

(1987) 02 AHC CK 0054
In the Allahabad High Court
Case No : Sales Tax Revision No. 561 of 1986

Anand General Store

APPELLANT

Vs

Commissioner of Sales Tax

RESPONDENT

Date of Decision : 13-02-1987

Acts Referred:

Uttar Pradesh Sales Tax Act, 1948 — Section 10(5)

Citation : (1987) 66 STC 349

Hon'ble Judges : Om Prakash, J

Bench : Single Bench

Advocate : Rajesh Kumar, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

Om Prakash, J.—Raising a very interesting question of law, this revision is filed by the assessee carrying business in handloom, cashmilon, etc., for the assessment year 1978-79 against the Tribunal's order dated 7th May, 1986.

2. By the order dated 25th February, 1980, the Sales Tax Officer (S.T.O.) imposed the tax at the rate of 2 per cent on the turnover of cashmilon. As the books of account were rejected and the turnover was enhanced by the S.T.O., the assessee appealed to the Assistant Commissioner (Judicial) [A.C. (J.)] challenging the rejection of the books of account and the enhancement of the turnover. Imposition of tax at the rate of 2 per cent on the turnover of cashmilon was not the subject-matter of appeal. The A.C. (J.), however, observed towards the end of his order dated 24th April, 1982, that according to rules cashmilon was liable to be taxed at the rate of 7 per cent and not at 2 per cent. He, therefore, remanded the case to the S.T.O. to reassess the sales of cashmilon.

3. Aggrieved, the assessee went up in second appeal to the Tribunal. The latter took the view that the A.C. (J.) was not right in remanding the case for imposing a tax at a higher rate on the turnover of cashmilon, as he himself was fully

competent to assess the turnover of cashmilon at the correct rate of tax. The Tribunal also held that u/s 10(5) of the U.P. Sales Tax Act, 1948 (for short the Act, 1948) "...the same could be done at the Tribunal stage". To take this view, the Tribunal relied on Raj Kumar Kotwaj v. Commissioner of Sales Tax, U.P. 1976 UPTC 742 and on two more authorities. The Tribunal finally held :

In the aforesaid background, I hold it to be proper to assess the turnover of imported cashmilon at 7 per cent in view of ruling of Honourable High Court in the case of Jaimets Pvt. Ltd. v. State of U.P. 1984 UPTC 67.

4. This is how the turnover of cashmilon was taxed by the Tribunal at the rate of 7 per cent while that was taxed by the S.T.O. only at the rate of 2 per cent.

5. The contention of Sri Rajesh Kumar, learned counsel for the assessee, is that imposition of tax at the rate of 2 per cent on the turnover of cashmilon was not challenged in appeal before the A.C. (J.) by the assessee and that not being a subject-matter of appeal, it was wholly beyond the jurisdiction of the A.C. (J.) to touch that part of the assessment. The turnover of cashmilon having been taxed at the rate of 2 per cent and that having not been agitated before the A.C. (J.) in appeal, Sri Rajesh Kumar argues that to that extent the assessment had become final and that part of the assessment stood closed. He urges that u/s 9 of the Act, 1948, the right of appeal is given only to a dealer and not to the department and that a dealer who feels aggrieved by any part of the assessment order made by the S.T.O. can file an appeal before the A.C. (J.) against that part, meaning thereby, that no appeal is permissible against the admitted part of the assessment order. It is argued by him that the dealer files an appeal to get a benefit from the appellate authority in respect of that part of the assessment order which he feels aggrieved of and that he does not go in appeal to get the assessment order reopened to the extent it has become final by not having filed an appeal. Once the order either whole or in part has become final in the sense that no appeal is preferred there against, it is argued that the appellate authority does not get any jurisdiction to interfere with such assessment order and that the order which has become final either that can be reopened u/s 21 by the S.T.O. or that the Commissioner of Sales Tax may exercise suo motu jurisdiction u/s 10-B which is a revisional jurisdiction of the Commissioner. The argument is that in no other way the assessment order which has become final, can be interfered with by any authority. On the other hand, the contention of the Revenue is that under Sub-clause (ii) of Clause (a) to Sub-section (3) of Section 9 of the Act, 1948, the A.C. (J.) is fully empowered to vary the assessment order by reducing or enhancing the amount of assessment, where such reduction or enhancement arises from a point raised in the grounds of appeal or otherwise. The contention is that the jurisdiction of the appellate authority is not restricted only to the grounds of appeal raised in the memorandum of appeal but the appellate authority can travel over other matters which are not the subject-matter of appeal. It is, therefore, argued by learned Standing Counsel that though there was no appeal on the point of rate of tax leviable on the turnover of

cash million, but the appellate authority was competent to touch upon that part of the assessment.

