
(1985) 01 MP CK 0034
In the Madhya Pradesh High Court
Case No : M.P. No. 114 of 1982

Auto Pins (India) (Regd.) and Another	APPELLANT
Vs	
Sales Tax Officer and Another	RESPONDENT

Date of Decision : 10-01-1985

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1986) 61 STC 287

Hon'ble Judges : R.K. Varma, J;P.D. Mulye, J

Bench : Division Bench

Advocate : M.S. Choudhary, for the Appellant; S.R. Joshi, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

P.D. Mulye, J.—The petitioner, a sales tax assessee, has filed this petition under Article 226 of the Constitution of India for quashing the order of assessment passed by respondent No. 1 on 31st December, 1981 (annexure 20).

2. The case of the petitioner may be stated in brief thus : The petitioners are carrying on the business of manufacture and sale of auto parts. Petitioner No. 1 submitted its returns as the representative of the firm for the period from 1st October, 1971, to 30th September, 1972. The said assessment was completed by the Sales Tax Officer, Circle No. III, Indore, on 10th April, 1974, as per annexure 6.

3. After the completion of the said assessment, respondent No. 2 issued a notice dated 27th May, 1977, u/s 39(2) of the M.P. General Sales Tax Act, as respondent No. 2, under the suo motu powers of revision felt that the order of assessment did not contain any reasoning for deducting a sum of Rs. 62,173.20 from the opening stock of Rs. 1,23,375.50. According to respondent No. 2, namely, the Commissioner of Sales Tax, the sales should have been enhanced by a sum of Rs. 52,173.20 plus 25 per cent profit, f. e., Rs. 13,043.20. Therefore

respondent No. 2 proposed addition to the turnover at Rs. 65,216 and a levy of tax at Rs. 6,631.60.

4. Petitioner No. 1 in response to the said notice explained the alleged discrepancy with reference to the certificate from the head office. According to the petitioner there was no discrepancy at all. The closing stock was valued at the time of transfer by the head office at Rs. 1,23,375.50 as per price list which included discount and profit margin of the company. Actual cost for the purpose of balance sheet was cost price according to the well-established principles of valuation of closing stock. The factual position could not be verified and proved with reference to the books of account as they were seized by the Income Tax department and were in its possession.

5. Respondent No. 2, therefore, could not verify the position as alleged by the petitioner in absence of the books of account and hence he remitted the case back to the assessing officer with the direction to verify the position with reference to the books of account and give a proper finding as to why deduction of Rs. 52,173.20 was permitted from the opening stock shown in trading account. This was to be done by the assessing officer on production of the books of account when they were released by the Income Tax department as per annexures 9 and 10. That in consequence of the remand order (annexure 10) dated 28th February, 1979, the assessing authority fixed the case for hearing, which was adjourned from time to time. According to the petitioner on 17th November, 1981, for the first time respondent No. 1 proposed addition of Rs. 14,93,363 on account of the escapement of the turnover to that extent. The petitioner filed reply to the same dated 18th November, 1981, by which he opposed the proposal for assessment on the basis of escaped turnover in absence of any notice u/s 19(1) of the said Act.

6. Respondent No. 1, therefore, issued notices u/s 19(1) proposing to assess additional turnover at Rs. 14,93,363 on the ground that it had escaped assessment and fixed the case for hearing on 26th December, 1981. Petitioner No. 1, through his counsel raised a preliminary objection to the jurisdiction of respondent No. 1 to initiate such proceedings on the ground that the jurisdiction of the assessing authority was limited to the remand order and after the expiry of the period of limitation he could not try to reassess the petitioner on the ground of escaped assessment. However, according to the petitioner, respondent No. 1 without deciding the preliminary objection completed the assessment on merits, vide his order dated 31st December, 1981 (annexure 20), as he felt that he had the jurisdiction in assessing the escaped turnover in remand proceedings. He further held that since respondent No. 2 had directed him to verify the stock position with reference to the scrutiny of the account he was entitled to bring in the net tax all turnover including escaped turnover, on which tax could be levied. He, therefore, assessed the escaped turnover and overruled the objection of the petitioner though respondent No. 1 accepted the factual position that notice u/s 19(1) is barred by limitation. According to him he was entitled to make a proper

assessment in remand proceedings without there being any limitation on his power of jurisdiction.

