
(1988) 12 AHC CK 0031
In the Allahabad High Court
Case No : Sales Tax Revision No. 79 of 1987

Jain Industries and Trading Corporation	APPELLANT
Vs	
Commissioner of Sales Tax	RESPONDENT

Date of Decision : 05-12-1988

Acts Referred:

Uttar Pradesh Sales Tax Act, 1948 — Section 7, 9(3)

Citation : (1990) 76 STC 45

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

Bench : Single Bench

Advocate : Rajesh Kumar, for the Appellant;

Final Decision : Dismissed

Judgement

R.K. Gulati, J.—This revision under the U.P. Sales Tax Act (for short "the Act") which relates to assessment year 1975-76 is instituted at the instance of Jain Industries and Trading Corporation, Raiwala, Saharanpur (hereinafter referred to as "the assessee").

2. During the year in question the assessee was engaged in manufacture and sale of oil and khal and for that purpose, it was also purchasing oilseeds. It is not in dispute that no regular account books, cash-memos, cash book and ledger, etc., were maintained. The only accounts produced before the assessing officer were sale-cum-stock register and purchase vouchers. The business premises of the assessee were surveyed on 24th August, 1975 and 27th October, 1976. On the first survey a voucher was found which contained an entry of sale of ten tins of oil worth Rs. 2,272 which was not found recorded in the sale-cum-stock register. On the second survey, an exercise book was found containing 39 written pages, which contained entries relating to assessee's business for the assessment years 1974-75 and 1975-76. The assessment for the year in question was made on best judgment. Against a disclosed taxable sales of oil of Rs. 10,563.50 and taxable turnover of khal of Rs. 2,901.86 the assessing authority completed the assessment on a combined turnover of Rs. 18,500 of

sales of oil and khal, and on the turnover of Rs. 10,000 of first purchase of oil-seeds. It may be noted that the assessee had not admitted any tax liability on the purchases of oil-seeds.

3. Being aggrieved by the assessment order, the assessee went up in appeal before the Assistant Commissioner (Judicial), Sales Tax. The first appellate authority set aside the assessment with the direction to make the assessment afresh after further investigation. A second appeal against the order of remand at the instance of the assessee was dismissed by the Sales Tax Tribunal. Being still aggrieved, the assessee has now come up in this revision.

4. From the orders passed by the appellate authorities it is evident that during the hearing of appeal before the Assistant Commissioner (Judicial), Sales Tax, the department's representative moved an application seeking enhancement of the turnover assessed in the hands of the assessee, on the ground that the assessee had been under assessed. The assessee contested the said application on some legal grounds which were repelled by both the appellate authorities. It is not necessary to refer to the details on that score because, that issue is of academic importance in these proceedings for two reasons. Firstly, both the appellate authorities independent of the department's application for enhancement, have held that the assessment was liable to be set aside because the Sales Tax Officer had failed to make proper investigation of the material that was brought on record. Secondly, the learned counsel for the assessee stated before me that in view of the alternate findings recorded by the appellate authorities, he was not challenging the correctness of the decision of the appellate authorities on the question about the maintainability of the application for enhancement at the instance of Revenue in the appeal filed by the assessee.

5. The only argument advanced on behalf of the assessee was that on the facts of this case, no remand by setting aside the assessment and directing fresh assessment was called for.

6. Having considered the submission carefully, the same cannot be upheld. In setting aside the assessment and directing fresh assessment the Appellate Assistant Commissioner (Judicial), has held that the assessment order appealed against was erroneous inasmuch as the assessment had been framed without considering and taking into account the documents seized during the two surveys referred to earlier. It was pointed out that all that was done was to enhance the turnover marginally than what was disclosed without scrutinizing the material that was relevant for a proper assessment in this case. In affirming the decision of remand passed by the Assistant Commissioner (Judicial), Sales Tax, the Sales Tax Tribunal has observed :

".....if the documents seized on relevant survey had to be considered for the determination of the appellant's turnover even in the appeal filed by the appellant and it was observed at the time of hearing of that appeal that certain documents upon which the turnover of the appellant should have been

determined have not been examined and discussed in the order of the assessing authority and those documents showed excess suppression, than that determined by the Sales Tax Officer, then either the learned Assistant Commissioner (Judicial), could consider those facts himself and enhance the turnover and tax assessed upon the appellant on that basis, or if in the interest of justice, he thought it fit to give an opportunity to the appellant to explain various entries therein before the assessing authority so that he may get a fair justice, then the same also cannot be held to be unjustified."

