
(1998) 06 GAU CK 0007
In the Gauhati High Court
Case No : Civil Rule No. 3410 of 1993

Bajnath Biswanath and Another	Vs	APPELLANT
State of Assam and Others		RESPONDENT

Date of Decision : 25-06-1998

Acts Referred:

Assam Finance (Sales Tax) Act, 1956 — Section 20, 20(1)

Citation : (2003) 133 STC 300

Hon'ble Judges : D.N. Chowdhury, J

Bench : Single Bench

Advocate : G.K. Joshi and R.K. Joshi, for the Appellant; H.N. Sarma, Additional Senior Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

D.N. Chowdhury J.

1.This is an application under Article 226 of the Constitution of India directed against and arising out of a common order dated December 17, 1990, passed by the Assistant Commissioner of Taxes, respondent No. 3, u/s 20(1) of the Assam Finance (Sales Tax) Act, 1956, hereinafter referred to as the Act, 1956, for the assessment periods ending September 30, 1984, March 31, 1985, September 30, 1985 and March 31, 1986 as well as the consequential orders passed thereunder.

2. The petitioner/firm is a registered dealer under Assam General Sales Tax Act, 1993. Prior to enactment of the Assam General Sales Tax Act, 1993, petitioner No. 1 was a registered dealer under the provisions of the Act, 1956. The petitioner at the relevant time was a registered dealer who used to deal in potatoes and onions and also submitted its returns on turnovers under the provisions of the Act, 1956 for the periods ending September 30, 1984, March 31, 1985, September 30, 1985 and March 31, 1986. The petitioner in terms of the notice u/s 9(2) of the Act, 1956 produced the books of account. Respondent No. 2, the concerned Superintendent of Taxes, made assessment u/s 9(3) of the

Act, 1956 by his order dated January 9, 1985. The assessing officer also accepted the sales as correct and complete in the absence of any information to the contrary. By notice dated March 15, 1989, the respondent No. 3, the Assistant Commissioner of Taxes, u/s 20(1) of the Act, 1956, informed the petitioner about his proposal to pass order for enhancement of assessment orders on the total turnovers for the periods ending September 30, 1983, March 31, 1984, September 30, 1984, March 31, 1985, September 30, 1985, March 31, 1986, September 30, 1986, March 31, 1987 in order to get the due revenue on the ground that the orders of assessment in the relevant periods appeared to be erroneous in so far as it was prejudicial to the interest of revenue. The petitioner/firm was accordingly served with the above notice to appear before the respondent No. 3 and explain its position. The petitioner responded to the notice and submitted its reply to the show cause before respondent No. 3 and questioned the proceeding initiated u/s 20(1) of the Act, 1956. By a common order dated December 17, 1990 passed by respondent No. 3 u/s 20(1) of the Act, 1956, the orders of assessment for the periods ending September 30, 1984, March 31, 1985, September 30, 1985 and March 31, 1986 were cancelled and directed to make fresh assessment on the basis of indications given by him in the above order. In his order, the Assistant Commissioner of Taxes, respondent No, 3, indicated the grounds of suo motu revision which reads as follows :

"Before passing the revision order, it will be within context to mention the circumstances which led me to the taking up for this and other such revision proceedings of dealers dealing in onion.

Onion is a taxable commodity which is taxed under the Assam Finance (Sales Tax) Act, 1956. The price of onion went on rising year after year from 1982-83 to 1987-88 and during some months of the latter years quoted above, the consumers price of onions became so abnormally high, that it became a topic of discussion amongst the common people of Assam, who require onion as a must item in the preparation of their daily food. This news of high price of onion reached the floor of the Assembly, when an honorable member raised a question in the Assembly regarding the high price of onion and wanted to know whether the sales tax authority assessed the onion dealers to sales taxes at rates prevailing in the market. The question was fixed to be discussed in the Assembly on April 4, 1988.

