
(2013) 04 AHC CK 0081

In the Allahabad High Court

Case No : Civil Misc. Writ Petition (Tax) No's. 744, 745 and 746 of 2004

M/s. J.K. Industries Ltd. and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 15-04-2013

Acts Referred:

Central Sales Tax Act, 1956 — Section 6, 6A, 6A(2), 7, 7(5)
Citizenship Act, 1955 — Section 18, 9, 9(2)
Constitution of India, 1950 — Article 19(1)(e)
Uttar Pradesh Trade Tax Act, 1948 — Section 21, 21(2)

Citation : (2013) 5 ADJ 460

Hon'ble Judges : Ram Surat Ram (Maurya), J;Prakash Krishna, J

Bench : Division Bench

Advocate : S.D. Singh, for the Appellant;

Final Decision : Allowed

Judgement

Prakash Krishna, J.—These three writ petitions raises a common question of law and fact. The facts are identical except that they relate to different assessment years i.e. assessment year 1998-1999, 1999-2000 and 2000-2001 (Central).

The writ petition No. 744 was treated as lead case.

Raising a short controversy with regard to the validity of the sanction granted by the Additional Commissioner under the proviso to Section 21(2) of the U.P. Trade Tax Act (hereinafter referred to as the Act) to reopen the assessment, the present writ petition has been filed.

2. The petitioner is a company duly incorporated under the Indian Companies Act having its registered office at Kolkata and regional office at Kanpur. The regional office, Kanpur is the principal place of business of the petitioners" company in U.P. and it is duly registered under the provisions of the U.P. Trade Tax Act, 1948 and under the Central Sales Tax Act, 1956. It is manufacturing and selling automobile tyres and tubes. Its manufacturing units are situate at Rajasthan,

Madhya Pradesh and Karnataka. It has branches for sale of manufactured goods inside as well as outside the State of U.P. The petitioner contends that it has branches in Punjab, Delhi and Uttaranchal. For the assessment years in question, the petitioner transferred certain stock of automobile tyres and tubes from its branches inside the State of U.P. to its branch situate outside the State of U.P. The total value of the stock transferred for the assessment year 1998-1999 is Rs. 37,27,286/-. The claim of stock transfer was accepted by the Assessing Officer in the assessment proceedings by the order dated 12th of March, 2001 passed u/s 9(2) of the Central Sales Tax Act.

3. Subsequently, the Assessing Officer sent a proposal to the Additional Commissioner, Trade Tax for sanctioning the reopening of the said assessment order, only on the ground that the petitioner has claimed the stock transfer through form F to its branches at Punjab, Rajasthan and Delhi which was accepted in the assessment order but these branches were not disclosed in the application for granting registration under the Central Sales Tax Act. There being no application for adding these branches in the registration form, stock transfer was wrongly allowed in the assessment order and therefore, the petitioner is liable to pay Central Sales Tax at the rate of 10 per cent. The petitioner filed objections to the aforesaid proposal of the Assessing Authority. The respondent No. 2 by the order dated 30th of April, 2004 has granted the sanction to the Assessing Officer permitting him to reopen the assessment for the relevant Assessment Orders.

4. Challenging the said order dated 30th April, 2004, and the consequently notice issued on 22nd of May, 2004 by the Assessing Authority, these three petitions have been filed.

5. The respondents in their counter affidavit have justified the sanction order although they have not disputed the material facts as set out in the writ petition. The defence set out in the counter affidavit is that the petitioner has not disclosed its branches outside the State of U.P. as has been provided in the Rule-3 of Central Sales Tax Registration and Turnover Rules, 1957. Hence, any such transfer made to undisclosed branches cannot be accepted, as stock transfer, instead it is interstate sale.

6. Heard Sri S.D. Singh, learned counsel for the petitioner and Sri C.B. Tripathi, learned Special Counsel for the respondents.

7. The learned counsel for the petitioner submitted two points in support of the writ petition:

1. Firstly, Section 6-A of the Central Sales Tax Act lays down that the burden to prove is on the assessee to show that the goods did not move in pursuance of any contract, which has been discharged by the petitioner by filing form "F". No illegality or irregularity of any kind has been found in the form F issued by the branches of the petitioner, submitted by the petitioner. There being no dispute with regard to the genuineness of the form F, no case for reopening the

assessment u/s 21 of the U.P. Trade Tax Act has been made out. Strong reliance has been placed upon a judgment of the Apex Court in the case of Ashok Leyland Ltd. Vs. State of Tamil Nadu and Another, .

2. Non mention of the names of branches outside the State of U.P. in the registration form for registration under the Central Sales Tax Act cannot be a ground to reopen the assessment in exercise of power conferred u/s 21(2) of the U.P. Trade Tax Act.

