
(2007) 05 GAU CK 0028
In the Gauhati High Court

Jyoti Forge and Fabrication and Another	APPELLANT
Vs	
State of Assam and Others	RESPONDENT

Date of Decision : 17-05-2007

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2007) 3 GLT 659 : (2010) 31 VST 66

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—This writ petition has been filed challenging the appellate order passed by the Assam Board of Revenue upholding the revisional order passed by the Joint Commissioner of Taxes, Assam under the provisions of the Assam General Sales Tax Act, 1993.

2. The petitioner is a partnership firm and is engaged in execution of works contract. For the year 1996-97, the petitioner had submitted its return of turn over before the Respondent No. 4 i.e. the Superintendent of Taxes as per the provisions of the Act. In the return so submitted by the petitioner, a claim was made for adjustment of excess payment allegedly claimed for the years 1993-94 and 1994-95 against the tax liability of the year 1996-97. The petitioner also claimed adjustment of tax deducted at source. It is the case of the petitioner that in response to the notice issued by the Respondent No. 4, it had produced the books of Accounts and other relevant documents in support of return so filed. According to the petitioner, the Respondent No. 4 examined and verified the books of accounts and on being satisfied, the claim for adjustment made by the petitioner was allowed and the assessment order was passed on 4.12.1997 u/s 17(4) of the Act determining total value of the work contract at Rs. 1,19,88,147/- and tax payable thereon at Rs 1,11,437/-.

3. Against the tax liability, the Respondent No. 4 granted credit of total tax paid

at Rs. 1,07,834/-being Rs. 61,757/- by way of adjustment of excess tax paid for the periods in question. After expiry of 2 years from the date of assessment, the Respondent No. 4 issued notice on 30.12.1999 intimating the petitioner that the adjustment of excess tax paid for the years 1993-94 and 1994-95 against tax dues of the year 1996-97 was made in contravention of Section 30 of the Act. The petitioner was directed to produce the books of accounts on 7.1.2000 and was asked to clarify as to why rectification of assessment u/s 37 of the Act should not be made.

4. In response to the aforesaid notice, the petitioner submitted petition dated 7.1.2000 objecting to the proposed rectification of the assessment. A prayer was made for allowing one month's time for production of books of accounts. Further, notice dated 13.9.2001 was issued by the Respondent No. 4 intimating the petitioner that the excess balance of Rs. 37,258/- and Rs. 24,499/- relating to the years 1993-94 and 1994-95 respectively was adjusted in the assessment for the year 1996-97 without obtaining sanction from the higher authority as required u/s 30(1) of the Act read with Rule 36 of the Assam General Sales Tax Rules, 1993. Therefore, it was alleged that the adjustment of the above excess being contrary to the aforesaid provisions of the Act, the assessment was liable to be rectified u/s 37(1) of the Act. The petitioner was directed to submit show cause reply before the Respondent No. 4 on 21.9.2000 as to why the assessment for the year 1996-97 should not be rectified u/s 37(1) of the Act by disallowing adjustment.

5. Upon receipt of the notice, the petitioner appeared before the Respondent No. 4 and found that the assessment had already been rectified vide order dated 26.9.2000 passed u/s 37(1) of the Act. According to the petitioner, he received notice of demand-cum-assessment order on 18.10.2000 for the year of assessment. In the order of assessment, the adjustment of excess sum of Rs. 61,757/- was disallowed. As a result, additional demand of Rs. 65,360/- (including T.D.S. amounting to Rs. 3,603/- by the Govt. Department) on account of tax was also raised on the petitioner. Further, penal interest to the extent of Rs. 37,050/- was also levied. The petitioner was directed to deposit a total sum of Rs. 98,807/- on account of tax and interest and the balance demand of Rs. 3,603/-was treated as tax deducted at source by the Govt. Department.

6. After the aforesaid development, the petitioner submitted petition dated 29.12.2000 before the Respondent No. 4 for reconsideration of the matter urging various grounds. Thereafter, the petitioner filed revision petition before the Respondent No. 3 i.e. the Joint Commissioner of Taxes, Assam making a challenge to the order of assessment dated 26.9.2000 passed by the Respondent No. 4. The revision application was disposed of by order dated 23.8.2001 (Annexure-8 to the writ petition) holding that the petitioner was deprived of opportunity of being heard before completion of rectification proceeding. Accordingly, while setting aside the order of rectification, a direction was issued to the Superintendent of Taxes to make a fresh rectification order after allowing

the petitioner an opportunity of being heard.

