

(1969) 05 CAL CK 0011
In the Calcutta High Court

Case No : C.R. No's. 828 (W) and 3045-8 (W) of 1965 and 1966 respectively

B.C. Nawn and Bros. Pvt. Ltd.

APPELLANT

Vs

Certificate, Officer and Others

RESPONDENT

Date of Decision : 02-05-1969

Acts Referred:

Bengal Finance (Sales Tax) Act, 1941 — Section 11(1)

Citation : 73 CWN 728 : (1969) 24 STC 25

Hon'ble Judges : D. Basu, J

Bench : Single Bench

Advocate : Nirmal Mukherjee, P.C. Mukherjee, P.K. Mukherjee and A.C. Roy, for the Appellant; N.C. Chakraborty, A.T. Ganguly and B.C. Dutt, for the Respondent

Judgement

D. Basu, J.—The sole question for determination in all these rules is one of law, namely, whether it is competent to the assessing authority under the Bengal Finance (Sales Tax) Act, 1941 (hereinafter referred to as "the Act") to consolidate the demand for several quarters in one assessment proceeding.

2. The question will be dealt with by me with reference to the materials in C.R. 3045.

3. The petitioner-company is a registered dealer under the Act, whose return period has been fixed by the assessing authority as each quarter of the "Akshoytritiya year", according to the Bengali calendar, so that the petitioner was, according to the aforesaid direction in its registration certificate, liable to furnish returns within 30 days from the expiry of each quarter, i.e., the 4th August, 15th November, 28th January and 26th April. The petitioner "having failed to furnish returns within the aforesaid dates in the year 1951-52, the Commercial Tax Officer (hereinafter referred to as the "assessing authority") issued a single notice, dated 25th October, 1952, u/s 11(1) of the Act (annexure A, p. 14 of the petition), in respect of all the four quarters ending with the 14th Baisakh, 1359 B.S. In pursuance of this notice, the petitioner filed a consolidated return for the four quarters on 15th November, 1955, which was revised on 7th

December, 1955. Upon such return, the assessing authority made his consolidated assessment order, dated 29th February, 1956 (which is at annexure B), amounting to over Rs. 9 lakhs, of which Rs. 8,36,846-3-3 was found to be due after deducting payments made by the petitioner. This sum was demanded from the petitioner by the single notice of demand at annexure C, dated 1st March, 1956.

4. As against the aforesaid orders, the petitioner preferred an appeal to the Assistant Commissioner of Commercial Taxes (respondent No. 1) which has been rejected by the order at annexure D, dated 5th September, 1966, on the technical grounds that the appellant failed to file certified copies of the impugned assessment orders within the period of limitation and that the full amount of admitted tax was not put in with the appeal.

5. In C.R. 828, the appeal has been disposed of by a subsequent order dated 21st June, 1968 (annexures X-Y) by which the appellate authority has directed the assessing authority to make a fresh assessment order, after setting aside the existing one; but the plea of the petitioner that one single assessment order could not be made in respect of more than one quarter has been rejected.

6. In order to determine the question raised, we have to wade through a number of provisions of the Act.

7. Section 4 lays down that the liability of a dealer to pay sales tax shall be determined with reference to his turnover during the preceding year. Hence, we have to turn to the definitions of the words "turnover" and "year".

8. The definition in Section 2(j) is-

"Year" used in relation to any particular dealer means the year by reference to which, according to a declaration made by that dealer, the accounts of that dealer are ordinarily maintained....

9. In the instant case, that year admittedly is the Akshoytritiya year.

10. The definition of "turnover" is given in Section 2(i) thus :

"Turnover" used in relation to any period means the aggregate of the sale prices or parts of sale prices receivable, or if a dealer so elects, actually received by the dealer during such period....

