(2004) 10 AHC CK 0104

In the Allahabad High Court

Case No : T.T.R. No. 148 of 1996

Minakshi Udyog APPELLANT

Vs

Commissioner of Trade Tax RESPONDENT

Date of Decision : 29-10-2004

Acts Referred:

Uttar Pradesh Trade Tax Act, 1948 — Section 21(4), 21(5), 30

Citation : (2005) 1 ESC 271 : (2005) 1 UPLBEC 253

Hon'ble Judges : M. Katju, Acting C.J.;Sunil Ambwani, J;K.N. Ojha, J

Bench : Full Bench

Final Decision : Allowed

Judgement

1. This Full Bench has been constituted in pursuance of a reference order dated 14.2.2003 made by a learned Single Judge of this Court who referred the following question to us for our opinion:

"In case an appeal is allowed against the order rejecting the application u/s 30 of UP. Trade Tax Act whether the-limitation provided u/s 21(4) will, Apply or limitation provided u/s 21(5) will apply for passing assessment order by the Assessing Authority, and in case Section 21(5) applies then whether the limitation runs from the date of service of the order or from the date of the order?"

2. Heard learned Counsel for the revisionist and learned Standing Counsel for the respondent.

3. The facts of the case are that in relation to assessment year 1986-87 the Assessing Authority under the U.P. Trade Tax Act passed an ex parte order on 16.7.1992. The applicant moved an application u/s 30 of the Act for setting aside the ex parte order, and re-opening of the case. This application u/s 30 was rejected by the Assessing Officer on 26.7.1993. Aggrieved, the assessee filed an appeal before the Assistant Commissioner (Judicial) Trade Tax, Agra which was allowed by order dated 13.12.1993. The Appellate Authority held that there was

sufficient cause for non-appearance on the date of hearing by the assessee, and in the interest of justice he was entitled for an opportunity of hearing.

4. It is alleged that the aforesaid appellate order of the Assistant Commissioner (Judicial) dated 13.12.1993 was served on the Assessing Authority on 11.1.1994, and the Assessing Authority on 23.2.1994 re-opened the case u/s 30 and started assessment proceedings. A show cause notice was issued to the assessee and the assessment order was passed on 17.8.1994.

5. Before the Assessing Authority the assessee raised an objection that the proceeding has become time bared in view of Section 21(5) of the UP. Trade Tax Act. However, this objection was rejected by the Assessing Authority who passed an assessment order. The assessee filed an appeal before the Assistant Commissioner (Judicial), Trade Tax, Agra which was rejected. The assessee then filed second appeal before the Trade Tax Tribunal which was allowed and the matter was remanded back to the Assistant Officer for passing an assessment order afresh. However, the Tribunal did not accept the assessee''s plea that the assessment order was barred by limitation. The Tribunal held that in pursuance of the appellate order dated 13.12.1993 the Assessing Officer had re-opened the case on 23.2.1994, and since Section 21(5) prescribed the period of six months, the assessment order dated 17.8.1994 was within limitation. Aggrieved, by this order of the Tribunal the present revision was filed..

6. The short question in this case is whether the assessment order was time barred in view of Section 21(5) of the U.P. Trade Tax Act.

7. Learned Counsel for the assessee has relied on the decision of the Court in Veena Match Line Industries v. State of U.P. 1991 UPTC 464, and also a decision of a learned Single Judge of this Court in M/s. Gupta Glass Industries v. Commissioner, Sales Tax, 1994 Tax Law Diary 164. In these decisions it was held that once the ex parte assessment order is set aside u/s 30, and the case is re-opened, the limitation u/s 21(5) is applicable which contemplates six months limitation period from the date on which the order was set aside u/s 30.

8. On the other hand, learned Standing Counsel contended that since the case was re-opened by the Sales Tax Officer on 23.2.1994, hence limitation will run from 23.2.1994 and not from 13.12.1993.

9. Sections 21(4) and 21(5) of the UP. Trade Tax Act read as follows: "

"(4) If an order of assessment is set aside and the case is remanded for re-assessment by any authority under the provisions of this Act or by a competent Court, the order of re-assessment may be made within one year from the date of receipt by the Assessing Authority of the copy of the order remanding the case, or by [December 31, 1982], whichever is later.

(5) If an order of assessment or re-assessment for any assessment year is set aside u/s 30, a fresh order of assessment, or re-assessment for that year may be made within six months from the date on which such earlier order was set aside."