7. The Tribunal also held that the remand in this case had not been made on whim or humour but was judicially sound.

8. Section 9 of the Act sets out the powers of the Assistant Commissioner (Judicial), Sales Tax, while disposing of an appeal. A consideration of Clause (a) of Sub-section (3) of Section 9 would show that jurisdiction of the appellate authority includes the power to confirm, reduce, enhance or annul the assessment whether such reduction or enhancement arises from a point raised in the grounds of appeal or otherwise. The appellate authority has also the power to set aside the assessment and direct the assessing authority to pass a fresh order after such inquiry as may be specified, or direct the assessing authority to make such inquiry and submit its report within such time as may be specified. Thus, in appeal the competence of the appellate authority ranges over the whole assessment proceedings which are thrown open as they were before the assessing authority without any restriction on it to consider only those matters raised before it in appeal by the assessee. The scope of the powers of the appellate authority is co-terminous with that of the assessing officer. The powers enjoyed by the Assistant Commissioner (Judicial) are both appellate as well as revisional. He can do what the Sales Tax Officer can do and can also direct him to do what he has failed to do. The circumstances in which the assessment should be set aside for fresh assessment are not specified in the statute. The appellate authority will have to consider the facts and circumstances of each case to determine whether in the circumstances obtaining in a given case the assessment should be set aside with a direction to make a fresh assessment. It must be observed that this statutory discretion given by Section 9 of the Act in disposing of an appeal, howsoever wide, is a judicial discretion which must be exercised in accordance with the legal principles and not in an arbitrary or capricious manner. The nature of the jurisdiction and the rights decided carry with them necessarily the duty to act judicially in disposing of the appeal. The principle to be applied in such a case is pointed out by Lord Halsbury in *Susannah Sharp v. Wakefield* (1891) AC 173 (HL) at page 179 :

"An extensive power is confided to the Justices in their capacity as Justices to be exercised judicially ; and "discretion" means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion : *Rooke's case* (1598) 5 Co. Rep. 100 ; according to law and not humour. It is to

be, not arbitrary, vague, and fanciful, but legal and regular....."

9. The power of the Assistant Commissioner (Judicial) of remanding an appropriate case to investigate the case afresh, cannot be disputed as shown above. The only question for consideration is whether on the facts and in the circumstances of the case, the Tribunal was justified in sustaining the order of remand passed by the Assistant Commissioner (Judicial) directing the Sales Tax Officer to pass a fresh assessment order after further investigation and inquiry. From the assessment order it is clear that the assessing officer has nowhere discussed the outcome of the material seized during the two surveys. Except for a mention that an exercise book was recovered containing 39 pages which contained business transactions for the years 1974-75 and 1975-76, no attempt was made to process the entries contained in that exercise book. There is nothing to suggest that the assessing authority had even attempted to find out the nature and value of the transactions contained therein, nor there is any finding in the assessment order to the effect that the assessee had been able to explain those documents to the satisfaction of the assessing officer. Even the entries and transactions pertaining to the two years were not sorted out to find out the transactions related to the year in dispute. In directing the remand of the case for fresh assessment the Assistant Commissioner (Judicial) has referred to this aspect, though not in details. He has further observed that turnover of taxable oil was nominally increased from Rs. 10,563.50 to 15,000 for the entire year when a single transaction of suppression on the survey dated 24th August, 1975, was found to the extent of Rs. 2,272. He also observed that in considering the question about the determination of turnover, electric consumption, a relevant factor which ought to have been considered by the assessing officer, was not done. The assessment was set aside for fresh assessment because of the above findings recorded by the Assistant Commissioner and that action was confirmed by the Tribunal. The appellate authorities have in a nutshell held that the assessing officer had failed to discharge his function of scrutinizing and processing the material relevant for making a proper assessment. The necessity to set aside the assessment was felt by the appellate authorities as they did not find possible to make a just order on appeal without further investigation of facts and findings thereon which the assessing authority had failed to record while making the original assessment.

10. In *Bhagwati Oil Mills Vs. Commissioner of Sales Tax*, , a Division Bench of this Court ruled that an order of remand passed by the revising authority would be valid in law where the revising authority finds that the assessee's account books had not been properly scrutinized by the Sales Tax Officer. A similar view has been expressed by another Division Bench of this Court in *Hari Oil Mills Vs. Commissioner of Sales Tax*, .

