

(1968) 08 AHC CK 0027

In the Allahabad High Court

Case No : Sales Tax Reference No. 574 of 1963 connected with Special Appeal No. 330 of 1963 and Miscellaneous Application No. 177 of 1963

Kanpur Vanaspati Stores

APPELLANT

Vs

Commissioner, Sales Tax

RESPONDENT

Date of Decision : 07-08-1968

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1969) 23 STC 62

Hon'ble Judges : R.S. Pathak, J; Jagdish Sahai, J

Bench : Division Bench

Advocate : Ashoke Gupta, B.L. Gupta and S.N. Kackar, for the Appellant; The Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

1. The dealer, Kanpur Vanaspati Stores, carries on business in hydro. generated oil and washing soap. He also imports and distributes vanaspati as an agent of Malwa Vanaspati and Chemicals Limited, Indore.

2. For the assessment year 1957-58 the dealer filed returns of his turnover under the U.P. Sales Tax Act for successive quarters of the year. Together they disclosed a gross turnover of Rs. 1,66,387.03 and a net turnover in the same figure. During the assessment proceedings a statement of account was filed by the dealer showing a net turnover of Rs. 1,66,387.03 in respect of imported vanaspati and washing soap. He admitted that he had realised an amount of Rs. 10,207.54 as sales tax from his customers at the rate of one anna per rupee on imported vanaspati and six pies per rupee on washing soap. When the figures were worked out before the Sales Tax Officer the dealer admitted that the tax liability in respect of the turnover should be Rs. 10,339.19. The Sales Tax Officer issued a notice under Rule 41(5) fixing a date for hearing to enable him to make an annual assessment. Repeated adjournments were taken by the dealer, and as the dealer was absent on the date ultimately fixed for hearing the Sales Tax

Officer proceeded ex parte. He estimated the turnover of imported vanaspati at Rs. 58,00,000 and calculating the rate of tax at one anna per rupee computed the tax liability at Rs. 3,62,500. He estimated the turnover of washing soap at Rs. 6,132.30 and taking the rate at six pies per rupee he calculated the tax liability at Rs. 191.62. The total turnover was thus estimated at Rs. 58,06,132.30 and the tax liability was determined at Rs. 3,62,691.62. As the dealer had deposited a sum of Rs. 1,060.43 only towards the tax liability the Sales Tax Officer issued a notice of demand for the balance, namely, Rs. 3,61,631.19.

3. The dealer preferred an appeal u/s 9 of the Act. In the memorandum of appeal he admitted the turnover at Rs. 1,66,387.03. One of the grounds taken in the memorandum of appeal was that the dealer, being an importer, was not a "successive" dealer within the meaning of Section 3-A of the Act and therefore the higher rate of tax at single point was not attracted. It was said that it was liable to tax u/s 3 at the multi-point rate at 3 pies per rupee only. The appellate authority at first returned the memorandum of appeal on the ground that the admitted tax had not been deposited but subsequently accepted it and ordered its registration. When the appeal came on for hearing, an objection was raised on behalf of the Sales Tax Officer that the appeal was not entertainable because the admitted tax had not been deposited. The objection was opposed by the dealer who pointed to the ground taken in the memorandum of appeal that it was liable to tax u/s 3 at 3 pies per rupee only and referred to a pending writ petition in this Court in which a similar ground had been taken. It contended that upon the rate of tax admitted by it the "admitted tax" was covered by the amount already deposited by it. However, an application was also filed by the dealer praying for time to deposit the balance in case the appellate authority held that for the purpose of the appeal the dealer was liable to deposit a larger sum as the admitted tax. The application was rejected by the appellate authority on the ground that the admitted tax had not been deposited on or before the date of filing the appeal and there was no valid reason justifying the grant of further time to deposit the admitted tax. The appellate authority, in the circumstances, declined to entertain the appeal and it was dismissed.

4. The dealer then applied in revision and the revision application was also dismissed.

5. At the instance of the dealer the revising authority has made the instant reference inviting the opinion of this Court on the following questions:-

(1) Whether "admitted tax" is that which is found to be due on the net turnover declared by the dealer on calculating at the rate prescribed under the U.P. Sales Tax Act and the notification issued thereunder?

(2) Whether the assessee could take a plea in the grounds of appeal so as to vary the tax admitted by him at the time of assessment by contending that the goods were liable to tax at a rate lower than that prescribed in the notification issued under the U.P. Sales Tax Act ?

(3) Whether the plea of the assessee admitting a lower rate of tax in the grounds of appeal as against the rate prescribed in the notification issued under the U.P. Sales Tax Act could be examined on merits to see if it was a bona fide plea or a frivolous plea, for the purpose of entertaining an appeal under the first proviso to Clause (1) of Section 9 of the U.P. Sales Tax Act ?

