

(2010) 04 GAU CK 0013
In the Gauhati High Court
Case No : Writ Appeal No. 292 of 2007

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

Date of Decision : 22-04-2010

Acts Referred:

Assam Finance (Sales Tax) Act, 1956 — Section 12(1)
Assam General Sales Tax Act, 1993 — Section 12, 30, 37, 37(1), 37(2)
Assam General Sales Tax Rules, 1993 — Rule 36(1)
Income Tax Act, 1961 — Section 132(1)

Citation : (2010) 6 GLR 308 : (2010) 31 VST 76

Hon'ble Judges : R.S. Garg, C.J.; Ranjan Gogoi, J

Bench : Division Bench

Advocate : G.K. Joshi and R.K. Joshi, for the Appellant; R. Dubey, Standing Counsel, Finance Department, for the Respondent

Final Decision : Dismissed

Judgement

R.S. Garg, C.J.—The appellant, an assessee under the Assam General Sales Tax Act, 1993, being aggrieved by the judgment and order dated May 17, 2007 (Jyoti Forge & Fabrication v. State of Assam) passed by a learned single judge of this Court in W. P. (C) No. 6111 of 2002 confirming the orders passed by the learned Member, Board of Revenue and the revisional order passed by the Joint Commissioner of Taxes has come before us with a submission that the learned single judge so also the subordinate Tribunals were absolutely unjustified in not appreciating that the first order of assessment was contrary to or in violation of the principles of natural justice or the statutory requirements, then the said order would be null and void and any order of remand cannot extend the limitation as provided u/s 37 of the Assam General Sales Tax Act.

2. The short facts necessary for disposal of the present writ appeal are that the appellant-writ petitioner is an assessee under the provisions of the Assam General Sales Tax Act. For the assessment year 1993-94 (the assessment order was made on June 20, 1996) the appellant-writ petitioner was charged in

addition to his legal liability an amount of Rs. 45,870 with a clear understanding that the amount is adjustable. For the assessment year 1994-95 under the assessment order dated June 10, 1996 the appellant-writ petitioner was again additionally charged a sum of Rs. 24,499 and an observation was made that the excess amount was refundable. Out of the said two amounts which were charged extra, in the assessment year 1995-96 a sum of Rs. 8,613 was adjusted while other amount remained either for adjustment or awaiting in application for refund. For the assessment year 1996-97 the appellant-writ petitioner made an application and also claimed adjustment of the balance amount. The total tax payable for the assessment year 1996-97 was Rs. 1,11,437 out of which the balance was claimed to be adjustable. The assessing officer vide the assessment order dated December 4, 1997 adjusted the balance amount. However, on September 13, 2000 notice was issued to the appellant-writ petitioner to show cause against the reopening of the proceedings and for passing an order of rectification u/s 37. The appellant-writ petitioner applied for adjustment and thereafter he was required to appear on September 21, 2000. It appears that the said notice dated September 13, 2000 requiring the appellant-writ petitioner to appear on September 21, 2000 was served upon the appellant-writ petitioner on October 16, 2000. It appears that before the appellant-writ petitioner could be served with the notice or could appear, the assessment order was made on September 26, 2000. The authority recorded that the adjustment was contrary to the provisions of Section 30 of the Assam General Sales Tax Act so also violative of Rule 36(1) of the Assam General Sales Tax Rules, 1993. The assessing officer accordingly made the rectification, issued another order and sent a notice of demand. The appellant-writ petitioner being aggrieved by the said order filed a revision petition before the Joint Commissioner, Sales Tax, who vide his order dated August 23, 2001/November 5, 2001 observed that in accordance with Section 37 of the Act service of the notice upon the assessee was mandatory and, as noticed above, the notice was served on October 16, 2000 and much before that on September 26, 2000 the assessment order was made, the rectification order was contrary to the principles of natural justice and were also in the teeth of the requirement of the law. The revisional authority under the circumstances set aside the rectification order and remanded the matter back to the assessing officer with the direction that it should pass a fresh order after giving appropriate opportunity of hearing to the appellant-writ petitioner.

3. The appellant-writ petitioner being partly aggrieved by the revisional order preferred an appeal to the Board of Revenue with a submission that if during the pendency of the revisional proceedings the limitation of three years to pass a rectification order has already expired then the revisional authority could not remand the matter back to the assessing authority nor was it entitled under its revisional jurisdiction or under the provisions of law to extend the period of limitation as provided u/s 37 of the Act. The Board of Revenue, however, did not agree with the contention raised by the appellant-writ petitioner and dismissed the appeal. The appellant-writ petitioner still assertive of his right and being

dissatisfied by the orders passed by the revisional authority and the appellate authority preferred W. P. (C) No. 6111 of 2002. However, the said petition, as observed above, came to be dismissed on May 17, 2007 1 (Jyoti Forge & Fabrication v. State of Assam), therefore, the appellant-writ petitioner has come up before us in this appeal.

