(1999) 08 OHC CK 0021

In the Orissa High Court

Case No : Tax Appeal No''s. 2 and 3 of 1994

J.C. Budharaja APPELLANT

Vs

State of Orissa and Others RESPONDENT

Date of Decision : 03-08-1999

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 17, 23(4)
Orissa Sales Tax Rules, 1947 — Rule 79, 80

Citation : (1999) 2 OLR 385 : (2000) 118 STC 140

Hon'ble Judges : A. Pasayat, Acting C.J.;B.P. Das, J

Bench : Division Bench

Advocate : D.K. Mohapatra, R. Das and M. Mishra, for the Appellant; Senior Standing Counsel and Additional Standing Counsel (C.T.), for the Respondent

Final Decision : Allowed

Judgement

A. Pasayat, Ag. C.J.

1. These two appeals u/s 23(4)(c)(i) of the Orissa Sales Tax Act, 1947 (in short, "the Act") involve the question whether the Commissioner of Sales Tax (in short, "the Commissioner") can revise an order passed by the Assistant Commissioner of Sales Tax in exercise of powers of revision Under Rule 80 of the Orissa Sales Tax Rules, 1947 (in short, "the Rules"). As this question has to be answered in the background of Section 23(4)(c)(i) of the Act and Rule 80 of the Rules, detailed reference to the factual aspects would be unnecessary.

2. Dispute relates to assessment year 1988-89. By order dated September 14, 1989, assessment was completed u/s 12(4) of the Act. Another order was passed Under Rule 5 of the Orissa Additional Sales Tax Rules, 1975 (in short, "the Additional Rules") read with provisions of the Orissa Additional Sales Tax Act, 1975 (in short, "the Additional Act"). Additional tax of Rs. 16,369 levied under the Rules was deposited on February 28, 1990. Since tax deducted at source was more than tax liability fixed at 4 per cent, an application for refund u/s 14 read with Rule 36 was filed on January 19, 1990. On August 11, 1992, suo motu

revision in terms of Rule 80 was initiated by the Assistant Commissioner only against order of assessment passed under the Act. By order dated September 18, 1992, the proceeding was dropped by a reasoned order by the Assistant Commissioner of Sales Tax, Puri Range, Puri. On May 12, 1993 O.J.C. No. 3773 of 1993 was filed for early disposal of refund application. On August 19, 1993, the said writ application was disposed of with a direction to dispose of the refund application within a month. Time was extended on an application moved by the Revenue till the end of November, 1993. On January 10, 1994, the Commissioner issued another notice Under Rule 80 of the Rules. Petitioner submitted his reply to the effect that once power of suo motu revision Under Rule 80 has been exercised by a delegatee with powers of the Commissioner u/s 27, the Commissioner does not possess residual power to be exercised by him. Reference was made to a decision of this Court in Orient Paper Mills v. State of Orissa [1988] 70 STC 333 Ori to contend that the Commissioner cannot revise an order passed by delegatee. The plea did not find favour with the Commissioner who passed the impugned order holding that order passed by the Assistant Commissioner dropping the proceeding Under Rule 80 was erroneous and he has power to revise an order passed Under Rule 80 by the delegatee.

3. These two appeals have been filed against such order. Reliance was placed by learned counsel for the petitioner in Orient Paper Mills'' case [1988] 70 STC 333 Ori to contend that the Commissioner has no power to revise an order passed by the delegatee.

4. However, learned Senior Standing Counsel for the Revenue submitted that a fresh look in the matter is necessary because of certain observations by the apex Court in State of Orissa v. Krishna Stores [1997] 104 STC 594 and Commissioner of Sales Tax, Orissa v. Halari Store [1997] 107 STC 579. It is also submitted that in the earlier cases the settled position in law that the delegator still retains the original power conferred on him was not considered. It is further stated that there has been no delegation of suo motu revisional power on the Assistant Commissioner.

Learned counsel for the petitioner submitted that the decision in State of Orissa and others Vs. M/s. Krishna Stores, has no relevance because the point involved related to the question whether the Commissioner of Sales Tax, suo motu can revise Under Clause (e) of Sub-section (4) of Section 23 of the Act read with Rule 80, an appellate order passed by the Assistant Commissioner of Sales Tax. The apex Court decided that such power was available. In Commissioner of Sales Tax, Orissa and Another Vs. Halari Store, it was observed that the expression "any order made under the Act" is of wide connotation and it includes both assessment and appellate orders. Coming to the question whether the said decisions have any relevance so far as the present case is concerned, it has to be noted that the aforesaid decisions have been rendered on an entirely different question and related to the jurisdiction of the Commissioner to suo motu revise the appellate order passed by the Assistant Commissioner. The decisions, therefore, have no application to the present dispute.

