officer, Special Circle, Jodhpur (here in after called as "the CTO") under both the Acts in time. The firm disclosed fully and truly all material and relevant facts in the returns with a view to enable the non-petitioner No. 1 to assess its turnover. The firm in its returns had mentioned all transfers to its branches out-side the State i.e. branches located at Sahibabad, Ahmedabad and Delhi aggregating to Rs. 12,40,695.83 p. The firm also included in its returns the transfers made through agents on consignment basis out-side the State of Rajasthan aggregating to Rs. 34,01,447.67 p. The firm claimed the aforesaid transfers to its branches and transfers made through agent on consignment basis as exempted from payments of tax under the Act of 1954 and the Act of 1956. The non-petitioner No. 1 assessed the firm and passed two detailed orders of assessment after taking into consideration the transfers to its branches and transfers made through its agents on consignment basis on 31-5-1971, which are Annexs. 3 & 4. After a lapse of more than 7 years the non petitioner No. 1 has issued two notices to the petitioner company, one u/s 12 of the Act of 1954 and the other u/s 12 of the State Act read with Section 9 of the Act of 1956 calling upon the petitioner to show cause why the turnovers amounting to Rs. 12,40,695.83p. and Rs. 34,01,447.57p. should not be assessed as sales in the course of inter-State trade & commerce and why penalty should not be levied for deliberately showing the above mentioned sales amounting to Rs. 46,42,143,40 p. as transfers to its branches out side the State and sales out-side the State in the returns furnished by the firm and thus involving commission of offence u/s 16(1)(e) of the Act of 1954 read with Section 9 of the Act of 1956. Both the notices dated 9-7-1978 issued u/s 12 have been placed on record as Annexs. 7 & 8. Aggrieved against these notices the petitioner has approached this Court by filing the present writ petition.

3. Mr. Mehta, learned Counsel for the petitioner, has challenged the validity of Section 12 of the Act of 1954. He has also challenged that on mere change of opinion no notice u/s 12 can be issued. He has also submitted that notice should have been issued to the numbers of the partnership firm and not to the petitioner. As against this, Mr. Balia, learned Counsel for the Revenue has opposed it by filing a. detailed reply and contended that Section 12 of the Act of 1954 is not ultra vires and he further submitted that the notices which have been issued u/s 12 are within the jurisdiction of the CTO as he can issue the same when there is any escaped assessment and the notices have rightly been issued to the petitioner company and it is not required to be issued to the partners of the firm.

4. In order to appreciate the submissions of the learned Counsel for both the parties, I have to reproduce the relevant provisions of the Act. The first and foremost question arises before me for my consideration is whether Section 12 of the Act of 1954 is valid or not. Section 12 reads as under:

12. Assessment of tax and levy of exemption fee or registration fees incorrectly assessed:

(1) If for any reason the whole or any part of the business of a dealer has escaped assessment to the tax, or if the registration fee or exemption fee has escaped levy or has been assessed at too low a rate in any year, the assessing authority may serve on the dealer liable to pay the tax in respect of such business or such registration fee or exemption fee a notice in the prescribed form and may proceed to assess the re-assess amount of the tax or levy the correct amount of registration fee or exemption fee from such dealer:

Provided that if the Deputy Commissioner (Administration) has reason to believe that the whole or any part of the business of a dealer has escaped assessment to tax or has been under assessed or has been assessed at the low rate he may at any time subject to the time limit specified in Sub-section (2) either direct the assessing authority to assess or re-assess or amount of tax or himself proceed to assess or re-assess the tax.

Explanation-Nothing in this Section shall be deemed to prevent the assessing authority from making as assessment to the best of his judgment.

(2) No notice under Sub-section (1) shall be issued in respect of any business, registration fee or exemption fee for any year after the expiry of eight years from the end of the relevant assessment year.

Provided that nothing contained in this sub-section shall apply to any assessment or re-assessment made in consequence of, or to give effect to, any finding or direction contained in an order u/s 13, 14 or 15 or in an order of any competent court.

Explanation-Where the assessment proceedings relating to any dealer remain stayed under the orders of any competent court, the period during which the proceedings remain so stayed shall be excluded in computing the period of limitation for assessment or re-assessment provided under this sub-section.

