
(2005) 01 MP CK 0048

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition 1218 of 1991

Eisher Motors Ltd. and Another

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 03-01-2005

Acts Referred:

Central Sales Tax Act, 1956 — Section 9(2)

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 147

Madhya Pradesh General Sales Tax Act, 1958 — Section 12, 19, 19(1), 52

Citation : (2005) ILR (MP) 233 : (2005) 3 MPHT 399 : (2005) 1 MPLJ 408 :
(2005) 142 STC 509

Hon'ble Judges : S.K. Seth, J

Bench : Single Bench

Advocate : G.M. Chaphekar and Anjali Jamkhedkar, for the Appellant; Amit Agarwal, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

S.K. Seth, J.

This petition under Article 226 of the Constitution of India is directed against the reassessment order dated 30-4-1991 (Annexure H) passed by the respondent No. 3. Necessary facts shortly are as under :?

M/s. Eisher Motor Limited is a Public Limited Company. Petitioner has set up an industrial unit in Pithampur for manufacture of Light Commercial Vehicle ("LCV for short) of different types for carriage of goods or passengers. Petitioner is a registered dealer both under M.P. General Sales Tax Act, 1958 (hereinafter referred to as "Act of 1958" for short) and Central Sales Tax Act, 1956 (hereinafter referred to as "Act of 1956" for short). Case of the petitioner is that in order to fillip industrial growth, State Government exercising powers conferred by Section 12 of the Act of 1958 issued the Notification dated 23-10-1981. Similar Notification dated 29-6-1982 was issued under the Act of 1956.

According to these notification incentives in the shape of exemption from payment of tax were provided to registered dealers who had set up industry in the District as mentioned in the schedule and had commenced production from the date specified in the notifications, subject to fulfillment of other terms and conditions as mentioned in the notifications. Pithampur is located in District Dhar which falls under "C" category of Part II of the Notifications. It is alleged that petitioner fulfilled required terms and conditions mentioned in the two notifications, therefore it applied for grant of eligibility certificate in order to claim exemption from payment of tax. Respondents duly processed the application submitted by petitioner-company and after satisfying they issued the eligibility certificate on 16-8-1988 (Annexure C) exempting petitioner from payment of sales tax. As per the eligibility certificate, raw material as mentioned in the registration certificate was also exempted from payment of tax. For the period from 14-10-1986 to 30-4-1987, turnover of the petitioner was assessed under the provisions of Act of 1956. Assessing officer from the returns filed by the petitioner found that the total taxable turnover was Rs. 44,55,252/-. While determining the taxable turnover, assessing authority allowed exemption/deduction of Rs. 15,80,10,349/- as it pertained to inter-State sales LCV in view of the eligibility certificate issued in favour of petitioner company. The assessment order was passed on 29-12-1989. Subsequent to passing of the assessment order, petitioner was served with a notice to show cause why the assessment order be not open on the ground that exemption/deduction was wrongly made and turnover of Rs. 15,80,10,349/- had escaped assessment from tax. Show-cause notice was issued by the same authority who had passed the earlier assessment order, i.e., Assistant Commissioner. Petitioner submitted detailed reply raising various objections against the reopening of assessment. The Assistant Commissioner overruled objections holding that petitioner did not manufacture LCV at Pithampur as it imported the fabricated bodies to be fitted on the chassis manufactured at Pithampur to make the complete LCV. Thus, Assistant Commissioner raised additional demand of tax by the order impugned. It is, against this order present writ petition has been filed.

After notice, respondents filed reply and submitted that after the assessment order was passed, it was noticed that certain items not manufactured by petitioner were wrongly exempted from payment of tax and in view of provisions contained in Section 19 of Act of 1958 read with Section 9(2) of the Act of 1956 the Assistant Commissioner was perfectly justified in reopening of earlier order of assessment.

I have heard Shri G.M. Chaphekar learned Senior Counsel and Shri Amit Agarwal, learned Government Advocate at length. Perused the material available on record. Shri Chaphekar raised two fold submissions. His first contention is that in view of the facts and circumstances of the case provisions of Section 19 of the Act of 1958 was not at all attracted so as to authorise the Assistant Commissioner to reopen the assessment already made on 29-12-1989. Mere change of opinion is not a valid ground to reopen the assessment and to rectify

mistake, if any. His second submission was that assuming that it was a case falling u/s 19, still the assessing authority could not go behind the eligibility certificate and assess tax on items which were exempted from payment of tax. Per contra, Shri Agarwal, learned Government Advocate justified the reopening of assessment and raising of additional demand.

After having heard learned Counsels for parties, in the considered opinion of this Court the present petition deserves to be allowed.

In order to appreciate the controversy, we are concerned with the interpretation of Section 19(1), hence it would be relevant to notice of Section 19 (1) of the Act of 1958, which reproduced as under :?