11. This definition thus begs the concept of a "period", of which there is no separate definition offered by the Act, though the word "period" occurs in various other sections of the Act. Thus, Section 5(2) says that-

In this Act the expression "taxable turnover" means in the case of a dealer who is liable to pay tax u/s 4, that part of his gross turnover during any period which remains after deducting therefrom....

12. The word "period" is also used in the assessment provision in Section 11(1), which, however, offers a clue to the concept of a "period". It says-

If no returns are furnished by a...dealer in respect of any period by the prescribed date, or if the Commissioner is not satisfied that the returns furnished are correct and complete, the Commissioner shall proceed in such manner as may be prescribed to assess to the best of his judgment the amount of the tax due from the dealer....

13 "Prescribed", of course, means prescribed by the rules made under the Act and Section 26(2)(i) confers upon the State Government the power to make rules to prescribe "the date by which returns for any period are to be furnished and the procedure to be followed for assessment u/s 11." The position is made clearer by the definition of "return-period" in Section 2(i) of the Act.

"Return-period" means in relation to any particular dealer the period for which returns are to be furnished by such dealer under Rules 17 to 29.

14. Before we turn to the Rules, we should also notice the relevant provisions of Section 10.

(1) Tax payable under this Act shall be paid in the manner hereinafter provided at such intervals as may be prescribed.

(2) Such dealers as may be required so to do by the Commissioner by notice served in the prescribed manner...shall furnish such returns by such dates and to such authority as may be prescribed.

15. Clauses (g) and (h) of Section 26(2) confer the power to make rules relating to the matters specified in Section 10.

16. Rules 17 and 21 of the Rules made under the Act deal with the fixation of the return-period :

17. Every registered dealer who establishes to the satisfaction of the Commercial Tax Officer that his annual taxable turnover is not likely to exceed 10 per cent, of his annual gross turnover shall furnish a return annually within sixty days from the expiry of each year....

21. Every registered dealer other than those referred to in Rule 17 shall furnish return quarterly within thirty days from the expiry of each quarter.

17. There is no dispute between the parties that the instant case is governed by Rule 21 and not Rule 17 and that the return-period fixed for the petitioner is each quarter of its accounting year.

18. Some other rules which are relevant are-

36. Every dealer for whom quarterly returns have been prescribed shall pay the tax due for any quarter before furnishing the return for that quarter.

19. As suggested by Section 2(i), the return-period is not the same for every dealer taxable under the Act. The relevant rules prescribe different periods, namely, a year, half-year, a quarter or a month. In the case of the petitioner

before me, this period is admittedly a quarter.

20. Rule 49 next makes it clear that the assessment order is to be made with respect to each return period :

When it appears to an assessing authority to be necessary to make an assessment u/s 11 in respect of a dealer he shall serve a notice in Form VI upon him-

* * * * (b) stating the period or the return-period or periods in respect of which assessment is proposed....

21. Mr. Dutt laid emphasis on the words "or periods" in support of his contention that there was nothing wrong in making one order of assessment in respect of several return-periods. But these words in Clause (b) of the above rule only indicate that one notice under Rule 49 may suffice to communicate to the defaulting assessee that the assessing authority proposed to make assessments u/s 11 in respect of the defaulting periods. This has in fact been held by the Supreme Court in *The State of Orissa and Another Vs. Chakobhai Ghelabhai and Company*, to which I shall advert presently. In other words, the assessee cannot insist that for every return-period for which he has defaulted, there must be a separate notice under Rule 49. But this rule does not authorise the authority to combine in his assessment order several return-periods.

22. The words "or periods" in Rule 49(b) are, in fact, clarified by the use of words "above-mentioned period and all subsequent periods" in the corresponding Form VI. From the foregoing provisions, it is clear that though taxability under the Act depends upon the turnover for the preceding year, the assessment and recovery proceedings rest upon the "return-period". Since the quarterly return-period has been fixed for the petitioner, the assessing authority can, u/s 11(1), assess the tax due by the petitioner with respect to the quarterly periods, and tax so assessed is due from the petitioner in respect of each quarter and is payable quarter to quarter. The scheme of this Act is different from that under the Income Tax Act under which the unit of taxation, in all cases, is a year.