6. The question for consideration is whether an appellate authority acquires jurisdiction for reducing or enhancing the amount of assessment which is not the subject-matter of appeal or whether the appellate authority can interfere with that part of the assessment against which no appeal is filed. This question is not *res Integra* as that has already been decided by this Court in the case of *Madan Studio v. Assistant Commissioner (Judicial) IV, Sales Tax 1975 UPTC 58*. In the said case the S.T.O. accepted the assessee's contention that the turnover of photographs was exempted from tax but he rejected the account books of the assessee in regard to the turnover of photo goods and estimated them. The assessee challenged the enhancement of the turnover in appeal. During appeal, the Revenue argued that the turnover of photographs was liable to tax and had been wrongly exempted by the S.T.O. Thereupon the A.C. (J.) issued a notice to the assessee to show cause as to why the turnover of photographs should not be brought to tax. The assessee challenged the validity of the notice in the writ petition, on the ground that the appellate authority had no jurisdiction to touch the turnover which had been exempted and against which no appeal was filed by him. A Division Bench of this Court then took the view that the appellate authority is confined to the subject-matter of the appeal, preferred by the dealer. It cannot go outside it. It may decide the points raised in appeal on the grounds set forth in the memorandum of appeal or on other grounds as contemplated by Sub-rule (3) of Rule 66. The Bench taking such a view held that the notice issued by the appellate authority requiring the assessee to show cause why the turnover of photographs be not brought to tax, was without jurisdiction. This authority was subsequently followed by this Court in the case of *Sohan Lal Babu Ram v. Commissioner of Sales Tax, U.P. 1981 ATJ 356*. The facts of this case are that the petitioner was a dealer in cotton, foodgrains, oil-seeds, etc. For the assessment year 1964-65, the dealer filed returns admitting tax liability on the turnover of cotton. It was assessed to tax accordingly. The petitioner then filed an appeal and challenged the assessment on the turnover of the cotton, though that was an admitted liability. The appellate authority, however, agreed with the dealer that the turnover of cotton was not assessable. He, therefore, remanded the matter to the assessing authority directing him not to levy such tax on the turnover of cotton. After the remand order, the assessing authority himself did not levy such tax on the turnover of cotton. Therefore, the appeal was filed by the dealer in respect of other matters. The appeal was disposed of on the grounds raised in the memorandum of appeal, but the appellate authority made an observation that as the High Court in a reference in the case of *Commissioner of Sales Tax v. Kashi Ram Ujager Sahi* decided on 3rd January 1974, has held that the turnover of the cotton for the year 1964-65 was liable to tax, the assessing authority may reconsider the tax liability of the petitioner in respect of the turnover of cotton. Aggrieved by such direction in respect of the turnover of cotton, the assessee filed the writ petition; then the Division Bench relying on

the case of Madan Studio 1976 UPTC 68 accepted the contention of the petitioner and held that the turnover of cotton was specifically not held liable to tax for the assessment year 1964-65 by the appellate authority and that finding in the first appellate order had become final and, therefore, it cannot hence be said that any tax under the Act on the turnover of cotton for the assessment year 1964-65 was due from the assessee. It was further held that the fact that the High Court may have held that such a turnover was taxable has no material bearing, when the finding given by the appellate authority inter-parties had become final.

7. Learned Standing Counsel argued that both the authorities relied upon by the assessee are of no use, as they were based on the pre-amended Sub-section (3) of Section 9 of the Act, 1948 and that the amended Sub-section (3) of Section 9 widened the powers of the appellate authority. Let us have a look at the pre-amended Sub-section (3) and the amended Sub-section (3) of Section 9 of the Act, 1948. Unamended Sub-section (3) of Section 9 is as follows:

(3) The appellate authority may, after giving the appellant and the Commissioner of Sales Tax a reasonable opportunity of being heard,-

(a) in the case of an order of assessment or penalty,-

(i) confirm, reduce, enhance or annul the order of assessment or of penalty or of both; or

(ii) set aside the order and direct the assessing authority to pass a fresh order after such further inquiry as may be specified; or

(b) in the case of any other order, confirm, cancel or vary such order.

