

(1972) 03 AHC CK 0042

In the Allahabad High Court

Case No : Sales Tax Reference No's. 612 of 1965, 550 of 1969 and 138 of 1970
and Writ Petition No. 3049 of 1970

Commissioner of Sales Tax

APPELLANT

Vs

Jag Mohan Nath

RESPONDENT

Date of Decision : 13-03-1972

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (1972) 29 STC 663

Hon'ble Judges : R.S. Pathak, J;R.L. Gulati, J;Hari Swarup, J;Gopi Nath, J;C.S.P. Singh, J

Bench : Full Bench

Advocate : S.P. Gupta, for the Respondent

Final Decision : Dismissed

Judgement

R.S. Pathak, J. (Concurring)

1. I have carefully considered the matter. The submissions made by the learned counsel before us disclose no reasonable basis for changing the view I took earlier in Commissioner of Sales Tax v. Sujan Chand 1970 A.L.J. 895 . I agree with the answer proposed by my brother Hari Swarup to the questions formulated in the different, references, and also agree that the writ petition should be dismissed. The parties should bear their own costs in each case.

R.L. Gulati, J. (Dissenting)

2. In this case an important and difficult question arises under the U.P. Sales Tax Act. The question is whether Section 21 or (1) Section 7(3) or both apply for making an assessment where a dealer fails to file a return of his turnover within the prescribed time.

3. It is necessary to notice a few relevant provisions of the Act. Section 3 is the charging section under which every dealer has to pay, for each assessment year,

tax at the rate specified therein on his turnover of such year. Machinery for assessment of the turnover and of the tax is contained in Section 7. Sub-section (1) thereof provides that every dealer, who is liable to pay tax, shall submit such return or returns of his turnover at such intervals within such period and in such form as may be prescribed. Under Sub-section (2) if the assessing authority is satisfied that any returns submitted under Sub-section (1) are correct and complete, he shall assess the tax on the basis thereof. Sub-section (3) then deals with a case where no return is filed or, if the return filed is incomplete or incorrect. This provision is important and may be quoted in full:

(3) If no return is submitted by the dealer under Sub-section (1) within the period prescribed in that behalf or, if the return submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing authority shall, after making such inquiry as he considers necessary, determine the turnover of the dealer to the best of his judgment and assess the tax on the basis thereof :

Provided that before taking action under this sub-section the dealer shall be given a reasonable opportunity of proving the correctness and completeness of any return submitted him.

4. Then we come to the rules. Rule 41 prescribes the time and the manner in which returns have to be submitted. Under Sub-rule (1) of Rule 41, every dealer who is liable to pay tax under the Act shall, before the last day of July, October, January and April, submit to the Sales Tax Officer a return of his gross turnover for the quarters ending June 30, September 30, December 31, and March 31, respectively in form IV. Under Sub-rule (2), before submitting the return under Sub-rule (1), the dealer shall deposit in the treasury the amount of tax calculated by him on the turnover shown in such return and shall submit a treasury challan with the return or a cheque for the amount so calculated. Under Sub-rule (3), if no return is submitted in respect of any quarter within the period or if the return submitted is without payment of the tax, the Sales Tax Officer shall after making such enquiries as he considers necessary, determine the turnover to the best of his judgment and provisionally assess the tax payable for the quarter. Then we have Sub-rule (5) which provides that upon the expiry of the assessment year, the Sales Tax Officer shall, after such enquiry as he may deem necessary, determine the turnover of the assessment year and shall assess the tax thereon. And finally under Sub-rule (6), if the tax assessed differs from the total amount deposited or paid by cheque, the difference shall be realized or refunded by the Sales Tax Officer, as the case may be,

5. Then we come to Section 21. That section contains a provision for the assessment of the turnover which has escaped assessment and reads as under:

Assessment of tax on the turnover not assessed during the year.- (1) If the assessing authority has reason to believe that the whole or any part of the turnover of the dealer has, for any reason, escaped assessment to tax for any year, the assessing authority may, after issuing notice to the dealer, and making

such enquiry as may be necessary, assess or reassess him to tax :

Provided that the tax shall be charged at the rate at which it would have been charged had the turnover not escaped assessment or full assessment, as the case may be.

Explanation. Nothing in this sub-section shall be deemed to prevent the assessing authority from making any assessment to the best of his judgment.

