
(1993) 02 KAR CK 0003
In the Karnataka High Court
Case No : S.T.R.P. No. 94 of 1990

Ambika Industries

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 11-02-1993

Acts Referred:

Income Tax Act, 1961 — Section 264
Karnataka Sales Tax Act, 1957 — Section 25 A

Citation : (1994) 92 STC 82

Hon'ble Judges : M.M. Mirdhe, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : B.P. Gandhi, for the Appellant; H.L. Dattu, Government Advocate, for the Respondent

Judgement

K. Shivashankar Bhat, J.—The petitioner is a dealer in fried grams. It buys grams and fries the same into fried grams. For the assessment period October 24, 1976 to November 11, 1977, there was an assessment order dated January 30, 1979. The total turnover was determined at Rs. 6,55,336 and the taxable turnover was held to be Rs. 15,000. On March 3, 1981 that order was rectified u/s 25A of the Karnataka Sales Tax Act, 1957 (for short "the Act"). The turnover regarding the sales of fried gram made out of the grams purchased in the course of inter-State sales was enhanced to Rs. 1.28,178, against which there was an appeal by the petitioner. The appellate authority set aside the rectification order and remanded the matter on July 22, 1981. On August 18, 1981, the assessing authority made a fresh order on the basis of the remand order and he recomputed the turnover regarding the sales of fried grams made out of grams purchased under inter-State sales at Rs. 19,311 and levied a tax of Rs. 772. The total turnover at Rs. 6,55,336 was however maintained.

2. Thereafter, the Deputy Commissioner initiated proceedings for revising the assessment order u/s 21(2) of the Act. After considering the objections of the petitioner, he made an order on November 29, 1985, by which he revised the

assessment. He held that the taxable turnover ought to be Rs. 3,32,210. The petitioner approached the Appellate Tribunal in appeal without any success. Hence this revision petition.

3. Mr. Gandhi, learned counsel for the petitioner, contended that the assessment order sought to be rectified was the order dated January 30, 1979 and if so, the initiation of the proceedings was clearly barred by limitation. According to Mr. Gandhi, the turnover had two elements; one was the quantum of turnover and another was the quantum of taxable turnover. The subject of rectification, according to the learned counsel, pertain to quantum of taxable turnover and the subject of total turnover was not touched at all and therefore, to that extent the first assessment order should be taken as the real assessment order that was revised.

4. It is not possible to accept the contention of the learned counsel for the assessee. There can be no doubt that the proceedings taken for rectification of assessment of tax, were proceedings for assessment. In other words, the rectification proceedings were part of the assessment proceedings. Consequently, the effect of the rectification was to rectify the taxable turnover which was part of the total turnover. The process of rectification involved the consideration of the question as to what was the turnover of the petitioner out of which the quantum to be determined for attracting the levy.

5. The doctrine of "merger" governs the fact situation. In Commissioner of Income Tax, Karnataka-I Vs. Hindustan Aeronautics Ltd., , the Full Bench of this Court has observed at pages 324 and 325 as under :

"Amid this diversity of opinions, this High Court in Vijayalakshmi Lorry Service"s case (see p. 327 infra) without much fuss over the matter has held that the entire order merges when the order was taken in appeal and was modified by the Appellate Assistant Commissioner. Such an order becomes final and the Commissioner was precluded from taking proceedings u/s 263 of the Act to revise the order of the Income Tax Officer on another ground. That decision was rendered on September 17, 1975, and is being followed by the authorities in this State. The view taken in that decision is neither unreasonable nor erroneous. Similar view has been taken, as earlier noticed, by the High Courts of Allahabad, Calcutta, Madhya Pradesh, etc. There is, therefore, no compelling reason to review that decision. It is not proper for us to reverse that decision, merely because another view is also possible. Consistency in law should be the hallmark in the administration of justice."

The above observations of the Full Bench in respect of the decision in Vijayalakshmi Lorry Service"s case (appended to the aforesaid decision at page 327) shall have to be appreciated with reference to the question referred to the opinion of the Full Bench. The question referred to is found at page 319 and it reads thus :

"Can the Commissioner of Income Tax entertain the assessee"s revision petition

u/s 264 of the Income Tax Act, 1961, preferred from a part of the appellate order of the Appellate Assistant Commissioner against which the assessee is aggrieved during the tendency or after the disposal, as the case may be, of the Department's second appeal before the Income Tax Appellate Tribunal preferred against another part of the same order where the subject-matter of the appellate and revisional proceedings are not the same but relates to distinct matters ?"

The Full Bench answered the question in the negative. Thus, the Full Bench clearly laid down the principle that the subject-matter of the assessment cannot be bifurcated in view of the doctrine of "merger" and as and when the assessment order is modified in any manner, doctrine of "merger" would be attracted.

6. In view of the aforesaid decision, we hold that the order of rectification replaced the original order of assessment and consequently the initiation of proceedings by the Deputy Commissioner to revise the said order was within the period of limitation. The contention of Mr. Gandhi is accordingly rejected.

7. Mr. Gandhi relied on a decision of the Kerala High Court in B. Sidharth Prabhu Vs. The State of Kerala, That was a matter where the appeal filed by the assessee therein was dismissed and thereafter there was a rectification in favour of the assessee whereby the tax liability as well as the penalty were reduced. Thereafter, the assessee sought revival of the earlier appeal or to permit him to file a fresh appeal against the rectification order replacing the original assessment order. The assessee's attempt failed. Mr. Gandhi contends that this decision supports his contention that the theory of "merger" was not accepted by the Bench of the Kerala High Court. We do not think so. The reasoning of the Bench is found at page 505 which reads thus :

"..... Section 43(3) makes it clear that the provisions of the Act and the Rules, which include the right of appeal also, would apply only to rectification orders which have the effect of enhancing an assessment or penalty. The clear intendment of the provision is that rectifications which have the effect of reducing an assessment or penalty would not come within the category of appealable orders. Section 34 which deals with the appeal to the Appellate Assistant Commissioner does not take within its ambit a rectification order which reduces the assessment or penalty. The result is that merely for the reason that a rectification order has been passed, the petitioner-assesses does not get a right of appeal."

8. Mr. Gandhi cited a decision of the Madras High Court in Madras Rubber Factory Limited Vs. The State of Tamil Nadu, No doubt, to some extent this decision supports the contention of the learned counsel for the petitioner before us. But, we have followed the reasoning of the Full Bench of this Court and, therefore, it is unnecessary for us to consider and follow this decision.

9. The learned counsel also cited a decision of the Bombay High Court reported in [1990] 77 STC 465 Bom (Commissioner of Sales Tax v. Maharashtra Hardware

Stores). The principles stated in this decision can be placed before the Deputy Commissioner since on merits we have not expressed any opinion.

10. Lastly, Mr. Gandhi contended that the petitioner had no full opportunity to place its objections on the merits of the matter as the petitioner concentrated only on the question of limitation.

11. In the circumstances, we set aside the order under revision, remit the matter to the Deputy Commissioner for fresh consideration on the merits of the case subject to the finding already given by us regarding the question of limitation. The Deputy Commissioner shall issue notice to the petitioner fixing a date of hearing. On the receipt of the notice the assessee is entitled to file its objections within a reasonable time from that date.

12. The sales tax revision petition is allowed accordingly.

13. Petition allowed.