(2002) 07 MP CK 0024

In the Madhya Pradesh High Court

Case No : Writ Petition No. 1993 of 1998 (G)

M/s Baboolal — APPELLANT

Vs

State of M.P. and Others — RESPONDENT

Date of Decision : 24-07-2002

Acts Referred:
Madhya Pradesh General Sales Tax Act, 1958 — Section 38, 39(2)

Citation : (2003) 2 MPJR 112

Hon'ble Judges : Rajendra Menon, J

Bench : Single Bench

Advocate : H.D. Gupta, for the Appellant; Jai Prakash Sharma, for the Respondent

Final Decision : Allowed

Judgement

Rajendra Menon, J.

The petitioner a dealer in grains has filed the aforesaid petition in connection with the dispute with regard to assessment made by the respondents under the provisions of Madhya Pradesh General Sales Tax Act, 1958 for the assessment years 1983-84 and 1984-85. For the aforesaid years assessment was made with respect to Dhahiya and Maithi which according to the petitioner are vegetables seed and are exempted from assessment. However initially assessment were made for the year 1983-84 and it was held that no tax is payable but a penalty was imposed for the said year. The assessment order was passed on 29.12.1986. As the petitioner was not liable to pay the tax and due to illegal imposition of penalty he filed an appeal before the Deputy Commissioner u/s 38 of the act aggrieved by the imposition of penality. It may be pointed out here that assessing authority itself came to the conclusion that the commodity is exempted from imposition of tax and therefore did not impose any tax instead only penalty was imposed. This order of penalty was quashed by the Dy. Commissioner on appeal vide Ann. P/ 3 on 09.05.1989. By the impugned show cause notice on 08.05.1992 in exercise of the power conferred u/s 39 (2) the said assessment has been reopened. Reply to show casue notice filed by the petitioner was not considered and orders for re-assessment have been issued. The petitioner challenged the said order before the Board of Revenue, the Board of Revenue has rejected the appeal.

Similarly for the assessment year 1984-85 the assessment order was passed on 15.12.1987 and by the impugned show cause notice the assessment has been reopened. The question that arises for consideration is that for the assessment made for the year 1983-84 and 1984-85 vide orders dated 29.12.86 and 18.12.87 whether suo motu power of revision could be exercised after a period of three years. Placing reliance on two judgments of this Court in the case of Commissioner of Sales Tax. M.P. vs. Sanawad Co-operative Society 1984 55 STC 54 and Commissioner of Sales Tax, M.P. vs. Himmatlal and Co. 1981 47 STC 415, learned counsel for the petitioner submits that the action of the respondent Addl. Commissioner in exercising the powers of suo motu revision is unsustainable and the consequential order passed by him and the Board of Revenue are liable to be quashed.

It is further submitted by him that a Division Bench of this Court in the case of Commissioner of Sales Tax M.P. vs. Bheraji Ramlal, Ratni 1986 (19) V.K.N. 61 has already held that the commodity namely maithi and dhaniya seeds are exempted from tax and in view of the same the assessing authority has held that no tax is liable to be paid. On merit also it is submitted that authorities had no jurisdiction to reopen the assessment after a period of three years.

Learned Counsel for the respondent/State however indicated that the order of assessing authority had merged with the order of the appellate authority and therefore the power of suo motu revision can be exercised within a period of three years from the date of issuance of order by the appellate authority.

I have heard learned counsel for the parties and perused the record. For the assessment year 1983-84 the assessment order was passed on 29.12.86 and the assessing authority has held that the petitioner is not entitled to pay any tax therefore as far as the question of payment of tax is concerned, the assessing authority order was final on and the appeal filed was challenging the in imposition of penalty. The appellate authority allowed the appeal and quashed the order imposing penalty. The records indicate that this order has attained finality. Similarly for the period 1984-85 also the assessment order was passed on 15.12.87 and the assessing authority has held that the petitioner is not entitled to pay tax. In this case also the penalty imposed was set aside by the appellate authority. Learned counsel for the respondent State has submitted that as the order of assessing authority merges with the order of appellate authority, three years period has to be counted from the date of order of appellate authority and not from the date of order passed by the appellate authority. The aforesaid question was considered by the this Court in the case of Commissioner of Sales Tax, M.P. vs. Sanawad Co-operative (supra) and after considering the same and after relying on two full bench decision of this Court rendered earlier has observed in the said case as under :

