

(1974) 12 AHC CK 0022

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 4897 of 1974

Madan Studio

APPELLANT

Vs

The Assistant Commissioner (J.) IV, Sales Tax, Varanasi
Range and Another

RESPONDENT

Date of Decision : 11-12-1974

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 15

Citation : (1975) 36 STC 282

Hon'ble Judges : Satish Chandra, J;P.N. Bakshi, J

Bench : Division Bench

Advocate : B.D. Madhyan, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Partly Allowed

Judgement

Satish Chandra, J.—The petitioner carries on the business of buying and selling photo goods and also of making photographs. Up to the assessment year 1969-70 the Judge (Revisions) upheld the petitioner's contention that the turnover of photographs made by the petitioner was exempt from sales tax because it was a turnover in respect of works contract and not sale of goods. For the assessment year 1970-71 the Sales Tax Officer held that the turnover of photographs was taxable. The assessee preferred an appeal against that order which was also dismissed on 2nd April, 1974, on the finding that the turnover of photographs was not a turnover of works contract but was sale of goods and was hence liable to tax. The petitioner challenges the validity of this order. The petitioner had, u/s 10 of the U. P. Sales Tax Act, a statutory remedy. In fact the petitioner has been exercising this remedy of revision u/s 10 against similar appellate orders in previous years. There was no justification for the petitioner in not going in revision especially when he had several revisional orders in his favour. In so far as this year is concerned, the present writ petition is liable to fail on the ground that the petitioner had an adequate alternative remedy for the

non-exercise of which he has not given adequate reasons,

2. For the subsequent assessment years, that is, 1971-72 and 1972-73, the Sales Tax Officer accepted the petitioner's contention that the turnover of photographs was exempt from tax, but he rejected the account books of the petitioner in regard to the turnover of photo goods and estimated them for each of the two years. The petitioner felt aggrieved and challenged this finding in appeals filed by him in respect of the two years.

3. It appears that at the hearing of the appeal the departmental representative argued before the Appellate Assistant Commissioner that the turnover of photographs was liable to tax and had been wrongly exempted. Thereupon the Appellate Assistant Commissioner issued a notice to the petitioner stating that the departmental representative has stated that the turnover of photographs has remained untaxed and the petitioner should show cause as to why that turnover should not be brought to tax. The petitioner filed a representation stating that the appellate authority had no jurisdiction to touch the turnover which had been held exempt and against which no appeal has been filed by him. Feeling that the appellate authority was not inclined to accept his preliminary objection the petitioner has filed the present writ petition. He questions the jurisdictional validity of the notice issued for the assessment years 1971-72 and 1972-73.

4. The question for consideration is whether in a case where the turnover of any particular commodity which was held exempt from sales tax liability by the assessing authority and which was not the subject-matter of the appeal filed by the assessee, has the appellate authority jurisdiction to reopen the question of taxability of the turnover of that commodity ?

5. Section 9 of the U. P. Sales Tax Act confers a right of appeal on any dealer objecting to any order made by the assessing authority. Under Sub-section (2) an appeal has to be in the form and verified in the prescribed manner. Sub-section (3) provides :

(3) The appellate authority may, after giving the appellant and the Commissioner of Sales Tax a reasonable opportunity of being heard,-

(a) in the case of an order of assessment or penalty-

(i) confirm, reduce, enhance or annul the order of assessment or of penalty or both ; or

(ii) set aside the order and direct the assessing authority to pass a fresh order after such further inquiry as may be specified ; or

(b) in the case of any other order, confirm, cancel or vary such order.

6. The learned standing counsel submitted that u/s 9 an appeal lies against, inter alia, an assessment order and not against individual findings recorded in that order. Under Sub-section (3) an appellate authority has the power to confirm, reduce, enhance or annul the order of assessment. Therefore, the learned

standing counsel argues, the appellate authority had jurisdiction to look into the validity of the finding recorded by the assessing authority in the assessment order relating to the turnover of photographs and to consider whether it was liable to tax.