4. The sole question for consideration before us is whether the revisional court could remand the matter for passing a fresh order of rectification/assessment and as a corollary to the same whether the order of assessment amounts to extension of limitation for passing order of rectification. For proper appreciation of the dispute it would be necessary to refer to Section 37 of the Assam General Sales Tax Act, 1993. Section 37 reads as under:

37. (1) The authority which made an assessment or order or passed an order in appeal or revision in respect thereof may, at any time within three years from the end of the financial year in which such assessment or order was made and of its own motion, rectify any arithmetical mistake or other mistake of a factual nature apparent from the record of the case, and shall even beyond such period, rectify any such mistake as is brought to its notice by a dealer or person affected by such order before the expiry of such time-limit:

Provided that no such rectification shall be made having the effect of enhancing the assessment unless the authority concerned has given notice to the dealer or person of its intention so to do and has allowed him a reasonable opportunity of being heard.

(2) Where as a result of any order in appeal or revision under this Act any change becomes necessary in the order of assessment or penalty, the appellate or revisional authority may direct the appropriate authority to amend the order of assessment or penalty accordingly.

(3) Where a rectification under Sub-section (1) or amendment under Sub-section (2) has the effect of reducing the tax or penalty or other sum payable by the dealer a refund shall be due to the dealer and where any further amount of tax, penalty or other sum becomes payable the same shall be collected in accordance with the provisions of this Act.

(4) Where any such rectification has the effect of enhancing the assessment, a notice of demand shall be issued for the sum so payable.

5. Sub-section (4) of Section 37 clearly provides where any such rectification has the effect of enhancing the assessment, a notice of demand shall be issued for the sum so payable. Sub-section (1) clearly provides for the limitation which is three years from the end of the financial year in which such assessment or order was made and the authority can take an action of its own motion or under the direction issued in revision or appeal and it can also rectify any arithmetical mistake or other mistake of a factual nature apparent from the record of the case. Section 37 clearly provides that no order of rectification shall be made if it

has the effect of enhancing the assessment unless the affected party is allowed a reasonable opportunity of being heard.

6. In our opinion it was rightly found by the revisional court that the principles of natural justice and the mandatory command of Section 37(1) proviso were violated by the assessing officer in view of the facts that the appellant-writ petitioner was required to appear on September 21, 2000 while the notice was received by him on October 16, 2000 and the order of assessment was made on September 26, 2000. The appellant-writ petitioner is not aggrieved by that part of the order. The grievance sought to be ventilated before us is could the revisional authority remand the matter for passing/making a fresh order of assessment if the order of assessment now passed would be passed after the period of three years.

7. The learned Counsel for the appellant-writ petitioner placing reliance upon the judgments of the honourable Supreme Court in *S. Govindaraju Vs. Karnataka S.R.T.C. and Another*, and *Krishan Lal Vs. State of Jammu & Kashmir*, has submitted that if the orders are passed against the principles of natural justice and against the statutory command then such orders would be absolutely null and void. Insofar as the principle laid down in the said judgments are concerned we cannot doubt the same because it would be trite to say that whenever an order is passed violating the statutory command or offending the principles of natural justice such orders would be no orders in the eyes of law. The question still would be whether the revisional court after recording a finding that the orders passed by the assessing officer were violating the principles of natural justice and the statutory command, could remand the matter to the first court/Tribunal for passing a fresh order. The learned Counsel for the appellant-writ petitioner has also placed reliance on a decision of the Division Bench of this Court in the matter of *Bengal Tea & Fabrics Ltd. v. Assistant Commissioner of Taxes, Silchar* reported in (1997) (II) GLT 30 and, yet, another judgment passed by the Division Bench of this Court in *Bhauram Jodhraj & Co. v. State of Assam* reported in (1989) 75 STC 23 : (1988) 2 GLR 285 and contended that in the identical situation where *pari materia* provisions were involved the High Court in the Division Bench has observed that the appellant or the revisional authority cannot confer jurisdiction upon the first authority to pass an order beyond the period of limitation nor the appellate or revisional authority can extend the period of limitation if same has expired. It was also contended that the provisions contained in Section 37 of the Act are mandatory in nature and if the limitation for the first authority during the pendency of the revision or appeal has expired then an order of remand permitting or directing the first authority to pass a fresh order cannot be issued.

8. The learned Counsel for the State, on the other hand, has submitted that the said judgment of the Division Bench of this Court unfortunately has not taken into consideration the judgments of the Supreme Court in the matters of *The Director of Inspection of Income Tax (Investigation), New Delhi and Another Vs.*

Pooran Mal and Sons and Another, and in Commissioner of Income Tax, Central, Calcutta Vs. National Taj Traders, His submission is that the limitation of three years as provided u/s 37 of the Act is for the first authority and not to restrict the powers of the revisional or appellate authority. His submission is that in a case where the principles of natural justice or the statutory command are violated the revisional or the appellate court acting in accordance with the law will have to direct the first authority to pass a fresh order and in such a case the question of limitation would not arise.

