
(1969) 04 MP CK 0013

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 303 of 1967

Kunjilal

APPELLANT

Vs

Assistant Sales Tax Officer 2

RESPONDENT

Date of Decision : 16-04-1969

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1970) J LJ 365 : (1970) 15 MPLJ 131 : (1970) MPLJ 131 : (1970) 26 STC 542

Hon'ble Judges : Bishambhar Dayal, C.J;G.P. Singh, J

Bench : Division Bench

Advocate : Y.S. Dharmadhikari, for the Appellant; Rama Gupta, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

G.P. Singh, J.

The petitioner is a registered dealer under the Madhya Pradesh General Sales Tax Act, 1958. He carries on the business of manufacturing furniture under the name and style of "New Era Furniture Mart." The petitioner was assessed for the year of assessment 1962-63 by an order of the Assistant Sales Tax Officer passed on 30th April, 1963. He was also assessed for the year 1963-64 on 17th October, 1964. In both these assessments the Assistant Sales Tax Officer came to the conclusion that the petitioner did not maintain regular books of account and he, therefore, made the assessments according to the best of his judgment u/s 18(4) of the Act. On 17th April, 1967, two notices were issued by the Assistant Sales Tax Officer under Rule 33 of the Madhya Pradesh Sales Tax Rules, 1959, for reopening the assessments u/s 19(1) of the Act. It was stated in the notices that because of irregular accounts maintained by the petitioner, sales had escaped assessment and that it was necessary to reassess the tax. By these notices the petitioner was called upon to show cause why reassessment of tax should not be made and was required to appear either personally or through representative

and to produce on the date fixed the relevant accounts for the year and any other evidence that he may like to produce. From the records of proceedings of the reassessment cases, which have been produced before us, it appears that in reply to the notices the petitioner appeared and on 25th May, 1967, he filed an application before the Assistant Sales Tax Officer demanding reasons why he was being reassessed as also praying for inspection of the record. The prayer for inspection was allowed but the counsel appearing for the petitioner was not ready to take inspection and the case was adjourned to 7th June, 1967. On that date, the counsel along with the petitioner appeared and stated that because of illness they could not inspect the record. They reiterated their request for disclosure of the reasons why the reassessment proceedings were started against the petitioner. The order sheet records that they were informed that having regard to the purchases made by the dealer of spirit and plastic cane and irregularities in accounts it was necessary to reassess the tax. The counsel for the petitioner inspected the record on 12th June, 1967. The record contains a report of inspection of the petitioner's premises made by the flying squad of the sales tax department on 8th March, 1967. The report states that the expenditure incurred by the petitioner during the assessment years on cane and spirit and other articles showed that large portion of his turnover escaped assessment. The petitioner, thereafter, filed this petition under articles 226 and 227 of the Constitution for quashing the notices issued under Rule 33 for reopening the assessments.

It has been contended by the learned counsel for the petitioner that the notice under Rule 33 is the foundation of the jurisdiction for re-assessment u/s 19 and, therefore, the notice issued must strictly comply with Rule 33 and Form No. XVI; that the notices issued in the instant case do not contain the particulars of escapement, i.e., the amount of turnover that escaped assessment; that the reason given in the notices that turnover had escaped assessment because of irregular accounts maintained by the petitioner could not be a valid reason for reassessment as the assessment which was sought to be reopened was best judgment assessment and was made on the same ground that the accounts were not properly maintained; and that the notices were invalid.

To appreciate the argument of the learned counsel it is necessary to refer to the relevant statutory provisions. The assessment of turnover escaping assessment is made u/s 19 of the Act, Sub-section (1) of which reads as follows :

Where an assessment has been made under this Act and if for any reason any sale or purchase of goods chargeable to tax under this Act, during any period has been under-assessed or has escaped assessment or assessed at a lower rate or any deduction has been wrongly made there from, the Commissioner may, at any time within five calendar years from the expiry of such period, after giving the dealer a reasonable opportunity of being heard and after making such enquiry as he considers necessary, proceed, in such manner as may be prescribed, to reassess the tax payable by such dealer and the Commissioner

may direct that the dealer shall pay, by way of penalty in addition to the amount of tax so assessed, a sum not exceeding that amount.

Section 51 of the Act empowers the State Government generally to make rules "for carrying out the purpose of the Act". The rule-making power is also conferred in respect of particular matters one of them being "all matters which are expressly required to be prescribed under this Act". In exercise of the rule-making power, the State Government made the Madhya Pradesh General Sales Tax Rules, 1959. Rule 33, which deals with the manner of reassessment, in so far as it is relevant, reads as follows :

33. Manner of assessment, reassessment and imposition of penalty.-

(1) Where-....

