(2007) 05 RAJ CK 0045

In the Rajasthan High Court

Assistant Commissioner, Commercial Taxes APPELLANT

Vs

Mahaveer Timber Mart RESPONDENT

Date of Decision : 08-05-2007

Acts Referred:
Rajasthan Sales Tax Act, 1994 — Section 25(5), 27, 29

Citation : (2007) 211 CTR 90 : (2009) 24 VST 409

Hon'ble Judges : Prakash Tatia, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Prakash Tatia, J.—Heard learned Counsel for the parties.

2. The law point raised by the Revenue in the present revision is whether the Tax Board was right in holding that the appeal preferred by the Revenue in the matter of provisional assessment proceedings became infructuous after the final assessment order made u/s 29 of the Rajasthan Sales-tax Act, 1994?

3. Brief facts of the case are that a survey was undertaken on 15th May, 1997 at the business premises of the respondent/assessee and during the course of survey, incriminating documents were found. In survey, it was found that there were discrepancies in the books of account. The proceedings for provisional assessment of tax u/s 27 of the Rajasthan Sales-tax Act, 1994 (for short ''the Act of 1994'') were initiated. Due notice was given to the assessee in the provisional tax assessment proceedings and tax liability of the assessee was assessed by the assessing authority by order dt. 11th Aug., 1997 holding that the assessee sold timber of Rs. 5,01,137 and its entry has not been made in the books of account and by that, the assessee has avoided payment of tax. The tax liability was assessed as Rs. 50,114 and a penalty of Rs. 1,00,228 was imposed and interest of Rs. 8,841 was charged. In all, the liability was assessed at Rs. 1,59,183.

4. The assessee preferred appeal before the Dy. Commr.(A), Commercial Taxes, Jodhpur. The appellate authority by order dt. 17th March, 1998 partly allowed

the assessee''s appeal and held that out of sale of Rs. 5,01,137, the assessee has verified and accounted for sale of timber of Rs. 3,31,833. Consequently, the appellate authority reduced the tax, as well as interest and penalty proportionately.

5. The Revenue preferred further appeal against the order dt. 17th March, 1998 before the Tax Board, Ajmer. During the pendency of this appeal before the Tax Board in the matter of proceedings arising out of provisional tax assessment u/s 27 of the Act of 1994, the proceedings for regular assessment for the same year were completed by the assessing authority u/s 29 of the Act of 1994 by order dt. 18th Nov., 1998. The Tax Board by following the decision of the Division Bench of this Court delivered in the case of CTO (AE) v. Rajasthan Taxation Tribunal & Am. 25 Tax World 81 (Raj) held that the provisional assessment merged in the final assessment order and, therefore, the appeal against the provisional assessment has become infructuous. The Tax Board further observed that contrary view taken by the Single Bench of High Court in the case of Asstt. CTO v. Chauhan Enterprises 93 STC 37 is no good law after the above Division Bench judgment of this Court. In view of the above, the Tax Board dismissed the appeal of the Revenue as infructuous.

6. It will be worthwhile to mention here that the Tax Board dismissed the Revenue''s appeal in the provisional assessment matter because of passing of regular assessment by the assessing authority on 18th Nov., 1998 and in the order dt. 18th Nov., 1998 itself, the assessing authority clearly mentioned that since the appeal arising out of the provisional assessment order of the assessing authority is pending before the Tax Board, therefore, action will be taken in accordance with the decision which may be given by the Tax Board in the proceedings for the provisional assessment of tax of the assessee u/s 27 of the Act of 1994. Though the issue was left open by the assessing authority in the final assessment order itself but the Revenue''s appeal in matter of provisional assessment was dismissed by the Tax Board by the impugned order.

7. Learned Counsel for the Revenue vehemently submitted that the provisional assessment proceedings are independent proceedings and not proceedings under regular assessment proceedings. Any order passed for assessment of tax under the provisional assessment u/s 27 of the Act of 1994 is appealable order like any order passed in regular assessment proceedings u/s 29. The appellate order in the provisional assessment proceedings is also appealable and further revision lies to the High Court against the Tax Board''s order even in provisional assessment matter. In these proceedings, the assessing authority gives full opportunity to the assessee before passing the order and the assessing authority decides the question of fact and law within the prescribed period as provided u/s 27(3). The finding which is recorded by the assessing authority and which becomes final on not challenging the finding of the assessing authority recorded in the provisional assessment order or upheld by the appellate authority and in further appeal and in revision, then that order cannot be reconsidered, modified

or set aside by the lower authority, i.e. assessing authority while dealing with the proceedings for regular assessment.