7. The learned counsel reinforces the submission with reference to Section 7 whereunder, after the dealer has submitted the return of his turnover, the assessing authority determines the turnover and assesses the tax on it. Thus the tax liability of a dealer is dependent upon his turnover of sales or purchases. Section 2, Clause (i), defines the "turnover" to mean the aggregate amount for which the goods are supplied or sold by a dealer either directly or through another. Similarly, the turnover of purchases is also defined to mean the aggregate of the amounts of purchase price paid or payable by a dealer in respect of purchase of goods made by or through him. It was urged that the tax liability of an assessee is dependent upon the determination of the turnover as such and, therefore, an assessment order which determines the turnover and fixes the tax liability is capable of being, inter alia, enhanced by the appellate authority under Sub-section (3) of Section 9 in respect of both matters. The appellate authority, hence, had jurisdiction to consider the question of taxability of the turnover of photographs even though the same had been held exempt from tax by the assessing authority.

8. Section 3 of the U. P. Sales Tax Act is the charging section. It provides that, subject to the provisions of this Act, every dealer shall, for each assessment year, pay tax at the rates provided by or u/s 3-A, Section 3-AB or Section 3-AA, on his turnover of sales which shall be determined in such manner as may be prescribed. The liability is to pay tax at the prescribed rates on the turnover of sales. Section 3-A provides that the turnover in respect of the goods specified in the second column of the First Schedule shall be liable to tax on the point specified in the third column thereof at such rate as the State Government may, by notification in the Gazette, declare. The First Schedule consists of 118 entries. Each entry relates to one or more different varieties of goods or commodities. Entry No. 70 mentions photographic and other cameras and enlargers, lenses, films and plates, paper and cloth and other parts and accessories required for use therewith. Entry No. 71 deals with picnic sets without contents. These commodities are taxable in the hands of manufacturer or importer. It is common knowledge that the various commodities or goods mentioned in this schedule are taxable at rates which are declared by different notifications in the Gazette by the State Government. The various commodities have a wide range of rates at which their individual turnover is taxable. Section 3-AA provides that subject to the provisions of Section 3-D the turnover in respect of goods declared u/s 14 of the Central Sales Tax Act, 1956, to be of special importance in inter-State trade or commerce shall not be liable to tax except at the point of sale by a dealer to the consumer, and the rate of tax shall be such, not exceeding the maximum rate for the time being specified in Section 15 of the said Act, as the State Government may, by notification in the Gazette, declare. It is evident that the

turnover of declared goods is taxable at the special rates provided u/s 3-AA. That may be a rate different from the rates notified by the State Government for various other commodities u/s 3-A. Section 3-AB adopts certain notifications as part of the Act and validates the acts done under them.

9. It is thus evident that liability to tax accruing u/s 3 is, in accordance with the provisions of Section 3-A and Section 3-AA, dependent upon the turnover of each commodity which is taxable at a specified rate. The assessing authority has to determine the turnover of each such commodity in which the dealer happens to do business and after determining the turnover of each commodity the assessing authority has to find the rate and calculate the tax liability of turnover of each variety independently and separately. After this has been done the assessing authority has to total up the items of tax liability ; the total represents the tax liability of the dealer for the particular assessment year.

10. The Sales Tax Rules do not lead to any different conclusion. Rule 41(5) authorises the Sales Tax Officer to determine the turnover of the assessment year and assess the tax thereon. Rule 44 provides for deductions from turnover. Clause (a) deals with all amounts allowed as discount in accordance with the regular practice of the dealer. Such discounts may be permissible in respect of a particular commodity and not another. This also shows that the assessing authority has to determine the turnover with reference to each taxable commodity separately. So even though the definition clause defines the turnover to mean the aggregate amount for which the goods supplied or sold, yet it does not mean that the turnover has to be the grand total of the aggregate amount of the different varieties of goods sold or supplied by the dealer, but the aggregate amount of sale proceeds of each variety for the whole year. This aggregate amount will be the turnover of the dealer in respect of that commodity. The assessment is a compilation of the turnover of each variety of goods and its tax liability. Ultimately, it determines the total tax liability of the dealer on the basis of the various turnovers determined by the assessing authority.