Further A.G.'s audit also raised objections for acceptance of sales figures of some of the onion dealers by the assessing authority at rates lower than the prevailing market rate in the assessment of the six monthly periods falling during the years 1982-83 to 1986-87, in its audit note for the period from April 1, 1987 to March 31, 1988 of the Office of the Superintendent of Taxes, Gauhati Unit-A. This objection of A.G. was informed to this Department vide A.G.'s memo No. RAW(A)/5-2/88-89/1548 dated November 1, 1988. The dealer in question is one of such dealers against whom the audit has given objection note for payment of less amount of tax than due during some of the aforesaid periods.

As already mentioned, the commotion amongst the consumers regarding high price of onion, the question in the assembly and the A.G.'s objections as aforesaid, led me for examination of the assessment orders, passed by the assessing officers in respect of the onion dealers of those periods covered by the years in question."

In pursuance of the directions contained in the above impugned order, the assessment orders were revised. For the aforesaid four periods, orders of assessment were passed u/s 9(3)720(1) of the Act, 1956 read with Section 74(2) of the Assam General Sales Tax Act, 1993 as a result of which the demand of tax was raised for the said periods and penal interest were also levied on the petitioner. The petitioner7firm preferred appeals before the respondent No. 4 against the revised assessment order as well as the suo motu order of revision dated December 17, 1990 and the respondent No. 4, Deputy Commissioner of Taxes (Appeals), by his order dated November 8, 1993, dismissed the appeals as being not maintainable. Hence this writ application challenging the order dated December 17, 1990, passed by respondent No. 3 in exercise of suo motu power of revision u/s 20(1) of the Act, 1956 as well as the consequential revised orders of assessment dated July 6, 1993 raising additional demand of tax and interest.

3. An affidavit-in-opposition has been filed on behalf of the respondent No. 1 through the Joint Commissioner of Taxes disputing the contentions of the writ petitioners. The respondent on its affidavit stated that the Assistant Commissioner of Taxes, presently the Deputy Commissioner of Taxes, in the course of his routine inspection of records of the case, found that the order of assessment passed by the assessing officer was without proper application of mind and on consideration of the materials on record and other informations available, the respondent No. 3 was satisfied that the order of assessment passed by the assessing officer was erroneous in so far as it was prejudicial to the interest of revenue and accordingly, proceeding under the law was initiated and after considering the explanation of the petitioners and on examination of the materials on record, passed the common order dated December 17, 1990 and cancelled the assessment of the dealer forthwith and directed for fresh assessment.

4. Mr. G.K. Joshi, learned counsel for the petitioners, firstly submitted that the impugned order was passed in a most illegal fashion without due application of mind. The learned counsel submitted that in the instant case, the power u/s 20(1) of the Act, 1956 was exercised by the respondent No. 3 in a most mechanical fashion, on alleged grounds of public commotion, questions raised in the assembly and the audit objections. The learned counsel submitted that the power of revision is meant to be exercised only when the order is erroneous in so far as it is prejudicial to the interest of revenue. Suo motu revision in exercise of the power u/s 20(1) of the Act can only be exercised on the basis of the materials on record and not on mere assumptions and presumptions. Mr. Joshi, the learned counsel for the petitioners, therefore, questioned the justification for

invoking the power u/s 20(1) of the Act, 1956 after conclusion of the assessment. The learned counsel further submitted that the authority while exercising the revisional power, is to act on the basis of materials on record which were available before the assessing authority. He particularly emphasised that the revisional authority must conduct his enquiry on the basis of the materials on record and not beyond it. In support of his contention, the learned counsel referred to Commissioner of Taxes, Assam v. Babubhai S. Patel [1970] 26 STC 7, Ganga Properties Vs. Income Tax Officer, Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra. The learned counsel further referred to the decision in (1990) 1 GLR 44, Parashuram Pottery Works Co. Ltd. v. Income Tax Officer [1979] 106 ITR 1, Sirpur Paper Mills Ltd. Vs. Income Tax Officer, "A" Ward and Another, Additional Commissioner of Income Tax, Gujarat Vs. Mukur Corporation, Russell Properties Pvt. Ltd. Vs. A. Chowdhury, Addl. Commissioner of Income Tax and Others, and Sirpur Paper Mills Ltd. Vs. The Commissioner of Wealth Tax, Hyderabad,

Mr. Joshi, the learned counsel for the petitioners, lastly pointed out to the limits and scope of revision. The learned counsel submitted that the power of suo motu revision can be exercised only when the order is erroneous in so far as it is prejudicial to the interest of revenue.