(2) No order of assessment under Sub-section (1) or under any other provision of this Act shall be made for any assessment year after the expiry of four years from the end of such year:

Provided that where the notice under Sub-section (1) has been served within such four years the assessment or reassessment to be made in pursuance of such notice may be made within one year of the date of the service of the notice even if the period of four years is thereby exceeded :

Provided further that nothing contained in this section limiting the time within which any assessment or reassessment may be made shall apply to an assessment or reassessment made in consequence of, or to give effect to, any finding or direction contained in an order u/s 9, 10 or 11.

Explanation.-Where the assessment proceedings relating to any dealer remained stayed under the orders of any civil or other competent court, the period during which the proceedings remained so stayed shall be excluded in computing the period of limitation for assessment provided under this sub-section.

6. The question then arises as to when does turnover escape assessment ? Now, the obvious case where turnover escapes assessment is when an assessment has once been made and thereafter it is discovered that a part of the turnover has not been taxed. That would be a case of a part of the turnover escaping assessment. Turnover also escapes assessment when an assessment order is made but the turnover of the dealer is held to be not liable to tax and thereafter it is discovered that the turnover was in fact taxable. That would be a case where whole of the turnover escapes assessment. Then arises the important question as to whether the turnover escapes assessment even if no assessment is made and the dealer files no return.

7. Before answering this question it would be useful to take an analogy from the Income Tax Act of 1922. Under the Income Tax Act, income escapes assessment if during the assessment year no return is filed by an assessee and no notice is served upon him under Sub-section (2) of Section 22. The income in such a case escapes assessment on the expiry of the assessment year and the only way to bring to tax such income is to initiate proceedings u/s 34 of the Act. The reason is that under the Income Tax Act every assessment year is a separate and self-contained period of assessment and according to the scheme of the Income Tax Act, assessment for each year must be made within that year or the proceedings for assessment must be commenced in that year.

8. How and when do the assessment proceedings commence ? Assessment proceedings commence when an assessee files a return u/s 22(1) or 22(3) or if a notice is issued to him u/s 22(2). If the assessment proceedings do not commence against him within the assessment year in the manner indicated above, it is not possible to make a regular assessment against him after the expiry of the assessment year. No notice can be issued to him u/s 22(2), nor is an assessment u/s 23(4) possible. Section 23(4) authorises "the Income Tax Officer to make a best judgment assessment against an assessee who fails to file a return, but that provision applies only if a notice u/s 22(2) has been issued within the assessment year and the assessee fails to file a return in response to that notice. No assessment u/s 23(4) can be made on the failure of the assessee to file a voluntary return u/s 22(1). A notice u/s 22(1) places a statutory obligation upon every assessee to file a voluntary return of his income. But no assessment proceedings are commenced by that notice. Reference may be made to the leading case of COMMISSIONER OF AGRICULTURAL Income Tax Vs. SULTAN ALI GHARAMI., . That was a case under the Bengal Agricultural Income Tax Act whose provisions for a regular assessment and the assessment of escaped income are identical to the provisions of the Income Tax Act. At page 440 it was observed:

Under the Indian Income Tax Act it is well settled that a notice u/s 22(2) cannot be issued after the expiry of the year of assessment and if no notice under that section has been issued during the assessment year, nor has the assessee filed a return, the assessment proceedings can be initiated thereafter only by the issue of the notice u/s 34.

9. In MAHARAJA OF PATIALA Vs. COMMISSIONER OF Income Tax (CENTRAL), BOMBAY, it was held by the Bombay High Court that a notice u/s 22(2) had to be issued within the assessment year and no valid assessment could be made on the basis of a return filed in response to a notice u/s 22(2) issued after the expiry of the assessment year. Under the Income Tax Act, therefore, the position is that income escapes assessment in the case of an assessee who fails to file a return after the expiry of the assessment year, if no assessment proceedings are commenced against him within the assessment year. The reason is that a regular assessment in such a case is not possible after the expiry of the assessment year. It follows, therefore, that power to make a regular assessment and the power to make assessment of an escaped income operate on mutually exclusive fields. So long as a regular assessment is possible, the question of income escaping assessment does not arise, and a regular assessment is possible only if the proceedings for assessment are commenced within the assessment year. In such a case an assessment can be made within a period of four years as provided in Sub-section (2) of Section 34.

