(1976) 09 GAU CK 0006

In the Gauhati High Court

Case No : Civil Rule No. 63 of 1973

Bharat Brick Works — APPELLANT

Vs

The Assam Board of Revenue and Others — RESPONDENT

Date of Decision : 17-09-1976

Acts Referred:
Constitution of India, 1950 — Article 226, 227
Income Tax Act, 1961 — Section 246, 251, 253, 254

Citation : (1978) 42 STC 84

Hon'ble Judges : M.C. Pathak, C.J;M. Sadanandaswamy, J

Bench : Division Bench

Advocate : P.G. Baruah, for the Appellant; J.C. Medhi, Advocate-General, A.M. Mazumdar, Sr. Government Advocate and B.M. Goswami, for the Respondent

Final Decision : Allowed

Judgement

M.C. Pathak, C.J.—By this application under Article 226/227 of the Constitution of India, the petitioner has prayed for a writ of certiorari or any other appropriate writ quashing the judgment and order of the learned Assam Board of Revenue passed on 10th August, 1972, in Case No. 34 STA/71 and for any other appropriate order or direction.

2. The petitioner is a dealer under the Assam Finance (Sales Tax) Act, 1956 (hereinafter referred to as the Act). For the period ending 30th September, 1969, the petitioner was assessed to tax by the Superintendent of Taxes, Jorhat, u/s 9(4) of the Act. The aggregate sale price was determined at Rs. 1,10,000 and the net turnover was determined at Rs. 1,02,806 and the tax assessed was Rs. 7,196.42 at 7 per cent.

3. The petitioner filed an appeal against the said assessment order dated 25th April, 1970, before the Assistant Commissioner of Taxes, Jorhat. By his appellate order dated 17th April, 1971, the Assistant Commissioner of Taxes held that the estimate of total turnover was high and, accordingly, the Assistant Commissioner of Taxes estimated the total turnover of the dealer at Rs. 95,000 and the

assessment of tax was reduced to that extent.

4. Against the said order dated 17th April, 1971, passed by the Assistant Commissioner of Taxes, Jorhat, the dealer preferred an appeal before the Board of Revenue. The appeal was numbered as Case No. 34 STA/71. The Board by its judgment and order dated 10th August, 1972, set aside the order of the Assistant Commissioner of Taxes and at the same time restored the assessment order dated 25th April, 1970, passed by the Superintendent of Taxes, Jorhat. This order dated 10th August, 1972, of the Board has been challenged in this writ petition.

5. Mr. P.G. Baruah, the learned counsel for the petitioner, submits that the Board of Revenue under the Assam Finance (Sales Tax) Act, 1956, in deciding an appeal u/s 20A has no jurisdiction to pass an order, effecting enhancement of tax.

6. Let us now consider the submission of the learned counsel for the petitioner.

7. A similar question under the Income Tax Act, 1961, arose for consideration of this court in ASSAM CO-OPERATIVE APEX BANK LTD. Vs. COMMISSIONER OF Income Tax, ASSAM., (income tax Reference No. 33 of 1974 decided on 18th August, 1976). The question that was considered in ASSAM CO-OPERATIVE APEX BANK LTD. Vs. COMMISSIONER OF Income Tax, ASSAM., was whether the Income Tax Appellate Tribunal has the power of enhancement of tax as assessed by the Income Tax Officer and affirmed by the Appellate Assistant Commissioner. After having considered the relevant appellate provisions under the Income Tax Act, 1961 and the decisions in THE MOTOR UNION INSURANCE CO., LTD. Vs. COMMISSIONER OF Income Tax, BOMBAY., ; Puranmal Radhakishan and Company Vs. Commissioner of Income Tax, Bombay, ; V. RAMASWAMY IYENGAR AND ANOTHER Vs. COMMISSIONER OF Income Tax, MADRAS., ; Pathikonda Balasubba Setty (Deceased) Vs. Commissioner of Income Tax, Mysore, ; Hukumchand Mills Ltd. Vs. Commissioner of Income Tax, Central Bombay and Others, and Commissioner of Income Tax, Madras Vs. S. Chenniappa Mudaliar, this court has observed in the ASSAM CO-OPERATIVE APEX BANK LTD. Vs. COMMISSIONER OF Income Tax, ASSAM., as follows :

On consideration of the above decisions of the different High Courts and the Supreme Court, the legal position that emerges is as follows:

If the Commissioner has not filed any appeal against the order of the Appellate Assistant Commissioner u/s 253 or has not filed any cross-objection in an appeal filed by the assessee, the Tribunal in exercise of its appellate power u/s 254, cannot pass an order enhancing the tax liability of the appellant-assessee before it.

