
(1987) 08 AHC CK 0050
In the Allahabad High Court
Case No : Sales Tax Revision No. 327 of 1987

Ilyas Ahmad Body Maker

APPELLANT

Vs

Commissioner, Sales Tax

RESPONDENT

Date of Decision : 03-08-1987

Acts Referred:

Uttar Pradesh Sales Tax Act, 1948 — Section 11

Citation : (1988) 69 STC 205

Hon'ble Judges : R.K. Gulati, J

Bench : Single Bench

Advocate : Rakesh Ranjan Agrawal, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

R.K. Gulati, J.—This revision u/s 11 of the U. P. Sales Tax Act (hereinafter referred to as "the Act") has been filed by the assessee, M/s. Ilyas Ahmad Body Makers, Kotdwar, Garhwal, against the order of the Sales Tax Tribunal, whereby it allowed the Revenue's appeal against the assessee ex parte and without his presence.

2. The assessment year in dispute is 1979-80. The assessee has been assessed to tax with the aid of Section 21 of the Act. There is no previous history of any assessment against the assessee.

3. According to the assessee he was engaged in the business of "job-work" constructing truck and motor bodies in respect whereof material was supplied by his clients. He was concerned with the labour charges only, and was not liable to sales tax inasmuch as in constructing bodies for others he had not engaged himself in making any sale thereof. However, the Sales Tax Officer did not accept the assessee's case and by an assessment order aforesaid he taxed the assessee on estimated turnover.

4. Being aggrieved, the assessee filed an appeal before the Assistant

Commissioner (Judicial). During the course of appeal proceedings, the assessee filed his own affidavit as well as confirmatory letters from his clients (the chassis owners) in support of his claim. Relying on the said affidavit and these letters, the Assistant Commissioner (Judicial) allowed the assessee's appeal.

5. The Revenue pursued the matter further and filed an appeal before the Sales Tax Tribunal. Initially hearing of the appeal was fixed on 6th November, 1986 for which the assessee was given due notice. As the assessee's counsel was ill, he sent an adjournment application under his own signature, under a registered cover. It appears, the Tribunal adjourned the hearing to 5th December, 1986. On the adjourned date, as no one had appeared on behalf of the assessee, the appeal filed by the Revenue was allowed ex parte. The Tribunal took the view that the affidavit and other evidence filed before the first appellate authority could not have been relied upon in annulling the assessment, without, first affording an opportunity to the assessing officer to meet it. Having come to that conclusion, the Sales Tax Tribunal restored the assessment order, instead of remanding the matter for fresh consideration or requiring the Revenue to meet the same before it.

6. Being aggrieved, the assessee has filed the present revision petition before this Court.

7. I have heard the parties at length. Submissions made on behalf of the assessee can broadly be divided in two parts.

8. As a first point, it is urged, that no notice of hearing for the adjourned date was sent to the assessee or to his counsel, thus the impugned order passed by the Sales Tax Tribunal is bad, having been made in breach of principles of natural justice and in violation of the provisions contained in Sub-section (5) of Section 10 of the Act read with Rule 68 of the Sales Tax Rules.

9. When this matter was initially heard by this Court, by an order dated 7th May, 1987, the counsel for the assessee was allowed time to file a personal affidavit of the assessee in support of his first argument. In compliance of the said order, two affidavits have been filed, one of the assessee himself and the other of his counsel Sri G. D. Singhal who had moved the application for adjournment before the Tribunal. In these affidavits it is averred that no notice was issued nor any such notice was sent by the Tribunal, fixing 5th December, 1986 as an adjourned date of hearing of the appeal, as a result whereof the assessee or his counsel could not appear before the Sales Tax Tribunal. No reply has been filed to these affidavits on behalf of the Revenue.