5. Main plank of learned counsel for Revenue''s argument to distinguish Orient Paper Mills'' case [1988] 70 STC 333 (Ori), is that the power Under Rule 80 has not been delegated, and in any event the delegator still retains the original power.

6. With reference to the notification delegating power, it is stated by the learned counsel for petitioner that Section 23(4)(a) deals with both suo motu power of revision and also the power to revise any order made under the Act or rule made thereunder by any person other than the Tribunal appointed under Sub-section (3) of Section 3 to assist the Commissioner upon an application by a dealer or person. Therefore, power of revision as available u/s 23(4)(a) has been delegated. The notification reads as follows :

"Notification No. I-ST-76/73 14171 dated the 3rd August, 1963

In exercise of powers conferred by Section 17, read with Clause (d) of Sub-section (4) of Section 23 of the Orissa Sales Tax Act, 1947 (Orissa Act XIV of 1947) I, S.M.H. Burney, I.A.S., Commissioner of Sales Tax, Orissa, with the prior approval of the State Government do hereby delegate my powers and duties under the said Act and the rule framed thereunder as specified in the Schedule hereto annexed to the Assistant Commissioner of Sales Tax and direct that the said powers and duties shall be exercised and discharged by the said Assistant Commissioner with their respective jurisdiction.

SCHEDULE

Serial No. Provisions of the Orissa Sales Tax Act, 1947, and Rules made thereunder specifying the powers and duties delegated. Description of the powers and duties delegated.

1 2 3

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Sub-section (4)(a) of section 23 of the Orissa Sales Tax Act, 1947 read with rule 80 of the Orissa Sales Tax Rules, 1947.

Powers to revise assessment order passed by the Sales Tax Officer and Assistant Sales Tax Officer suo motu provided that no appeal has been filed against such orders."

It is to be noted that Rule 79 deals with application to Commissioner for revision. Undisputedly the power of revision available to the Commissioner u/s 23(4)(a) read with Rule 79 has been delegated. Commissioner by the impugned notices purported to exercise power Under Rule 90. The question is whether he can do it after the revisional order is passed by the Assistant Commissioner as delegated by the Commissioner on an application filed by any person or dealer. This Court in Orient Paper Mills case [1988] 70 STC 333, observed as follows :

"It is not difficult to consider the first aspect in view of the delegation of power by the Commissioner in favour of the Special Additional Commissioner under Notification No. 5118 dated 10th February, 1971 by which the Special Additional Commissioner exercised the power of revision of the Commissioner u/s 23(4)(a) and (d) of the Act. So the orders dated 24th May, 1978 passed by the Special Additional Commissioner in annexure 6 series were in fact deemed to be orders passed by the Commissioner himself in exercise of power of revision. Therefore, in purported exercise of power Under Rule 80, the Commissioner could not revise the orders which by legal fiction were deemed to have been passed by himself. As a concept of law, it is unthinkable that a quasi-judicial authority having delegated his quasi-judicial function to a subordinate or co-ordinate authority shall again revise the order passed by that authority. An identical question arose for consideration before the Gujarat High Court in a case reported in [1982] 50 STC 322 ; 1981 TLR 2965 (Ashwin Industries v. Deputy Commissioner of Sales Tax, Baroda). According to Section 67(1) of the Gujarat Sales Tax Act, the Commissioner has power of revision of any order passed by any officer appointed to assist him on his own motion. According to Section 27(2) of the aforesaid Act, Deputy Commissioners, Assistant Commissioners and Sales Tax Officers were appointed to assist the Commissioner. According to Sub-section (5) thereof, the Commissioner is authorised to delegate powers in favour of a Deputy Commissioner and after such delegation the Deputy Commissioner is authorised to perform all functions of the Commissioner delegated to him. According to Sub-section (7) thereof, the State Government can delegate functions of the Commissioner to Additional Commissioners. In view of the aforesaid provisions, it was held that suo motu power of revision delegated to the Additional Commissioner or the Deputy Commissioner can be exercised by them and their orders passed in revision cannot further be revised by the Commissioner. The second aspect does not also present any difficulty. As would appear from Section 29(2)(s)(ii), framing of rules is permissible according to law to lay down the procedure for appeals and revisions. In the guise of framing rules substantive law giving a fresh quasi-judicial power of revision unconnected with procedure could not be introduced to the Rules. Rule 80 is a substantive quasi-judicial power given to the Commissioner to be exercised in general on his own motion to correct errors prejudicial to the interest of the Revenue. Such a general, substantive and all pervasive quasi-judicial function could be contemplated in the statute but not under the Rules framed thereunder, particularly when the rule-making power does not authorise for framing of such a rule. Rule 80 is, therefore, an excessive delegation of substantive quasi-judicial power in favour of the Commissioner which ex facie seems unsupportable. But this Court exercising its power as a court of appeal u/s 23(4)(c)(i) cannot quash Rule 80 being itself a creature of the statute. This rule could only be quashed in an appropriate proceeding under Article 226 of the Constitution,"

7. At this juncture it is necessary to take note of the relevant provisions. They, so far as relevant, are Section 23(4) and Rules 79 and 80, and read as follows :

"Section 23.--Appeals and revisions.--

(1)to(3)...................