7. Against the said order the petitioner has filed an appeal, which is also pending. But in the meanwhile he has filed the present petition on the ground that respondent No. 1 could not act and proceed beyond the wording of the remand order passed by respondent No. 2 and consequently the original assessment having been completed in 1974, he had no jurisdiction to reassess the petitioner on the ground of escaped assessment. Further, according to the petitioner, the appellate authority has deferred to decide the appeal pending before him on the ground that the matter is sub judice before this Court. Hence this petition.

8. The respondents in their returns have submitted that the remand order (annexure 10) directs fresh assessment for the period in question as the original assessment order was set aside. Further, according to the respondents, if the assessee was desirous of the production of the accounts which were seized by the Income Tax department, it was open to the assessee to have made an application u/s 35(1) of the said Act. Further, according to the respondents, since the time-limit to decide the case was expiring on 31st December, 1981, it was not possible for the department to have granted any further adjournment in the matter. Further according to the respondents in the case of fresh assessment Section 19(1) of the M.P. General Sales Tax Act would not be attracted as the original assessment order has already been quashed by the Additional Commissioner in the revision before him and the assessing officer was directed to make a fresh assessment. Further, according to the respondents, it is not disputed that notice was not issued under the provisions of Section 19(1) of the said Act as, according to them, question of reopening u/s 19(1) did not at all arise since the assessment was to be made afresh.

9. In order to appreciate the rival contentions, it is necessary to quote the relevant extract of the remand order, which is as follows :

This order is considered to be erroneous and prejudicial to the revenue and is sought to be revised u/s 39(2) of the Act on the following grounds :

That allowing an exemption of Rs. 52,173.20 as discount from the opening stock was not justified and it was accordingly proposed to tax an amount of Rs. 65,216 by adding 26 per cent profit over the amount of discount allowed by the assessing officer.

In response to the notice the dealer represented by his counsel was present and heard. It was contended on behalf of the dealer that in the opening balance, the valuation was made at the cost price of the goods. The dealer did not offer the account books for my perusal and the contention of the non-applicant could not, therefore, be properly verified or appreciated. The account books of the dealer are said to be under the custody of the Income Tax department and even till today they were not released. The assessing officer is, therefore, directed to

examine the above contention of the dealer as and when the account books are released and come to a proper finding as to why deduction of Rs. 52,173 was permitted from the opening stock shown in the trading account at Rs. 1,23,375.

For the reasons above, the case is remitted back to the assessing officer to examine the difference in the opening stock as shown in the trading account and actually found in the books of account. He may, accordingly consider the desirability of taxing the proper figure after scrutiny of the account books.

10. Apparently the wording of the remand order clearly indicates that the same was remanded for a specific purpose. It is also interesting to note that the assessing officer after the remand by the impugned order dated 31st December, 1981 (annexure 20), maintained the same figure of Rs. 6,62,242.00 which he had taken as correct in the original assessment order towards the sale. But as he felt that this was a case of escaped assessment, he assessed the petitioner on that basis accordingly by the said order.

11. The learned counsel for the petitioner mainly contended that the impugned order of the respondent is bad in law because it is beyond the scope of the powers of assessment for giving effect to the order of remand } that respondent No. 1 had no jurisdiction to assess escaped turnover in proceedings for giving effect to the order of remand, as he was bound by the direction of respondent No. 2 and could not travel beyond the scope of the remand order; that the order of remand being specific which authorised the scrutiny of stock position only, the respondent No. 1 had no power or authority to make enquiries at large and tax the turnover which was not the subject-matter of the order of respondent No. 2; that respondent No. 2 had himself no jurisdiction to assess escaped turnover as a consequence of information de hors the record and hence the order of remand could not be interpreted to confer any jurisdiction or authority on respondent No. 1 to do what could not be done by respondent No. 1; that the order of respondent No. 1 assessing the escaped turnover on the basis of the information collected by him from the Income Tax department behind the back of petitioner No. 1 is vitiated in law; that respondent No. 1 had no jurisdiction to issue any notice or make an assessment u/s 19(1) beyond the period of limitation prescribed under the section as in the instant case the proceedings were initiated after the prescribed period of five calendar years from the date of the order, the same are barred by limitation and, therefore, the order is without jurisdiction.