10. Sub-section (5) of Section 10 enjoins a duty on the Sales Tax Tribunal to afford a reasonable opportunity of being heard to the parties, to the appeal. Under Sub-rules (1) and (2) of Rule 68 the Tribunal is required to fix a date of hearing and send a notice of the date fixed to be served well in time on the parties to the appeal at the address mentioned in the memorandum of appeal, or on their lawyer or authorised agent. Sub-rule (4) says that on the date of

hearing, if all the relevant records have been received the parties present shall be given reasonable opportunity of being heard and the Tribunal after examining all the relevant records, decides the appeal provided that if, despite proper service of the notice either party is not present, the appeal may be heard and decided ex parte. Giving an opportunity of hearing contemplates an inherent power in the appellate authority to adjourn the case from time to time. Adjournment is a procedural matter and a power to that effect need not be specifically conferred. Admittedly, hearing of the appeal originally fixed was adjourned on a personal ground of the assessee's counsel, namely, he was unwell, i.e., cause shown was genuine and reasonable. This application as stated earlier was sent by registered post. There is nothing on record to indicate that the order adjourning the appeal and fixing the next date of hearing was passed by the Tribunal on that very date of hearing itself and the adjourned date was not fixed subsequently. There is also nothing on record to indicate that the assessee or his agent was present on the first date of hearing.

11. In order to support his contention that the assessee was entitled to get a fresh notice of the adjourned date, the learned counsel relied upon a decision of this Court in *Kailash Rice Mitts v. Commissioner of Sales Tax 1982 UPTC 797*. It is a case where the assessee did not appear on the date fixed for hearing and the hearing of appeal was adjourned. The appeal was decided ex -parte on the adjourned date without any fresh notice to the assessee, the view of the tax authority being that the assessee was not entitled to fresh notice as it was for him to find out the next date. Setting aside the order of the Judge (Revisions), Sales Tax, it was observed:

It is true that once assessee was served it was its responsibility to keep track of the date and proceedings and its failure to appear on the date intimated or informed was covered in expression, "affording" reasonable opportunity of hearing but the same could not be said of the adjourned date. Under law a party has every right to participate on the adjourned date even. For instance if assessee would have appeared on 17th July it could not be denied hearing only because it did not appear on earlier date. But the revising authority was disabled from deciding the revision. The assessee may not have any right of fresh intimation but the requirement of law being that revising authority could not decide without affording reasonable opportunity of hearing, an order passed in breach of this requirement would be bad. The reasonable opportunity of hearing was linked with confirming, cancelling, varying or setting aside the order. In other words the assessee must have had reasonable opportunity of hearing on the date the revision is heard and decided.

12. This decision squarely applies to the present case. It is admitted before me that no notice of hearing of the adjourned date was issued to the assessee or his counsel. The procedure adopted by the Sales Tax Tribunal in view of the aforesaid decision was not in accordance with law, and hence, the impugned order cannot be sustained.

13. It was next contended that the Sales Tax Appellate Tribunal being of the opinion that without, confronting the Revenue, the additional evidence adduced before the first appellate authority could not have been relied upon; the Tribunal ought to have remanded the matter or it should have itself afforded such opportunity before disposing of the appeal. As a part of the same submission, it was urged that the Tribunal did not go into the merits of the question whether the transactions in question were not "works contract" and it has restored the order of the assessing officer without giving its own decision in this regard.

14. From the orders passed by the tax authorities it appears, that chassis owner had entered into some kind of financing/loan agreement with some bank. A part of the said loan under these agreements, was advanced for construction of truck/motor bodies. That part of the money was paid by the bank directly to the assessee. Proceedings u/s 21 of the Act were initiated against the assessee on receipt of this information on the ground that the assessee had supplied truck bodies to the chassis owners and it was not a case of "job-work" only. According to the assessee, money received from the bank was handed over to the chassis owners who supplied the material for constructing truck/motor bodies according to their own liking and wishes and he was paid labour charges only. The affidavit and confirmatory letters were filed before the first appellate authority in that connection.