(4)(a) Subject to such rules as may be made and for reasons to be recorded in writing, the Commissioner may, upon application by a dealer or person or on his own motion revise any order made under this Act or the Rules made thereunder by any person other than the Tribunal, appointed under Sub-section (3) of Section 3 to assist him :

Provided that the Commissioner shall not entertain any such application for revision if the dealer or the person filing the same having a remedy by way of appeal under Sub-section (1), or Sub-section (3) did not avail of such remedy or the application is not filed within the prescribed period.

Explanation.--Any provision contained elsewhere in this Act which provides for determination of any specific matter shall not debar the Commissioner from determining such matter in exercise of the powers conferred upon him under this sub-Section.

(b) If the Commissioner proposes to reject an application for revision under the foregoing provision he shall record the reasons for such rejection.

(c) Any dealer or person, as the case may be, the State Government aggrieved by any order passed by the Commissioner on his own motion may, within sixty days from the date of receipt of such order, prefer an appeal--

(i) if the order was passed by the Commissioner, to the High Court, and

(ii) if the order was passed by any authority subordinate to the Commissioner, to the Commissioner.

(cc) All orders passed under this sub-section shall, subject to orders passed in an appeal, if any, be final.

(d) Notwithstanding anything contained in Section 17, the Commissioner shall not, except with the prior approval of the State Government delegate his powers under this sub-section to any other person appointed under Sub-section (3) of Section 3 to assist him."

"Rule 79 : Application to Commissioner for revision.--The application to the Commissioner for revision of an order passed by an Assistant Sales Tax Officer or a Sales Tax Officer, or an Assistant Commissioner, as the case may be, may be filed by the dealer within thirty days from the date of receipt by him of such order :

Provided that no such application shall be entertained by the Commissioner in respect of any order against which the applicant has a right of appeal under Sub-section (1) or Sub-section (3) of Section 23 :

Provided further that the Commissioner may admit an application for revision received after the said period if it is shown to his satisfaction that the appellant had reasonable cause for not preferring the application in time.

Rule 80: Revision by the Commissioner suo motu.--The Commissioner may on his own motion at any time within three years from the date of passing of any order by the Sales Tax Officer or within two years from the date of passing of any order by the Additional Commissioner, Special Additional Commissioner or Assistant Commissioner, as the case may be, call for records of the proceedings in which such order was passed and if he considers that any order passed therein is erroneous in so far as it is prejudicial to the interest of the revenue he may after giving the dealer an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary revise any such order :

Provided that the Commissioner shall not revise any order under this rule--

(1) Where an appeal against the order is pending before the appellate authority u/s 23, or

(2) Where time-limit for filing an appeal u/s 23 has not expired."

8. It is an accepted position in law that to "delegate" to another is not to denude yourself. As was observed by Wills, J. in Huth v. Clarke (1890) 25 QBD 391, "In my opinion the word, in its general sense and as generally used, does not imply, or point to, a giving up of authority, but rather the conferring of authority upon some one else". As observed by Lord Coleridge, C.J. 25 Q.B. 304, the word "delegation" implies that powers are committed to another person or body which are as a rule, always subject to resumption by the power delegating. The person delegating does not denude himself. (Per Wharton''s Law Lexicon, 1976 Reprint Edition at page 316). Delegation implies also the power to withdraw delegation. As indicated in Wharton''s Law Lexicon, delegation is a sending away ; a putting into commission ; the assignment of a debt to another ; the entrusting another with a general power to act for the good of those who depute him. The word "delegate" means little more than an agent. An agent exercises no power on his own but only the powers of his principal. The observation in Huth''s case (1890) 25 QBD 391 was referred to in Roop Chand Vs. State of Punjab, . In general, a delegation of power does not imply parting with authority. The delegating body will retain not only power to revoke the grant, but also power to act concurrently on matters within the area of delegated authority except in so far as it may already have become bound by an act of its delegate. [See Battelley v. Finsbury Borough Council : (1958) 56 LCR 165)

9. In Corpus Juris Secundum, Volume 26, "delegate" has been described as follows :

"As a noun, a person sent and empowered to act for another, one deputed to represent another in a more popular but less accurate sense, a regularly selected member of a regular party convention.

As a verb, in its general sense and as generally used, the term does not imply, or point to, a giving up of authority, but rather the conferring authority upon some one else.