7. Although the rectification order passed was set aside by the revisional authority but the petitioner being aggrieved by the direction of the revisional authority for fresh rectification, preferred an appeal before the Assam Board of Revenue, Guwahati. The appeal was registered and numbered as Case No. 21/STA/01. The appeal has been dismissed by the impugned judgment and order dated " 4.6.2002. Hence, this writ petition.

8. I have heard Mr. R.K. Joshi, learned Counsel for the petitioner as well as Mr. R. Dubey, learned Standing Counsel, Finance Department. Mr. Joshi, learned Counsel for the petitioner submits that the revisional authority could not have issued direction for making fresh rectification order after setting aside the earlier order passed on rectification proceeding. According to him, a fresh rectification proceeding was barred u/s 37(1) of the Act. He has placed reliance on the decision of the Division Bench of this Court as reported in (1997) 2 GLT 30 (Bengal Tea & Fabrics Ltd. v. Assistant Commissioner of Taxes).

9. Countering the above argument, Mr. R. Dubey, learned Standing Counsel, Finance Department submits that the revisional authority even after setting aside the order passed on rectification proceeding was within its competence and jurisdiction to issue direction for fresh rectification order as per the provisions of the Act. In this connection, he has referred to Section 37(2) of the Act. He further submits that even otherwise also, no restrictive construction could be given to the provisions of Section 37(1) of the Act. He has placed reliance on the decision of the Apex Court as reported in 1994 ITR 390 : AIR 1996 SC 390 (Director of Inspection of Income Tax v. Poor an Mall & Sons) and Commissioner of Income Tax, Central, Calcutta Vs. National Taj Traders, .

10. I have considered the submissions made by the learned Counsel for the parties as well as materials on record. The petitioner preferred revision application against the rectification order passed on 26.9.2000. The revisional authority set aside the revisional order on technical ground of violation of principles of natural justice. Referring to the provisions of Section 37(1) of the Act, the revisional authority held that, the order on rectification could not have been passed without affording an opportunity of being heard to the petitioner. From the materials on record, it was found by the revisional authority that the petitioner was not allowed the opportunity of hearing before rectification order of the assessment order was passed. It was upon such finding the order passed on rectification proceeding was set aside and quashed and the matter was remanded back to the same authority for making a fresh rectification order in accordance with law and upon providing reasonable opportunity of being heard to the petitioner.

11. It is the sole contention of the petitioner that the revisional authority upon setting aside the earlier order of rectification could not have issued direction for passing a fresh rectification order since by the time the revisional authority

passed the order on 5.11.2001, the period of limitation prescribed u/s 37(1) of the Act for rectification of the assessment order was already over. Section 37(2) of the Act provides that where as a result, any order in appeal or revision under the Act, any change becomes necessary in the order of assessment or penalty, the appellate or revising authority may direct appropriate authority to amend the order of assessment or penalty accordingly.

12. Apart from the above provision, which according to Mr. Joshi, learned Counsel for the petitioner is not applicable to the instant case, what is material to note is that the revisional authority upon setting aside the rectification order on the ground of violation of the principles of natural justice remanded the matter back to the same very authority for passing a fresh rectification order after allowing the petitioner an opportunity of being heard in accordance with law. The matter did not come to an end with the passing of the revisional order. The revision petition was filed by the petitioner making a grievance against the rectification order. It cannot be said that the revisional authority is left with only option of either allowing or dismissing the revision petition and it cannot, upon setting aside the rectification order, remand the matter back to the same very authority, which had earlier issued rectification order. If such restrictive construction, as has been sought to be given by the petitioner is allowed, the very purpose of the provisions of the Act will be frustrated.

13. The decision on which Mr. Joshi, learned Counsel for the petitioner has placed reliance, is not applicable to the facts and circumstances of the instant case. In the said case, i.e. Bengal Tea & Fabrics Ltd. (supra), the appellate authority dealing with the provisions of the Assam Agricultural Income Tax Act, 1939 and having regard to the fact that the appellate authority issued direction to the Assessing Officer to make fresh assessment in accordance with law, was of the opinion that no such direction could have been issued after expiry of the period of limitation prescribed for making a fresh assessment. In the instant case, the assessment was already made but the authority on the basis of the materials, decided to initiate the rectification proceeding and passed the rectification order within the period of limitation prescribed. The petitioner had made a grievance of violation of principles of natural justice. There visional authority found the same to be correct and accordingly, set aside the rectification order and remanded back the matter to the same very authority for passing a fresh rectification order in accordance with law after providing reasonable opportunity of being heard.