9. The learned Counsel for the appellant-writ petitioner, in reply, has submitted that if the learned single judge was of the opinion that the two Division Bench judgments of this Court were per incuriam then maintaining judicial discipline the learned single judge should have referred the matter to a larger Bench.

10. We have heard the learned Counsel for the parties at length and have also gone through the orders passed by the learned single judge and the subordinate Tribunals.

11. In the matter of Bhauram Jodhraj & Co. (1989) 75 STC 23 (Gauhati) : (1988) 2 GLR 285 the question of interpretation of Section 12(1) of the Assam Finance (Sales Tax) Act, 1956 was under consideration. Undisputedly the provisions of Section 12(1) of 1956 Act are pari materia with the provisions of 1993 Act. In the said matter of Bhauram Jodhraj & Co. (1989) 75 STC 23 (Gauhati) : (1988) 2 GLR 285 the Division Bench has observed that when the requirement of Section 12 of the Act was not followed the demand notice to the affected dealers was liable to be quashed. The High Court left the authority free with the direction that it may take up rectification proceedings in case of those affected dealers if those were not otherwise barred and if there was no other impediment under the Act and the Rules. In the said matter the question whether the remand order amounted to enhancing or extending the limitation in favour of the assessing authority was not considered.

12. In the matter of Bengal Tea & Fabrics Ltd. (1997) (II) GLT 30 yet another Division Bench of this Court in paragraph 4 of the judgment had observed that it would be established principle of law that the appellate authority cannot confer any jurisdiction which the assessing officer does not have, that in the said case if the assessment was already barred then giving of direction which would amount to conferring jurisdiction would be illegal and without jurisdiction. In the said matter also the Division Bench observed that such question will have to be considered by the assessing officer whether the assessment was barred or not. In the said matter, beyond the said observations the Division Bench did not say anything.

13. True it is that an appellate or revisional authority cannot confer jurisdiction upon any subordinate Tribunal or court to do what the law does not permit. In a given case when the basic limitation has run out the appellate authority or the revisional authority cannot confer jurisdiction upon the subordinate court or

Tribunal to consider the matter to be within the limitation. However, the said principle would not apply to a case of the present nature where the first authority had passed its order in accordance with law and within the limitation. In the present matter it is not the submission of the learned Counsel for the appellant that the first authority has passed the order beyond the period of limitation.

14. It is common knowledge that in the judicial system or in the hierarchy of the system the delay is necessarily involved. In a given case when the limitation for passing an order is prescribed against the first authority then the first authority only is required to observe the limitation. If the revisional authority or the appellate authority or the High Court in its jurisdiction takes a longer time than the original limitation as provided under the law then the order of the first authority cannot be condemned on the ground of limitation. It would also be trite to say that the time spent in judicial proceedings or any such action would not affect the rights of the parties adversely. It would also be equally important to say that an action of the appellate/revisional authority or the court would cause no harm to anybody. In the present matter undisputedly the first order was made by the authority within the period of limitation.

15. True it is that the learned single judge while distinguishing the case of *Bengal Tea & Fabrics Ltd. (1997) (II) GLT 30* did not refer the matter to larger Bench but the fact still remains that the learned single judge had two Supreme Court judgments with him which were clearly providing that no further period could be prescribed if an appeal against the impugned order was to be filed. In the matters of *The Director of Inspection of Income Tax (Investigation), New Delhi and Another Vs. Pooran Mal and Sons and Another*, and *Commissioner of Income Tax, Central, Calcutta Vs. National Taj Traders*, their Lordships of the Supreme Court were taking into consideration the provisions of the Income Tax Act which though are not *pari materia* in language but on principles are the same. They also provide for rectification orders and orders of reassessment. The Supreme Court in the said matters had gone to the extent of saying that if the period of time fixed under a particular provision is held to be mandatory it would be satisfied when the first order was made. According to the Supreme Court if any direction is given under the appellate/revisional powers or by a court in writ proceedings, as it was in that case, it could not be taken to be an order made in pursuance of such direction and that it would not be subject to limitation prescribed under the original section providing limitation. The Supreme Court was clear in its opinion when it observed that once the order has been made within 90 days the aggrieved person has got the right to approach the notified authority u/s 132(1) of the then Income Tax Act within 30 days and that authority could direct the Income Tax Officer to pass a fresh order. The Supreme Court after appreciating the questions posed before them was of the considered opinion that such a fresh order under the directions of the revisional or appellate order were not required to be passed within the period of limitation as prescribed for passing the first order.

16. In the wake of the two judgments of the Supreme Court which were either not in existence when the judgments were delivered by the Division Bench or were not brought to the notice of the Division Bench of this Court we are of the considered opinion that the learned single judge was absolutely justified in dismissing the petition and affirming the directions issued by the learned Joint Commissioner of Sales Tax and approved by the Board of Revenue.

17. The appeal is dismissed. There shall be no order as to costs.