

(1966) 01 CAL CK 0020
In the Calcutta High Court
Case No : Matter No. 385 of 1961

Khas Kajora Coal Co. Limited

APPELLANT

Vs

Member, Board of Revenue

RESPONDENT

Date of Decision : 07-01-1966

Acts Referred:

Bengal Finance (Sales Tax) Act, 1941 — Section 10(3)

Citation : 70 CWN 643 : (1966) 18 STC 79

Hon'ble Judges : Sinha, J;Sen, J

Bench : Division Bench

Advocate : S. Mitra and S.B. Sen, for the Appellant;A.C. Mitra and K.C. Mukherjee, for the Respondent

Judgement

Sinha, J.—This is a reference u/s 21(3) of the Bengal Finance (Sales Tax) Act, 1941 (hereinafter referred to as the said Act).

2. Before I come to the question posed before us, I shall briefly enumerate the facts. The assessee, Messrs Khas Kajora Coal Co. Ltd. is a registered dealer under the said Act. We are concerned here with the period 1st April, 1949, to 31st December, 1949. In respect of this period, the assessee made certain payments of tax particulars whereof are given below :

Date	Amount	20-1-50	...	...	Rs.	4,452	13	0	20-1-50	...	...	Rs.	3,879	6	0
		1-3-50	...	...	Rs.	1,894	1	9	7-7-50	...	...	Rs.	7,548	11	3
													-----	Total	...
															Rs. 17,775 0 0 -----

3. On the 28th January, 1950, the assessee filed a return for the period mentioned above, but in the return no challans were filed and indeed on the date on which the return was filed, the last two items mentioned above had not been paid at all. Under the said Act and the Rules made thereunder, 1st March, 1950, was the date on which the return should have been filed. Therefore, the fact is that on the date that the return was filed, certain amounts of monies which were payable had not been paid, and challans had not been filed and in regard to two

unpaid sums, challans could not possibly have been filed. On the 18th August, 1950, the Commercial Tax Officer issued notice u/s 11(1) of the said Act, read with Rule 49 of the Rules. A copy of this notice has been set out in the paper book at page 7. Thereafter, on 15th January, 1952, the assessee sought to file an amended return but nothing turns upon it. On the 4th November, 1952, the Commercial Tax Officer, after hearing the assessee and looking into the books that had been produced before him, made an assessment order. In that assessment order a penalty of Rs. 50 was imposed. Thereafter there were further proceedings in the course of the assessment which may be briefly enumerated as follows : Firstly, the assessment was set aside and a fresh assessment was directed by the Assistant Commissioner on 8th July, 1953. Then on the 27th September, 1954, a fresh assessment was made but this was set aside on an appeal to the Assistant Commissioner by his order dated 31st March, 1955. On the 27th August, 1957, a notice was issued u/s 20(2)(b) of the said Act. On the 27th September, 1957, the order of the Assistant Commissioner was set aside. Thereafter, on the 27th December, 1957, a petition for revision u/s 20(3) of the said Act was made to the Board of Revenue, West Bengal. On the 13th July, 1960, this application for revision was rejected. Thereafter, on the 10th September, 1960, an application was made for a reference to this Court u/s 21, but this was rejected by the Board of Revenue on the 19th September, 1961. Thereupon an application was made to the High Court and ultimately this Court directed the Member, Board of Revenue, to refer to the High Court the following question :

Whether in the facts and circumstances of the case the Commercial Tax Officer was justified in treating the matter as a case where no return was filed and to issue notice in Form VI on the footing and whether such notice is valid in law and if such notice is not valid in law, how it has affected the assessment.

4. Before I deal with the question posed, it will be necessary to refer to certain provisions of the said Act. The first provision is Section 10 of the said Act, the relevant provisions of which are set out below:

10. (1) Tax payable under this Act shall be paid in the manner hereinafter provided at such intervals as may be prescribed.

(2) Such dealers as may be required so to do by the Commissioner by notice served in the prescribed manner and every registered or certified dealer shall furnish such returns by such dates and to such authority as may be prescribed.

(3) Before any registered or certified dealer furnishes the returns required by Sub-Section (2), he shall, in the prescribed manner, pay into a Government Treasury or the Reserve Bank of India the full amount of tax due from him under this Act according to such returns, and shall furnish along with the returns a receipt from such Treasury or Bank showing the payment of such amount.

(4) If any dealer discovers any omission or other error in any return furnished by him, he may at any time before the date prescribed for the furnishing of the next

return by him furnish a revised return; and if the revised return shows a greater amount of tax to be due than was shown in the original return, it shall be accompanied by a receipt showing payment in the manner provided in Sub-Section (3) of the extra amount.