Again, if the Commissioner has not preferred any appeal and no crossobjection also has been filed, the department cannot be allowed to agitate the other matters which were not the subject-matter of the appeal before the Tribunal, because, in the absence of an appeal or cross-objection by the department, the other matters stand finalised and by the remand order the Tribunal cannot direct the Appellate Assistant Commissioner to do something which would go adversely to the assessee by way of enhancing the tax liability.

8. The learned counsel for the respondents has submitted that none of the decisions under the Income Tax Act referred to above, is applicable to the present case because the relevant provisions under the Income Tax Act and the Assam Finance (Sales Tax) Act are not pari materia.

9. The relevant appellate provisions under the Assam Finance (Sales Tax) Act, 1956, are quoted below :

Section 19. Appeal.-(1) Any dealer objecting to an order of assessment or penalty passed under this Act may, within thirty days from the date of the service of such order, appeal to the prescribed authority, against such assessment or penalty ;....

(3) The appellate authority shall fix a day and place for hearing of the appeal and may from time to time adjourn the hearing and make, or cause to be made, such further enquiry as may be deemed necessary.

(4) In disposing of an appeal under Sub-section (1), the appellate authority may-

(a) confirm, reduce, enhance or annul the assessment, or

(b) set aside the assessment and direct a fresh assessment after such enquiry as may be ordered, or

(c) confirm, reduce or annul the order of penalty.

10. The prescribed appellate authority is the Assistant Commissioner of Taxes.

11. The corresponding provision of appeal under the Income Tax Act, 1961, is found in Section 246(c). The right of appeal under the Assam Finance (Sales Tax) Act as well as under the Income Tax Act from the assessment order has been given to the dealer and the assessee respectively and not to the department.

12. The relevant provisions of Section 20-A of the Assam Finance (Sales Tax) Act, 1956, read as follows:

20A. Appeal to the Board.-(1) Any dealer aggrieved by an order passed in appeal u/s 19 or passed in revision under Sub-section (1) of Section 20 may appeal to the Board within sixty days of the date on which such order is communicated to him....

(4) The Board may, after giving the dealer an opportunity of being heard, pass such orders thereon as it thinks fit and shall communicate any such orders to the dealer and to the Commissioner.

13. The corresponding appellate provision under the Income Tax Act, 1961, is found in Section 253.

14. On comparison of the provisions of Section 20A of the Assam Finance (Sales Tax) Act, 1956 and Section 253 of the Income Tax Act, 1961, it is found that under the Assam Finance (Sales Tax) Act, the right of appeal has been given to the dealer only and not to the taxing authority. On the other hand, u/s 253(1) of the Income Tax Act, the right of appeal has been given to the assessee and u/s 253(2) the right of appeal has been given to the taxing authority as well.

15. Sub-section (4) of Section 19 of the Assam Finance (Sales Tax) Act confers power of enhancement of the assessment on the appellate authority, that is, the Assistant Commissioner of Taxes. Similarly, u/s 251 of the Income Tax Act the power of enhancement of the assessment has been conferred on the Appellate Assistant Commissioner.