15. Section 12-B of the Act deals with additional evidence in appeal. It imposes restrictions, that the assessee, shall not be entitled to produce additional evidence whether oral or documentary before the appellate authority or the Tribunal. However, certain exceptions are provided by this section under which the appellant is entitled to adduce additional evidence in appeal. These exceptions are :

- (i) when the assessing authority has wrongly refused to admit the evidence; or
- (ii) when after the exercise of due diligence the evidence was not within the knowledge of the appellant; or
- (iii) when even after the exercise of due diligence the evidence could not be produced before the assessing authority.

16. This section also provides that if the appellate authority decides to accept the additional evidence in the circumstances mentioned above, it is necessary in every such case to afford a reasonable opportunity to the Commissioner of Sales Tax for challenging or rebutting such evidence.

17. Now, a perusal of the order of the Assistant Commissioner (Judicial) shows that the Sales Tax Commissioner was duly represented before him by Sri M. B. Saxena, Sales Tax Officer. This order does not show that at any stage, an objection was taken on behalf of the Revenue against the additional evidence being brought on record at the appellate stage. It is well-settled that if the evidence is allowed to be let in without objection, it would not be open to the

party aggrieved to raise any objection as to its admissibility at a subsequent stage. Not only that no objection was taken to such evidence being brought on record, but it appears that the first appellate authority was invited to act on such evidence.

18. It is not in dispute that the Assistant Commissioner (Judicial) has got a discretion either to admit the document as additional evidence or to reject the same at the appellate stage. If he was of the view that the documents filed were relevant for the purposes of deciding the issue before him and the case was covered by the exceptions provided u/s 12-B of the Act, it was well within his power to admit the evidence and consider the same. Admission of evidence at the appellate stage is not referable to any right of the party to produce the evidence but is dependent solely on the requirement of the court and it is for the court to decide whether for pronouncing its judgment or for any other substantial cause, it is necessary to have the evidence before it. There is no finding in the order of the Sales Tax Tribunal that the additional evidence was not necessary for the purpose of deciding the issue in dispute, or that the assessee's case was not covered by any of the exceptions provided u/s 12-B of the Act. The Tribunal has founded its order on the solitary ground that the first appellate authority has failed to afford an opportunity to the Sales Tax Commissioner before relying on the additional evidence and in annulling the assessment. I have observed, earlier, no such objection was taken before the first appellate authority, by the Revenue, although the Sales Tax Commissioner was duly represented. Be that as it may, want of opportunity of hearing does not render the proceedings or admission of the evidence null and void. It may require a remand of the proceedings instead of quashing the proceedings. The purposes of affording an opportunity to the Sales Tax Commissioner as contemplated u/s 12-B of the Act is that the assessee should not be allowed to take the Revenue by surprise by producing the evidence at a late stage. In the instant case, the department did not avail of the opportunity to rebut the additional evidence which was brought on record. Accordingly, the Assistant Commissioner (Judicial) considered the evidence on merit and granted the relief due to the assessee. In such a situation, there seems no justification for the Sales Tax Tribunal for excluding the additional evidence from consideration and brushing aside such evidence on the ground that the department had not been afforded an opportunity to rebut it. At worse, accepting the finding of the Tribunal it was only a procedural irregularity committed by the first appellate authority, which was curable by affording an opportunity to the Revenue by the Tribunal itself or in the alternative it could have sent the matter back to the first appellate authority or even to the assessing officer for making fresh assessment after taking the evidence into account brought on record during the appeal proceedings before the Assistant Commissioner (Judicial). The Sales Tax Tribunal has not adopted this course. It is, therefore, necessary that the Tribunal may now be directed to do so particularly when the Tribunal itself has not considered the case on merit and applied its mind to the question whether the transactions in dispute were "works

contract" as asserted by the assessee.

19. In the result, this revision succeeds. The order of the Sales Tax Tribunal is set aside* with a direction to restore the appeal to its original number and to decide it afresh in accordance with law and in the light of the observations in this judgment after giving due notice to the assessee. The assessee shall be entitled to his cost.