11. In an appropriate case where the appellate authority finds that the assessment in question was made callously or hurriedly without proper investigation or examination of the account books or other materials, the

authority concerned would be well within its limits to set aside the assessment for fresh assessment with a direction to the assessing authority to examine the case afresh and to pass appropriate orders thereafter. On the findings recorded by the Assistant Commissioner (Judicial) it is futile to contend that the order of remand was illegal or the Tribunal had committed any error of law in sustaining the order passed by the Assistant Commissioner (Judicial). The learned counsel for the assessee strenuously urged that the remand was illegal as the necessary investigation could have been done by the appellate authority itself. It is true that the Assistant Commissioner in exercising his power u/s 9 of the Act was competent to examine the case himself or to call for a remand report from the assessing officer, but this by itself is not sufficient to hold that the discretion exercised by the Assistant Commissioner in setting aside the assessment was not warranted in the instant case. It is not a case where all the basic facts for disposal of the matter were already on record. It is a case where the assessing authority had failed to discharge its function of scrutinizing the relevant material and the account books before making the assessment. In such a situation, it is not incumbent for the appellate authority to make the investigation itself. Where the appellate authority comes to the conclusion, as in this case, that in the ends of justice the matter should be set aside and remanded to the assessing officer for fresh examination to bring out correct facts, it cannot be held that such a decision of the appellate authority was motivated with irrelevant consideration or the power to set aside the assessment was exercised for an oblique motive with a view to provide a fresh inning to the Revenue. The decision of the Assistant Commissioner to remand the case for fresh assessment in the instant case was based on judicial considerations which was rightly upheld by the Sales Tax Tribunal.

12. Learned counsel for the assessee expressed an apprehension that if the order of remand is sustained, the assessing authority while framing the fresh assessment, will have no option but to enhance the disclosed turnover of oil by multiplying the amount of one day suppression, namely, Rs. 2,272 (noticed on the survey dated 24th August, 1975) by number of days covered in the year in dispute. This apprehension was expressed because of the remarks in the order of Assistant Commissioner, where he stated that in view of the decision of this Court in Harbansi Lal Moti Lal v. Commissioner of Sales Tax 1981 UPTC 1139, the turnover of taxable oil determined by the Sales Tax Officer was inadequate. The learned counsel contended that it was most improper for the appellate authority to have tied the hands of the assessing authority in advance and remitted the matter for fresh disposal.

13. The apprehension entertained by the learned counsel is wholly unfounded. The observations of the Assistant Commissioner (Judicial) are to be read in the context they were made. There is nothing in the order of the Assistant Commissioner (Judicial) to indicate that he directed the Sales Tax Officer to enhance the turnover of the assessee on the lines on which the apprehension has been expressed by the learned counsel. Even the decision in Harbansi Lal Moti

Lal 1981 UPTC 1139, does not lay down any such rule of thumb. That was a case in which the question for consideration was about the determination of turnover where the account books had been rejected by the assessing officer. It was held that once account books are rejected, the assessing authority is empowered to determine the turnover to the best of his judgment but the determination should be based on material found and correlated to it and further, it must satisfy the yardstick of not being arbitrary. In dealing with the question of turnover of foodgrains and paddy determined by the tax authorities it was observed :

"So far as foodgrains and paddy are concerned it is true that proportion of enhancement in subsequent period is much higher than in the period ending 18th May, 1973, but that by itself could not be a ground for setting aside the order or reducing the turnover for the second part. It is not denied that the material found in survey dated 6th January, 1974, related to second part. In view of specific material the revising authority was within jurisdiction to enhance the turnover of the second part by six times. It cannot be said to be arbitrary or excessive."

14. Where an assessment is set aside and the case is remanded for fresh assessment the assessing authority, subject to any direction of the appellate authority, has the same power as it originally had in making the assessment u/s 7 of the Act. On the assessment being set aside with a direction to pass a fresh assessment order the proceeding in which the original assessment order was made is revived and the assessment in consequence to the remand has to be concluded afresh in accordance with the provisions applicable to it after making such inquiry as may have been directed by the appellate authority. In absence of any direction from the appellate authority in making the fresh assessment, the assessing officer is not bound by anything that had happened either when he made the original assessment or when the appeal was heard. He is bound to consider the entire case afresh and to take notice of fresh material which comes to his knowledge during further investigation before making the assessment order. The provisions of Clause (iii) of Section 9(3)(a) of the Act which empowers the appellate authority to set aside the order and direct the assessing authority to pass a fresh order after such inquiry as may be specified, do not contemplate any direction being given by the appellate authority with regard to the extent to which an assessment is to be made on remand or to limit in such cases, the power of the assessing authority to make the assessment in accordance with law. In this case, all that which had been done by the Appellate Assistant Commissioner, was to set aside the assessment for fresh investigation without any specific directions and curtailing the power of the assessing authority in any manner whatsoever. The fear expressed by the learned counsel for the assessee is wholly imaginary. The second contention is also without merit and cannot be accepted.

15. In the result, the revision is dismissed with costs.