"Section 19. Assessment of turnover escaping assessment.? (1)

Where an assessment has been made under the Act or any Act repealed by Section 52 and if for any reason any sale or purchase of goods chargeable to tax under this Act or any Act repealed by Section 52 during any period has been under assessed or has escaped assessment or assessed at a lower rate or any deduction has been wrongly made therefrom, the Commissioner may, at any time within 5 calendar years from the date of order of assessment, after giving the dealer a reasonable opportunity of being heard and after making such enquiry as he considers necessary, proceed in such manner as may be prescribed to reassess within a period of two calendar years from the commencement of such proceedings, the taxable by such dealer and the Commissioner may, where omission leading to such reassessment is attributable to the dealer, direct the dealer shall pay, by way of penalty in addition to amount of tax so assessed, a sum not exceeding that amount." (Rest of provision omitted being irrelevant to present case.)

A careful reading of provision reveals that expression "escape" serves as a key and foundation of the jurisdiction to reopen an assessment is that of "turnover" and not, be it noted, an assessment. A turnover escapes assessment when it is not noticed by the officer either because it is not before him by reason of inadvertence omission or deliberate concealment on the part of the assessee or because of want of care on the part of officer the turnover though shown in returns was not taken notice of. This would be the natural and normal meaning of expression "turnover which has escaped". In the present case, petitioner had filed the returns disclosing turnover. It was not the case of ex parte assessment or discovery of new material. Perusal of reassessment order reveals that show-cause notice was issued on the basis of flying squad report. Now the question is whether said report would come within the ambit of expression "for any reason" occurring in Section 19 of the Act of 1958. In (1996) 29 VKN 430 a Division Bench of this Court has already held reopening of assessment on the basis of audit report is not permissible u/s 19 of the Act of 1958. Same can safely be held in respect of Flying Squad Report. In *Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi*, , Supreme Court held that

opinion of an internal audit party on point of law could not be regarded as "information" enabling the income tax officer to initiate reassessment proceedings u/s 147(b) of the Income Tax Act, 1961. Same view was taken in A.L.A. Firm Vs. Commissioner of Income Tax, Madras, , wherein Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi, has been explained and approved. Except the report, there was no other material before the assessing authority in the present case to initiate the reassessment proceedings. There must exit a live link between the material coming to notice of assessing officer and the formation of his believe that there has been escapement of turnover because of concealment of true and material facts by the assessee. The power conferred by Section 19 to reopen the assessment though very wide but is not plenary and certainly can not be invoked on mere change of opinion to rectify the mistake committed earlier. In the present case, during the assessment proceedings, it was noticed that Rs. 15,80,10,349/- pertaining to inter-State sales of LCV was exempted from payment of tax, hence deduction was allowed. If the deductions were wrongly allowed then for correction of mistake Section 19 of the Act of 1958 can not be invoked as held by the Division Bench of this Court in Commissioner of Sales Tax v. Filterco Neemuch, [1996] 29 VKN 162. In that case assessee, a registered dealer was manufacturing compressed woolen felts which were sold in State as well in the course of inter-State trade & Commerce. Assessee requested the Commissioner of Sales Tax to treat the merchandise covered under Entry No. 6 of Schedule I. The said request after due consideration was allowed and the sale turnover of woolen felts manufactured by assessee was not subjected to tax during the period 1971 onwards and no tax was levied. However, in Union of India v. Gujrat Woolen Felt Mill AIR 1997 SC 1548 it was held that non woven felts manufactured from woolen fibers by machine pressing and used for filtration in heavy industries were "woolen fabrics" covered by Entry 21. Based upon that decision, Commissioner issued show- cause notice for reopening of assessment. Division Bench while answering the reference held in no uncertain terms that turnover considered exempted can not be treated as escaped assessment and in doing so authorities exceeded jurisdiction by resorting to Section 19 (1) of the Act of 1958. The view taken by the Division Bench is based upon the decision of Supreme court in Ghanshyam Das Vs. Regional Assistant Commissioner of Sales Tax, Nagpur, . In view of the aforesaid discussion, I have no hesitation to hold it was not case of escaped assessment. In the present case there was no concealment of taxable turnover relating to inter-State sale of LCV. It was shown in returns and assessing authority exempted it from payment of tax by permitting deduction. Except for change of opinion based upon the report of the flying squad, there was no material to initiate proceedings u/s 19 of the Act of 1958. Thus authorities clearly acted beyond their jurisdiction by initiating reassessment proceedings and passing the order of reassessment. This is unsustainable in law. Accordingly, the impugned order of reassessment is quashed. Since the writ petition is allowed on this ground there is no need to touch the other contentions raised by Counsel for petitioner.

In the result the writ petition succeeds. The impugned order of assessment and additional demand raised there under are hereby quashed. However, there shall be no orders as to costs.