
(1973) 07 PAT CK 0003

In the Patna High Court

Case No : Tax Cases No's. 28 of 1967 and 27 of 1968

Laxmi Stores

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 13-07-1973

Acts Referred:

Bihar Sales Tax Act, 1959 — Section 18(1), 18(1)(a), 33(3)

Citation : (1973) 32 STC 466

Hon'ble Judges : N.L. Untwalia, C.J.;S.K. Jha, J

Bench : Division Bench

Advocate : G.N. Varma, J.N.P. Varma and Vijayashwar Prasad, for the Appellant;
Udai Sinha, for the Respondent

Judgement

S.K. Jha, J.—These two tax cases relate to the same assessee, Messrs. Laxmi Stores, for different periods. Tax Case No. 28 of 1967 arises out of assessment of sales tax for the year 1962-63, whereas Tax Case No. 27 of 1968 relates to assessment for the period from 1st September, 1963, to 12th January, 1964. Though the questions of law arising in these two cases are not common, yet there are, by and large, facts and circumstances which are common to both these tax cases. Therefore, though these two cases are being disposed of by one judgment, questions arising in these two cases are being answered separately.

Tax Case No. 28 of 1967.

2. In pursuance of the directions of this court a statement of case has been drawn up u/s 33(3) of the Bihar Sales Tax Act, 1959 (hereinafter referred to as "the Act") and four questions have been referred to be answered. They are as follows :

(1) Whether there was any causative and rational connection between the information regarding escaped assessment in the possession of the Sales Tax Officer and his satisfaction required u/s 18(1) of the Bihar Sales Tax Act, 1959, so as to invest him with jurisdiction to initiate proceedings under that section.

(2) Whether the completion of assessment on the alleged escaped turnover to the best of judgment u/s 18(1) of the Bihar Sales Tax Act, 1959, is justified and legal in view of the fact that there is no evidence on the record that the turnover of the applicant for the period 1962-63 actually escaped assessment and whether the amount is not vitiated in any case on the grounds of illegality for denial of permissive deduction on the ground of tax-free goods in the sales disclosed by the entries of the seized books as enjoined in the provision of Section 18(1)(a) of the Act.

(3) Whether the imposition of penalty u/s 18(2) of the Act without issue of the prescribed mandatory notice and without affording the assessee an opportunity to be heard as required under the second proviso thereof and without establishing the actual suppression of sales in 1962-63 is justified and legal.

(4) Whether, in the facts and circumstances of the case, the alleged suppression of sales for the period 25th July, 1963, to 12th January, 1964, could be projected back to the period 30th January, 1963, to 31st March, 1963, on mere presumption, suspicion and conjecture and without positive evidence thereof and whether such projection at the same rate was not arbitrary.

3. As already stated, this case arises from assessment of sales tax on Messrs. Laxmi Stores (assessee) for the year 1962-63 ending on 31st March, 1963. The assessee being a registered dealer was originally assessed by an order dated 13th November, 1963, passed by the Assistant Superintendent of Commercial Taxes, Khagaria, on a gross turnover of Rs. 11,34,809 as returned by the assessee. Subsequently, there was a surprise inspection of the business premises of the assessee on 13th January, 1964, by the officers of the intelligence branch of the commercial taxes department. In the course of this surprise inspection a number of books of account of the assessee were seized out of which books Nos. 1 to 4 on examination were found to contain transactions of sale relating to the period from 1st September, 1963, to 12th January, 1964. These transactions had been suppressed from the regular books of account maintained by the assessee for production and actually produced before the taxing authorities. On receipt of the report of the intelligence branch aforesaid, a notice was issued to the assessee u/s 18(1) of the Act for assessment of the turnover, which in the opinion of the assessing officer had escaped assessment. After examination of the books of account and hearing the assessee, the assessing officer by his order dated 22nd February, 1965 (annexure A), held on best judgment assessment that the assessee had suppressed transactions to the extent of rupees one lac per month from 30th January, 1963 and, therefore, he assessed the tax for the period under consideration by adding a sum of rupees two lacs to the turnover as returned originally by the assessee. A penalty of Rs. 6,307.07 was also imposed u/s 18(2) of the Act.