10. What is the position under the U. P. Sales Tax Act ? Now, the provision for filing returns and for making assessment are identical with the corresponding provisions under the Income Tax Act. Rule 5 provides for notices. Clause (1)(a)

of Rule 5 provides for a general annual notice to be issued by the Commissioner of Sales Tax calling upon all dealers liable to pay tax to furnish returns within the period specified in Section 7. Clause (1)(b) of that rule authorises the Sales Tax Officer to serve a notice in form I individually on any dealer within his jurisdiction, if he considers it necessary. Then we have Rule 41 to which reference has already been made. That rule places a statutory liability upon every dealer to file quarterly returns. Section 7 provides the machinery for assessment.

11. In *Anandji Haridas and Co. (P.) Ltd. Vs. S.P. Kushare, S.T.O. Nagpur and Others*, the Supreme Court while dealing with the provisions relating to the escaped turnover under the C. P. and Berar Sales Tax Act and after quoting certain decisions under the Income Tax Act observed at page 335 :

It is true that the said decisions were given with reference to either Section 34(1) of the Income Tax Act or Section 14 of the Business Profits Tax Act, but so far as the present enquiry is concerned, the said sections are in *pari materia* with Section 11A of the Act. In construing the meaning of the expression "escaped assessment" in Section 11A of the Act there is no reason why the said expression should bear a more limited meaning than what it bears under the said two Acts. All the three Acts are taxing statutes and the three relevant sections therein are intended to gather the revenue which has improperly escaped.

12. It is thus clear that the same meaning has to be given to the expression "escaped assessment" under the U. P. Sales Tax Act as it bears under the Income Tax Act. It follows, therefore, that if income escapes assessment under the Income Tax Act when an assessee does not file a return within the assessment year and no assessment proceedings are commenced against him in that year, the same would be the position under the U. P. Sales Tax Act. Assessment proceedings under the U. P. Sales Tax Act commence as under the Income Tax Act when a return is filed by a dealer or when a notice is served upon him under Rule 5(1)(b) or when the Sales Tax Officer makes a provisional assessment against him for any quarter under Rule 41(3). The general notice under Rule 5(1) (a) does not commence assessment proceedings, nor does the statutory obligation under Rule 41(1) requiring every dealer liable to pay tax to file quarterly returns commence such proceedings.

13. In *Ghanshyam Das Vs. Regional Assistant Commissioner of Sales Tax, Nagpur*, the Supreme Court while dealing with a similar provision under the C. P. and Berar Sales Tax Act observed at page 989 :

For the foregoing reasons we hold that a statutory obligation to make a return within a prescribed time does not *proprio vigore* initiate the assessment proceedings before the Commissioner, but the proceedings would commence after the return was submitted and would continue till a final order of assessment was made in regard to the said return.

14. The next question that arises is as to when does the escapement take place.

Does it take place at the end of the assessment year as under the Income Tax Act ? Here there appears to be a slight difference. Under the U. P. Sales Tax Act the time for filing the last quarterly return extends up to 30th of April of the next assessment year. It can be argued that so long as the time for filing the returns does not expire the turnover cannot be said to have escaped assessment. That appears to be true. Therefore, it is to be held that the turnover for a particular assessment year escapes assessment on April 30 of the next year, if no assessment proceedings are commenced against a dealer by that time.

15. I come back now to the main question as to whether Section 21 or Section 7(3) or both apply for making an assessment of escaped turnover. Under the Income Tax Act where income escapes assessment Section 34 is the only provision under which assessment of such income is possible. In fact Section 34 has been enacted to apply to a case where a regular assessment is no longer possible so that Section 34 and the provisions relating to a regular assessment operate on mutually exclusive fields. Where one applies the other does not. Section 7(3) of the U. P. Sales Tax Act creates some difficulty. Under that provision the Sales Tax Officer has been given the jurisdiction to make a best judgment assessment against a dealer who has not filed a return. Such an assessment can be made within four years as provided in Section 21(2). Unlike Section 23(4) of the Income Tax Act, the assessment can be made u/s 7(3), if a dealer fails to file a return in response to a statutory obligation placed upon him under Rule 41(1) and it is not necessary that an individual notice under Rule 5(1) (b) should have been served upon him. But for that reason it is not possible to hold that the two provisions apply simultaneously. To hold that way would nullify the very conception of escapement. If an assessment is possible u/s 7(3), it would not be a case where turnover can be said to have escaped assessment. Turnover escapes assessment only where a regular assessment is not possible. It is, therefore, necessary to hold that no assessment u/s 7(3) is possible if assessment proceedings have not been commenced till the end of April of the year next following the assessment year in question. After all, an assessment order is only a final act in the process of assessment and the final act cannot be taken unless the process has been set in motion at an earlier stage.

