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(1987) 09 OHC CK 0015

In the Orissa High Court

Case No : Original Jurisdiction Case No. 187 of 1979

Jayanarayan Kedarnath and Another APPELLANT

Vs

Sales Tax Officer RESPONDENT

Date of Decision : 24-09-1987

Acts Referred:
Income Tax Act, 1961 — Section 147

Citation : (1987) 64 CLT 705 : (1988) 68 STC 25

Hon'ble Judges : H.L. Agrawal, C.J;P.C. Misra, J;K.P. Mohapatra, J

Bench : Full Bench

Advocate : R.K. Rath, for the Appellant; Standing Counsel (C.T.), for the Respondent

Final Decision : Allowed

Judgement

H.L. Agrawal, C.J.—"Can a proceeding u/s 12(8) of the Orissa Sales Tax Act, 1947 (for short, ''the Act'') be initiated for the period for which the assessment proceeding is pending before the assessing authority ?" is the short and significant question which has come to the fore in this writ application.

2. The facts.--Petitioner, which is a registered partnership firm and deals in ready-made garments, woollen clothes, handloom materials, etc., is a registered dealer under the provisions of the Act. It had submitted its return for the assessment year 1974-75 in the usual course in May, 1975. But the assessment proceedings were initiated late, in December, 1977 and went on being adjourned from time to time and were ultimately fixed to 10th March, 1978. The petitioner''s stand is that it had been fully co-operating in the assessment proceedings and was not responsible for the adjournments except on a few occasions. However, on 10th March, 1978, the assessing officer instead of completing the assessment served the notice in annexure 1 u/s 12(8) on the petitioner alleging that he had reasons to believe that the turnover of 1974-75 had escaped assessment, and the petitioner was called upon to appear on 10th April, 1978.

3. The petitioner has challenged the initiation of this proceeding u/s 12(8) of the Act mainly on the ground that the assessment proceeding in respect of which the return had already been filed having not been completed, there was no question of any "escaped assessment" or "under-assessment" and the occasion for reopening any proceeding on the facts of the case did not arise.

4. In the counter-affidavit filed on behalf of the opposite party it has been stated that in the original assessment proceeding, hearing took place from time to time and it was finally adjourned to 10th March, 1978 when the following order was passed:

The dealer along with sales to R. D. (registered dealers) statements, to negate the fraud case report, has filed a list of names (23 cases) to whom he has given (as claimed) goods worth of different values for approval and not for sale.

In the interest of Revenue it is necessary to verify from these persons whether the contention taken is correct. In many cases he has not given the address and we have to find it out. Sales to R. D. statement also needs verification. The dealer has himself applied for adjournment and did not come up prepared as mentioned in my order on preceding dates. Since it would not be possible to complete assessment, considering all aspects judiciously, issue notice u/s 12(8) of the Act to keep it alive and in the meantime give reference to concerned quarters for verification of the contention taken by the dealer.

Since in another dealer''s case Honourable High Court of Orissa has ordered that when notice u/s 12(8) is issued even if the case is not assessed within the time-limit of three years, the case remains open for assessment, this procedure should be adopted in registered dealers case like the present one.

* * * The rest of the reply is all arguments and need not be noticed save and except the following statement which is in support of the stand of concealment or suppression:

That the opposite party humbly submits that in the present set of facts, the opposite party had information that the turnover as returned by the dealer was not correct inasmuch as they were under-stated in view of the fraud report at hand. That verification of the fraud report would have taken a long time, as it would be apparent from the record that the dealer did not extend co-operation as was required by him. Besides, the petitioner did not furnish the correct address of the persons to whom he stated to have given the goods on approval. That whether the goods were sold to the third parties or were taken for approval could not certainly have been decided without making inquiries with those persons and which meant that the assessment could not have been completed within the prescribed time and would be barred by limitation at the end of the financial year, i.e., 31st March, 1978...