4. On appeal, the learned Deputy Commissioner of Commercial Taxes, Bhagalpur, by his order dated 30th November, 1965 (annexure C), gave no relief to the assessee. The assessee thereafter filed an application in revision before the

Commercial Taxes Tribunal, Bihar, which by its revisional order dated 16th June, 1966 (annexure E), rejected the petitioner's petition in revision. On behalf of the assessee, it was urged before the Tribunal that the assessing officer had no jurisdiction to pass an assessment order u/s 18(1) of the Act as the conditions prerequisite for making an order under that provision of law were not fulfilled. The other point urged on behalf of the assessee was that imposition of penalty u/s 18(2) of the Act without estimating actual suppression of sales during the period 1962-63 was unwarranted. The Tribunal found no force in these contentions and, accordingly, rejected them.

5. From the facts as noticed by the Tribunal in its revisional order, it is clear that the suppressed books of account being books Nos. 1 to 4 relate to a period from 1st September, 1963, to 12th January, 1964. On the entry relating to 1st September, 1963, since there was an opening balance, the assessee was asked to produce the corresponding previous books which, it was rightly assumed, had also been suppressed. The assessee thereafter submitted some books of account starting from 25th July, 1963 and ending on 31st August, 1963 and obviously, it was contended on behalf of the assessee that since there was no opening balance in the books of account relating to 25th July, 1963, the clandestine transactions had actually started on that very day and there was no other clandestine transaction or suppressed books of account. The taxing authorities did not accept the contention of the assessee that the clandestine transactions had not taken place before 25th July, 1963 and they actually disbelieved the books of account which according to the assessee had been suppressed but were filed subsequently for the period between 25th July, 1963 and 31st August, 1963. Having done so, the assessing authority, with whom the appellate authority as well as the Tribunal have agreed, held that since the assessee's regular books of account started from 30th January, 1963, the period between 30th January, 1963 and 31st March, 1963, which was the closing day of the year under assessment, was liable to be included for assessment u/s 18(1) read with Section 16 of the Act on the basis of best judgment. For the purpose of arriving at a figure on estimate according to best of judgment, the average figure of rupees one lac per month, which was the gross monthly turnover during the period for which the suppressed books of account (being books Nos. 1 to 4) had been seized, were added. This rupees two lacs of additional gross turnover for the months of February and March, 1963, having been treated as having escaped assessment during the year 1962-63, the figure was added to the total gross turnover as returned by the assessee; and the further penalty u/s 18(2) was imposed.

6. The learned counsel appearing for the assessee submitted, on the aforesaid facts, that there being no material on record either in the shape of any information or otherwise connecting the suppression of books of account or pointing out any clandestine transaction during the year under assessment, there was no basis on which the provisions of Section 18(1) could be attracted. In my view, this contention is well-founded. Section 18(1) of the Act reads as follows :

18. Turnover of registered dealer escaping assessment.-(1) If upon information which has come into his possession, the prescribed authority is satisfied that reasonable grounds exist to believe that any turnover of a registered dealer in respect of any period has, for any reason, escaped assessment or any turnover of any such dealer or a dealer assessed under Sub-section (5) of Section 16 has been under-assessed or assessed at a rate lower than that which was correctly applicable or any deductions therefrom have been wrongly made, the prescribed authority may, subject to such rules as may be made by the State Government under this Act and,

(a) within eight years of the expiry of such period, where the said authority has reasons to believe that the dealer has concealed, omitted or failed to disclose fully the particulars of such turnover or has furnished incorrect particulars of such turnover and thereby returned figures below the real amount;

(b) within six years of the expiry of such period in any other case,...