8. Considered the respective submissions of the learned counsel for the parties and perused the record.

9. The facts are not much in dispute. It could not be disputed by the petitioner that in the registration form, name of its branches at Punjab, Delhi and Uttaranchal were not disclosed. It was also not disputed that the claim of the stock transfer u/s 6-A of the Central Sales Tax Act was accepted by the Assessing Authority while framing the assessment order on the basis of the form F submitted by such dealers to the petitioner. We are required to consider the effect of non disclosure of names of the branches in the registration form vis-a-vis on the question of determination of turnover of the dealer. Submission of the petitioner is that the Apex Court has concluded the issue in the second case of Ashoka Leyland Limited v. State of Tamilnadu (supra). However, the respondents submitted that all the three assessment years involved herein relate to the period before the amendment made in Section 6-A of the Act. Section 6-A of the Central Sales Tax Act was amended by Central Act No. 20 of 2002 which came into force from 1st of May, 2002 and the following words were added in sub-section (1) thereof if the dealer fails to furnish such declaration, then, the movement of such goods shall be deemed for all purposes of this section, to have been an occasion as a result of sale.

10. Sri Tripathi maintains that the law as stood prior to the aforesaid amendment shall apply to the present case, therefore, the law laid down by the Apex Court in the earlier case of Ashok Leyland Limited Vs. Union of India (UOI) and Others, , would be applicable. The petitioner submitted that the earlier judgment of Ashoka Leyland Limited has not been approved in the subsequent judgment of Ashoka Leyland Limited by the Apex Court.

11. The ratio laid down in the first of Ashoka Leyland Limited is that there are no words in Section 6-A which can be said to create a conclusive presumption or clothe, "the deemed fact with a conclusive character". It has been held that the presumption available u/s 6-A is rebuttable presumption. The said ratio has not been approved in the subsequent judgment of the Apex Court. Paragraph-56 of the earlier judgment is reproduced below:

We find it difficult to agree with Sri Parasaran that Section 6-A creates a conclusive presumption. It is true that if the particulars stated in the declaration/ Form "F" are found to be true, the assessing authority shall pass an order, either at the time of making of the assessment or at any time before, that the contents

of Form "F" are accepted as true. On such order being made, it shall be deemed that the movement of goods to which the form relates has been occasioned otherwise than as a result of sale. But there are no words in Section 6-A which can be said to create a conclusive presumption or clothe the "deemed" fact with a conclusive character. All that it says is that if the particulars stated in Form "F" are true, certain fact shall be presumed - or shall be or deemed to have taken place, as the case may be. It is not possible to agree that the word "deemed" in sub-section (2) of Section 6-A can be understood as creating a conclusive presumption nor is it possible to agree that the fact "deemed" is final and conclusive. Section 6-A merely states a rule of evidence. It says that where a dealer claims that certain goods have been moved from one State to another and that such movement has occasioned otherwise than as a result of sale, the burden of proving the same lies upon him. Besides creating the said rules of evidence, the section also sets out how the said burden can be discharged. It can be discharged by producing Form "F" and on the particulars stated in the said form being found true on being enquired into by the assessing officer. From this it does not follow that once order is made accepting Form "F" as true, it is not subject to the power of reopening or revision contained in Section 16 and 32 of the Tamil Nadu General Sales Tax Act read with Section 92 of the Central Sales Tax Act. After all, Section 6-A is also one of the provisions in this Act. There is no reason to elevate it to a higher status than the rest of the provisions. If it were the intention of the Parliament to invest the "deemed" fact with the status of a conclusive presumption, the Parliament would have said so. The Court cannot supply that requirement. Ordinarily speaking, an order accepting - or rejecting - Form "F" as true will be passed only during the assessment proceedings. There may be case where such an order is passed earlier to the making of the assessment. Even so, such an order is incidental to and integrally connected with the assessment of the dealer. The High Court has characterised the said provision as a step-in-aid of assessment. Be that as it may, if the very assessment is subject to the power of reopening or revision, it is un-understandable as to how an order u/s 6-A(2) is not similarly amenable. The power to reopen can exercise u/s 16 of the Tamil Nadu General Sales Tax Act "where for any reason the whole or any part of the turnover of business of a dealer has escaped assessment to tax". The power is very wide, though it may be that it should not be mechanically or lightly exercised. Sri Parasaran has relied upon certain decisions in support of this contention. The first decision relied upon is in *Izhar Ahmad Khan Vs. Union of India (UOI)*, which dealt inter alia with Section 9 of the Citizenship Act, 1955. Sub-section (1) of Section 9 provides that if any citizen of India voluntarily acquires citizenship of another country, he shall cease to be a citizen of India with effect from the date of such acquisition. Sub-section (2) says that if any question arises as to whether, when or how any person has acquired citizenship of another country, it shall be determined by such authority in such manner and having regard to such rules of evidence as may be prescribed in that behalf. Rule 30 of the Rules framed under the Act prescribes Central Government as the authority to decide the said question while Rule 3 incorporates a conclusive