5. Mr. H.N. Sarma, learned Additional Senior Government Advocate appearing on behalf of the State/respondents on the other hand submitted that the jurisdiction u/s 20 of the Act, 1956 does not depend on any condition precedent. The section confers full power to the assigned officer to pass such orders as the circumstances of the case justify including orders enhancing or modifying the assessment or cancelling an assessment and directing fresh assessment. When the order is erroneous in so far as it is prejudicial to the interest of revenue, the concerned authority is at liberty to proceed u/s 20 of the Act, 1956 without waiting for the fulfilment of any condition precedent. He is required only to act fairly by giving a dealer the opportunity of being heard and to submit his explanation before reaching his decision. In support of his contentions, Shri. H.N. Sarma, the learned Additional Senior Government Advocate, referred to the decisions reported in State of Kerala Vs. K.M. Charia Abdullah and Co., and Commissioner of Income Tax, Bangalore Vs. Shree Manjunatheaware Packing Products and Camphor Works. Mr. Sarma submitted that the respondent No. 3 all throughout acted fairly which will also appear from the fact that the revisional authority did not interfere in all the assessment orders. Since the revisional authority did not find any error in the assessment orders for the periods 1982-83, 1983-84 and 1986-87, as indicated in the notice dated March 15, 1989, the revisional authority did not disturb the assessment for the aforesaid six periods.

6. Sub-section (1) of Section 20 of the Act, 1956 has empowered the Commissioner to call for and examine the records in a proceeding under the Act and if he considers that any order passed therein by any person appointed u/s 4

of the Act, 1956 to assist him is erroneous in so far as it is prejudicial to the interest of revenue, he is authorised to pass such orders thereon as the circumstances of the case justify including orders enhancing or modifying an assessment or cancel the assessment and directing a fresh assessment after giving the dealer an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary. The legislature conferred powers on the Commissioner to revise an order. The authority, as such, is entitled to examine the correctness, legality and propriety of the order and to pass such suitable orders as he may think fit in the circumstances of the particular case. The concerned authority viz., the Commissioner, is authorised to make an enquiry or cause an enquiry to be made as he deems necessary. The authority is, thus conferred with the power to call for and examine the records in a proceeding and to make an enquiry to reach at a proper and just decision. For this purpose, the Commissioner is not necessarily to confine itself only to the records those were made available before the assessing authority.

Sub-section (1) of Section 263 of the Income Tax Act confers similar powers for suo motu exercise of powers of revision by the Commissioner. In the case of *Ganga Properties Vs. Income Tax Officer*, , the Calcutta High Court delineated the powers reposed on the Commissioner u/s 263(1) of the Income Tax Act. According to the said decision, the Commissioner is authorised to call for and examine the "record of the proceeding" in order to consider in his revisional jurisdiction whether the order-in-question passed by the ITO "is erroneous" and prejudicial to the interests of the revenue.

7. To overcome the above controversy, Section 263 of the Income Tax Act was amended and explanation was incorporated for removal of doubts. The legislative will is clear and unambiguous. It has given full powers to the Commissioner to make or cause to be made such enquiry as he deems necessary to ascertain the lawfulness of the order and if on such enquiry, the Commissioner finds that the order is erroneous so far as it is prejudicial to the interest of revenue, it may pass such orders as it deems fit. The decision in the case of *Ganga Properties Vs. Income Tax Officer*, came up for consideration before the Supreme Court in the case of *Commissioner of Income Tax, Bangalore Vs. Shree Manjunatheaware Packing Products and Camphor Works*, , wherein the Supreme Court held :