14. In the case of Pooran Mall & Sons (supra), the Apex Court referring to the provisions of the Income Tax Act and the Rules held that even if the period of time fixed u/s 132(5) of the Act found to be mandatory, that was satisfied when the first order was made. It was held that if any further direction is issued u/s 132(2) of the Act or by a Court in a writ proceeding, as in that case, an order in pursuance of such a direction could not be subject to the limitation prescribed u/s 132(5) of the Act. The power and jurisdiction under Article 226 of the Constitution was also emphasized. In the instant case, admittedly, the first

rectification order was passed within the period of limitation prescribed. Thereafter, the petitioner preferred revision application and the same was disposed of. The revisional authority upon setting aside the order on rectification proceeding remanded back the matter to the same very authority to pass a fresh rectification order providing reasonable opportunity of being heard. When the first rectification order was passed within the period of limitation, I am of the considered opinion that there was no restraint on the part of the revisional authority to remand the matter back to the same very authority to pass a fresh rectification order in accordance with law. If the argument advanced by the learned Counsel for the petitioner that the revisional authority could not have issued direction for passing a fresh rectification order is accepted, the same will be anti-thesis to the provisions and spirit of the Act. In *National Taj Traders* (supra), the Apex Court in somewhat similar circumstances held that the kind of construction sought to be given as in the instant case would lead to manifest absurd result.

15. The aforesaid case was relating to the orders passed under the provisions of the Income Tax Act, 1922. The Appellate Tribunal, while setting aside the order of the Commissioner remanded the matter back to him, with direction to dispose of the matter afresh after giving opportunity to the respondent assessee, referred inter-alia, the following question for the opinion of the High Court:

Whether, on the facts and in the circumstances of the case, the Tribunal acted properly by vacating the order of the Commissioner u/s 33-B of the said Act and in directing him to dispose of the proceedings under the said section afresh after giving due opportunity to the assessee?

16. The above question was answered in the affirmative by the High Court so far as the first aspect of the matter is concerned. As regards the second aspect of the matter, the High Court opined that the Tribunal could not have issued direction for disposal of the case afresh, because the period of limitation had expired.

17. The Apex Court dealing with the appeals posed the following question:

The question that arises for our consideration is whether such a direction to dispose of the case afresh can be given to the Commissioner by the Appellate Tribunal when the period of limitation prescribed under Sub-section (2)(b) has expired? In other words, whether Sub-section (2)(b) of Section 33-B has the effect of attending or curtailing the appellate powers of the Tribunal under Sub-section (4)?

18. While answering the above issue in favour of the Revenue, the Apex Court observed as follows:

It is true that Sub-section (2)(b) thereof prescribed a period of limitation on his power by providing that no order shall be made under Sub-section (1) after the expiry of two years from the date of the order sought to be revised by the

Commissioner and a literal construction of Sub-section (2)(b) also suggests that the bar of limitation imposed thereby was absolute in the sense that it applied to every kind of order to be made under Sub-section (1) and no distinction was made between a suo motu order and an order that might be made by him pursuant to a direction given by any appellate or other higher authority but the question is whether such a literal construction should be accorded to that provision? As stated earlier Sub-section (3) conferred on an assessee a right to prefer an appeal to the Appellate Tribunal against The Commissioner's order made under Sub-section (1) and under Sub-section (4) the Tribunal had authority to deal with the impugned order of the Commissioner in such manner as it deemed fit in exercise of its appellate power; for instance, it could confirm the impugned order, it could annul that order, it could after vacating it remand the case back to the Commissioner for making a fresh assessment in the light of the observations made by it in its judgment or it could, after calling for a remand report, rectify the erroneous order of the Income Tax Officer.