presumption. According to it, "fact that a citizen of Indian has obtained on any date a passport from the Government of any other country shall be conclusive proof of his having voluntarily acquired the citizenship of the country before that date". The petitioner challenged the validity of Rule 3 saying that Rule 3 was not a mere rule of evidence but a rule of substantive law and, therefore, outside the purview of the delegated authority conferred by Section 9(2) as well as general rule-making power conferred upon the Central Government by Section 18. Indeed, Section 9(2) itself was impugned on the ground that it purported to deprive the petitioner of their fundamental right under Article 19(1)(e) of the Constitution. All these contentions were rejected. We are unable to see how the ratio of or discussion in this decision is of any help to the appellant herein. Rule 3 of the Citizenship Act expressly enacts a conclusive presumption and that called for a discussion as to the nature of presumptions, the types of presumptions and their evidentiary value.

12. The Supreme Court has noticed that whereas prior to amendment in subsection (1) of Section 6A, the dealer had option of filing a declaration in form F; after such amendment, he does not have such operation, in so far as in terms of amended provisions, if the dealer fails and/or neglects to file such declaration, the transaction would be deemed to be an inter-state sale. It is to be noted that for the aforesaid period also, the Parliament advisedly used the expression "deemed" is interpreted differently, would ensue incongruity. It has been laid down that the subsection (1) and sub-section (2) of Section 6A must be given its proper meaning and statute must be read in its entirety. After a great deal of discussion, it has recorded its conclusion in paragraphs 114-115 which are reproduced below:

104. Once it is held that such determination of an issue having regard to legal fiction created in terms of Subsection (2) of Section 6A is conclusive, it must a fortiori follow that the same is binding.

105. The particulars required to be furnished in Form F clearly manifest that the proof required is as to whether the goods were factually transferred to the assessee himself or his branch office or his agent and not to any third party. Any other enquiry is beyond the realm of the assessing authority.

106. It is true that this Court in *Ashok Leyland* (supra) upon consideration of the matter holding that no statutory conclusiveness had been attached by reason of a legal fiction in terms of Sub-section (2) of Section 6A. This Court opined:

After all Section 6A is also one of the provisions of this Act. There is no reason to elevate it to a higher status than the rest of the provisions.

107. With utmost respect, therein the Court did not take into consideration that the provisions of Section 6A having been provided by way of exclusionary clause subject to the satisfaction of the conditions precedent contained therein, and, thus, the same stand at an elevated stage over charging Section 6 of the Act. The assessing authority while passing an order is required to take into

consideration the jurisdictional fact. Once it is found, having been conferred with a plenary power to determine its own jurisdiction, that he did not have any jurisdiction under the Act, the opinion of the assessing authority attains finality. What would be a jurisdictional fact has been noticed by this Court in *Shrisht Dhawan* (supra) in the following terms:

19... A Jurisdictional fact is one on existence or non-existence of which depends assumption or refusal to assume jurisdiction by a Court, tribunal or an authority. In *Back's Legal Dictionary* it is explained as a fact, which must exist before a Court can properly assume jurisdiction of a particular case. Mistake of fact in relation to jurisdiction is an error of jurisdictional fact. No statutory authority or tribunal can assume jurisdiction in respect of subject-matter which the statute does not confer on it and if by deciding erroneously the fact on which jurisdiction depends the Court or tribunal exercises the jurisdiction then the order is vitiated. Error of jurisdictional fact renders the order ultra vires and bad...xx

114. We, therefore, are of the opinion that the observations made by this Court in *Ashok Leyland* (supra) to the effect that an order passed under Sub-Section (2) of Section 6A can be subject-matter of reopening of a proceeding u/s 16 of the State Act was not correct.

115. However, we may hasten to add that the same would not mean that even wherein such an order has been obtained by commission of fraud, collusion, misrepresentation or suppression of material facts or giving or furnishing, false particulars, the order being vitiated in law would not come within the purview of the aforementioned principle.

13. In view of the above discussion, the position appears to be as follows:

14. Prior to amendments in sub-section (1) of Section 6A of the Central Sales Tax Act, the dealer could prove the movement of the goods from one State to another otherwise as sale either by filing the form F or by any other mode. After the amendment, the dealer has no option except to file form F to establish his case of stock transfer u/s 6A of the Act. The earlier law laid down in the case of *Ashoka Leyland Limited* that filing of form F does not raise irrebutable presumption has not been approved in the subsequent judgment of *Ashoka Leyland Limited* except where an order has been obtained by commission of fraud, collusion, misrepresentation or suppression of material facts or giving or furnishing false particulars i.e. by playing fraud or any deceitful manner.

