

(1970) 10 AHC CK 0003
In the Allahabad High Court
Case No : S.T.R. No. 148 of 1970

Commissioner of Sales Tax

APPELLANT

Vs

Devi Das Ganpat Lal

RESPONDENT

Date of Decision : 21-10-1970

Acts Referred:

Income Tax Act, 1922 — Section 33B

Uttar Pradesh Sales Tax Act, 1948 — Section 11(3)

Citation : (1971) 28 STC 544

Hon'ble Judges : R.S. Pathak, J; R.L. Gulati, J

Bench : Division Bench

Advocate : B.P. Agarwal, for the Respondent

Judgement

R.L. Gulati, J.—At the instance of the Commissioner of Sales Tax, U.P., the Additional Judge (Revisions), Sales Tax, Agra, has submitted this statement of the case u/s 11(3) of the U.P. Sales Tax Act for the opinion of this Court on the following question of law:

Whether on the facts and circumstances of the case, it was legal and proper for the Additional Judge (Revisions) to set aside the assessment order and appellate order against which the dealer had not filed any revision ?

2. The assessee who is a dealer in foodgrains and oil-seeds was assessed under the U. P. Sales Tax Act for the year 1959-60 by an ex parte order dated 26th November, 1962. The assessee moved an application u/s 30 of the Act for setting aside the assessment order and making a fresh assessment on the ground that he could not attend on the appointed date because of his illness. The application was, however, rejected initially on the ground that the assessee had not paid the admitted tax. The matter, however, was remanded by the Assistant Commissioner (Judicial) on the ground that the application had been rejected by the Sales Tax Officer without giving a proper opportunity to the assessee to explain the case. On remand the Sales Tax Officer rejected the application holding that the assessee had not been able to establish any sufficient cause of

his absence on the appointed date. The assessee again went up in appeal which was allowed on the ground that there was no proper service on the assessee of the date of the hearing of the application u/s 30. The matter went back to the Sales Tax Officer and he once again rejected the application on the ground that the assessee had not made out any sufficient cause for his absence on the date of hearing. In the meantime while the proceeding relating to Section 30 was going on, the assessee had filed an appeal u/s 9 against the assessment order. That appeal was dismissed. When the appeal against the order u/s 30 came before the Assistant Commissioner (Judicial) on the third occasion, he held that the same had become infructuous as the appeal against the assessment order had been dismissed on the merits. Alternatively, he also confirmed the finding that there was no sufficient cause for non-appearance on the date of the hearing.

3. The assessee then applied in revision against the order of the Assistant Commissioner (Judicial) relating to Section 30 proceedings, but he did not file a revision petition against the appellate order relating to the assessment order. The revising authority accepted the plea of the assessee that his failure to appear before the Sales Tax Officer was due to sufficient cause and he accordingly set aside the appellate order and remanded the case back to the Sales Tax Officer to dispose of the assessee's application u/s 30 afresh.

4. It appears that an objection was raised on behalf of the department before the Judge (Revisions) that as the assessee had not filed an application for revision of the appellate order confirming the assessment, the assessment had become final and as such the assessee's revision directed against the proceedings u/s 30 had become infructuous. The Judge (Revisions) overruled this objection and held that the remedy u/s 30 was different from the remedy by way of an appeal against the assessment order u/s 9 of the Act. Accordingly the revision application of the assessee was maintainable. He, however, exercised his suo motu power vested in him u/s 10 and set aside the order passed by the Assistant Commissioner (Judicial) confirming the assessment order. He felt that the effect of the order passed by him allowing the assessee's revision directed against the proceedings u/s 30 was to have the assessment reopened before the Sales Tax Officer and it was desirable that the order of the Appellate Assistant Commissioner confirming the assessment order should also be set aside. The Commissioner is aggrieved and has brought this reference before this Court.

5. Sri R.M. Sahai, learned Counsel for the parties has raised two contentions. The first contention is the same as was raised before the Judge (Revisions), namely, that the assessment order having become final, it was not open to the Judge (Revisions) to set aside the same in exercise of his suo motu powers. We find absolutely no force in this contention.