Further there was no period prescribed within which an appeal against the impugned order of the Commissioner had to be disposed of by the Tribunal and in the normal course on rare occasions such appeals would have been heard and disposed of before the expiry of two years from the date of the Income Tax Officer's order which was regarded as erroneous by the Commissioner. More often than not such appeals would come up for hearing after the expiry of the said period of two years--a fact fully known and within the contemplation of the Legislature when it introduced the section in the Act in 1948. In these circumstances did the Legislature intend to attenuate or curtail the appellate powers which it conferred on the Appellate tribunal in very wide terms under Sub-section (4) by enacting Sub-section (2)(b) prescribing a time-limit on the Commissioner's power to revise an erroneous order of the Income Tax Officer when the Commissioner was seeking to exercise the same not suo motu but in pursuance of or obedience to a direction from the Appellate Authority? According to the construction contended for by the assessee and which found favour with the High Court the answer was in the affirmative because Sub-section (2)(b), on its literal construction, was absolute. In our view such literal construction would lead to a manifestly absurd result, because in a given case, like the present one, where the appellate authority (Tribunal) has found (a) the Income tax Officer's order to be clearly erroneous as being prejudicial to the interests of the revenue, and (b) the Commissioner's order unsustainable as being in violation of principles of natural justice, how should the appellate authority exercise its appellate powers ? Obviously it could not withhold its hands and refuse to interfere with Commissioner's order altogether, for, that would amount to perpetuating the Commissioner's erroneous order, nor could it merely cancel or set aside the Commissioner's wrong order without doing anything about the Income Tax Officers, order, for, that would result in perpetuating the Income Tax Officer's order which had been found to be manifestly erroneous as being prejudicial to the revenue. But such result would flow from the view taken by the

High Court which has held that the Tribunal acted properly in vacating the Commissioner's order but did not act properly in directing him to dispose of the proceedings afresh after giving opportunity to the assessee. Such manifestly absurd result could never have been intended by the Legislature.

Moreover, it was fairly conceded by the counsel for the assessee before us that in exercise of its appellate powers it was open to the Tribunal itself to call for a remand report from either the Commissioner or the Income Tax Officer and rectify the Income Tax Officer's erroneous order after giving opportunity to the assessee and in doing so no question of limitation would arise. It was also not disputed by him that it was equally open to the Tribunal to set aside the Commissioner's order and remand the case directly to the Income Tax Officer giving the requisite direction to rectify his erroneous order and thereupon the Income Tax Officer could carry out the Tribunal's direction, for, admittedly, the bar of limitation under Sub-section (2)(b) was only on the Commissioner's power to make an assessment afresh and not on the Income Tax Officer. (If this be the correct position then it is gravely anomalous that the Tribunal should not be in a position to set aside the Commissioner's order and remand the case back to the Commissioner for making a fresh assessment because in the meantime two years' period of limitation has expired, for, it would mean that the Tribunal was prevented from achieving the desired effect directly through the Commissioner but it could do so indirectly through the Income Tax Officer.) A literal construction placed on Sub-section (2)(b) would lead to such manifestly absurd and anomalous results, which we do not think, were intended by the Legislature. These considerations compel us to construe the words of Sub-section (2)(b) as being applicable to suo motu orders of the Commissioner in revision and not to orders made by him pursuant to a direction or order passed by the Appellate Tribunal under Sub-section (4) or by any other higher authority. Such construction will be in consonance with the principle that all parts of the section should be construed together and every clause thereof should be construed with reference to the context and other clauses thereof so that the construction put on that particular provision makes a consistent enactment of the whole statute.

19. In the aforesaid case, the Apex Court referred to its earlier decision in Pooran Mall's case (*supra*), in which the following observation was made:

Even if the period of time fixed u/s 132(5) is held to be mandatory that was satisfied when the first order was made. Thereafter, if any direction is given u/s 132(12) or by a Court in writ proceedings, as in this case, we do not think an order made in pursuance of such a direction would be subject to the limitations prescribed u/s 132(5). Once the order has been made within ninety days the aggrieved person has got the right to approach the notified authority u/s 132(11) within thirty days and that authority can direct the Income Tax Officer to pass a fresh order. We cannot accept the contention on behalf of the respondents that even such a fresh order should be passed within ninety days. It would make the Sub-section (11) and (12) of Section 132 ridiculous and useless.

20. In the instant case also, the petitioner after availing the remedy of revisional jurisdiction without any restriction as regards the disposal of the same, wants to put restriction on its power and jurisdiction as regards its direction for fresh rectification. If this is allowed, same will lead to a manifestly absurd situation, which of course, will suit the purpose of the petitioner. As observed above, such restrictive construction will be anti-thesis to the very purpose of revisional authority and jurisdiction.

21. The Appellate Tribunal in its impugned judgment and order dated 4.6.2002 has given sound reasons for not interfering with the revisional order. It has dealt with the matter considering the materials on record. Even otherwise also, in view of the findings recorded above, the Tribunal's judgment and order needs no interference and accordingly, the same is upheld.

22. In view of the above, both the revisional and appellate orders are upheld. The writ petition is merit less and accordingly, dismissed. There shall be no order as to costs.