15. The next question which arises is whether the non disclosure of branches in the registration form could be treated as non disclosure of material facts or not or is a fraudulent act.

16. Section 7 of the Central Sales Tax Act provides for registration of dealers. Every dealer liable to pay tax under the Central Sales Tax Act is required to obtain registration by filing application in the prescribed form. Form - A is the prescribed form. Its column-6 requires furnishing of list of places of business in

each other States together with the address of every such place etc.. The registration was granted. It may happen that by passage of time, a dealer may open new branches or close existing branches or a branch which shifted from one place to another. What would be the consequences for not updating the information to the registering authority. Sub-sections (4) and (5) of Section 7 of the Central Sales Tax Act are the provisions for cancellation and amendment of the registration certificate. They provide that a registration can be cancelled either on the application of the dealer to whom it has been granted or where no such application has been made, after due notice to the dealer, be amended by the authority granting it if he is satisfied that by reason of the registered dealer having changed the name, place or nature of his business or the class or classes of goods in which he carries on business or for any other reason the certificate of registration granted to him requires to be amended. The learned counsel for the petitioner contends that power has been conferred on the registering authority to amend the registration certificate in case there is a change in the name, address, place or nature of business or for any other reason. Suo moto power should have been exercised by the registering authority by suitably amending the registration certificate, initiation of reassessment proceedings instead.

17. Clause (b) of sub-section (4) of Section 7 gives power, authority and jurisdiction to the Assessing Authority to cancel certificate of registration.

18. Under the following circumstances the registration certificate can be cancelled by the assessing authority.

- (a) Where the dealer has ceased to carry on the business.
- (b) Where the dealer has ceased to exist.
- (c) Where the business is transferred.
- (d) Where the business is closed or discontinued.
- (e) Where the dealer has failed without sufficient cause to comply with an order u/s 3-A or with the provision of sub-section 3-G or sub-section 3-C.
- (f) Where the dealer has failed to pay any tax or penalty payable under the Act.
- (g) Where in the case of a dealer registered under sub-section 2 has ceased to be liable to pay tax under the Sales Tax Act of the appropriate State.
- (h) For any other sufficient reason.
- (i) At the request of the dealer (Section 7(5)).
- (j) Where the dealer to whom registration certificate is issued is found to be fictitious person.

19. None of the situations referred to above exist in the present case. Non mention of name and addresses of the branches situate outside the State of U.P. will not be covered within the phrase "for any other sufficient reason". That is the

reason that the Assessing Authority has not proceeded to invoke its power to cancel the registration of the petitioner and rightly so. When the registration certificate cannot be cancelled and has not been cancelled, we are of the opinion that an irrebutable presumption which is available u/s 6A of the Central Sales Tax Act to the petitioner on the production of form-F will not in any manner be diluted for the above omission which is more technical in nature than any substance. In such matters, the Assessing Authority should have exercised its suo moto power to amend the registration certificate to bring in conformity with the facts as they exist and recourse to Section 21(2) of the U.P. Trade Tax Act is not warranted under law.

20. We find that the case of the respondents lacks any allegation of fraud against the petitioner. The genuineness or correctness of the form issued by its branches situate outside the State of U.P., who had obtained the form F from their registering authority is not an issue. After all form F is a document to prove that the goods were not moved in pursuance of contract of sale from one State to another. There is no dispute that the forms were not issued by the branches of the petitioner. It is a different thing to say that the factum of existence of branches were not disclosed in the registration application. The law does not provide that in such matters, the contention of dealer with regard to the stock transfer is liable to be rejected. As laid down by the Apex Court in the second case of Ashoka Leyland Limited (*supra*), by filing the form F an irrebutable presumption that the goods were moved from one State to another by way of stock transfer has to be drawn. In this facts situation, we fail to understand as to how it can be said that the turnover of the petitioner has escaped the assessment within the meaning of Section 21 of the U.P. Trade Tax Act.

21. Besides the above, the learned counsel for the petitioner is right in his submission that the impugned order granting sanction to reopen the assessment is no order in the eyes of law in as much as it is a non-speaking order, bereft of any reason. The order does not show the application of mind to the reply given by the petitioner to the show-cause notice. Except mentioning that a case for reopening the assessment has been made out, there is no consideration of the petitioner's stand in the impugned order.

22. The petition is on terra-firma. The impugned order is bad and cannot be allowed to stand. The writ petition succeeds and is allowed. With the result, the impugned order dated 30th of April, 2004 passed under the proviso to Section 21(2) as also the consequential notice dated 22.5.2004 for reassessment are hereby quashed. No order as to costs.