8. Amended Sub-section (3) of Section 9 runs thus:

(3) The appellate authority may, after calling for and examining the relevant records and after giving the appellant and the Commissioner of Sales Tax a reasonable opportunity of being heard or as the case may be, after following the procedure prescribed under Sub-section (1-A)-

(a) in the case of an order of assessment or penalty,-

(i) confirm or annul such order; or

(ii) vary such order by reducing or enhancing the amount of assessment or penalty, as the case may be, whether such reduction or enhancement arises from a point raised in the grounds of appeal or otherwise; or

(iii) set aside the order and direct the assessing authority to pass a fresh order after such inquiry as may be specified; or

(iv) direct the assessing authority to make such inquiry and to submit its report within such time as may be specified in the direction or within such extended time as it may allow from time to time and on the expiration of such time the appellate authority may, whether the report has been submitted or not, decide

the appeal in accordance with the provisions of the preceding sub-clauses; or
(b) in the case of any other order, confirm, cancel or vary such order :

Provided that nothing in this sub-section shall preclude the appellate authority from dismissing the appeal at any stage with such observations as it deems fit, where the appellant applies for withdrawal of the same and no request for enhancement of the assessment or penalty has been made.

9. At a glance the comparison shows that sub-clauses (ii) and (iv) were inserted by amendment in Sub-section (3). Sub-clause (ii) alone is relevant, so far as the instant case is concerned. The thrust of the argument of the Revenue is that under Sub-clause (ii) of Clause (a) to Sub-section (3) of Section 9, the powers of the appellate authority of reducing or enhancing the amount of assessment are not restricted only to the points raised in the grounds of appeal, but the words "or otherwise" occurring in Sub-clause (ii) confers a jurisdiction on the appellate authority to travel beyond the grounds of appeal and interfere with any part of the assessment against which no appeal has been preferred by the assessee. I am not at all persuaded by this argument of the Revenue. The part of the assessment against which no appeal is preferred, becomes final. Where an assessment order is partly challenged in appeal, then it cannot be said that the whole assessment becomes the subject-matter of the appeal. When an assessment order is partly accepted and partly challenged in appeal by an assessee, then only that part of the order which is challenged in appeal, becomes the subject-matter of appeal. The question is what is the position of the part of the assessment order against which no appeal is filed and which is accepted by the assessee. In my opinion such part of the assessment having become final, cannot be interfered with by the appellate authority suo motu. After the assessment having become final, if the assessing authority has reason to believe that the whole or any part of the turnover of a dealer for any assessment year has escaped assessment to tax or has been under-assessed or has been assessed to tax at a rate lower than that at which it is assessable under the Act, then u/s 21 of the Act, the assessing officer may reopen the assessment after issuing notice to the dealer and making such enquiry as it may consider necessary. So it is only the assessing officer who has the power to reopen the assessment to impose tax at a higher rate. No such power has been conferred on the appellate authority. For invoking Section 21, the assessing officer will have to show that it has reason to believe that the turnover of certain commodity was assessed at a rate lower than that at which it were assessable. Unless he has reason to believe that a given turnover has been under-assessed or assessed at a lower rate, no assessment can be reopened by him. u/s 10-B of the Act, the Commissioner of Sales Tax may call for and examine the record relating to any order passed by any officer subordinate to him for the purpose of satisfying himself as to the legality or propriety of such order and may pass such order with respect thereto as he thinks fit. So this is a revisional jurisdiction that can be suo motu exercised by the Commissioner. This power is conferred upon the