7. On the plain language of Section 18 of the Act, it is clear that the information which has come into the possession of the assessing authority and on the basis of which reasonable grounds may induce it to be satisfied to believe that there has been a case of escaped assessment must be in relation to, or in respect of, the period of assessment. There is neither any presumption under the general law nor can anything be culled out from the provisions of the Act that an assessee who is found to be dishonest in one year must be deemed to have been dishonest ever since he started his business. Therefore, the term "information" appearing in Section 18(1) of the Act has to be in respect of the period under assessment. In the present case, the taxing authorities may be said to be justified in drawing an inference that during the year 1963-64 the assessee may reasonably be said to have suppressed sales even prior to the date which appeared in the seized books of account which were suppressed. But, such a presumption cannot be extended further back to a previous assessment year with regard to which or in respect of which there was no information in the possession of the assessing authority from which it could be satisfied that reasonable grounds existed that the turnover of such previous assessment year had escaped assessment. The terminus a quo in such cases must be fixed at the beginning of the year under assessment.

8. The learned counsel for the assessee has referred to some decisions both of this court as well as of other High Courts. One such decision of this court is that in the case of Standard Mercantile Company Vs. The State of Bihar, , wherein it was held that additions for the periods as possible omissions which were not made with reference to any evidence or material were not legal. Though the case relied upon by the learned counsel is not directly in point with regard to the question for consideration before us, yet some observations in this case do go to support his contention to some extent. It has been laid down in that case that if the determination of the turnover is without any material, it would be an erroneous determination in law and notwithstanding the fact that it is only a

determination of the quantum of turnover, which is normally a question of fact, it will still be open to attack as erroneous in law not being supported by evidence or not being related to any material. A decision of the Allahabad High Court in *Hukam Chand Mahendra Kumar Vs. Commissioner of Sales Tax*, , seems to be more in point. In this case, it has been held that there is no general rule that the result of a survey carried out during one year is not relevant for other years. It is not the date of survey which is material, but what is material is the nature of the evidence or the material discovered during the survey. If the material so discovered relates to suppression for a particular assessment year in which the survey is made, then the survey report is not material for other years, but if the material discovered relates to suppression for different years, the survey becomes relevant for those years. One of the questions referred to the High Court in the aforesaid case was whether the fact that some suppression was detected in the year 1961-62 would in law justify an inference that the assessee must have suppressed sales in other assessment years and the answer given was that the suppression detected in the year 1961-62 could not by itself justify an inference that the assessee must have suppressed the sales in other years. It would thus be seen that, in principle, the Allahabad High Court held that the information derived from any survey in one year must relate to other years before the assessment of these years could be reopened on the basis of such information.

9. On the facts of the present case, as stated above, it will be noticed that there was no material on record which could connect the clandestine transactions found to have been indulged in during the year 1963-64 to the previous year of assessment, namely, 1962-63. If there had been some material in the seized books of account even though they related to the year 1963-64, which would have furnished any information to the effect that some clandestine transactions had been undertaken by the assessee during any previous year then the provisions of Section 18(1) could be attracted subject, of course, to the period of limitation. But, in the absence of any such material connecting the year in which such suppression has been made with any previous year, there could not be any justification in law in treating any part of the turnover of that previous year of assessment as having escaped.

10. In this state of facts apparent from the revisional order of the Tribunal and the correct approach on points of law, I think the questions referred ought to be reframed. Questions Nos. (1), (2) and (4) require to be reframed by one composite question in the following terms :

(1) Whether, in the facts and circumstances of the case, the Tribunal was justified in holding that the provisions of Section 18(1) of the Act were attracted.

In so far as question No. (3) is concerned, I think it should be reframed in the following manner :

(2) Whether, in the facts and circumstances of this case, the imposition of

penalty u/s 18(2) of the Act was rightly upheld by the Tribunal.

11. So far as the first question as reframed is concerned, it is obvious that, in the facts and circumstances of the case, there was no information nor any material or evidence on the basis of which it could be said that any part of the assessee's turnover during the year 1962-63 had escaped assessment. The notice u/s 18(1), under such circumstances, was not warranted in law. In so far as the second question as reframed is concerned, it is quite clear that if the provisions of Section 18(1) of the Act were not attracted, the powers under the provisions of Section 18(2), as a necessary corollary, could not be invoked and, as such, imposition of penalty also has to be held as illegal. I thus answer the first question as reframed in favour of the assessee and hold that, in the facts and circumstances of the present case, the Tribunal was not justified in holding that the provisions of Section 18(1) of the Act could be attracted. With regard to question No. (1), as reframed, I also answer the same in favour of the assessee and hold that, in the facts and circumstances of this case, imposition of penalty u/s 18(2) of the Act was not rightly upheld by the Tribunal.