12. On the other hand the learned counsel for the respondents submitted that as the petitioner has already filed an appeal, which is still pending, this Court should not interfere in exercise of the writ jurisdiction. He further submitted that as there is a provision u/s 44 of the Sales Tax Act to make a reference, the petitioner should not have run to this Court at this stage. He also submitted that according to the remand order, as the assessing authority was directed to scrutinise the account, he had every jurisdiction to reassess the petitioner when he found that this is a case of escaped assessment relating to certain transactions.

13. In order to appreciate the rival contentions first it is necessary to reproduce the relevant provisions of law. Section 19 of the said Act is as follows :

19. Assessment of turnover escaping assessment.-(1) Whereas an assessment has been made under the Act or any Act repealed by Section 52 and if for any reasons any sale or purchase of goods chargeable to tax under this Act or any Act repealed by Section 52 during any period has been under-assessed or has escaped assessment or assessed at a lower rate or any deduction has been wrongly made therefrom, the Commissioner may at any time within 5 calendar years from the date of order of assessment, after giving the dealer a reasonable opportunity of being heard and after making such enquiry as he considers necessary, proceed in such manner as may be prescribed to reassess within a period of two calendar years from the commencement of such proceedings, the tax payable by such dealer and the Commissioner may, where the omission leading to such reassessment is attributable to the dealer, direct that the dealer shall pay, by way of penalty in addition to the amount of tax so assessed, a sum not exceeding that amount :

Provided that in the case of an assessment made under any Act repealed by Section 52, the period for reassessment on the ground of under-assessment, escapement or wrong deduction shall be as provided in such Act notwithstanding the repeal thereof:

Provided further that any reassessment proceedings pending on the date of commencement of the Madhya Pradesh General Sales Tax (Amendment) Act, 1978 (No. 25 of 1978), be completed in accordance with the provisions in force before the date of such commencement and within a period of two calendar years from the date of such commencement.

(2) The reassessment made under Sub-section (1) shall be at the rate at which it would have been made had there been no under-assessment or escapement or wrong deduction.

(3) If for any reason the licence fee, registration fee or exemption fee has escaped levy or has been charged at a lower rate in any year, the Commissioner may, at any time within a period of three calendar years next succeeding that to which such fee relates, levy the correct amount of the fee payable in respect of that year after issuing a notice to the dealer and after making such enquiry as he considers necessary; and the Commissioner may direct that the dealer shall pay, by way of penalty in addition to the amount of fee so levied, a sum not exceeding that amount.

14. According to this section the limitation prescribed is five years from the date of the order of assessment. In the present case the original order of assessment was passed on 10th April, 1974. But admittedly no notice for the alleged escaped assessment was given u/s 19 of the said Act as is clear from the returns submitted by the respondents. Therefore it is apparent that the Additional Commissioner never treated the case as one of escaped assessment, but

proceeded u/s 39(2) of the said Act in exercise of the revisional powers. However, proviso to Sub-section (2) of Section 39 provides that no proceedings shall be initiated under this sub-section after the expiry of three years from the date of the order sought to be revised. In the present case as per annexure 7 dated 27th May, 1977, the Additional Commissioner of Sales Tax had initiated the proceedings u/s 39(2) of the said Act after the expiry of the period of three years and even this notice is quite specific regarding an amount of Rs. 62,173.20 and it in no way refers to any escaped assessment. Even this power of suo motu revision has to be exercised in case the Commissioner finds the order of the assessing authority to be erroneous in so far as it is prejudicial to the interest of the revenue. Therefore, it is apparent that the Additional Commissioner of Sales Tax has remanded the case vide annexure 10 only relating to the deduction of Rs. 62,173.20 and has nowhere directed the assessing authority to make a fresh assessment by setting aside the initial order of the assessing authority. Therefore, the assessing authority in the garb of the remand order could not make a fresh assessment in respect of the alleged escaped assessment as has been done by him by the impugned order dated 31st December, 1981 (annexure 20), and get over the question of limitation.