5. Mr. Mehta, learned Counsel for the petitioner submits that Section 12 is ultra vires of Article 14 of the Constitution as it confers a blanket power on the authority to issue a notice and it does not provide any guidelines that in what circumstances and for what consideration this provision should be invoked. This confers a blanket discretion on the CTO and such a provision which confers an arbitrary and blanket discretion to the CTO is ultra vires of Article 14 of the Constitution. In order to justify his contention learned Counsel for the petitioner has referred to Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, and the The State of Punjab and Another Vs. Khan Chand, So far as Ram Krishna Dalmia's case (supra) is concerned their Lordships of the Supreme Court while dealing with the validity of statute on ground of violation of Article 14 observed that it is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. Their Lordships also laid down that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure. While dealing with this aspect of the matter, their Lordships of the Supreme Court laid down as under the criteria:

- (a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;
- (b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
- (c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
- (d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;
- (e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every statement of facts which can be conceived existing at the time of legislation; and
- (f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

6. This case does not lay down that such discretion which has been vested on the CTO is ultra vires or not. The next case cited by the learned Counsel is Khan Chand's case (supra) and the learned Counsel has invited my attention to the following observations of their Lordships in that case:

There is no element of judicial arrogance in the act of the Courts in striking down an enactment. The Constitution has assigned to the Courts the function of determining as to whether the laws made by the legislature are in conformity with the provisions of the Constitution. The Courts would be shirking their responsibility if they hesitate to declare the provisions of a statute to be unconstitutional, even though those provisions are found to be violative of the articles of the Constitution. Hesitation or refusal on the part of the Courts to declare the provisions of an enactment to be unconstitutional, even though they are found to infringe the Constitution because of any notion of judicial humility would in a large number of cases have the effect of. taking away or in any case eroding the remedy provided to the aggrieved parties by the Constitution. It is as much the duty of the Courts to declare a provision of an enactment to be unconstitutional if it contravenes any article of the Constitution as it is theirs to uphold its validity in case it is found to suffer from no such infirmity.

7. In that case their Lordships has laid down that if the courts come to the conclusion that any provision is not in conformity with the provisions of the Constitution, the court should not hesitate to declare that provision unconstitutional and strike down such unconditional provision.

8. But the question before me is whether Section 12 is arbitrary and it confers a blanket discretion on the authority exercising this power. I am unable to agree with this contention of Mr. Mehta. Mr. Balia learned Counsel for the respondent has pointed out that there is already a built-in safeguard in Section 12 of the 1954 Act. Section 12 can only be operated if the authority who exercised the power u/s 12 comes to the conclusion for any reason that there is an escaped assessment in any previous year. That shows that he has to apply his mind for forming the opinion. Then there is a check that a notice has to be given to the affected party of this reopening and after hearing him pass an order whether the turn-over has really escaped or not. Thus, it provides a reasonable opportunity to the affected person. If any person is affected by the order passed on reopening then that order is appealable under the Act. Lastly, there is a time limit fixed that if the escaped turnover is beyond the period of 8 years then this power cannot be exercised by the assessing authority. These checks which are built in this provision and the scheme of the Act provides a sufficient safeguard against its arbitrary exercise and abuse of the provision Their Lordships of the Supreme Court in *Jyoti Pershad Vs. The Administrator for The Union Territory of Delhi*, has dealt with the scope of delegated legislation and observed as under:

In regard to this matter we desire to make two observations. In the context of modern conditions and the variety and complexity of the situations which present themselves for solution, it is not possible for the Legislature to envisage in detail every possibility and make provisions for them. The legislature therefore is forced to leave the authorities created by it an ample discretion limited. however by the guidance afforded by the Act. This is the ratio of delegated legislation, and is a process which has come to stay, and which one may be permitted to observe is not without its advantages. So long therefore, as the Legislature indicates, in the operative provision of the statute with certainty, the policy and purpose of the enactment. The mere fact, that the legislation is skeletal or the fact that a discretion is left to those entrusted with administering the law, affords no basis either for the contention that there has been an excessive delegation of legislative power as to amount to an abdication of its functions, or that the discretion vested is uncanalised and unguided as to amount to a carte blanche to discriminate. The second is that if the power or discretion has been conferred in a manner which is legal and constitutional, the fact that the Parliament could possibly have made more detailed provisions, could obviously not be a ground for invalidating the law.