23. Mr. Dutt, on behalf of the respondents, drew my attention to Rule 32 of the Rules made under the Act which says-

The assessing authority shall estimate the amount of tax payable by the dealer for the whole year, and shall communicate the same to the dealer.

24. But a glance at Rules 30-37 will show that different provisions are made for dealers whose return-period is a year, half-year, quarter or a month. Rule 32 relates only to those whose return-period is a year or a half-year. This is clear from Rule 34 and the Form V in which the estimate under Rule 32 is to be submitted. The annual estimate is not required to be furnished in respect of those whose return-periods are a quarter or a month and to whom Rules 36 and 37 apply, respectively.

25. Though the question involved in the Supreme Court decision in *Ghanshyam Das Vs. Regional Assistant Commissioner of Sales Tax, Nagpur*, related to Section 11A of the Central Provinces and Berar Sales Tax Act, 1947, there are certain observations in that case which throw light on the question to be decided by me, because the provisions of the Berar Act are similar to those of the Bengal Act on the relevant points. Under that Act also, a dealer is taxable u/s 4 only when his turnover during a year exceeds the specified limit. But once the liability is thus fixed, Section 10(1) requires the dealer to submit returns by the prescribed dates. Rule 19 prescribes a quarter as the period in respect of which such return has to be filed within a month from the expiry of the quarter to which the return relates. Section 11 provides for assessment on the basis of the return for each period of return. u/s 11(5) or Section 11 A, there is a limitation of three years from the expiry of the period in respect of the turnover of which he was liable to be assessed to tax, within which the assessing authority could make his best judgment assessment or escaped assessment. The majority held, inter alia (paras. 21-23, *ibid.*) that the unit of assessment "was a quarter and that separate assessments were to be made in respect of each of such unit or period of assessment. Each quarter is a separate period for the assessment" and the limitation of three years was also to be computed from the expiry of each quarter. This decision has been followed in *Anandji Haridas and Co. (P.) Ltd. Vs. S.P. Kushare, S.T.O. Nagpur and Others*, .

26. Mr. Dutt on behalf of the respondents relied strongly on the decision in *The State of Orissa and Another Vs. Chakobhai Ghelabhai and Company*, . This decision, however, dealt only with the question whether a notice u/s 12(5) of the Orissa Sales Tax Act, 1947, was invalid merely because it did not relate only to one quarter for which the return was to be made but comprised more than one quarter, e.g., the period from 1st January, 1953, to 31st December, 1953. The question was answered in the negative and this decision has been followed on this point in *Anandji Haridas and Co. (P.) Ltd. Vs. S.P. Kushare, S.T.O. Nagpur and Others*, . It is to be noted that Section 12(5) of the Orissa Act corresponds to Section 11(2) of the Bengal Act and lays down the procedure that is to be followed where a dealer has failed to get himself registered. This decision does not relate to the situation u/s 11(1) of the Bengal Act. It is in this context that the Supreme Court said that it did not matter if one notice was issued comprising several quarters, but the eventual order of assessment "was made for each quarter separately". It was expressly observed (para. 7, *ibid.*) that though the notice might include several quarters,

the return has, however, to be submitted in Form IV which read with Rule 20 of the Orissa Sales Tax Rules, 1947, requires the assessee to furnish details of his turnover for each quarter. The assessment must, therefore, be made on the taxable turnover of each quarter.

27. These observations, in fact, support the contention of the petitioner before me that the jurisdiction of the assessing authority to assess is separate as

regards each period or unit of assessment and that if an order of assessment is made consolidating several units together, such order would be ultra vires the statutory provisions and hence invalid.