8. According to learned Counsel for the Revenue, though the words "provisional assessment" have been used in Sections 27 and 28 of the Act of 1994 but the words "final assessment" have not been used for the orders which are passed u/s 29. Section 2(4) clearly says that the assessment includes provisional assessment, reassessment and best judgment assessment. Therefore, mere use of word "provisional" before "assessment" u/s 27 cannot make the assessment under Sections 27 and 28 an order like the order passed on application for grant of injunction or any other order passed in a proceeding which merges in the final order like in civil suits where there may be interlocutory proceedings for grant of injunction or orders passed during the course of hearing of the main suit.

9. Learned Counsel for the Revenue also submitted that Section 34 of the Act of 1994 also provides that the assessment order passed u/s 27 shall be deemed to be final assessment in case no assessment order is passed by the assessing authority u/s 29 within the specific time-limit or where in case, the provisional assessment has been made but no assessment has been made u/s 29. Therefore, provisional assessment order under Sections 27 and 28 creates a liability of the assessee and determines the question of fact and law so far as issues involved for assessment of that period for which provisional assessment has been made. The order of assessment under Sections 27 and 28 once becomes final, the assessing authority in regular assessment u/s 29 cannot examine the legality and validity of the provisional assessment order and the liability under the provisional assessment continues even when the regular assessment is made u/s 29. Therefore, the Tax Board committed error of law in holding that the appeal has become infructuous.

10. In addition to above, learned Counsel for the Revenue further submits that the law laid down by the Division Bench of this Court in the case of CTO (AE) v. RTT (supra) cannot be applied to the facts of the present case. For this, learned Counsel for the Revenue submitted that the judgment of the Division Bench was delivered under the provisions of Rajasthan Sales-tax Act, 1954 (for short ''the Act of 1954'') wherein no section like Section 34 of the new Act was there which makes the provisional assessment order passed for a period as final assessment when regular assessment is not made by the assessing authority u/s 29. It is also submitted that in the present case, since the assessing authority itself in final assessment order clearly mentioned that since the appeal against the provisional assessment is pending before the Tax Board, therefore, the effect to the Tax Board''s decision which may be passed in the provisional assessment proceedings will be given effect and by this, the challenge to the decision of Dy. Commr.(A) reducing the liability of the assessee remained undecided in final assessment order and was dependent upon the decision of the Tax Board in the Revenue''s appeal which was preferred against the order of Dy. Commr.(A) dt. 17th March, 1999. If it is held that the appeal of the Revenue was rightly held to

be infructuous, then the Revenue will be remediless and will not be able to challenge the order of Dy. Commr.(A) by which the tax liability, penalty and interest were reduced. The assessing authority, during pendency of appeal before the Tax Board, could not have taken a view contrary to the view taken by the Dy. Commr.(A) being an authority lower to Dy. Commr.(A) nor could have examined the legality and validity of the order when the matter was pending before the highest Court in the revenue side i.e. Tax Board.

11. Learned Counsel for the assessee submitted that the question raised by the Revenue about the effect of regular assessment order over the provisional assessment order came up for consideration before this Court in the case of Chauhan Enterprises (supra) wherein the Single Bench of this Court held that the appeal arising out of the provisional assessment proceedings cannot become infructuous on passing of regular assessment order. The said judgment was considered by another Single Bench of this Court in the case of Shreechand v. CTO 100 STC 53 (Raj) and in a detail judgment, after considering the relevant provisions of law, this Court held that challenge to the provisional assessment in appeal becomes infructuous on passing of final assessment u/s 10 of the Act of 1954 (provision similar to Section 29 of the Act of 1994). Not only this, but the judgment taking a contrary view delivered in the case of Chauhan Enterprises (supra) has been overruled specifically by the Division Bench of this Court in the case of CTO (AE) v. RTT (supra) and the Division Bench held that once regular assessment order takes place after provisional assessment, the findings given in the regular assessment and tax demand created thereunder only operate. Yet another Single Bench of this Court in the case of Commercial Taxes Officer Vs. P.G. Fiiles Limited, took the same view as taken by the Division Bench in CTO (AE) v. RTT (supra) and in the case of Shreechand (supra).