Commissioner, because the Revenue has no right to appeal against the order of the Sales Tax Officer. The Sales Tax Officer represents the department and the department cannot appeal against its own order and, therefore, no right of appeal is given to the department. But in exercise of the revisional jurisdiction, the Commissioner may look into the legality of the order passed by the S.T.O. and he can pass an order adversely affecting the assessee after giving an opportunity of being heard to him. So the scheme of the Act is that it prohibits the department to appeal against the assessment order. If the contention of the Revenue is accepted that the appellate authority has ample power under Sub-clause (ii) of Clause (a) to Sub-section (3) of Section 9 to interfere with that part of the assessment order, which is not appealed against then it would amount to conferring a right of appeal on the department, which is prohibited by the Act. What the department cannot do directly that cannot be permitted to be done by it indirectly in the appeal of the assessee by challenging that part of the assessment order which is not the subject-matter of the appeal before the appellate authority. The matter can be looked at from another angle also. *Suo motu* jurisdiction can be exercised only by the Commissioner u/s 10-B. The result of acceptance of the contention of the Revenue would be that the appellate authority may also exercise revisional jurisdiction *suo motu* which is now conferred only on the Commissioner u/s 10-B, simultaneously. Then this will cause a great confusion and may some times result into conflicting orders of the Commissioner as well as the appellate authority. The interpretation leading to confusion or conflict must always be avoided and the interpretation which conforms to the well-settled principles that the part of the assessment which is not appealed against, becomes final and closed, unless is validly reopened by a competent authority or is altered in the revisional jurisdiction, must be accepted. This being so, the decision in the case of *Madan Studio 1975 UPTC 58* still holds good and the contention of the Revenue that the amended Sub-section (3) of Section 9 has widened the power of the appellate authority has to be rejected.

10. There is one more reason to reject the contention of the Revenue that the part of the assessment which has become final, can be touched upon by the appellate authority. In an appeal to be filed before the appellate authority, a dealer is required to state the grounds of appeal and he cannot travel beyond them, unless permitted by the appellate authority for cogent reasons. If the contention of the Revenue is accepted, then it would mean that the Revenue would be free from the fetters, imposed on a dealer and it can raise any ground before the appellate authority without submitting the grounds of appeal. So far as the procedure of appeal is concerned, the law does not make any distinction between a dealer and the Revenue and the distinction may be only in regard to the right of appeal. It shows that the legislature would not have intended to confer power on the appellate authority to touch upon the part of the assessment which has become final.

11. It is argued by the Revenue that the power of the appellate authority is co-extensive and co-terminous with the powers of assessing officer and, therefore,

no exception can be taken to the order of the appellate authority enhancing the rate of tax from 2 per cent to 7 per cent. This contention is to be seen on the facts and circumstances of this case. No doubt, the powers of the appellate authority are co-extensive and co-terminous, but the question is whether the assessing authority after having made the assessment was competent to enhance the rate of tax from 2 per cent to 7 per cent. Except exercising powers u/s 21 of the Act, 1948, for the invocation of which, certain ingredients have to be established by the assessing officer, the turnover of cash million cannot be taxed at a higher rate even by the assessing officer. So on the facts of this case, no enhancement in tax rate can be made even by the assessing officer and, therefore, the appellate authority has no power to do what cannot be done by the assessing officer.

12. It was then argued by Sri Rajesh Kumar that in this case no enhancement was made by the A.C. (J.) himself under Sub-clause (ii) of Clause (a) to Sub-section (3) of Section 9 of the Act, 1948, but he simply directed the assessing officer to reassess the turnover of cash million. It is contended that the enhancement in fact was made by the Tribunal and, therefore, the question is whether the powers of the Tribunal are co-extensive and co-terminous with the assessing officer. Certainly, the powers of the Tribunal are not co-extensive and co-terminous with the powers of the assessing authority and no enhancement can be made by the Tribunal at least.

13. The question is as to how the phrase, "whether such reduction or enhancement arising from a point raised in the grounds of appeal or otherwise" occurring in Sub-clause (ii) of Clause (a) to Sub-section (3) of Section 9 of the Act, 1948, can be construed. For the foregoing reasons, the proper construction of this phrase seems to be that the appellate authority can exercise power of reduction or enhancement in the appeal before it with regard to the subject-matter of appeal and not in respect of the part of the assessment which is not appealed against.

14. In the result, the revision succeeds and is allowed. The Tribunal's order dated 7th May, 1986, in so far as it relates to enhancing rate of tax on the turnover of cash million is set aside and the order of the assessing officer in that regard is restored. Let copy of this order be sent to the Tribunal to pass a conforming order u/s 11(8) of the Act, 1948.