16. Sub-section (1) of Section 254 of the Income Tax Act, 1961, reads as follows :

The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

17. Comparing the provisions of Sub-section (4) of Section 20A of the Assam Finance (Sales Tax) Act and the provisions of Sub-section (1) of Section 254 of the Income Tax Act, it is found that in disposing of an appeal, the Board has to give the dealer only an opportunity of being heard and then it has to pass such orders thereon as it thinks fit and it has the duty to communicate the appellate orders to the dealer and to the Commissioner. On the other hand, the Income Tax Appellate Tribunal before disposing of an appeal has to give an opportunity of being heard to both the assessee and the department and then it has to pass orders thereon as it thinks fit and then the Income Tax Appellate Tribunal shall send copies of the orders to the assessee and the Commissioner. Thus it is found that in an appeal before the Board as provided u/s 20A of the Assam Finance (Sales Tax) Act the department does not come into the picture though for the ends of justice and in compliance with the principles of natural justice the department is also usually heard in an appeal before the Board.

18. Thus on a comparison of the relevant appellate provisions of the two Acts it is found that under the Assam Finance (Sales Tax) Act the department cannot prefer any appeal or file any cross-objection for enhancement of the tax as assessed either by the Superintendent of Taxes or by the Assistant Commissioner of Taxes in appeal. That being so, we find that the reasonings given in this court''s judgment in ASSAM CO-OPERATIVE APEX BANK LTD. Vs. COMMISSIONER OF Income Tax, ASSAM., (income tax Reference No. 33 of 1974) are applicable to the point at issue and we are clearly of the opinion that in an appeal before the Board of Revenue under the Assam Finance (Sales Tax) Act, 1956, the Board has no power to pass an order resulting in enhancement of the tax assessed by the authority from whose order the appeal has been preferred before the Board.

19. Under Sub-section (4) of Section 20A of the Assam Finance (Sales Tax) Act the Board has no power for passing an order enhancing the assessment but it

has the jurisdiction to remand the appeal to the Assistant Commissioner of Taxes, if it so decides on the facts and in the circumstances of a particular case.

20. In the instant case, the Assistant Commissioner of Taxes in his appellate order has observed as follows :

In the instant period the total turnover has been determined at Rs. 1,10,000 and the net turnover at Rs. 1,02,806 only. No material or evidence is there on record in support of high estimate made by the learned Superintendent of Taxes. No report or record of enquiry is also available. The learned Superintendent of Taxes has mentioned better business and increase in the rate of sale only. Taking into consideration all aspects of the case, I feel that the estimate of total turnover made is high. In my opinion, the total turnover if estimated at Rs. 95,000 only will be reasonable to meet the ends of justice.

21. The Board has found that it is unable to agree with the observations of the Assistant Commissioner of Taxes to the effect that there are no materials or evidence on record in support of high estimate made by the Superintendent of Taxes. On the other hand, the Board found to the contrary that the order of the Assistant Commissioner of Taxes suffered from the defects which he seemed to have noticed in the assessment order of the Superintendent of Taxes.

22. In other words, the Board found that the Assistant Commissioner of Taxes did not consider the materials on record in coming to his findings in setting aside the order of the Superintendent of Taxes and at the same time the Board held that there were no materials on record on which the Assistant Commissioner of Taxes could estimate the total turnover at Rs. 95,000.

23. Having arrived at these findings the Board correctly set aside the order of the Assistant Commissioner of Taxes.

24. But the point that arises for consideration is that after setting aside the order of the Assistant Commissioner of Taxes what legal order the Board could have passed in the instant case. By the impugned order the Board has set aside the order of the Assistant Commissioner of Taxes and upheld the order of assessment passed by the Superintendent of Taxes. But by doing that the Board has purported to enhance the tax liability of the dealer which, as we have held, the Board has no jurisdiction to do. That being the position, in the instant case, if the Board deemed it necessary, it could have remanded the appeal to the Assistant Commissioner of Taxes for disposal of the appeal in accordance with law drawing particular attention of the Assistant Commissioner of Taxes to the provisions of Sub-section (3) and Sub-section (4) of Section 19 of the Assam Finance (Sales Tax) Act, 1956.

25. In the result, we quash the impugned order dated 10th August, 1972, passed by the Board of Revenue and remand the appeal to the Board for disposal of the same in accordance with law.

26. The petition is allowed as indicated above and the case is remanded. We,

however, make no order as to costs.

M. Sadanandaswamy, J.

27. I agree.