11. Section 9 confers a right of appeal to the dealer. He can appeal against an order to which he has an objection. An appeal has to be in the prescribed form. Rule 66 provides that the memorandum of appeal shall specify the name and address of the appellant, shall set forth concisely and under distinct heads the grounds of objection and the relief prayed for and shall be signed by the appellant or his lawyer or his duly authorised agent and verified in the prescribed form. Under Sub-rule (3) of Rule 66 the appellant is disentitled to be heard on any ground not set forth in the memorandum of appeal except with the permission of the Assistant Commissioner (Judicial). This rule goes on to provide that the decision of the Assistant Commissioner (Judicial) shall not be confined to the grounds of objection set forth in the memorandum of appeal, or taken by the leave of the Assistant Commissioner (Judicial) and the Commissioner shall not rest his decision on any ground other than the one set forth in the memorandum of appeal or taken by the leave of the Assistant Commissioner (Judicial) unless

the party, who may be affected thereby, has had sufficient opportunity of contesting the case on that ground. Sub-rule (3) and its proviso deal with the grounds of appeal. The appeal is normally confined to the grounds upon which the assessee challenges the order of the assessing authority though the appellate authority may decide an appeal on a ground not taken. Rule 66 requires the memorandum of appeal to set forth the relief prayed for. It is in respect of the relief prayed for that the appellate authority acquires jurisdiction to deal with the matter. It is the claimed relief with reference to which the appellate authority has the power to confirm, reduce, enhance or annul the order of assessment.

12. Section 9 does not confer any right of appeal on the department or the Commissioner of Sales Tax. This is further clear by the provisions of Section 10, which entitles the Commissioner of Sales Tax to apply to the revising authority against any order made by the assessing or appellate authority. Further, the revising authority has been conferred suo motu powers to call for and examine the relevant record and cancel, confirm or vary any order passed either by the assessing authority or by the appellate authority. The fact that the Commissioner of Sales Tax has not been given any right of appeal but has been given a right of revision must be borne in mind while construing the ambit of the appellate jurisdiction given by Section 9. In the context the appellate jurisdiction cannot usurp the revisional jurisdiction u/s 10. Else the position would be that an assessment order or a portion of it against which the Commissioner is aggrieved would be liable to challenge not only before the revising authority u/s 10 but also before the appellate authority u/s 9 and different results may be reached by these authorities. That would cause confusion. Reading the appellate jurisdiction in the manner in which the learned standing counsel suggests would indirectly nullify the express bar to the Commissioner of Sales Tax filing an appeal. That is not permissible. Further, if the appellate authority is construed to possess jurisdiction to go outside the purview of the subject-matter of the appeal filed by the dealer, it will virtually amount to reading into Section 9 the conferment of the suo motu jurisdiction which the Act confers upon the revising authority alone. The existence of suo motu jurisdiction in more than one authority against the same assessing authority is neither desirable nor in accordance with the scheme of the Act under which this jurisdiction is reserved only in the revising authority. For these various considerations we are unable to read the phrase "confirm, reduce, enhance or annul" occurring in Sub-section (3) of Section 9 to include that part of the assessment order which is not the subject-matter of the appeal, that is that part of the assessment order against which no relief is prayed for in the memorandum of appeal of the dealer. The appellate authority, in our opinion, is confined to the subject-matter of the appeal preferred by the dealer. It cannot go outside it. It may decide the points raised in appeal on grounds set forth in the memorandum of appeal or on other grounds, as contemplated by Sub-rule (3) of Rule 66. In this view the notice issued by the appellate authority requiring the petitioner to show cause why the turnover of photographs be not brought to tax was without jurisdiction.

13. In the result, the writ petition succeeds and is allowed in part. The impugned notice issued by the appellate authority for the assessment years 1971-72 and 1972-73 is quashed. In view of the divided success the parties may, however, bear their own costs.