Tax Case No. 27 of 1968

12. This is a reference u/s 33(1) of the Act in which the Tribunal has referred the following two questions to this court:

(1) Whether the production of declarations before the appellate authority can be deemed to be sufficient compliance of the requirements of the Bihar Sales Tax Act, 1959 and the Rules framed thereunder, for allowing the claim of deduction on account of sale of tax-paid goods?

(2) Whether in the case of an assessment to the best of judgment a dealer is legally entitled to get a reasonable deduction on account of sale of tax-free and tax-paid goods out of the turnover determined for the purposes of assessment, without producing the documentary evidence for claiming such deduction ?

13. This case relates to the assessment of sales tax on the assessee for the year 1963-64 on the basis of best judgment assessment. The facts and circumstances giving rise to such best judgment assessment, namely, surprise raid, seizure of books of account which have been suppressed, rejection of the books of account submitted by the assessee, which have been suppressed according to the assessee itself, have already been set out while dealing with the facts of Tax Case No. 28 of 1967. The only further facts which need to be set out in relation to this case are as follows :

14. On the basis of the report of the intelligence branch, the assessing officer by his order dated 22nd February, 1965 (annexure A), determined the turnover to the best of his judgment at Rs. 22,28,568 as against the turnover of Rs. 12,69,481 as per return filed by the assessee, The enhanced turnover comprised of the actual transactions found from the seized books of account for the period 1st September, 1963, to 13th January, 1964 and the estimated suppression on

the basis of the seized books for the period from the 1st April, 1963, to the 31st August, 1963 and a further sum of rupees one. lac on the basis of the closing stock as on 13th January, 1964. On an appeal having been filed by the assessee, the learned Deputy Commissioner by his appellate order dated 30th November, 1965 (annexure C), confirmed the assessment except in regard to the addition of rupees one lac on the basis of the closing stock. A revision having been filed by the assessee before the Commercial Taxes Tribunal, Bihar, the Tribunal by its order dated 16th June, 1966, upheld the appellate order.

15. Both before the learned Deputy Commissioner sitting in appeal and the Tribunal, one of the points urged on behalf of the assessee was that the taxing authority should have allowed exemption of the entire claim of sales of goods amounting to Rs. 5,50,953 as per its regular books of account on which tax had been paid at source, but for some reasons the declarations in form IXC could not be produced before the assessing authority though they were actually produced before the learned Deputy Commissioner at the time of hearing of the appeal.

16. The next point which was urged before the Tribunal on behalf of the assessee was that it was legally entitled to get a deduction of 25 per cent on account of the sale of tax-free and tax-paid goods out of the turnover determined on the basis of estimate. So far as the first point raised before the Tribunal is concerned, the Tribunal held that since the provisions relating to the filing of form IXC declarations along with the return were mandatory, it was not open to the Deputy Commissioner hearing the appeal to take into evidence the form IXC declarations, which were produced by the assessee at the appellate stage. Though there are indications in the order of the Tribunal that there may have been a failure to submit the form IXC declarations by the assessee along with the return on account of some bona fide mistake yet the Tribunal did not choose to decide the question of sufficiency of cause or bona fides of the assessee or otherwise, but merely rejected the claim of the assessee on the ground that the appellate court had no jurisdiction to entertain any additional evidence as already stated.

17. With regard to the second point urged before the Tribunal, the Tribunal held that since in the amount of turnover with regard to which 25 per cent was claimed by the assessee as exemption on account of sale of tax-free and tax-paid goods, there was nothing to show as to what was the amount of tax paid at source on the goods with regard to which exemption was sought to be claimed, it was not possible to determine the amount of turnover relating to tax-free goods. There was thus no material on record on the basis of which it could be said that 10 per cent deduction given on estimate by the assessing authority with regard to the sale of tax-free goods was in any way erroneous.