"Such a narrow interpretation of the word "record" was justified, in view of the object of the provision and the nature and scope of the power conferred upon the Commissioner. The revisional power conferred on the Commissioner u/s 263 is of wide amplitude..... Obviously, as a result of the enquiry he may come into possession of new material and he would be entitled to take that new material into account. If the material, which was not available to the Income Tax Officer when he made the assessment could thus be taken into consideration by the Commissioner after holding an enquiry, there is no reason why the material which had already come on record though subsequently to the making of the assessment cannot be taken into consideration by him."

As indicated earlier, the suo motu power of revision conferred on the Commissioner is of wide amplitude. He can revise an assessment when the order of assessment passed is not in accordance with law in consequences of which the State is deprived of its lawful revenue. The power reposed on the Commissioner, no doubt, is a power of judicial nature and, therefore, such power is to be exercised lawfully and with due application of mind. The power cannot be exercised mechanically or at the behest of some other authority other than on the own discretion of the assigned officer. The Commissioner, therefore, is not to exercise his discretion on the dictation of some other authority. But in the instant case, the action of the Commissioner cannot be faulted simply because of his reference in the impugned order about the public debate on the high price including debate in the assembly and the audit objection. The decision of the Commissioner, as it appears from the order, was not affected by any of those debates. The Commissioner, however, fell into error on relying upon the market information and the report from the Department of Agriculture in determining the sale price. In the absence of any authentic material regarding sale price on the date of assessment, the Commissioner ought not to have acted on such information. The minimum rate and the maximum rate, as indicated by the Commissioner, which led him to arrive at a particular sale price/market price, cannot, therefore, be legally sustained. The revisional authority is required to act on materials on record. A decision to be sustained lawfully, is to be based on materials, otherwise the decision will suffer from the vice of perversity.

The Commissioner is authorised to take any decision as he deems fit and is free to draw any inference from the facts available. He is, however, to act on factual material and not on conjectures, assumptions and presumptions, else the decision will suffer from the vice of perversity. In this case, the revisional authority in determining the price of onions referred to same prices which was collected by the Department from the market as well as from the Agricultural Marketing Board, Assam. The sale price depends on the market force and in the absence of any valid piece of evidence like sale receipts of the commodity indicating the price or any other acceptable evidence, the said average price relied on by the Commissioner cannot be accepted as a lawful evidence for the aforesaid periods. The decision in respect of determining the sale price, therefore, cannot be upheld.

8. The Commissioner by the said impugned order dated December 17, 1990, also disallowed the shortage claimed by the assessee. According to the Commissioner, the assessee failed to provide any explanation before the assessing authority seeking a big margin of allowance. The Commissioner while exercising his power, took note of the accepted shortage or damage that was adopted in the market. According to the Commissioner, the shortage or damage ought to have ranged from 1 per cent to 3 per cent at the maximum at normal price. At any rate, according to the Commissioner, shortage of 5 per cent in the absence of any valid material was not admissible. The said inference of the Commissioner, however, cannot be faulted.

9. The respondents/authorities, in addition, levied interest in the revised orders on the additional demand of tax from the date of original assessment till the date of revised assessment which is assailed as unlawful and arbitrary by the learned counsel for the petitioners. According to the learned counsel, interest can be levied u/s 22A of the Act, 1956 where the dealer does not pay into the Government Treasury the full amount of tax payable by him under the Act, 1956 by the due date. The learned counsel further pointed out that the manner of payment of tax is laid down by the statute as per Section 22 of the Act and only when the dealer does not pay the full amount of tax payable by the due date, interest can be levied.

In the instant case, the petitioner/firm paid the taxes within the due date and, therefore, question of levying interest does not arise, contended the learned counsel and in support of his contentions. Mr. Joshi referred to the decision in J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another, .