5. The next section to be considered is Section 11(1) which is in the following terms :

11. (1) If no returns are furnished by a registered or certified dealer in respect of any period by the prescribed date, or if the Commissioner is not satisfied that the returns furnished are correct and complete, the Commissioner shall, within eighteen months after the expiry of such period, proceed in such manner as may be prescribed to assess to the best of his judgment the amount of the tax due from the dealer and in making such assessment shall give the dealer a reasonable opportunity of being heard ; and in the case of failure by a registered or certified dealer to submit in respect of any period a return accompanied by a receipt from a Government Treasury or the Reserve Bank of India, as required under Sub-Section (3) of Section 10, by the prescribed date, the Commissioner may, if he is satisfied that the default was made without reasonable cause, direct that the dealer shall pay by way of penalty in addition to the amount of the tax so assessed a sum not exceeding one and a half times that amount.

6. I now come to the Rules framed u/s 26(1) of the said Act (hereinafter referred to as the "Rules"). Rule 49 provides that where it appeared to an assessing authority necessary to make an assessment u/s 11, he shall serve a notice in Form VI upon him calling upon him to produce his books of accounts etc., and stating the period or the return period or periods in respect of which assessment is proposed. Under the said rule, the assessing authority fixes a date for hearing and then considers any objection which the dealer may prefer. The appropriate form, therefore, is Form VI, the relevant part whereof runs as follows :

Whereas-

(a) You, a dealer registered under Certificate No..., have not furnished return for the year/half-year/quarter/month ending the day of...;

(b) I am not satisfied that the return filed by you for the month/ quarter/half-year/year ending the day of is correct and complete;

* * * * * You are hereby directed to attend in person or by an agent to show cause on that date....

7. The short point that arises in this reference is as to whether this was a case of "no return", and in that event, whether the Commercial Tax Officer was entitled to issue notice according to Form No. VI(a) and whether by doing so he had exercised a jurisdiction which he did not possess, rendering the assessment invalid. The argument put forward by Mr. Mitra is briefly as follows : He says that Section 11(1) and Form No. VI, the relevant part whereof has been quoted above, clearly show that the law contemplates two eventualities. The first is,

where no return was furnished, and secondly, where the return furnished was incorrect or incomplete. He argues that in this case, the notice under Form VI proceeds on the footing that there was no return, and not on the footing that the return furnished was incorrect or incomplete. He follows up this argument by saying that the assessee here, did in fact file a return and, therefore, it cannot be a case of "no return". Simply because he had not paid part of the money, that was due and consequently could not annex the challans in respect thereof, it cannot be said that no return was filed. At the highest, it could be said that the return was incomplete. If the return was incorrect or incomplete, the assessee had a locus poenitentiae under Sub-Section (4) of Section 10 and he could file a revised return and Mr. Mitra says that a revised return was filed although he was not sure whether it was filed in time. In any event, he argues that this being not a case of "no return", the notice issued in Form VI was entirely wrong and conferred no jurisdiction upon the Commercial Tax Officer to make a best judgment assessment.

8. It appears that there is no decision on the point as to what is the exact meaning of the word "no return" in Section 11. In my opinion, however, the legal position is quite clear. The scheme of Section 10, and particularly Sub-Section (3), is that the assessee should file his return making his own estimate of the amount payable from him. This amount, which we may characterise as the admitted amount, must be put into a Government Treasury or the Reserve Bank as the case may be, in full before a return is furnished. It is then provided that as proof of such payment, the assessee must enclose with his return the receipts or challans in respect of the amounts paid. One must distinguish between the two operations. One is the prepayment of the money which is a condition precedent. Once the money is paid, then the enclosing of the challan is merely a mechanical process. If the money has been paid but for some reason or other, the challan has not been enclosed, that may make the return "incomplete", but the prepayment of the admitted amount is a condition precedent to the furnishing of the return and until the money is so paid, that is to say, paid into a Government Treasury or the Reserve Bank of India, no return can be validly furnished. Where the law lays down a precondition, then that must be observed, in order to hold that the law has been complied with. This position has been amply established by the Supreme Court in a decision under the Bengal Agricultural Income Tax Act, in *Commissioner of Agricultural Income Tax, Bengal Vs. Sri Keshab Chandra Mandal*, . Under that Act, as under the Indian Income Tax Act, a return has to be in a prescribed form, which has been prescribed under Rules which forms part of the Act itself. The form requires that the assessee must append his own signature to the return in order to make it a valid return. What happened in that case was that the assessee, who was an agriculturist, filed a return signed by his son, who purported to sign it Bakalam his father. The High Court held that this was in order, but the Supreme Court set aside the judgment of the High Court on the ground that it was required by law (in the prescribed form) that the return should be signed by the assessee and as

it was not signed, there was no valid return. Of course, if there was no valid return, it cannot be said that there was any return at all, for an invalid return cannot be a return in accordance with law.