6. In a sense the order of the Assistant Commissioner (Judicial) relating to the assessment had become final as the assessee had not challenged the same in revision, but this order was open to revision u/s 10 under the suo motu powers of the revising authority. In fact if the assessee had preferred a revision petition

against the appellate order passed u/s 9, there would have arisen no occasion for the Judge (Revisions) to exercise the suo motu powers. It became necessary for him to exercise the suo motu powers because the assessee had not preferred a separate revision petition against the appellate order relating to assessment. The Judge (Revisions) was satisfied that the interests of justice required that the appellate order should be set aside and he acted within his jurisdiction in doing so. Once he had decided to allow the application u/s 30 and quash the assessment order and so reopen the assessment proceeding, to make that decision effective, it was necessary that the appellate order confirming the assessment order should also be set aside.

7. The other point raised by the learned Counsel is that the order which has been set aside by the Judge (Revisions) was not a part of the record before him. Learned counsel states that the only record before him was the one relating to the proceedings u/s 30 and since there was no proceeding pending before him relating to the assessment, that record could not be before him. According to the learned Counsel, the Judge (Revisions) cannot exercise suo motu powers against an order, unless the records pertaining to that order are before him.

8. This contention is based upon Sub-section (3) of Section 10 of the U.P. Sales Tax Act, which provides :

10. (3)(i) The revising authority or any additional revising authority may, for the purposes of satisfying itself as to the legality or propriety of any order made by any appellate or assessing authority under this Act, in its discretion, call for and examine, either on its own motion or on the application of the Commissioner of Sales Tax or the person aggrieved, the record of such order and pass such order as it may think fit.

9. It is contended that according to the requirement of the provisions quoted above, it was necessary for the Judge (Revisions) to have called for the assessment record before he could exercise his suo motu jurisdiction with regard to the assessment order.

10. We, however, find that no such question was raised before the Judge (Revisions). Whether or not the Judge (Revisions) called for the record relating to the assessment order is a pure question of fact and unless a question had been raised before him, the Judge (Revisions) was not expected to give any finding. The normal presumption is that he must have proceeded in accordance with the law and if the law requires that before passing an order in the exercise of the suo motu power u/s 10, he must call for the relevant record the presumption is that he must have done so.

11. Moreover, there is nothing on the record to show that there were in fact two records, one relating to the assessment and the other relating to the proceedings u/s 30. Normally there is only one assessment record which also contains the record relating to any proceedings arising out of or connected with the assessment. However, it is not necessary for us to examine this aspect any more,

because such a question does not arise out of the revisional order and has not been referred to us. It is settled law that in a reference, this Court cannot entertain and proceed to answer a question which has not been raised before the Judge (Revisions) and which has not been referred for the opinion of the court.

12. Learned counsel for the Commissioner placed reliance on the decision of the Supreme Court in Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co., There the question was entirely different. In that case the Commissioner of Income Tax in exercise of his suo motu power u/s 33B of the Income Tax Act, 1922, set aside an order passed by the Income Tax Officer granting registration to the assessee-firm u/s 26A of the Act. The assessee had filed an appeal against the assessment order. The order granting registration u/s 26A was not the subject-matter of the appeal. u/s 33B the Commissioner has the jurisdiction to revise any order passed by the Income Tax Officer, if the same is found to be prejudicial to the interest of the revenue. It was contended on behalf of the assessee that the order u/s 26A had merged into the assessment order which was the subject-matter of appeal and there was therefore no order of the Income Tax Officer which could be revised u/s 33B. This contention was repelled by the Supreme Court holding that the two proceedings, one relating to the assessment and the other relating to the registration u/s 26A were separate and an order u/s 26A could not be said to have merged into an assessment order. There is no such question in the instant case. It is nobody's case that the assessment order had merged into the order u/s 30 or that the order passed by the appellate authority against the order u/s 30 also included in it the order relating to the assessment. In fact the Judge (Revisions) treated the two proceedings separately and therefore he took care to set aside both the orders. It is difficult to understand as to how the Supreme Court case can have any relation to the facts of the present case.

13. The other decision relied upon by the learned Counsel is the State of Madras Vs. Madurai Mills Co., Ltd., . There also the question was entirely different. There the question was as to whether the Board of Revenue could revise an order after four years. In the relevant section relating to the revisional power of the Board the limitation of four years is provided. In the case before us the question of limitation is not involved and therefore the case cited by the learned Counsel, in our opinion, is of no assistance whatsoever.

14. For the reasons stated above, we answer the question in the affirmative in favour of the assessee and against the department. The assessee is entitled to the costs of this reference which we assess at Rs. 100. Counsel's fee is also assessed at the same figure.