10. In our opinion, the assessment proceedings were clearly time barred in view of Section 21 (5) of the Act- We do not agree with the submission of learned Standing Counsel that the case was re-opened only on 23.2.1994 when an order was passed to that effect by the Assessing Authority.

11. In our opinion, while allowing an appeal against an order rejecting an application u/s 30. the Appellate Authority can pass two kinds of orders (1) he may observe that the Assessing Authority has not properly considered the application u/s 30, and hence the Assessing Authority should again re- consider the application u/s 30 properly and decide it in accordance with law. or (2) he may himself decide the application u/s 30 on merits and hold whether the dealer did not receive the notice or was prevented by sufficient cause from appearing on the date fixed, and hence the order u/s 30, deserves to be set aside and the case be re-opened.

12. In our opinion, when the order of the Appellate Authority is of the first kind referred to above, then it docs not amount to re.-opening of the assessment proceedings because the Section 30 application has yet to be decided. However, if the appeal is allowed with the observation that the asscssee was not served a notice or was prevented by sufficient cause from appearing on the date fixed then this in our opinion amounts to automatic and immediate re-opening of the assessment, and it does not require a further order from the Assessing Authority re-opening the assessment.

13. In our opinion, when an appeal against the order u/s 30 is allowed by holding that the dealer did not receive notice or was prevented by sufficient cause from appearing on the date fixed the assessment stands re-opened automatically, and it does not require any order of the Assessing Authority re- opening the case. We cannot accept the argument that when the Appellate Authority has allowed the assessors appeal against the order u/s 30 for want of notice or for sufficient cause for non-appearance, and ordered that the assessment be re-opened, the actual re-opening will not be automatic and immediate but will depend on the sweet will of the Assessing Officer who may pass an order for re-opening the case as and when he likes. Such a view would frustrate the period of limitation u/s 21(5). The legal effect of an order allowing the appeal against an order u/s 30 on the ground that the dealer did not receive notice or was prevented by sufficient cause from appearing is that the ex parts assessment stands cancelled and the case stands re-opened immediately and automatically. In the present case, the order dated 13,12.1993 States that there was no service of notice on the dealer. Hence there was immediate and automatic re-opening of the case on 13.12.1993.

14. In our opinion, it is Section 21(5) which will apply in this case, and not Section 21(4). Section 21(5) specifically deals with the orders u/s 30, and hence it is a special provision. On the other hand, Section 21(4) is a general provision which deals with a case when the assessment is set aside by the Appellate Authority and the case is remanded for a fresh assessment under the Act. Hence

in the present case Section 21(5) will apply and not Section 21(4).

15. In the present case, the appellate order of the Assistant Commissioner (Judicial) dated 13.12.1993 was served on the Assessing Authority on 11.1.1994. Hence whether we take 13.12.1993 as the date from which the period of limitation begins, or 11.1.1994, in either case the period of limitation for making an assessment had expired before 17.8.1994 when the fresh assessment was actually made.

16. Hence, in our opinion, the period of limitation had clearly expired and the assessment proceedings became time barred.

17. For the reasons given above, we answer the question referred by observing that it will be Section 21(5) which will apply in cases where the appeal is allowed against an order rejecting the application u/s 30 of the U.P. Trade Tax Act.

18. As regards the question as to from what date the limitation period will run, in our opinion, if the parties or the Counsels were present before the Appellate Authority when he passed his order, then the limitation will run from the date of the order, but if they came to know about the order only subsequently, it will run from the date of service of the order or knowledge of the order, whichever is earlier.

19. This view is in accordance with the decision of the Supreme Court in M/s Raja Harishchandra Singh v. Deputy Land Acquisition Officer AIR 1961 SC 15. In the present case, admittedly the appellate order dated 13.12.1993 was served on the Assessing Authority on 11.1.1994, and hence the said authority certainly knew about the appellate order on 11.1.1994. Hence, in this case the limitation period for making the assessment had clearly expired.

20. In the circumstances, the revision is allowed and the order of the Trade Tax Tribunal, Bench Agra dated 10.11.1995 in Special Appeal No. 598 of 1994 for assessment year 1986-87 as well as the assessment proceedings u/s 30 of the U.P. Trade Tax Act and any demand raised thereunder arc quashed. If any amount has been realised from the assessce towards trade tax for the assessment year 1986-87 the same will be refunded to him within two months from production of a certified copy of this order along with interest at the rate of 10% per annum from the date of deposit till the date of refund. No order as to costs.