(4) Whether the plea of the assessee that a dealer making the first sale would not come within the term "successive dealer", occurring in Section 3-A of the U.P. Sales Tax Act, is a bona fide or frivolous plea in the circumstances of the case ?

(5) Whether an assessee can be permitted to raise frivolous pleas and avoid payment of tax which he himself had considered to be due and had realised ?

(6) Whether the objection to the entertainability of the appeal could be raised after the appeal had been registered in accordance with Rule 67 of the U.P. Sales Tax Rules ?

6. Special Appeal No. 330 of 1963 arises in the following circumstances. When the revision application mentioned above was dismissed by the revising authority, the dealer filed a petition under Article 226 of the Constitution praying for certiorari against the assessment order, the appellate order and the order made in revision and for mandamus directing the Sales Tax Officer not to take recovery proceedings for realization of the tax. That petition was dismissed by Manchanda, J., on 13th March, 1963, in the view that the U.P. Sales Tax, Act provided adequate alternative remedy for obtaining relief. He did not express any opinion on the merits of the assessment or on the interpretation of the proviso to Section 9(1) of the Act. The order of the learned single Judge has been challenged by the dealer in Special Appeal No. 330 of 1963.

7. The other connected case, Miscellaneous Application No. 177 of 1963, is an application dated 20th March, 1963, under Article 227 of the Constitution. As is apparent, it was filed within a few days after Manchanda, J., dismissed the writ petition. By the said application the dealer challenges the validity of the recovery proceedings, the ground being that they could not be taken so long as the correct tax liability was not decided in appeal.

8. We shall first consider the sales tax reference. Section 9(1) of the Act provides:

Any dealer objecting...to an assessment order made u/s 7 ...may within 30 days from the date of service of the ...notice of assessment...appeal to such authority as may be prescribed :

Provided that no appeal against an assessment shall be entertained unless it is accompanied by a satisfactory proof of the payment of the amount of tax admitted by the appellant to be due, or of such instalments thereof as may have become payable :

Provided...

9. It is clear that while a dealer has a right of appeal against an assessment the

appeal cannot be entertained unless it is accompanied by satisfactory proof that the admitted tax has been paid by the appellant.

10. The dealer contends that the "admitted tax" is the tax which the dealer admits to be due from it at the stage when it files the appeal. It is urged that the tax determined on the basis of the turnover disclosed in the return cannot be said to be the "admitted tax". That may be the tax "due on the turnover shown in such return" which is mentioned in Section 7(1-A). But it is open to a dealer, the argument goes on to show, in appeal that the turnover disclosed by it in the return is not liable to tax at the rate which the dealer considered at the time of filing the return to be applicable to the turnover. What is the rate to be applied pertains to law. While there may be an admission as to the amount of turnover there could be no admission as to what is the true rate attracted by the turnover. And no matter what the rate suggested by the dealer, it is for the Sales Tax Officer to determine the true rate. In case the rate applied in the assessment order is erroneous, even if that rate was indicated by the dealer, it is open to the dealer to question the rate by preferring an appeal u/s 9(1). The admitted tax is the tax which the dealer admits to be due and which it does not dispute in the appeal either by challenging the turnover assessed by the Sales Tax Officer or by challenging the rate applied by him. It is urged that the tax not disputed in appeal must be taken to have been admitted. The dealer says that it calculated the tax at the time of realising it from the customers, and at the time of filing its return, at one anna per rupee in the case of imported vanaspati and six pies per rupee in the case of washing soap u/s 3-A. Then, it says it came to understand that Section 3-A did not apply to it because it was not one of the "successive dealers". It says that as an importer it was the first dealer in the State of Uttar Pradesh and should not be considered to be one of the "successive dealers". It points out that it took that plea in ground No. 11 of the memorandum of appeal. That ground is as follows :-

Because the levy of tax at one anna a rupee at single point at the hands of the importer is illegal, inasmuch as the importer is not a "successive" dealer contemplated u/s 3-A of the U.P. Sales Tax Act, the Notification No. ST-905 dated 31st March, 1956, taxing the importer is therefore invalid. The levy of tax u/s 3 therefore ought to be at 3 pies a rupee only.

11. The dealer contends that having regard to ground No. 11, which it says it took bona fide, the Notification No. ST-905/X dated 31st March, 1956, must be treated as ultra vires. But it is contended on behalf of the Commissioner that it was not open to the dealer to take ground No. 11 in the appeal and challenge the validity of the notification. The validity of a notification issued under the Act cannot be questioned before an authority constituted under the Act. And if the dealer is precluded from doing so, he cannot by adding such a ground attempt to obtain a benefit which otherwise is not available to him. After hearing the learned counsel for the parties we are of opinion that the Commissioner is right. It is well-settled that it is not competent for the authorities constituted under the statute.