When the matter was taken up for hearing by a Division Bench of this Court and reliance was placed on behalf of the Revenue on a Bench decision of this Court in

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State of Orissa v. Sri Sanatan Pathal [1973] 31 STC 632 which of course supports the stand of the Sales Tax Officer, as already indicated by him in his order extracted above, the Division Bench entertaining doubts regarding the correctness of the said decision, particularly in view of the decision of the Supreme Court in Ghanshyam Das Vs. Regional Assistant Commissioner of Sales Tax, Nagpur, , referred the matter to a larger Bench. The matter is accordingly before us.

5. Before proceeding to consider the authorities, let me notice the relevant provision of the law. Section 12 of the Act lays down the procedure of assessment. We are not concerned with the other provisions under which the assessing officer can proceed to assess on acceptance of the returns as correct or may assess to the best of his judgment. The second proviso to Sub-section (7) prescribes the period of limitation for passing the order of assessment in these words:

Provided further that no order assessing the amount of tax due from a dealer in respect of any year or part thereof shall be passed later than thirty-six months from the expiry of the year.

It is, therefore, obvious that the assessment proceeding in question was to be completed by 31st March, 1978 and not later than that. Sub-section (8), which is almost in fari materia with Section 147 of the Income Tax Act, 1961, covers the case of "escaped assessment" or "tinder-assessment" or "unauthorised compounding" of tax. It empowers the Commissioner at any time within thirty-six months (now five years) from the expiry of the year to which the assessment relates to call for returns under Sub-section (1) of Section 11 and proceed to assess the amount of tax due from the dealer in the manner laid down in Sub-section (5) of this Section "if for any reason the turnover of a dealer for any period has escaped assessment or has been under-assessed". It is not necessary to refer to Rule 23 of the Rules which prescribes a form of the notice and the return to be filed by the dealer.

6. We have simply to examine the scope and ambit of Sub-section (8) of Section 12. The scheme of this provision contemplates cases where the turnover of a dealer for any period has escaped assessment or has been under-assessed. It was submitted that the petitioner''s case did not fall under the mischief of this provision inasmuch as the assessment proceeding being still incomplete and in a stage of finalisation, it could not be a case of under-assessment much less of escaped assessment. With respect to the grounds and reasons advanced in the counter-affidavit that some "fraud report" having been received in the meantime, it was submitted that the assessing authority, even if he required more time to complete the assessment on the basis of the said report in regular course on applying the principles of natural justice in extenso, he should have in the first instance completed the regular assessment within the prescribed period of three years for which he had enough time and could have initiated the proceeding u/s 12(8) within the period of limitation for completion of which no outer period was

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fixed. It is obvious from the language and scope of Section 12(8) that it is a special provision dealing with the assessment of escaped tax even though the escapement may be the result of a mistake committed by the assessing officer himself.

7. Let me now first consider the decision of this Court in State of Orissa v. Sri Sanatan Pathal [1973] 31 STC 632 which is the sheet-anchor of the Revenue, where, considering the said provision it is observed that the words "escaped assessment" in Section 12(8) of the Orissa Sales Tax Act are capable of widest construction and the word "escaped" is not qualified by any expression indicating the manner of escape. If the turnover escapes assessment in any manner whatsoever, it is open to the authorities to assess the same under "escaped assessment". Therefore, even if no notice had been issued to a dealer tinder Section 12(5) or no assessment had been made, it is open to the taxing authority to proceed u/s 12(8). This was a case on a reference by the Tribunal and one of the questions which is relevant for our purpose was as follows:

Whether the Tribunal was right in holding that assessment u/s 12(8) is not maintainable where there has been earlier no notice and no assessment u/s 12(5) of the Orissa Sales Tax Act ?