9. Likewise their Lordships of the Supreme Court in the *The Registrar of Co-operative Societies, Trivandrum and Another Vs. K. Kunjabmu and Others*, has laid down that while judging a provision of a statute whether it is arbitrary or not

the policy of the Act has to be seen. Their Lordships observed as under in the aforesaid case:

The policy of the Act is there and so are the guidelines. The objectives are clear the guidelines are there. There are numerous provisions of the Act dealing with registration of societies rights and liabilities of members, duties of registered societies, privileges of registered societies, property and funds of registered societies, inquiry and inspection, supersession of committees of societies, dissolution of societies, surcharge and attachment, arbitration etc. The provisions are generally designed to further the objectives set out in the preamble. But numerous as the provisions are, they are not capable of meeting the extensive demands of the complex situations which may arise in the course of the working of the Act, and the formulation and the functioning of the societies. In fact the too rigorous application of some of the provision of the Act may itself occasionally result in frustrating the very object of the Act instead of advancing them. It is provided for such situations that the Government is invested by Section 60 with a power to relax the occasional rigour of the provisions of the Act and to advance the object of the Act. Section 60 empowers the State Government to exempt a registered society from any of the provisions of the Act or to direct that such provisions shall apply to such society with specified modification.

10. Mr. Balia has also invited my attention to Shiv Dutt Rai Fateh Chand and Others Vs. Union of India (UOI) and Another, and specially to the observations made in the aforesaid case which read as under:

The argument urged on behalf of the dealers in the State of Haryana is that this Section which authorises the levy of penalty "at a sum of not less than twice and more than ten times the amount of tax" on proof of the defaults mentioned there in is violative of Article 14 as there is no guidance given to the authority levying the penalty about the quantum of penalty. There is no substance in this plea. The provision in question itself suggests that the levy to be made under it is in the nature of penalty which requires the authority concerned to apply his mind to all relevant aspects of the default alleged to have been committed by a dealer. First the default committed by a dealer should be established at an enquiry after giving the dealer concerned an opportunity of being heard The degree of remissness involved in the default is a relevant factor to be taken into account while levying penalty. The Section provides both the minimum and maximum amount of the penalty leviable and it is correlated to the amount of tax which would have been avoided if the turnover returned by such dealer had been accepted as correct. The order levying penalty is quasi judicial in character and involves exercise of judicial discretion. The considerations which should weigh with the authorities while imposing penalty are well known and have been settled by many decisions. Hindustan Steel Ltd. Vs. State of Orissa, is one such decision. An order levying penalty u/s 48 of the Haryana General Sales Tax Act is also subject to the provisions relating to appeal, etc. set out in Chapter VII thereof. In

the circumstances, it is not possible to hold that Section 48 of the Haryana General Sales Tax Act 1973 confers an uncanalised unguided and arbitrary power on the authority levying penalty. This contention should, therefore, fail.

11. He submits that on account of the position of law and in view of the fact that there is a sufficient built-in check against its arbitrary use, such power cannot be said to uncanalised and it is not violative of Article 14 of the Constitution. I agree with this submission of Mr. Balia that on account of the checks built in the provision a sufficient safeguard has been provided against its arbitrary use and as such Section 12 of the Act of 1954 is not ultra vires of Article 14 of the Constitution.

12. The next question which has been raised by Mr. Mehta is that Section 12 cannot be used for mere change of opinion. Learned Counsel submits that Section 12 confers a power to the C.T.O. to only issue notice when there is an escaped assessment of the turnover. He submits that the firm has disclosed all the sales in its return and the same has been taken into consideration by CTO. Therefore, mainly on account of change of opinion of the CTO he cannot issue these notices of reopening the assessment after seven years. In this connection Mr. Mehta has invited my attention to Deputy Commissioner of Agricultural Income Tax and Sales Tax. Quilon v. Dhanlakshmi Vilas Cashew Co. 24 STC 491; The State of Kerala v. K.E. Nainan 26 STC 251; The Commissioner of Agricultural Income Tax Trivendrum v. Smt. Lucy Kochuvered 1976 UJ (SC) 598; Shri D.D. Gupta v. State of Haryana AIR 1972 SC 2672 and Commissioner of Income Tax, West Bengal II Vs. Dinesh Chandra H. Shah and Others, ; Mr. Balia, learned Counsel for the respondents has also invited my attention to two Division Bench judgments of this Court in Ms Akbarali Amantali v. Asst. Cammrl. Taxes Officer 1976 WLN 815 ; and Rajasthan Felts Manufacturing Company Vs. The State of Rajasthan and Others, He has also invited my attention to R.S. Narayana Sheno v. State of Kerala 12 STC 665; East India Corporation Ltd. Madurai v. The State of Madras 31 STC 330; Yercaud Coffee Curing Works. Ltd. v. The State of Tamil Nadu 40 STC 531; Surya Fertilisers and Chemicals v. The State of Tamil Nadu 40 STC 538; The Commissioner of Sales Tax, M.P. v. Jeewa Khan 42 STC 96; R.K. Ismail v. The State of Kerala 43 STC 123; Beharilal Shamsundar v. Sales Tax Officer Cuttak 17 STC 508; Mini Fertilizer (Pvt.) Ltd. v. Commissioner of Sales Tax, U.P. Lucknow 44 STC 494; Bharat Refineries Ltd. v. The State of Tamil Nadu 49 STC 134 ; and (1976) 102 ITR 287 (SC)