(f) the sale or purchase of goods by a dealer during any period has been under-assessed or has escaped assessment or has been assessed at a lower rate or any deduction has been wrongly made therefrom within the meaning of Sub-section (1) of Section 19, or

(g)....

then in every such case the assessing authority shall serve on the dealer a notice (which shall as far as may be, be) in Form XVI, specifying the default, escapement or concealment, as the case may be and calling upon him to show cause by such date ordinarily not less than 30 days from the date of service of the notice as may be fixed in that behalf why he should not be assessed or reassessed to tax and/or penalty should not be imposed upon him and directing him to produce on the said date his books of accounts and other documents, which the assessing authority may require and any evidence, which he may wish to produce in support of his objection :

Provided that no such notice shall be necessary where the dealer, having appeared before the assessing authority, waives such notice.

(2) On the date fixed in the notice issued under Sub-rule (1), or in case the notice is waived on such date which may be fixed in this behalf, the assessing authority shall, after considering the objections raised by the dealer and examining such evidence as may be produced by him and after taking such other evidence as may be available, assess or reassess the dealer to tax and/or impose a penalty or pass any other suitable order.

Form No. XVI prescribed under this rule pertaining to reassessment is as under :

I have reason to believe that your sale or purchase during the period(s) from... to... has been under-assessed/has escaped assessment/has been assessed at a lower rate/has been allowed in the assessment order to be reduced for purpose of tax by reasons of wrongly making a deduction therefrom and thereby rendered yourself liable to be reassessed and liable to penalty u/s 19(1) of the Act ;

(Here state the reasons) or ... or ...

Now therefore you are hereby called upon to show cause on...why you should not be assessed/reassessed/why a penalty should not be imposed/why the correct amount of fee should not be levied upon you.

Further, you are hereby directed to attend in person or by a person authorised by you in writing in that behalf being a person specified as required by Sub-section (1) of Section 21, before me and to produce or cause to be produced your books of accounts and the documents specified in the Schedule there under in respect of the above period and any evidence on which you rely in support of your objection at...(place)... (time) on...(date) and further required to present yourself or through an authorised person on the said place, date and time to be heard in this regard.

It will be seen from Section 19 that in terms it does not speak of any notice. It requires that before proceeding to reassess the tax in such manner as may be prescribed, the assessing authority shall give the dealer a reasonable opportunity of being heard and shall make such inquiry as he considers necessary. It also provides that reassessment can only be made if for any reason any sale or purchase of goods has been under assessed or has escaped assessment, or has been assessed at a lower rate or any deduction has been wrongly made. Rule 33 and Form XVI which provide for a notice and contents thereof must be taken to have prescribed a mode for giving the dealer a reasonable opportunity of being heard and a step in the process of reassessment. Section 19 as such does not make issue of a notice to the dealer as the foundation for exercise of jurisdiction. All that is made necessary is that the dealer shall be given a reasonable opportunity of being heard. In this background the prescribed notice and the form of notice cannot be taken to be as the basic requirement for the exercise of jurisdiction. It is no doubt true that the proceedings for reassessment will begin from the issue of notice, but any irregularity or defect in the notice will not be fatal to the reassessment proceedings if it is shown that in spite of the defect the dealer was not prejudiced and was given reasonable opportunity of being heard. The above construction of these provisions is strongly supported by the decision of the Supreme Court in *Anandji Haridas and Co. (P.) Ltd. Vs. S.P. Kushare, S.T.O. Nagpur and Others*, . In that case their Lordships construed Sections 11(4) (a) and 11-A of the Central Provinces and Berar Sales Tax Act, 1947 and Rule 32 of the Rules framed under that Act. These provisions of the Central Provinces Act correspond to Sections 18(5) and 19 of the Madhya Pradesh General Sales Tax Act, 1953 and Rule 33 of the Rules framed there under. The argument put before their Lordships was that the notice issued under Rule 32 for assessment of escaped turnover was defective, in that it gave only nine days period whereas normally thirty days period had to be given for showing cause and the assessment year was not correctly mentioned in the notice. In rejecting the contention their Lordships observed as follows:

We are unable to accept the contention of Mr. Gokhale that a notice u/s 11(4)(a)

or 11A(1) is a condition precedent for initiating proceedings under those provisions or that it is the very foundation for the proceedings to be taken under those provisions. The notice contemplated under Rule 32 is not similar to a notice to be issued u/s 34(1)(b) of the Income Tax Act, 1922. All that Sections 11 (4) and 11 A(I) prescribe is that before taking proceedings against an assessee under those provisions, he should be given a reasonable opportunity of being heard. In fact, those sections do not speak of any notice. But Rule 32 prescribes the manner in which the reasonable opportunity contemplated by those provisions should be afforded to the assessee. The period of 30 days prescribed in Rule 32 is not mandatory. The rule itself says that "ordinarily" not less than 30 days" notice should be given. Therefore, the only question to be decided is whether the defects noticed in those notices had prejudiced the appellants. It may be noted that when the assessee received the notices in question, they appeared before the assessing authority, but they did not object to the validity of those notices. They asked for time for submitting their explanation. The time asked for was given. Therefore, the fact that only nine days were given to them for submitting explanation could not have in any manner prejudiced them. So far as the mistake in the notice as regards the assessment year is concerned, the assessee kept silent about that circumstance till 1958. It was only when they were sure that the period of limitation prescribed by Section 11A had expired, they brought that fact to the notice of the assessing authority. It is clear that the appellants were merely trying to take advantage of the mistakes that had crept into the notices. They cannot be permitted to do so.... In *Chatturam v. Commissioner of Income Tax, Bihar* ([1947] 15 ITR 302), the Federal Court held that any irregularity in issuing a notice u/s 22 of the Income Tax Act, 1922, does not vitiate the proceedings ; that the income tax assessment proceedings commence with the issue of the notice, but the issue or receipt of the notice is, however, not the foundation of the jurisdiction of the Income Tax Officer to make the assessment or of the liability of the assessee to pay the tax. The liability to pay the tax is founded on Sections 3 and 4 of the Income Tax Act which are the charging sections. Section 22 and others are the machinery sections to determine the amount of tax. The ratio of that decision applies to the facts of the present case.