Now, the appellate authority undoubtedly had jurisdiction u/s 38(5) of the Act to set aside the order of the assessing authority granting exemption of sales worth Rs. 66,360. But the appellate authority did not even touch that part of the order of the assessing authority. The question as to the extent to which the order passed by an assessing authority merges with the order of the appellate authority, has been concluded by two Full Bench decisions of this Court in Commissioner of Income Tax, Delhi-II Vs. Banwari Lal and Sons Ltd., and in Commissioner of Income Tax Vs. Mandsaur Electric Supply Co. Ltd., . The following observations of the Full Bench in Commissioner of Income Tax, Delhi-II Vs. Banwari Lal and Sons Ltd., are relevant:

The result, therefore, is that the doctrine of merger applies to income tax proceedings but the extent of its application depends on the scope and subject matter of the appeal and the decision rendered by the appellate authority. Where an appeal has been preferred by the assessee to the A.A.C. from an order of assessment made by the I.T.O. in respect of only some of the items covered by the I.T.O.''s order and the remaining items, forming part of the I.T.O.''s assessment order were not agitated by either party, though it was open also to the revenue to agitate them or the A.A.C. to consider them suo motu and no decision of the A.A.C. is, therefore, made in respect of the remaining items, the I.T.O''s order merges with the appellate order of the A.A.C. only to the extent it was considered and decided by the A.A.C., but the matters which are not convered by the appellate order of A.A.C. are left untouched and to that extent the I.T.O.''s assessment order survives, permitting exercise of revisional jurisdiction by the Commissioner u/s 263 of the Income Tax Act, 1961. It necessarily follows that the items considered and decided by the A.A.C. in his appellate order are beyond the scope of the revisional power of the C.I.T. u/s 263 inasumch as the I.T.O.''s order merges to that extent with that of the A.A.C. and the Commissioner has no revisional power over the A.A.C. The question whether the I.T.O.''s order has merged with that of the A.A.C. has to be answered on this basis.

From the aforesaid judgment it is clear that for the purpose of counting three years the theory of merger will not apply when the assessing authority has not assessed the establishment for tax. A turnover which was not assessed by the assessing authority and which was not in issue before the appellate authority cannot be revised by the Commissioner in exercise of power of suo motu revision u/s 39 (2) after expiry of three years from the date of order passed by the assessing authority. In the light of this the order in the present case which directs for reopening of the assessment and proceedings in the matter cannot be sustained. As the question of assessment for tax was not agitated before the appellate authority, because the assessing authority itself had held that the commodities are exempted from payment of tax.

As far as the questions of reopening of the case for imposing penalty are concerned, it may be relevant to mention that when the assessment for earlier were made and the proceedings were initiated for imposition of penalty matter went up to the Board of Revenue and the Board of Revenue gave it orders with regard to the exemption to be granted in the case of Maithi and Dhaniya from imposition of tax. Because of difference of opinion between both the members in accordance with the rules matter was referred to third member and third member by its order dated 26.09.96 (Ann. P/11 and P/12) has given a finding that the commodities are exempted from the payment of tax and no penalty could be imposed. Even though this aspect was specifically pointed out to the Board of Revenue. The Board of Revenue while passing impugned order has ignored the same by holding that the question of redetermination of the issue by a third member does not arise. The Board of Revenue has committed clear error of jurisdiction in re-deciding the case when the matter stood concluded by a decision of the Board of Revenue vide order passed on 26.09.96 (Anne. P/11 and P/12). Infact when the matter was pending before the Board of Revenue no proceedings for suo motu revision can be exercised u/s 39 (2) by Additional Commissioner. In the instant case apart from the fact that the power of suo motu revision exercises by the authorities was beyond the period of limitation another material irregularity in the entire proceedings is that the question of liability to pay penalty was agitated before the Board of Revenue and the Board of Revenue had given a final verdict in the matter holding that no tax or penalty is payable on the said. This order of Board of Revenue was totally ignored while passing impugned order by an another single member of Board of Revenue. This is a further illegality in the entire proceedings. It is normal rule that when two members of Bench dis-agree, the matter is referred to third member and order passed by the said member becomes final. Considering the case in hand in all respect there is no doubt that the orders impugned passed are by the Board of Revenue on 09.10.1997 (Ann.P/10) unsustainable. The Board has not considered the case in accordance with law and in view of the above the action of the respondents is unsustainable.

Accordingly the petition is allowed. The orders impugned passed by the revising authority as contained in Ann. P/8 and P/9 dated 22.12.92 and the orders confirming the aforesaid by the Board of Revenue filed commulatively Ann. P/10 dated 19.10.97 are hereby quashed.

Parties to bear their own costs.