13. It will be a futile exercise on my part to deal with all these authorities because in view of the two division bench judgments of this Court, which have already undertaken this exercise and have held that on mere change of opinion the C.T.O. can reopen the assessment. The Division Bench of this Court after relying on an earlier decision of their Lordships of the Supreme Court in Maharajadhiraj Sir Kameshwar Singh Vs. The State of Bihar, , has observed as under in M/s. Akbarali" s case (supra) (Sen, J., as he then was):

The words "for any reason" in Section 12(1) of the Act are wide enough and the

powers of the Commercial Taxes Officer under the Section are not circumscribed by any condition. In *Maharajadhiraj Shri Kameshwar Singh v. The State of Bihar*, their Lordship while interpreting the Bihar Agricultural Income tax Act, 1938, which used the same expression, observed:

The use of the words "any reason" which are of wide import dispenses with those conditions by which Section 34 of the Indian Income Tax Act is circumscribed".

"See D.B. Civil Writ Petition No. 655 of 1970: *M/s Bhanwar Lal Biniamram v. The Assistant Commercial Taxes Officer, Ward-II, Circle "A" Jodhpur* decided on 29-10-1976. The decision of the Division Bench in *M/s National Clinic v. Asst. Commercial Taxes Officer, Shri Ganga Nagar 1966 RLW 256* which lays down that there can be not re-assessment u/s 12(1) of the Act on mere change of opinion therefore does not lay down good law.

14. Likewise in *Rajasthan Felts Manufacturing Co's case (supra)* the same position has been reiterated. The authorities cited by Mr. Balia pertain to Kerala High Court, M.P. High Court and Madras High Court. They have also considered the provisions as appearing in their Acts and have interpreted the provision and accepted our High Court's reasoning. Mr. Mehta learned Counsel for the petitioner has tried to persuade me by referring to *Smt. Lucy Kochuvereed (supra)* and *K.E. Narain's case (supra)* that in view of the subsequent observations made by their Lordships of the Supreme Court the matter requires reconsideration. I cannot take a different view when the two division benches of this Court have already interpreted the provisions of Section 12 and have construed the expression "for any reason" to include even the change of opinion. Thus, in view of the law laid down by the two division bench judgments of this Court, I am bound by it and hold that the expression "for any reason" is wide enough to include even the change of opinion. Thus, this submission of the learned Counsel has no merit and deserves to be rejected.

15. The next question which has been placed for my consideration by Mr. Mehta is that the notices of reopening of the assessment should have been given to the members of the firm and not the present petitioner company. It is an admitted case of the petitioner company that the business of the firm has been transferred to the petitioner company. It cannot be lost sight of the fact that there were five partners in the firm and the petitioner company having four of the old partners out of the five partners of the firm. The petitioner company has 4 of the partners of the firm except *Shri Ganga Prasad Vyas*. The case of the petitioner company is that entire business of the firm was transferred to the petitioner company and the firm stood dissolved w.e.f. 1-8-1971. Now in the present situation the question is whether notice should have been given to the members of the old firm or to the transferee petitioner company. In this connection Mr. Mehta, learned Counsel for the petitioner has invited my attention to Section 9(3)(b) of the Act of 1954. Section 9 reads as under:

9. Liability on transfer of business or on discontinuance of dissolution of business

of a firm, etc.-(1) When the ownership of the business of a dealer liable to pay the tax is entirely transferred, any tax payable in respect of such business and remaining unpaid at the time of the transfer, shall be payable by the transferee, as if he were the dealer liable to pay tax on the sale or purchase of goods effected by him with effect from the date of such transfer and shall within thirty days of the transfer, apply for registration unless he already holds a certificate of registration:

(2) When a dealer liable to pay the tax transfers the ownership of part of his business, the transferor shall be liable to pay the tax in respect of the stock of goods transferee along with that part of his business which is not so transferred, as if the goods have been sold by him, unless the transferee holds a certificate of registration or obtains it within the prescribed period;

(3) Where any business carried on by a firm, a Hindu undivided family or an association of persons, liable to pay the tax, is dissolved or discontinued or where such Hindu undivided family is partitioned-

(a) such firm, family or association, as the case may be shall be liable to pay the tax on the goods allotted to any partner or member thereof as if the goods had been sold to such partner or member unless holds a certificate of registration or obtains it within the prescribed period.

(b) every person who was at the time of such dissolution, discontinuance or partition, a partner or member of such firm association or family and the legal representative of any such person who is deceased shall, in respect of the turnover of such firm, association or family, be jointly and severally liable to assessment and for the amount of tax, penalty or other sum payable, and all the provisions of this Act, so far as may be, shall apply to any such assessment and liability for payment of tax or imposition of penalty or other sum.

(4) When a dealer to whom a part of the business has been transferred, or who has obtained the whole or part of the stock relating to business of a firm, an association of persons or a Hindu undivided family, which has been dissolved or discontinued or partitioned as the case may be, obtains a certificate of registration, he shall be liable to pay the tax on the sale or purchase of goods made by him with effect from the date of such transfer, dissolution, discontinuance of the business or partnership, as the case may be.

16. Mr. Mehta, learned Counsel for the petitioner, submits that by virtue of the provisions of Section 9(3)(b) once a firm is dissolved or discontinued then in respect of the turnover of such firm the old members of that firm shall be jointly and severally liable to assessment and for the amount of tax. He emphasised on the expression "liable to assessment" and submits that u/s 9(3)(b) the notice of re-assessment should have been given to the members of the dissolved partnership firm and not to the petitioner company. Mr. Balia learned Counsel for the respondents has invited my attention to Sub-section (I) of Section 9 and submitted that it is simply a case of transfer of the entire business of the firm

and once the firm's business has been transferred then the transferee is liable to pay such tax, Thus in this background, the question which arises for consideration is whether the dissolved firm should be given notice of re-assessment u/s 9(3)(b) or whether the notice has rightly been given to the transferee company or not. I think that the submission of Mr. Balia appears to be justified. Section 9(1) clearly says that when the ownership of the business is transferred then the transferee company will be liable for all tax liability under the Act. In the present case, it is an admitted case of the parties that whole business of the old firm has been transferred to the petitioner company. Once transfer as such has been converged by the provisions of Sub-section (1) of Section 9 then it is not necessary for the Commercial Taxes Officer to invoke the provision of Sub-section (3)(b) of Section 9 of the Act which deals with the dissolution, discontinuance or partition of the business or undivided Hindu Family. It is true that when The business is transferred to another concern it does not necessarily follow that the firm stood automatically dissolved even after the transfer of the business, the firm can continue with the old kind of business or it may have other business apart from the business which has been transferred or it can undertake a new business also. Sub-section (3)(b) of Section 9 only deals with liability of a dissolved firm and it does not deal with the transfer of business. Once the legislature has specifically provided for a particular contingency then report should be taken to that provision only. In the present case a specific provision has been provided for a specific contingency & that has been taken care of by the legislature by providing a specific provision under Sub-section (1) of Section 9. Section 9(1) clearly deals with the transfer of business and when this situation has been squarely covered then reference to Sub-section (3)(b) of Section 9 is absolutely irrelevant. It could have provided assistance if the business has been dissolved and if any liability remains to be discharged then of course a notice could have been sent to the partners of the dissolved firm. But it is not a case of dissolution, therefore, it is a case of pure and simple transfer and it is squarely covered by the provisions of Section 9(1) of the Act. Since the business has been transferred to the petitioner company, therefore, the respondents have rightly given the notice of reopening of assessment u/s 9(1) to the petitioner company. This contention of the learned Counsel has also no merit.

17. In the result, I do not find any merit in the writ petition and the same is dismissed.

18. The parties are left to bear their own costs.