The aforesaid observations, in our opinion, bring out the principle that when the requirement of notice is not mentioned in the section as such and is prescribed under the rules as a step for affording the dealer a reasonable opportunity of being heard (which is the requirement of the section), a defect in the notice cannot invalidate the proceedings unless it is shown that before the order of reassessment was made, the dealer was not afforded reasonable opportunity of being heard and he was prejudiced because of the defect in the notice.

The argument of the learned counsel for the petitioner must be considered in the light of these principles. It is true that the notice does not mention the amount of turnover that had escaped assessment, but the notice does mention that the reassessment proceedings are to be taken in respect of sale that has escaped

assessment. Reassessment may take place when sale or purchase of goods has been under-assessed or has escaped assessment or has been assessed at lower rate, or any deduction has been wrongly made there from. Out of these various alternatives, the notice points out that the petitioner is proposed to be reassessed on the ground that sales have escaped assessment. This, in our opinion, is sufficient specification of the escapement and it was not necessary to mention the exact amount of the turnover which may have escaped assessment and which can be determined only after hearing the dealer. Similarly, the reason that because of the failure of the petitioner to maintain regular accounts, sales have escaped assessment cannot be said to be a reason extraneous to Section 19. It is true that the first assessments that were made against the dealer were best judgment assessments made on the ground that the dealer did not properly maintain the accounts but non maintenance of accounts may, even if assessment is made to the best judgment of the assessing authority, also give rise to escapement of turnover from assessment. Simply because the earlier assessments were best judgment assessments it cannot be held that notices for reassessment could not be issued for the reason that the dealer did not maintain proper accounts which resulted in the escapement of sales from assessment. Moreover, as stated earlier, the petitioner has already appeared before the assessing authority and has been told more about the reasons for starting reassessment proceedings against him. He has also taken inspection of the record which includes the report of inspection made by the flying squad of the department and which contains more details as to why the turnover may have escaped assessment. This report appears to be the basis on which the assessing authority acted and issued the notices for re assessment. It is also possible that if requested, the assessing authority may during the course of reassessment proceedings furnish to the petitioner further particulars of the escapement of turnover and the reasons for reassessment. The question ultimately would be whether the petitioner was afforded reasonable opportunity of being heard before re assessment and whether he was prejudiced because of defects in the notices. All that we need say at this stage is that the irregularities pointed out in the notices are not such which vitiate the taking of re assessment proceedings.

In support of his argument, the learned counsel relied upon *Janta Hardware Stores v. B.S. Parihar*, Assistant Sales Tax Officer 1962 M.P.L.J. 889. In that case it was held that the issue of a notice was a condition precedent to the validity of an assessment u/s 19(1) and that when Rule 33 required that the notice shall be in Form XVI that meant that the form must be strictly and literally followed. The case cannot be treated as an authority for this proposition after the decision of the Supreme Court in *Anandji Haridas and Co. (P.) Ltd. Vs. S.P. Kushare, S.T.O. Nagpur and Others*, to which we have earlier referred. Moreover, in that case the notice was issued in old Form XVI which was held to have become inconsistent with Section 19(1) of the Act after its amendment. In the instant case, the notices were issued in the amended Form No. XVI and, therefore, *Janta Hardware Stores*" case (1962 M.P.L.J. 889) is distinguishable. Reliance has also

been placed on *Esufali v. Commissioner, Sales Tax*, M.P. (1969 M.P.L.J. 228), where at page 231 it is observed that in the notice which is issued in Form No. XVI, the extent of escaped turnover has to be specified. The only point directly decided in that case was that best judgment assessment can also be made u/s 19(1) of the Act. The notice issued under Rule 33 which was considered in that case mentioned the extent of the escaped turnover and no question arose as to the effect of not specifying in the notice the amount of turnover escaping assessment. *Esufali's* case 1969 M.P.L.J. 228 cannot therefore be taken as an authority that the assessing authority must specify the amount of turnover escaping assessment in the notice. The observations relied upon were made in a different context.

The petition fails and is dismissed with costs. Counsel's fee Rs. 100, if certified. The outstanding amount of security deposit shall be refunded to the petitioner.