
(2001) 08 KAR CK 0045

In the Karnataka High Court

Case No : Writ Appeal Nos. 6417 to 6421 of 1999

Bharat Heavy Electricals Limited, Electronics Division,
Bangalore

APPELLANT

Vs

The Assistant Commissioner of Commercial Taxes (Int-i),
Bangalore and Others

RESPONDENT

Date of Decision : 14-08-2001

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 12(6)(B)

Citation : (2001) 51 KarLJ 337

Hon'ble Judges : P. V. Reddi, C.J.;N. K. Patil, J

Judgement

P.V. Reddi, C.J.-The appellant is the electronic division of BHEL, a Government of India undertaking engaged inter alia in designing, manufacturing, supplying and installation of power plant equipment. It has challenged the deferment orders dated 3-12-1998 passed by the 3rd respondent herein in purported exercise of power under Section 12(6)(b) of the Act read with Section 9(2) of the Central Sales Tax Act in relation to the assessment years 1980-81 to 1984-85. The appellant/writ petitioner also sought for a writ of prohibition restraining the 2nd respondent from proceeding further to finalise the assessments for the aforementioned years under the Central Sales Tax Act.

2. Under Section 12(6)(b) of the KST Act, the time during which the assessment has been deferred in any case or class of cases by the Joint Commissioner for reasons to be recorded in writing shall be excluded while computing the period of limitation for assessment. The core question is whether the impugned deferment order is valid in law and can be availed of by the assessing authority to gain time for making assessment. It is not in dispute that but for the deferment order, the assessment gets time barred. It may be mentioned that the period of limitation for making the assessment is four years from the date of expiry of the relevant year. The learned Single Judge observed that the time spent during the period of operation of stay order in Writ Petition Nos. 4734 and 4735 of 1988 can be excluded and the order of deferment passed by the Joint Commissioner cannot

be assailed. It is common ground that irrespective of operation of the stay order, the time for making assessment is not available, when once the deferment order is found to be invalid.

3. The learned Single Judge referred to the view taken by him in Writ Petition No. 36529 of 1997 regarding the applicability of the order of the stay granted in an earlier writ petition and directed that till the writ appeal against the said judgment is disposed of, the assessment shall not be framed. With these observations, the writ petitions were disposed of. Aggrieved thereby, the present writ appeals are filed. It may be mentioned that Writ Petition No. 36529 of 1997 is the subject-matter of Writ Appeal No. 4442 of 1998 and it is being disposed of today.

4. We must now advert to the relevant facts and march of events culminating in the passing of impugned deferment order dated 3-12-1998.

5. The appellant-Company filed annual returns relating to the assessment years 1980-81 to 1984-85 in the month of April of the relevant year. Long thereafter, there was an inspection by the CTO (Intl.) and certain records were seized, notices were issued on 2-3-1998 under Section 29 of the KST Act to show cause why the prosecution shall not be launched. An option was given to compound the offences under Section 31. The concerned authority was of the view that inter-State sales attracting Central Sales Tax have been shown as inter-unit/branch transfers, thereby avoiding the sales tax payable under the CST Act. Incorrect maintenance of accounts and records was alleged in the said notices. The appellant-Company then filed Writ Petition Nos. 4734 and 4735 of 1988 in this Court questioning that notice. This Court by an order dated 30-3-1988 stayed further proceedings pursuant to the notice dated 2-3-1988. That writ petition was eventually dismissed as infructuous on 9-2-1998 for the reason that the provisional assessment orders made were challenged in the Supreme Court and stay was granted therein. The provisional assessment orders were passed under Section 28(6) of the Act on 8-3-1993. The Supreme Court granted interim stay staying the demand notices pursuant to the provisional assessment. By an order dated 23-8-1996, the interim stay was continued. Thereafter, pre-assessment notices or notices calling for books of accounts were issued proposing to make final assessment on various dates between January 1997 and June 1997. The appellant filed Writ Petition Nos. 17218 to 17224 of 1997 in this Court. Interim stay of further proceedings was granted in that writ petition. While so, on 19-3-1998, the Supreme Court disposed of Writ Petition No. 237 of 1993 quashing the assessment orders on the ground that the order of deferment passed earlier on 31-7-1989 was not valid in the absence of notices to the assessee. After the decision of the Supreme Court, the impugned deferment order deferring the assessments for the years 1980-81 to 1985-86 was passed on 3-12-1998 with effect from 31-7-1989, "until further orders". Writ petitions giving rise to these writ appeals were then filed. The order of stay continued during the pendency of the writ petitions which were disposed of by the

impugned judgment dated 5-7-1999. Along with this judgment, Writ Petition Nos. 17218 to 17224 of 1997 which are the subject-matter of Writ Appeal Nos. 6422 to 6428 of 1999 as well as Writ Petition No. 2704 of 1997 which was the subject-matter of Writ Appeal No. 6430 of 1999 were disposed of with the observation that if the assessments are to be framed in the light of the judgment in Writ Appeal No. 4442 of 1998 (against Writ Petition No. 36529 of 1997), an opportunity should be given to the petitioners at that stage.