12. Learned Counsel for the assessee also relied upon Section 25(5) as well as Section 34 of the Act of 1994 in support of his arguments in addition to Sections 27, 28 and 29 and submitted that if the provisional assessment order itself would have been final order so far as the question decided in the provisional assessment proceedings under Sections 27 and 28 is concerned, then there was no necessity of making a provision like Section 34 which alone makes the provisional assessment final in a situation; when the regular assessment u/s 29 is not passed. Therefore, where regular assessment is made u/s 29, the only regular assessment is the final assessment and in that situation, possibility of becoming provisional assessment as final assessment has been excluded by the statutory provision. Even a liability created u/s 27 is a liability of assessee of payment of tax u/s 27 even then that payment or liability is only provisional which is clear from Section 25(5) which clearly says that every deposit of tax or deduction of amount shall be subject to adjustment against tax liability determined in the assessment for any order made u/s 29. Therefore, if any liability is created u/s 27 or any amount is paid by the assessee in consequence of provisional assessment, that liability and payment is provisional and if it is not incorporated in regular assessment u/s 19, it cannot be continued.

13. I considered the submissions of learned Counsel for the parties and perused the reasons given in various judgments of this Court as well relevant provisions of law.

14. The judgment of this Court delivered in the case of Chauhan Enterprises (supra) was considered by the Division Bench of this Court in the case of CTO (AE) v. RTT (supra) and has been overruled specifically, therefore, the judgment delivered in the case of Chauhan Enterprises (supra) does not lay down the correct legal position.

15. The judgment of Single Bench delivered in the case of Shreechand (supra) though is based on the provisions as per the Act of 1954 but the provisions for provisional assessment under Sections 7(A) and 7(B) are almost same as that of Sections 27 and 28 of the Act of 1994.

Section 7(4) of the Act of 1954 provides that every deposit of tax made u/s 7 (provisional assessment) shall be deemed to be provisional subject to necessary adjustments in pursuance to the final assessment of tax made for an order u/s 10 of the Act of 1954. Similar provision to this is Section 25(5) of the Act of 1994. The provisional assessment made under the provisions of Sections 27 and 28 of the Act of 1994 is the best judgment provisional assessment and creates provisional liability u/s 7(4) of the Act of 1954 and similarly, the provisional assessment under Sections 27 and 28 of the Act of 1994 is subject to the provisions of Section 25(5) of the Act of 1994 and that means the amounts payable under the provisional assessment under the Act of 1994 are adjustable to the tax dues for which the assessee is held liable finally u/s 29 of the Act of 1994.

16. Substantially there is no difference so far as the nature of order passed under the provisions of the Act of 1954 or the Act of 1994 when they are made for provisional assessment or regular assessment and with respect to adjustment of liability created under the provisional assessment in regular assessment, therefore, the legal effect of the provisional assessment under Sections 27 and 28 and about the regular assessment u/s 29 is same and the issue raised by the assessee is squarely covered and decided by the Division Bench of this Court in the case of CTO (AE) v. RTT (supra).

17. Learned Counsel for the Revenue tried his best to canvass before this Court that the provisional assessment order decides the question once for all and finally and the original order can be challenged by preferring appeal and further appeal and by revision before the High Court and is not integral part of the proceedings of final assessment and not arising in the proceedings of regular assessment, therefore, the proceedings of provisional assessment are independent and order survives even after the final assessment and, therefore, such final order of provisional assessment cannot be set aside by the same authority when the provisional assessment order is not challenged and cannot be modified or set aside when the provisional assessment order has been finally

decided by the appellate or revisional authority.