In *Beharilal Shyamsunder v. Sales Tax Officer, Cuttack* [1966] 17 S.T.C. 508, the assessee filed a petition under Article 226 of the Constitution to quash a notification issued by the Government under the Orissa Sales Tax Act. The writ petition was dismissed by the High Court on the ground that the petitioner had "not exhausted the internal remedies under the Orissa Sales Tax Act". The Supreme Court in appeal held that the High Court was wrong. It referred to its decision in *K. S. Venkataraman and Co. (P.) Ltd. v. State of Madras* [1966] 17 S.T.C. 418, where it had held that the Sales Tax Tribunal could only decide a dispute between the assessee and the Commissioner in terms of the provisions of the Madras General Sales Tax Act and the question of ultra vires was foreign to its jurisdiction. For the same reason, the Supreme Court in *Beharilal Shyamsunder* [1966] 17 S.T.C. 508 held that the contention that the imposition of tax was without authority of law or ultra vires the Sales Tax Act and the rules could not be decided by the Sales Tax Authorities under the Orissa Sales Tax Act. Accordingly, it held that the High Court had erred in dismissing the writ petition on the ground that the appellant should exhaust his internal remedies under the Act. Now, if an authority constituted under the statute is not entitled to adjudicate upon the vires of a notification issued under that statute, clearly it is not open to a party to raise that ground before the statutory authority. It was not open to the appellate authority in the instant case to pronounce upon the vires of Notification No. ST-905/X dated 31st March, 1956. That being so, ground No. 11 was not a ground which the dealer could take in its memorandum of appeal. It was not a ground upon which the dealer could appeal under the Act. If that ground is excluded from the appeal, then clearly the very foundation disappears upon which the dealer attempts to support its contention that the tax deposited by it before it filed the appeal was the "admitted tax". The notification challenged by the dealer was issued u/s 3-A of the Act. It declares that in the case of goods imported from outside Uttar Pradesh the turnover at the point of sale by the importer is liable to tax and the rate is one anna per rupee. Vanaspati is one of the items in the list affected by this declaration. Admittedly as the dealer is an importer of vanaspati the notification in terms applies to it. The dealer could escape the burden of that levy only by having the notification declared ultra vires. If that was achieved then the lower rate of 3 pies per rupee levied u/s 3 would be attracted. It was argued before us that ground No. 11 consists of two parts, the first part being to the effect that the importer was not a "successive dealer" within the contemplation of Section 3-A and the second part being that the notification taxing the importer was invalid. The contention is that if the second part of the ground is excluded the first part remains. The argument is fallacious. If the ground is read as a whole it is clear that the dealer intended by that ground to say that Section 3-A imposes a levy on a "successive dealer", and as an importer was not a "successive dealer", and the notification imposed the levy on the importer the notification was inconsistent with Section 3-A and, therefore, ultra vires. The substance of ground No. 11 is essentially directed against the validity of the notification.

12. Therefore, even if the dealer's contention be accepted that the "admitted tax" is the tax which at the stage of filing the appeal represents the admitted liability, it could not employ ground No. 11 for deriving any benefit from that position.

13. In our opinion, upon the facts of the instant case the admitted tax is the tax found to be due on the net turnover declared by the dealer on calculating at the rate prescribed under the U.P. Sales Tax Act and the notification issued thereunder. The first question is answered in the affirmative.

14. In the circumstances, the remaining questions need not be answered.

15. The sales tax reference is disposed of accordingly.

16. As regards the special appeal, we are of opinion, with respect, that Manchanda, J., was plainly right in declining relief to the appellant on the ground that an adequate alternative remedy was available to it. The special appeal is liable to be dismissed.

17. We have also heard learned counsel for the parties in Miscellaneous Application No. 177 of 1963. The applicant is unable to satisfy us that there is any substance in the case. No error of jurisdiction has been pointed out and no manifest injustice can be said to arise because of the proceedings taken by the Sales Tax Officer for recovery of the sales tax assessed against the petitioner. That application must also fail.

18. Accordingly, we make the following orders :

Sales Tax Reference No. 574 of 1963.--The questions referred are answered as follows:

Question No. (1): In the affirmative.

Question No. (2) : Need not be answered.

Question No. (3) : Need not be answered.

Question No. (4) : Need not be answered.

Question No. (5) : Need not be answered.

Question No. (6) : Need not be answered.

19. Inasmuch as question No. (1) has been answered against the dealer on the basis of the law declared subsequently by the Supreme Court, there is no order as to costs.

20. Special Appeal No. 330 of 1963.-The special appeal is dismissed with costs.

21. Miscellaneous Application No. 177 of 1963.-The application is dismissed with costs.

22. Reference answered accordingly and appeal and application dismissed.