16. There is another reason why the two provisions must be held not to apply simultaneously. The period of limitation for an assessment u/s 7(3) is four years while it is five years if the assessment is made u/s 21, provided of course a notice under that section is served within four years. There is no indication in the Act as to when Section 7(3) or Section 21 would apply. The first proviso to Sub-section (2) of Section 21 which prescribes a larger period of limitation would contravene Article 14 of the Constitution and would thus become ultra vires. In *Anandji Haridas and Co. (P.) Ltd. Vs. S.P. Kushare, S.T.O. Nagpur and Others*, the Supreme Court struck down a similar provision in the C. P. and Berar Sales Tax Act for similar reasons. An interpretation which leads to the invalidity of a provision should not be accepted, if another interpretation is possible which makes the provision valid. I would, therefore, hold that in a case where turnover

escapes assessment, Section 21 is the only provision under which it can be taxed and Section 7(3) does not apply.

17. A Full Bench of this court in Commissioner of Sales Tax v. Sugan Chand 1970 A.L.J. 895 has taken a contrary view. There it has been held that Section 21 and Section 7(3) apply simultaneously. Reliance has been placed by the Full Bench on the decision of the Supreme Court in Anandji Haridas and Co. (P.) Ltd. Vs. S.P. Kushare, S.T.O. Nagpur and Others, where it has been held that Section 11(4)(a) and Section 11A(1) of the C. P. and Berar Sales Tax Act both apply where turnover escapes assessment. Section 11(4)(a) of the C. P. and Berar Sales Tax Act corresponds to Section 7(3) of our Act and Section 11A(1) corresponds to Section 21 of our Act. The case of Anandji Haridas and Co. (P.) Ltd. Vs. S.P. Kushare, S.T.O. Nagpur and Others, however, can be distinguished. Under the C. P. and Berar Sales Tax Act, sales tax is not a yearly tax. Every quarter of an assessment year is a separate unit of assessment. There is no provision for final assessment at the expiry of the assessment year, so that if no assessment has been made or no return is filed for any quarter, the turnover of that quarter escapes assessment within the assessment year itself. In such a case the Commissioner of Sales Tax may proceed either u/s 11(4)(a) or u/s 11A(1). Such is not the case under the U. P. Sales Tax Act. Here the unit of assessment is the assessment year and quarterly assessments are only provisional. A regular assessment for the whole year is made after the expiry of the assessment year. It is not possible, therefore, to say that any turnover escapes assessment before the expiry of the assessment year. After the expiry of the assessment year, the turnover escapes assessment, if no assessment proceedings have been commenced up to April 30 of the next financial year.

18. Now I shall take up each case separately.

19. S.T.R. No. 612 of 1965.-In this case the assessment year involved is 1956-57. The dealer did not file any quarterly return. The Sales Tax Officer did not make any provisional assessment under Rule 41(3), nor was any other proceeding taken against him before the expiry of the assessment year. Subsequently after more than three years had passed from the end of the assessment year, a notice under Rule 41(5) was served upon the dealer and the Sales Tax Officer passed the assessment order under that rule. The dealer's appeal failed, but the revising authority allowed the revision and annulled the assessment holding that no assessment could have been made by the Sales Tax Officer without initiating proceedings u/s 21. At the instance of the Commissioner the following question of law has been referred:

Whether upon the facts and in the circumstances of the case the assessment order passed under Rule 41(5) was a valid one ?

20. For the reasons already stated I would answer the question in the negative in favour of the assessee and against the department. As the question raised in this case was not. free from difficulty, I would make no order as to costs.