18. The same argument as of learned Counsel for the Revenue was considered by Single Bench of this Court in the case of Shreechand (supra) and by the Division Bench of this Court in the case of CTO (AE) v. RTT (supra) and after considering the submissions as submitted by learned Counsel for the Revenue, the Single Bench and the Division Bench held that the appeal becomes infructuous after passing of the final assessment order. Therefore, the argument of learned Counsel for the Revenue cannot be accepted being contrary to the law laid down by this Court.

19. Learned Counsel for the Revenue submitted that the assessing authority itself in its order of regular assessment dt. 18th Nov., 1998 clearly mentioned that the action, so far as tax liability of the assessee is concerned for the sale which was under consideration during provisional assessment proceedings, will be taken in accordance with the decision given by the Tax Board. By this, the issue about the liability of the assessee in pursuance of the original provisional assessment order dt. 11th Aug., 1997 remained undecided and by the decision of the Tax Board dt. 8th Feb., 2002, the challenge to the order of the Dy. Commr. (A) dt. 17th March, 1998 has come to an end without determination of the legality and validity of the order dt. 17th March, 1998, thereby the Revenue has been prejudiced because of the view taken by the assessing authority under assumption that it being the original authority neither can consider the legality and validity of the order passed by the appellate authority nor there can be any justification to do so when the highest Tribunal on the side of taxation?Tax Board was seized with the matter.

20. It will be worthwhile to notice the reason given by this Court on this issue in Shreechand''s case (supra). In the said case, a specific question was raised that when the provisional assessments were under challenge in appeal and the appellate authority modifies or set aside the provisional assessment, whether the assessing authority while making the final assessment u/s 10 (in the present case Section 29) is bound by the orders made in the appeal from the orders of the provisional assessment? This Court held that the answer is simple. As the assessment is provisional and subject to final assessment u/s 10 of the Act of 1954 (s. 29 of the Act of 1994), even the orders passed by the appellate authority while dealing with the appeals from the provisional assessment orders would be subject to final assessment u/s 10 of the Act of 1954 (s. 29 of the Act of 1994). This Court very specifically held that, "There is no question of assessing authority defying or flouting the orders of the superior officers while making assessment u/s 10 of the Act. The situation is akin to a suit for permanent injunction in which a temporary injunction is passed. Even if the temporary injunction is confirmed in appeal by a higher Court, the Trial Court is not precluded from dismissing the suit and refusing to grant permanent injunction."

21. In view of the above reasons, if any mistake has been committed by the

assessing authority by not following the decision of this Court delivered in case of Shreechand (supra) and Division Bench judgment of this Court in the case of CTO (AE) v. RTT (supra), the order of the Tax Board dt. 8th Feb., 2002 dismissing the appeal of the Revenue as infructuous on passing of the final assessment cannot be set aside despite the fact that the assessing authority in final assessment order observed that appropriate action will be taken in accordance with the decision given by the Tax Board in appeal challenging the order of Dy. Commr.(A) dt. 17th March, 1998. Since it has been held that as per law, the provisional assessment is subject to regular assessment and the order even if it is passed and upheld by the highest Court in provisional assessment proceedings, then by the order of the assessing authority which may have been passed in the proceedings of regular assessment, cannot make the provisional assessment order to become order of regular assessment and to give precedence to the provisional assessment order over regular assessment simply because the regular assessment order itself made the regular assessment order subject to decision on provisional assessment.

22. The contention of learned Counsel for the Revenue is that if the order of Tax Board is not set aside, then the Revenue will be remediless despite the fact that there is an order that the appropriate order will be passed in regular assessment proceedings in accordance with the order which may be passed in provisional assessment. In view of the reasons mentioned above, this argument of learned Counsel for the Revenue deserves to be rejected on the ground that the law cannot be interpreted because of the reason of hardship which may be caused to the authority by any order which was contrary to law. In the cases of Shreechand (supra) and P.G. Foiles Ltd. (supra) as well as Division Bench judgment in the case of CTO (AE) v. RTT (supra), almost similar situations were there except mentioning in the order of regular assessment that regular assessment will be subject to decision in the provisional assessment.

23. In view of the above reasons, I do not find any merit in this revision petition and the same is hereby dismissed.