At common law, it is the transfer of authority by one person to another, the act of making or commissioning a delegate.

Expression ''delegation of authority or power'' is a term which like the word ''delegate'' does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself."

In Collins Cobuild English Dictionary the word "delegate" has been stated to be "a person who is chosen to vote or make decisions on behalf of a group of other people. If you delegate duties, responsibilities, or power to some one, you give them those duties, those responsibilities, or that power so that they can act on your behalf. If you are delegated to do something you are given the duty of acting on some one else''s behalf by making decisions, voting, or doing some particular work."

In Black''s Law Dictionary, 6th Edition, the word "delegate" has been stated to mean a person who is appointed, authorised, delegated or commissioned to act in the stead of another. Transfer of authority from one to another. A person to whom affairs are committed by another. "Delegation" according to said dictionary means, instructing another with a general power to act for the good of those who depute him ; transfer of authority by one person to another.

According to Venkataramaiya''s Law Lexicon, "delegation" as the word generally used does not imply a parting with powers by the person who grants the delegation, but points rather to a conferring of an authority to do things which otherwise the person would have to do himself. In State of Orissa and Others Vs. Commissioner of Land Records and Statement, Cuttack and Others, , it was held that when the delegatee personifies his principal and his orders are to be treated as orders of his principal, all other powers attributable to the personality which he personifies, will be exercisable by him. While considering the scope of Section 15 of Orissa Survey and Settlement Act, 1958 it was observed that Commissioner has statutory powers of revision. Powers of revision of Board of Revenue Under Sections 6-B, 15, 25 and 32 of the said Act were delegated to Commissioner. He could exercise power of review conferred on the Board by Section 7 of Orissa Board of Revenue Act, 1951. Order passed by Commissioner as delegate of Board of Revenue cannot be revised by Board u/s 15 of 1958 Act or reviewed u/s 7 of 1951 Act.

10. There is no quarrel over the proposition that a delegator retains power, and is not denuded of the power by such delegation. The Commissioner admittedly does not intend to exercise power delegated, i.e., the power of hearing revision applications u/s 23(4)(a) read with Rule 79. That power has already been exercised by the delegatee. The Commissioner intends to exercise the power of revision Under Rule 80. Exercise of power Under Rule 80 is not same as exercised by him Under Rule 79. It is to..be noted here that the Legislature in its wisdom put a seal of finality on all orders passed under Sub-section (4) of

Section 23 of the Act.

11. Under Clause (c) of Sub-section (4) of Section 23 the dealer or person, as the case may be, the State Government aggrieved by any order passed by the Commissioner on his own motion may, within sixty days from the date of receipt of such order, prefer an appeal. If the order is passed by the Commissioner, the appeal is to be filed before the High Court, and if the order is passed by any authority subordinate to the Commissioner, to the Commissioner. It is, however, to be noted that the right of appeal has been conferred in respect of an order passed by the Commissioner on his own motion. The expression "Commissioner" as defined in the Rules means the Commissioner of Sales Tax and includes any officer to whom the Commissioner of Sales Tax may delegate u/s 17 his powers and duties under the Act, as provided in Rule 2(e).

Further, u/s 23(4)(d) notwithstanding anything contained in Section 17, the Commissioner shall not, except with the prior approval of the State Government, delegate his powers under this sub-section to any other person appointed under Sub-section (3) of Section 3 to assist him. Under Sub-section (3) of Section 3, the State Government may appoint such other persons under any prescribed designation including an Additional Commissioner and a Deputy Commissioner to assist the Commissioner and they shall exercise such powers and perform such duties as may be conferred or imposed by or under the provisions of the Act within such local area, as may be assigned to them by the Commissioner.

12. From notification dated August 3, 1963 referred to above, it is quite clear that with regard to exercise of power of revision u/s 23(4)(a), the Commissioner delegated his function to the Assistant Commissioner, and in exercise of such power latter disposed of the matter by the order which is now sought to be revised. The scheme of Section 23 in fact does not provide for a second revision. Section 23(4)(cc) attaches finality to the first order passed in revision as indicated above. It has been submitted that the power delegated was sought to be exercised, because the delegator does not denude his original power. This submission has no force because the Commissioner has not initiated the proceeding for hearing the matter afresh in terms of power conferred Under Rule 79. The Commissioner could not have done this after disposal of the matter finally by the delegated authority, and the order has assumed finality. Even if the Commissioner would have initiated the proceeding for hearing the matter afresh, it would have amounted to an attempt to review of his own order because the delegated authority had exercised power of revision by the delegator, i.e., the Commissioner. This position has been elaborately dealt with by this Court in JK Corp Limited Vs. Sales-tax Officer and Others, The order of the Commissioner cannot therefore, be maintained and the appeals are allowed. No costs.

B.P. DAS, J.

13. I agree.