21. S.T.R. No. 138 of 1970.-The assessment year involved in this case is 1961-62. In this case the dealer did not file any return, nor were the assessment proceedings commenced against him during the assessment year. An assessment u/s 21 was made on 30th July, 1966. The dealer argued before the revising authority that the first assessment could not be made u/s 7(3) and not u/s 21 meaning thereby that Section 21 was applicable only where a regular assessment had already once been made. As the assessment was made after the expiry of four years, the same was bad in law. This plea of the assessee has been accepted. The revising authority, however, at the instance of the Commissioner has submitted the following question of law for our opinion:

Whether in the circumstances of this case the first assessment can also be made u/s 21 when the whole turnover has escaped assessment as the dealer has neither filed returns nor paid any sales tax for the year in dispute ?

22. For the reasons already stated above, I am of opinion that even the first assessment could be made u/s 21 as the turnover of the dealer had escaped assessment on account of his failure to file a return. The question, therefore, must be answered in the affirmative against the assessee and in favour of the department. There would be no order as to costs.

23. S. T. R. No. 550 of 1969.-In this case the assessment year involved is 1959-60. A notice u/s 21 was served upon the dealer on 29th March, 1964, i.e., within four years of the end of the assessment year. The assessment order was passed in the fifth year. The assessment order was challenged by the assessee before the revising authority on the ground that the first assessment could not be made u/s 21 which according to the assessee applies only where the original assessment had already once been made. He urged that if the assessment order could be treated to be u/s 7(3); it was barred by time. This plea was accepted and the assessment order was annulled. At the instance of the Commissioner, the following question of law has been referred:

Whether in the circumstances of the case the first assessment could only be made u/s 7(3) and not u/s 21 of the U.P. Sales Tax Act ?

24. My answer to the question is in the negative. The first assessment could be made u/s 21 as the turnover of the dealer had escaped assessment on account of the failure of the assessee to file a return. There would be no order as to costs.

25. Writ No. 3049 of 1970.-In this case the assessment year involved is 1959-60. The dealer, which is a partnership concern, did not file any return nor did it pay any tax with regard to that year. On 24th March, 1964, information was received by the Sales Tax Officer that the turnover of the dealer had escaped assessment. A notice u/s 21 was accordingly served upon the dealer on 29th March, 1964. The assessee disputed the service of the notice. This contention was overruled by the appellate authority which, however, set aside the assessment order and remanded the case to the Sales Tax Officer for a fresh assessment. The assessee went up in revision and challenged the validity of the service of the notice as well

as the assessment order on the ground of limitation. The revising authority held that the service effected on 29th March, 1964, by affixation was a valid service. The revising authority, however, held that as the assessment was made after the expiry of four years, the same was barred by time. In the opinion of the revising authority the first assessment could only be made u/s 7(3) and not u/s 21. He accordingly annulled the assessment. The Commissioner of Sales Tax applied for and obtained a reference u/s 11(1) of the Act on the following question of law :

Whether in the circumstances of the case, the first assessment could only be made u/s 7(3) and not u/s 21 of the U. P. Sales Tax Act ?

26. This reference was registered in the High Court as S.T.R. No. 550 of 1969 and came before a Full Bench. The assessee made an application before the Full Bench praying that a supplementary statement of the case be called from the revising authority on the following question :

Whether in view of the facts of the case notice sent to the assessee was validly served on the assessee on 29th March, 1964 ?

27. In view of that application, the Full Bench did not hear and decide the reference. I have already answered the question contained in the aforesaid reference by saying that the first assessment can be made u/s 21 of the U.P. Sales Tax Act, where the turnover of the dealer has escaped assessment. The assessee has now filed this petition challenging the validity of the first proviso to Sub-section (2) of Section 21 as violative of Article 14 of the Constitution. I have already dealt with this question and held that as Sections 21 and 7(3) do not apply simultaneously, the first proviso to Sub-section (2) of Section 21 does not offend against Article 14 of the Constitution and is not ultra vires.

28. The petition fails and is dismissed. But there will be no order as to costs.

Hari Swarup, C.S.P. Singh and Gopi Nath, JJ. (Concurring)

29. With great respect we are unable to agree with the view expressed by brother Gulati, J., in his proposed judgment. As the facts giving rise to these references and the questions referred therein and the facts giving rise to the writ petition have been given in his judgment, it is not necessary to repeat them.