10. Every dealer in taxable goods is fastened with the liability to pay tax on his turnover at the rates specified in the Act, 1956 u/s 3(1). The tax as aforesaid is payable at the stage of first sale of the taxable goods in Assam. u/s 8 of the Act, 1956, every registered dealer is required to furnish such returns of his turnover by such dates and to such authorities as may be prescribed. No return, submitted under the section, shall be valid unless it is accompanied by Treasury receipt showing payment of the tax due as provided in Sub-section (2) of Section 22 or in the case of sales covered by a notification under Sub-section (5) of Section 22 of the Act by such evidence as may be specified in the notification. Section 9 of the Act, 1956 contains the provisions for assessment. Tax payable under the Act is to be paid in the manner provided under Sub-sections (2), (3), (4) and (5) of Section 22 of the Act, 1956. Under Sub-section (2) of the aforesaid section, before any registered dealer furnishes the returns required by Section 8(1), he is required to pay in the prescribed manner into the Government Treasury the full amount of tax due from him under the Act on the basis of such returns, and is required to furnish along with the returns a receipt from such treasury in token of payment of such tax, where a revised return is submitted by a registered dealer u/s 8(3) of the Act, 1956 and if the revised return shows a greater amount of tax to be due than was payable on the basis of the original return, the dealer is to pay the excess amount of tax in the manner provided for in Sub-section (2) of Section 22 and to furnish along with the revised return, a receipt from the Treasury in token of payment of such excess tax. Under Sub-section (4) of Section 22, the amount of tax due under the provision of the Act, 1956 (a) in excess of payments already made under Sub-sections (2) and (3) or (b) where no payment has been made, shall be paid by the dealer by such date as may be specified in the notice of demand and where no such date is specified, it shall be paid within thirty days from the date of service of the notice.

Section 22A of the Act, 1956 envisage of interest payable by a dealer. Sub-

section (1) of the Act, 1956 enjoins that if any dealer does not pay into the Government Treasury the full amount of tax payable by him under the Act by the due date simple interest at the rate of twelve per centum per annum from the first day of the month next following the said date shall be payable by him on the amount by which the tax is paid, if any, by the due date fall short of the tax payable. No interest under this section shall be payable if the amount of tax paid by the due date is not less than ninety per centum of the tax payable. Sub-section (2) of Section 22A envisage that if such tax is not paid within a period of sixty days from the due date, then in addition to interest payable under Sub-section (1), the dealer shall be liable to pay simple interest at the rate of twenty-four per centum per annum from the day commencing after the said period of sixty days on the amount by which the tax is paid, if any, before the expiry of the said period falls short of the amount payable.

11. "Tax payable" means the amount of tax as finally assessed under the Act, 1956 as per Explanation I to Section 22A. By explanation II to Section 22A, it is envisaged that for the purpose of the section tax payable shall be deemed to be due for payment as follows :--

For any period :--

(a) From 1st April to 30th September.....by 31st October.

(b) From 1st October to 31st March.....by 30th April.

12. From the provisions of the Act, 1956 as referred to above, it thus appears that "tax payable" means the amount of tax as finally assessed as per ratio of the decision in J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another, and as per the statutory provisions. Tax payable, in this case also, will mean the amount of tax as finally assessed under the Act, 1956. Under the fact situation, therefore, the levy of interest also cannot be sustained.

13. For the reasons stated above, the impugned order dated December 17, 1990, passed by the Assistant Commissioner of Taxes in suo motu exercise of revisional power directing fresh assessment by determining the sale price on the basis of the prevailing market rate during the periods in question-not lower than the minimum rate prevailed at that relevant period of time, is set aside. The order disallowing the shortage is, however, upheld.

14. In view of the above, the consequent assessment orders for the periods mentioned as contained in annexure V series of the writ petition, passed by the Senior Superintendent of Taxes, Gauhati, Unit A, is set aside and direct the assessing officer to make fresh assessment as regards the shortage, as mentioned in direction No. (2) of annexure IV to the writ petition.

The petition is accordingly allowed to the extent indicated above. However, there shall be no order as to costs.