15. It is, no doubt, true that the petitioner having already filed an appeal, ordinarily this point should have been left to the decision of the appellate authority. But it is apparent that the appellate authority is not inclined to decide the same in view of this pending petition. Therefore, we are of the opinion that as the point raised is about jurisdiction of the assessing authority, we can consider the same in this petition.

16. The jurisdiction of the revising authority u/s 39(2) is confined to the legality and propriety of the order passed by the appellate and/or the assessing authority if he considers it to be erroneous in so far as it is prejudicial to the interest of the revenue. It is not the forum to overcome the limitation. A remand could not be directed to fill up the lacuna. It is not overcome limitation is not permissible in law. A revising authority has no power to remand the case to the assessing authority directing him to proceed afresh with the assessment proceedings after taking into consideration matters which had escaped notice earlier, though in the present case the remand order in no way refers to any escaped assessment but it has directed the assessing authority to enquire about the specific amount mentioned above.

17. As the petitioner has not challenged the remand order passed by the Additional Commissioner of Sales Tax, it is not necessary to consider the submissions made about the same. However, in support of the other contentions he placed reliance on the following decisions : [1963] 14 STC 674 (Rajab Alt Farishta v. Commissioner of Sales Tax, M.P.), (1971) 4 VKN 77 (R.S. Seth Gopikisan Agrawal & Sons, Tumsar v. C.L. Sharma, Assistant Commissioner of Sales Tax, Jabalpur), (1968) 1 VKN 1 (Ghanshyam Das Vs. Regional Assistant Commissioner of Sales Tax, Nagpur, (Income Tax Officer, V Circle, Madras, and

Another Vs. S.K. Habibullah, (Deputy Commissioner of Agricultural Income Tax and Sales Tax, Quilon Vs. Dhanalakshmi Vilas Cashew Co., (Deputy Commissioner of Agricultural Income Tax v. Dhanalakshmi Vilas Cashew Co.), [1982] 49 STC 181 (Commissioner of Sales Tax, Lucknow v. Babu Lal Parmanand), [1984] 57 STC 89 (Rajinder Nath and Others Vs. Commissioner of Income Tax , Delhi, (Katihar Jute Mills (P.) Ltd. Vs. Commissioner of Income Tax (Central A), (Katihar Jute Mills (P.) Ltd. v. Commissioner of Income Tax, Calcutta).

18. As regards the alternative remedy, so far as the writ jurisdiction is concerned, he placed reliance on the following decisions : Sardar Mahinder Singh v. Deputy Commissioner of Sales Tax [1971] 28 STC 427, New India Investment Corporation Ltd. Vs. Income Tax Officer and Others, and The Sales Tax Officer, Navgaon, and Another Vs. Timber and Fuel Corporation, . He also referred to the provisions of Section 18(8) of the M.P. General Sales Tax Act and placed reliance on Rajinder Nath and Others Vs. Commissioner of Income Tax , Delhi, .

19. After going through these authorities, which support the contentions raised on behalf of the petitioner, we are of the opinion that as the question principally raised being of jurisdiction on the basis of the remand order passed in this case, the same can be considered in this petition because we are satisfied that the remand order being quite clear the assessing authority had no jurisdiction to transgress the same and reopen fresh assessment on the ground of escaped assessment for which limitation has already expired about which there is no dispute.

20. However, the learned counsel for the respondents tried to contend that if the assessing authority has misinterpreted the remand order or while going through the accounts it has come to its notice that the petitioner can be held liable for escaped assessment, merely because he has misinterpreted the remand order, the same cannot be interfered with in this petition. However, considering the facts and circumstances of the case, we are not persuaded to agree with this submission as the original assessment has not at all been set aside by the revisional authority but he has remanded the same for a specific purpose and assessing authority, namely, respondent No. 1, has proceeded to start afresh assessment proceedings for the same period on the alleged ground of escaped assessment especially when the original order of assessment had become final and the remand order being quite clear gives no scope of any other interpretation.

21. In the result this petition succeeds and is allowed with no order as to costs. The impugned order, annexure 20 dated 31st December, 1981, passed by respondent No. 1 is quashed and set aside, being without jurisdiction. The amount of security deposit, if any, after verification be returned to the petitioner-in-person.