30. The controversy in these references is regarding the applicability of the provisions of Section 7(3) and Section 21(1) of the U.P. Sales Tax Act (hereinafter referred to as the Act) to cases of assessment of dealers who file no returns of their turnovers.

31. u/s 7, read with Rule 41, quarterly returns of turnovers have to be filed by dealers liable to pay tax under the Act. The return for the last quarter can be filed within a month after the end of the assessment year. Although there is power to make a provisional assessment under Rule 41(3), the Act contemplates assessment of the turnover of the entire year as the charging Section 3 imposes liability of tax on the turnover of the entire year. In the normal course, therefore,

proceedings for final assessment can be commenced by the assessing authority only after the expiry of a month from the end of the assessment year and not during the assessment year. By virtue of Section 21(2) of the Act which prescribes limitation, assessment can be made irrespective of the fact that the assessment is u/s 7 or u/s 21, within four years from the end of the assessment year. u/s 21, however, an additional period of one year becomes available if notice for assessment is issued within four years.

32. The scheme of the Act requires every dealer to file returns of his turnover every quarter and pay along with it the tax due on that turnover. If he does so, the assessment proceedings by the assessing authority can be commenced only after the year is over. If, however, the dealer fails to file quarterly returns or to pay the tax due, it becomes open to the assessing authority to make a provisional assessment under Rule 41(3) and to pass a final assessment order after the close of the year. As soon as the period for filing the returns expires and no tax is paid by the dealer as required by Section 7 read with Rule 41, it becomes a case of escapement of turnover to tax, and it becomes open to the assessing authority to take proceedings u/s 21(1) of the Act provided he has reason to believe that the whole or part of the turnover of the dealer has escaped assessment to tax for the relevant assessment year. In such a case, he has to issue a notice u/s 21 and proceed to make the assessment. But in case the assessing authority has no material to provide reason for believing that the whole or any part of the turnover of the dealer has escaped assessment, he will have to proceed to assess the dealer u/s 7(3) if he finds that the dealer is liable to pay tax but has submitted no return. u/s 7(3), the assessing authority can proceed on much less evidence against the dealer than he is required to have before proceeding u/s 21 of the Act,

33. The principle of law laid down by the Supreme Court in the cases of Ghanshyam Das Vs. Regional Assistant Commissioner of Sales Tax, Nagpur, and Anandji Haridas and Co. (P.) Ltd. Vs. S.P. Kushare, S.T.O. Nagpur and Others, applies equally to assessments under the U.P. Sales Tax Act and assessment proceedings in cases where no returns are filed by a dealer can be made both u/s 7(3) and Section 21(1). Which of the two sections will apply to a particular case will, however, depend on the circumstances of each case. The non-furnishing of returns by a dealer, and the consequent failure to pay the tax due, vest in the assessing authority the power to make a best judgment assessment both u/s 7(3) and Section 21(1) of the Act. If the circumstances are such as to attract the provisions of Section 21(1), the assessment will be made under that provision, otherwise u/s 7(3). It is not incumbent on the assessing authority to make the assessment first u/s 7(3) and then only to proceed u/s 21 for bringing to tax the turnover not assessed u/s 7(3). The powers contemplated by Section 7(3) and Section 21 are independent of each other and can be resorted to independently according to the material available to the assessing authority.

34. There is also nothing in the Act which may debar the assessing authority

from making final assessment u/s 7(3) if no provisional assessments were made under Rule 41(3). The assessing authority can proceed to make a final assessment u/s 7(3) of the Act after the assessment year is over, even though he may not have made a provisional assessment or initiated proceedings for assessment within the course of the assessment year.

35. In the result, we answer the questions in S.T.R. No. 138 of 1970 and S.T.R. No. 612 of 1965 in the affirmative and that in S.T.R. No. 550 of 1969 in the negative. The writ petition is not maintainable as there is still no operative order affecting the rights of the petitioner. It is accordingly dismissed. In the circumstances of the case the parties will bear their own costs in each case.

By the Court

36. We answer the questions referred as follows: Sales Tax Reference No. 612 of 1965 : In the affirmative. Sales Tax Reference No. 550 of 1969: In the negative. Sales Tax Reference No. 138 of 1970 : In the affirmative.

37. The writ petition is dismissed.

38. In each case the parties will bear their own costs.