18. Both the aforesaid points urged by the assessee before the Tribunal having thus failed, the Tribunal has referred two questions to this court u/s 33(1) which have already been quoted above. In view of the facts stated earlier, I think question No. (1) has to be reframed and, accordingly, it is framed as follows:

(1) Whether, on the facts and in the circumstances of the case, the Deputy Commissioner could take into evidence the form IXC declarations and set aside the assessment in exercise of his power u/s 30(5)(a)(ii) of the Act and direct the assessing authority which made the assessment to pass a fresh order after further enquiry ? If so, whether the Tribunal, in exercise of its revisional power, can give the same relief to the assessee u/s 31 of the Act ?

The second question as referred is, in my view, correctly framed.

19. With regard to the first question, the point is clearly covered by a number of decisions of this court, the earliest in point of time being the case of *Basta Colla Colliery Co. (P) Ltd. Vs. State of Bihar*, but a later case which this very Bench has recently decided fully covers not only the question of law but the facts and circumstances in which such a question had been referred to this court and had been answered. In *Hewitt Robine Incorporation Vs. State of Bihar*, it was held on a review of the earlier decisions that "the appellate authority has, therefore, been given power to direct the assessing authority to make a fresh order after further enquiry. But in exercise of this power, obviously, the assessment order has got to be set aside. In other words, it is a power to open remand conferred on the appellate authority under the Act. If, therefore, in a given case the appellate authority is satisfied that due to a bona fide mistake or for sufficient cause the assessee could not produce, as in this case, a correct declaration form, then it could set aside the assessment and for satisfaction of the assessing authority as to whether the fresh declaration form filed before the appellate authority was correct or not, could ask it to make a further enquiry and pass a fresh assessment order".

20. Having discussed the question at length, this court held that there was ample power u/s 30 of the Act, vested in the appellate authority, to take additional evidence in the shape of correct declaration forms at the appellate stage. It was also held that similar powers could be exercised by the court while exercising its revisional jurisdiction u/s 31 of the Act. In that view of the matter, I answer the first question as refrained in favour of the assessee and against the Commercial Taxes Department.

21. So far as the second question referred to this court is concerned, it is the admitted case that the 25 per cent exemption over the suppressed turnover which is being claimed by the assessee was merely on the basis of estimate and that too not only of tax-free goods but the tax-paid goods lumped up with tax-free goods. The assessee has nowhere at any stage of the proceedings been able to show as to which part of this exemption claimed by it relates to tax-free goods and which are to tax-paid goods. In the absence of any such bifurcation, the Tribunal has, in my opinion, rightly decided not to interfere with the 10 per cent exemption granted by the assessing authority. But it must be made clear that if the quantum of turnover relating to tax-free goods as distinct from tax-paid goods would have been clearly ascertained in the assessment proceeding, then obviously the entire tax-free goods would have been obliged to be exempted in

so far as there is no provision in the Act in which the power to tax could be extended in respect of goods which have been declared tax-free. But so far as the tax-paid goods out of the suppressed books of account are concerned, no exemption could be granted in any case since the amount was neither returned nor were the necessary declarations filed, as obviously it could not be filed in any case of suppressed turnovers. The first part of question No. (2), therefore, as framed, will have to be decided in favour of the assessee in so far as it must be held that even in the case of assessment to the best of judgment the dealer is legally entitled to get a deduction on account of sale of tax-free goods by estimate or otherwise. The second part of that question must be decided against the assessee and in favour of the department and it must be held that in the case of assessment to the best of judgment the dealer is not legally entitled to get any deduction by estimate on account of sale of tax-paid goods out of the turnover determined for the purpose of assessment without putting in documentary evidence for claiming such deduction.

22. Though the assessee has succeeded on both the questions in Tax Case No. 28 of 1967 and partly in Tax Case No. 27 of 1968, in the circumstances of this case, I do not think that any costs should be awarded. There will, therefore, be no order for costs.

N.L. Untwalia, C.J.

23. I agree.