The stand of the dealer in that case also was that he was never assessed earlier u/s 12(5) of the Act. I do not find much discussion of this question in the judgment. When the learned Chief Justice who delivered the judgment for the Bench took up the question for consideration, he only referred to a general observation of the Supreme Court in Anandji Haridas and Co. (P.) Ltd. v. S. P. Kushare, Sales Tax Officer, Nagpur [1968] 21 STC 326 quoted below and recorded the opinion that even if no notice had been issued to the dealer u/s 12(5) or no assessment had been made, yet it was open to the taxing authority to proceed u/s 12(8) and did not enter into the factual aspect as it was thought not necessary for answering the question.

We, therefore, hold that the expression ''escaped assessment'' in Section 11A of the Act includes that turnover which has not been assessed at all, because for one reason or other no assessment proceedings were initiated and therefore no assessment was made in respect thereof.

It is now necessary to examine the Supreme Court case.

The above observation was made, as already indicated, in a situation where the dealer had not submitted any return and on that account no assessment had been made. This will become clear from the discussions made at page 335 of the report. With due deference to the learned Judges of this Court who decided the case of Sanatan Pathal [1973] 31 STC 632, they relied upon the general observation of the Supreme Court in Anandji Haridas & Co. (P.) Ltd. [1968] 21 STC 326 without going into the facts of that case and have thus committed an error in applying the conclusions of that decision. The earlier decision of the Supreme Court in Ghanshyam Das Vs. Regional Assistant Commissioner of Sales

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Tax, Nagpur, was perhaps not brought to their notice. I would, therefore, hold that the answer to the second question in Sanatan Pathal''s case [1973] 31 STC 632 was not correctly given by this Court and to that extent the said decision is overruled.

8. It was then submitted by the learned Standing Counsel that if a construction in favour of the Revenue was not made by us, it would result in the failure of completing the assessment on account of the setting-in of the period of limitation as noticed above. That may be so, but simply on the ground that the Revenue would suffer, it cannot be permitted to take recourse to an unwarranted and illegal procedure as a subterfuge to overcome the difficulty of limitation. The provision of limitation is based upon a wholesome public policy to give protection to the dealer after a reasonable time as also casting a duty on the assessing authority to proceed with speed and dispatch. It is not the duty of the court to find out a means to cover up the lapses of the Revenue authorities.

9. The principle has been precisely laid down by the Supreme Court in the case of Ghanshyam Das Vs. Regional Assistant Commissioner of Sales Tax, Nagpur, . Considering an analogous provision in the C. P. and Berar Sales Tax Act (21 of 1947) and relying upon some earlier decisions of the Calcutta High Court and the Privy Council, the Supreme Court held that:

A turnover can not be said to escape assessment if proceedings in respect of the first assessment were pending and no final order of assessment was made therein. A proceeding is said to be pending as soon as it is commenced and until it is concluded. Before the final order of assessment, it could not be said that the entire turnover or a part thereof of a dealer had escaped assessment, for the assessment was not completed and, if completed, it might be that the entire turnover would be caught in the net.

The court has made an obvious distinction between a case where a proceeding of assessment had been initiated but no final order of assessment had been made and where the turnover had not been assessed, because for one reason or other no assessment proceeding had been initiated.

It is understandable as to how escapement of an income from assessment can be predicted before an assessment is complete. A Bench of the Allahabad High Court, of course, dealing with an Income Tax case, following the above Supreme Court case, took a similar view in the case of S.P. Kochhar Vs. Income Tax Officer, .

The observation in Ghanshyam Das Vs. Regional Assistant Commissioner of Sales Tax, Nagpur, would apply with full force to this case and it must be held that the proceeding initiated by the opposite party for the period in question by issuing the notice in annexure 1 cannot be sustained. Keeping the assessment proceeding incomplete, the assessing authority had no jurisdiction to take recourse to the powers conferred upon him u/s 12(8) of the Act.

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10. The writ application, therefore, must succeed. It is accordingly allowed and the notice in annexure 1 is hereby quashed. In the circumstances, however, I shall leave the parties to bear their own costs.

P.C. Misra, J.

11. I agree.

K.P. Mohapatra, J.

12. I agree.

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