6. We shall now refer to the details pertaining to the two deferment orders dated 31-7-1989 and 3-12-1998. In the preamble to the order, it is mentioned that the Deputy Commissioner (CT) requested that the assessments relating to the appellants and certain other dealers be deferred in order to allow the assessing officer sufficient time to make the assessments. No other reason is given therein. Such a reason was found to be an irrelevant reason in the decision of the Supreme Court in *Fag Precision Bearings v Sales Tax Officer (1) and Another*, 1997(42) Kar. L.J. 236 (SC). That deferment order, as already noted was not preceded by show-cause notice which is a must, as per the ruling of the Apex Court referred to above. The latter reason, namely, the infraction of "principles of natural justice" weighed with their Lordships of the Supreme Court in quashing the provisional assessment orders and demands. The Supreme Court obviously felt that the deferment order, if invalid, will make the provisional assessment time barred.

7. We shall now come to the 2nd deferment order dated 3-12-1998 which is assailed in the present writ appeals as well as in the writ petitions. The second deferment order was passed by the Joint Commissioner after giving notice to the assessee and hearing its objections. The Joint Commissioner proceeded on the basis that liberty has been given by the Supreme Court, rather impliedly, to pass a fresh deferment order in conformity with the principles of natural justice. In other words, the liberty given in *Fag Precision Bearings* case, *supra*, was read into the order passed by the Supreme Court in the case of the appellant. Coming to the justification for the deferment, the Joint Commissioner was of the view that order of stay granted by the Supreme Court prohibited by necessary implication even the final assessments. It was also observed that the factum of pendency of Writ Petition Nos. 4734 and 4735 of 1988 which is directed against the compounding notice is itself a sufficient reason for deferment of assessment inasmuch as the issue whether the assessee made stock transfer to branches or inter-State sales was also in issue in that writ petitions which were ultimately dismissed on 9-2-1988. The Joint Commissioner observed that he is not precluded from passing a fresh deferment order according to law. At the same time, the Joint Commissioner invoked the theory of relating back the fresh deferment order passed on 3-12-1998 to 31-7-1989 i.e., the date on which the 1st and invalid deferment order was passed.

8. It must be noted that the impugned order of deferment, if it is effective from the date of passing the order would not have the effect of saving the limitation.

That is the reason why the Joint Commissioner chose to give retrospective operation to the deferment order so as to date it back to 1989. The question is whether it is legally permissible to do so. It is true that in a case of violation of principles of natural justice, a notice can be given and a fresh order can be passed in conformity with principles of natural justice. But, where the question of limitation for making the assessment is involved, the point is whether such deferment order could be passed even after the expiry of the period of limitation giving notional retrospectivity thereto. In other words, for the question when the power to pass a deferment order can be exercised even after the expiry of period of limitation, the answer should be, in our view, clearly in the negative. Deferment of assessment has the effect of enlarging the period of limitation which did not expire by the time the deferment order is contemplated to be passed. When once the period of limitation expires, the immunity against being subject to assessment sets in the right to make assessment gets extinguished. Resort to deferment provision does not retrieve the situation. There is no question of deferring assessment which had already become time barred. The provision for exclusion of time in computing the period of limitation of deferment of assessment is meant to prevent further running of time against the revenue if the limitation had not expired. But it does not confer a Carte Blanche to overcome the period of limitation by unduly extending the power beyond its legitimate purpose and parameters. The Division Bench of the Gujarat High Court in *Javer Jivan Mehta v Assistant Commissioner of Sales Tax (Appeals)*, VIII Circle, (1998)111 STC 199 (Guj.), while considering a similar provision under Section 42(1) of Gujarat Sales Tax Act held that the assessment proceedings must be stayed before the expiry of the period of limitation but not thereafter. The learned Judges held:

"In order to avail of the benefit of exclusion under the second proviso to Section 42(1), the assessment proceedings are required to be stayed before the expiry of the period of limitation. Any order made after the period of expiry of limitation staying the assessment proceedings cannot relate back to revitalise the proceedings. At the expiry of the period of three years from the dates stipulated in Section 42(1)(a), the authority to make an assessment order ends".