28. Unless separate assessment in respect of each of the units or periods of return is made, the assessee's right to make periodical payments u/s 10(1) will also be affected. As would appear from the observations of the Supreme Court in *Ram Narain v. Assistant Commissioner* [1951] 6 S.T.C. 627 (S.C) the assessee may have separate and independent defences available in respect of different periods, which would be affected if they are consolidated by one assessment order. The evidence relating to the different periods, it follows, may also be different.

29. Regarding the liability to pay the assessee has, u/s 10(1), read with Rule 36 and the connected rules, the right to pay at the periodical intervals, unit by unit, which in the instant case is a quarter. The respondents cannot, by consolidating all the arrears in one lump, oblige the assessee to pay all the instalments, governed by different legal incidents, all at once or suffer the consequences.

30. If, in this context, we turn to Form VII in which the notice of assessment is to be issued under Rules 54-56, after the assessment is completed, it is clear that the notice shall also be issued in respect of each of the return-periods, namely, year, half-year or quarter, as the case may be. The notice specifies a date within which the payment is to be made, in default of which the amount may be recovered as a public demand under Rule 56. There is no doubt that if several demands in respect of different return-periods are consolidated in the notice in Form VII, the burden on the assessee will be higher than what is contemplated by Section 10(1).

31. Mr. Dutt, on behalf of the respondents, has argued that since the limitation clause in section 11(2a) of the Bengal Act was different from other Acts inasmuch as it provides for computation of the limitation from the end of the year "in respect of which or part of which the assessment is made" instead of from the end of each quarter or period of assessment, as, e.g., in the C.P. and Berar Act, noticed in *Ghanshyam Das Vs. Regional Assistant Commissioner of Sales Tax, Nagpur*, there was no illegality if the assessing authority chose to assess at the close of each year instead of each return-period. But though the limitation is to be computed under the Bengal Act from the end of the year instead of from the end of each period of return, it does not follow that the assessing authority has, under the Bengal Act, the option to make his order of assessment for a year, even where the return-period is smaller, e.g., a quarter. I have already said that the right to pay in respect of each period separately is a substantive right of the assessee conferred by Section 10(1), read with the relevant rules. It is to be noted that the return-period prescribed under the Act is not uniform, but varies from a year to a month. That is why the words "in respect of which or part of which" are used in Section 11(2a).

32. That the assessing authority under the Bengal Act has no such option to wait for his assessment until the assessee had defaulted in respect of several return-periods is evident from the very opening words of Section 11(1)-

If no returns are furnished by a...dealer in respect of any period by the prescribed date...the Commissioner shall proceed in such manner as may be prescribed....

33. It is clear from the above that as soon as the date fixed for submission of return for a return-period expires, it is mandatory for the assessing authority to initiate the assessment proceeding. The contention of Mr. Dutt is that the expression "any period" includes "any periods". The whole provision will be dislocated if such a construction, as contended, were made. Even if there is any delay in making assessment, the assessing authority must start proceeding unit by unit.

34. The contention of the respondents on the point is, accordingly, rejected. I hold that the consolidated orders of assessment and all subsequent proceedings founded thereon are ultra vires.

35. It has however been urged on behalf of the respondents that whatever be the position in law, the petitioners are estopped from raising this question inasmuch as the petitioners had voluntarily submitted a consolidated return for a year. They are accordingly estopped from urging that the assessing authority had no jurisdiction to make annual assessment on the basis of that annual return. The facts out of which this contention arises are :