9. Similarly, in this case, the law requires that the admitted amount should be prepaid into the Government Treasury or the Reserve Bank of India before a return is furnished. Therefore, unless the prepayment is made, it cannot be said that there was a valid return, that is to say, a return in accordance with the provisions of law. Consequently, one must come to the conclusion that in such a case, the precondition not having been satisfied, there was no return at all or, in other words, it was a case of "no return", and not merely an incomplete or incorrect return. In my opinion, Sub-section (4) of Section 10 has nothing to do with such a contingency. The "omission" or "error" mentioned therein are omissions and errors in the body of the return, relating to its subject-matter or the figures mentioned therein. It can have nothing to do with the prepayments mentioned in Sub-Section (3).

10. Coming now to Section 11, it does deal with the case of "no return" as also incomplete and incorrect returns. In the case of penalty, however, the grounds on which penalty can be imposed have been clearly mentioned. If a registered dealer files a so-called return but unaccompanied by the receipt from a Government Treasury or the Reserve Bank of India, then unless he is able to satisfy the Commercial Tax Authorities that the default was due to a reasonable cause, he will be liable to payment of a penalty.

11. In my opinion, reading all these provisions of law, it must be held that the prepayment of the admitted amount mentioned in Sub-section (3) of Section 10 is a precondition to the furnishing of a return, and unless such payment has been made the return filed cannot be considered as a valid return and it is "no return" in the eye of law and the Commercial Tax Authorities in the instant case were justified in treating the matter as if no return has been filed.

12. The learned Standing Counsel has referred to another aspect of the matter. He says that the notice under Form VI deals with a case of "no return" as well as incorrect and incomplete returns. Even assuming that this was not a case of "no return" but that of an incomplete return, it does not affect the jurisdiction of the Commercial Tax Officer to deal with the matter u/s 11, even though by either mistake or inadvertence, the notice has gone Under Clause (a) rather than Clause (b) of Form No. VI. For this purpose he has cited a decision of the Supreme Court *L. Hazari Mal Kuthiala Vs. The Income Tax Officer, Special Circle, Ambala Cantt.*, . The facts in that case were as follows :

13. The assessee was carrying on business in Kapurthala which was a former princely State. This princely State, before it merged with the Indian Union, had been integrated with the State of Patiala and for a certain period, the Patiala Income Tax Act applied. Thereafter, the area in question merged in India and at the relevant time the Indian Income Tax Act applied. What happened was that

the Income Tax Officer, Special Circle, Ambala, issued a notice u/s 34 of the Patiala Income Tax Act, seeking to reopen the assessee's account for the relevant year, although in fact he should have done so u/s 34 of the Indian Income Tax Act. The provisions of the two Acts were similar, but not identical. The point was, therefore, taken that the notice was invalid and gave no jurisdiction to the Income Tax Officer to reopen the assessment. This contention was negatived. It was held that the Income Tax Officer concerned had the power, although he purported to exercise it under a wrong statute. It was held that the principle laid down in *Pitamber Vajirshet v. Dhondu Navlapa* (1888) ILR 12 Bom. 486 should be followed and the exercise of a power should be referred to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. In other words, the Income Tax Officer had jurisdiction u/s 34 of the Indian Income Tax Act to reopen the account and he merely made a mistake in referring to Section 34 of the wrong Act, but his notice should be taken to have been issued under the correct jurisdiction, which would make his action valid and not nugatory.

14. Coming to the facts of the instant case, we find that the Commercial Tax Officer had the power to issue notice in Form No. VI. It is said that, instead of proceeding Under Clause (b) of it, he chose to proceed under Clause (a). This however ought not to vitiate the proceedings and under the principles enunciated above, the exercise of the power should be referred to the jurisdiction which confers validity upon the acts of the Commercial Tax Officer rather than which makes it nugatory. In other words, it should in that case be taken to be Under Clause (b). It will further be observed that this objection of the assessee is rather belated. This objection was not taken before the Commercial Tax Officer in the first instance. On the other hand, the books and documents were produced and the assessee got every opportunity of defending himself and putting forward his objections and it is after hearing him fully that the assessment was made. There is, therefore, no merit in the objection which is now being taken. For these reasons we are of the opinion that the question should be answered as follows:-

Question.

Whether in the facts and circumstances of the case the Commercial Tax Officer was justified in treating the matter as a case where no return was filed and to issue notice in Form VI on that footing and whether such notice is valid in law and if such notice is not valid in law, how it has affected the assessment.

Answer.

The Commercial Tax Officer was justified in treating the matter as a case where no return was filed and to issue notice in Form VI on that footing. Such a notice is valid in law and, therefore, the last part of the question requires no answer. Even if it is held that the notice itself should have proceeded under Clause (b) rather than Clause (a), that does not make it invalid in law. The notice even in such an event is valid and the proceedings are in accordance with law.

15. The assessee must pay the costs of the revenue. Certified for counsel.

Sen, J.

I agree.