9. The same view was taken by a learned Single Judge of this Court in *Shaw Wallace and Company Limited v Deputy Commissioner of Commercial Taxes (Assessments-2)*, Gandhinagar, Bangalore, 1998(45) Kar. L.J. 361 (HC). Mohan Kumar, J., observed thus:

"Upon the lapse of the period mentioned in sub-section (5) of Section 12 of the Karnataka Sales Tax Act, 1957, the right of the department to assess an assessee gets extinguished. That extinction confers a very valuable right on the assessee.....

When an order of deferment is made, then the time fixed under Section 12(5) stops to run. Therefore, when such an order of deferment is being made, it should be during the period when the period under Section 12(5) is current.

Hence, if such period had already come to an end, and the right to assess stood extinguished, then, the deferment contemplated under Section 12(6)(b) cannot stop the running of the period mentioned in Section 12(5). Therefore, it is crucial that such an order should come into existence after hearing the assessee and before the time under Section 12(5) has expired".

We are in agreement with the view expressed in the two decisions referred to above.

10. The learned Single Judge has referred to the decision in *M/s. Guduthur Brothers v The Income-tax Officer, Special Circle, Bangalore*, AIR 1960 SC 1326. The facts of the case and the provision considered therein are materially different and the ratio has no bearing on the present case. The Supreme Court was of the view that the notice proposing to levy penalty which was issued earlier was during the course of assessment proceedings and the subsequent action taken in conformity with the principles of natural justice will relate back to the time when the first notice was issued. The decision of the Supreme Court rendered in the context of Section 28(1)(a) of the Income-tax Act, 1922 has no bearing on the present case.

11. The next question is whether the order of stay granted by this Court in W.P. Nos. 4734 and 4735 of 1988 which was in force from 30-3-1988 to 9-2-1998 can be pressed into service by the department to save the limitation. If the stay operates as stay of making assessment, then, the revenue's contention has to be upheld. In such a case, even if the deferment order is invalid in law, the limitation for making assessment would still be available. This factual position has not been disputed by the learned Counsel for the appellants. Therefore, the crucial question is what is the scope and ambit of the stay order granted by this Court on 30-3-1988. Those writ petitions, as already stated, were filed questioning the notice under Section 29(1)(e) and 29(2)(c) of the Act to show cause why prosecution should not be launched unless the offence is compounded under Section 31. This Court stayed further proceedings pursuant to the show-cause notice dated 2-3-1988. This stay order, in our view, cannot be construed as an order staying or restraining the assessment. In fact, the Assessing Authority, during the operation of the stay order granted in W.P. Nos. 4734 and 4735 of 1988, did make provisional assessments which, as already stated, were challenged before the Supreme Court. That means, the Assessing Authority himself did not treat the stay order dated 30-3-1988 as constituting a bar to passing the assessment orders. The learned Single Judge however observed thus:

"Notice dated 2-3-1988 was in respect of search and seizure of certain documents on the basis of which option was given to the petitioner for compounding the offence. Once an option is given, the petitioner may accept that option or may not accept it. If the option is not accepted, then, the assessment is the only option left with the assessing authority which can be framed on the basis of documents seized. The submission of the learned Counsel for the respondent therefore has justification in considering the stay order dated

30-3-1988 as prohibiting the assessing authority even for framing the assessment".

12. We find it difficult to appreciate the above reasoning. The option to compound in order to avoid prosecution for an offence is quite different from suffering an assessment. It may be that the circumstances necessitating the compounding notice and for addition to reported turnover in the course of finalisation of assessment are one and the same. However, on that account, it cannot be said that the stay order of this Court either expressly or by necessary implication prohibited the assessment. We cannot read the words which do not exist into the stay order. The order of stay has to be construed on its own terms. At best, the competent authority should have deferred the assessment proceedings on the ground of pendency of the writ petitions after giving notice to the assessee. But, the Assessing Authority, should not have taken it for granted that the interim order passed in W.P. Nos. 4734 and 4735 of 1988 created a bar against the assessment.

13. For the reasons stated above, the impugned deferment order as well as the order of the learned Single Judge are set aside and the respondents are restrained from making any assessment at this stage on account of expiry of the period of limitation. However, it is made clear that this judgment shall not in any way absolve the appellant of the liability to pay the admitted tax as per the returns.

14. Writ appeals are allowed. We make no order as to costs.