The petitioner initially submitted separate returns in respect of each quarter (para. 5 of the petition and para. 5 of the counter-affidavit of the respondent), but the assessing authority, not being satisfied with those returns, issued the notice in Form VI at annexure A calling for the petitioners' books of accounts etc., for the purpose of making assessment for the four quarters of 1359 B.S. It is in pursuance of this notice that the petitioners filed a fresh return in respect of the four quarters together. Whether the petitioners did this at the private advice of the assessing authority or not it is quite evident that since initially they had filed separate returns for the different quarters, the subsequent consolidated returns must have been made under some mistake or misapprehension of the legal situation. In the above state of things, it is not open to the respondents to contend that it is the submission of a consolidated return by the petitioners that gave jurisdiction to the assessing authority to make a consolidated assessment order even though the latter was ultra vires the statutory provisions. The principle that there cannot be an estoppel against a statute has been well established by various decisions in England and India : Mathra Prashad and Sons Vs. State of Punjab, . In short, estoppel cannot be pleaded by a public official to do an act which is ultra vires since an ultra vires Act is a nullity, even when it is embodied in an agreement between the parties : Ministry of Agriculture v. Matthews [1949] 2 All E.R. 724 , Cong & Sons v. London Corporation [1951] 2 All

37. On behalf of the respondents, reliance is placed on the decision in Pannalal Binjraj Vs. Union of India (UOI), which laid down the principle of acquiescence which precludes the remedy of prohibition or certiorari on the ground of absence of jurisdiction. No question of estoppel against a statute was, however, raised in that case, inasmuch as the court held (paras. 22-23, *ibid.*) that the right of an assessee under the Income Tax Act to be assessed by the Income Tax Officer of the area where he resides or carries on business is not an absolute right but is subject to the limitation that "it has to yield to the exigencies of tax collection". When, therefore, a transfer to another area was ordered for the convenience of collection of the tax, there was no violation of the statute ; hence, the principle of no estoppel against the statute could not be invoked by the assessee in that case who had submitted to the jurisdiction of the officer to whom he had been transferred.

38. In C.R. 828, an additional ground was taken that since the period for which assessment was made ended on the 14th Baisakh, 1367 B.S., corresponding to 27th April, 1960, but the demand notice was issued on 7th July, 1964, i.e., more than 4 calendar years from 27th April, 1960, the demand was barred by limitation. On this point, however, I do not find anything to differ from the conclusion arrived at by the appellate authority at annexure X. The year u/s 11 (2a) is to be computed according to the accounting year of the petitioner, i.e., the Akshoytritiya year, because of the definition of "year" in Section 2(j) and not according to the calendar year and the limitation of four years is to be computed from the last day of the accounting period in respect of which the assessment was being made, i.e., the last day of the Akshoytritiya year, 1367 B.S. The respondents are also correct in their contention that the word "assessment" in Section 11 (2a) does not include the procedure for recovery of the amount assessed, under Rule 56 et seq. It is, therefore, not necessary that the certificate proceedings must also be completed within the period of four years.

39. It is true that under the Income Tax Act, the word assessment has been interpreted to comprise the entire proceeding from the initiation of the proceeding for determining the liability up to the recovery and payment of the tax. But the judicial pronouncements in this behalf are all made with reference to the scheme under the Income Tax Act and cannot be extended to the Bengal Finance (Sales Tax) Act, the scheme of which is different. The word "assessment" is of course not defined in this Act, but Section 11 is an independent provision relating to "assessment of tax" and the import of Sub-section (2a) of that section is to be gathered from the context of Section 11 and not from anything outside it. The proceeding for assessment under the Sales Tax Act is, therefore, completed as soon as a final order of assessment is made. An observation to this effect was also made by the Supreme Court in Ghanshyam Das Vs. Regional Assistant Commissioner of Sales Tax, Nagpur, . But, in all the cases before me, the petitioners will succeed on my finding that a consolidated assessment order

in respect of several return-periods is ultra vires, and, accordingly, all subsequent proceedings for demand and recovery, founded on such ultra vires assessment order, are also invalid. The impugned orders are accordingly quashed and the rules made absolute accordingly. I make no order as to costs, however. Respondents shall have the liberty to proceed afresh, in accordance with law, if not otherwise barred.

40. On the prayer of the learned Advocate for the respondents, the operation of this order will remain stayed for a period of six weeks from this date.