
(2013) 04 AHC CK 0120

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition (Tax) No's. 799, 796 and 801 of 1993

M/s. Shyam Dal Industries

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 02-04-2013

Acts Referred:

Income Tax Act, 1922 — Section 60(1)

Citation : (2013) 4 ADJ 119 : (2013) 63 VST 470

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

Bench : Division Bench

Advocate : Rajesh Kumar, Indra Pal Singh Rajpat, Rishi Raj Kapoor and Ram Kishore Gupta, for the Appellant;

Judgement

Prakash Krishna, J.—All these three petitions were heard together and are being disposed of by a common judgment. Learned counsel for the parties agreed that identical controversy is involved in all these three writ petitions. The facts from Writ Petition (Tax) No. 799 of 1993 are being taken.

2. The petitioner is a registered dealer and was carrying on the business of food-grain etc. in its own account as well as on Commission agency. For the assessment year 1984-85, the assessment was completed by the Sales Tax Officer, Mahoba under the U.P. Sales Tax Act (hereinafter referred to as "the Act") and under the Central Sales Tax Act. Thereafter, the department initiated proceedings u/s 21 of the Act for reassessment on the ground that the turn-over of the petitioner has escaped assessment. The petitioner filed appeal against reassessment order before Deputy Commissioner (Appeal), Sales Tax Kanpur, who vide its order dated 16th January, 1990 allowed the appeal and set aside the reassessment order passed u/s 21 of the Act for the assessment year 1984-85. Thereafter, the petitioner was served with the impugned order passed by the Sales Tax Officer, Mahoba purporting to be u/s 21(4-A) under the U.P. Sales Tax Act. Questioning the legality and validity of the said order, the present writ petition has been filed.

3. In the writ petition, the main challenge is on the ground of limitation i.e. the impugned order has been passed beyond the prescribed period of limitation. It is further stated that the limitation for completion of the assessment u/s 21(2) is four years. The said period of limitation of four years has been expired in the year 1989. It is further pleaded in the writ petition that sub-section (4-A) was inserted by U.P. Act No. 8 of 1992 w.e.f. 1st January, 1992 and is not retrospective in operation. It will not apply to such cases where period of limitation has already expired.

4. Controverting the allegations made in the petition, a counter-affidavit has been filed alleging that the impugned assessment order has been passed after show-cause notice and the writ petition challenging the same is not maintainable as against the impugned order, the petitioner has alternative remedy by way of appeal. Section 21 (4-A) has been inserted by U.P. Act No. 8 of 1992 on 17th March, 1992. It will apply to all those cases where the assessment order is quashed on the ground of want of jurisdiction of the Assessing Authority or any other like ground by any competent Court or authority.

5. Heard Sri Ram Kishore Gupta, learned counsel for the petitioner and Sri S.P. Kesharwani, Additional Chief Standing Counsel and Sri C.B. Tripathi, Special Counsel for the State of U.P. on behalf of the respondents.

6. The main contention of the learned counsel for the petitioner is that on a true and proper construction of Section 21(4-A) of the Act; it will apply to only in such cases where the assessment order has been set aside for want of jurisdiction of the Assessing Authority or any like other ground. Submission is that the assessment order has not been set aside in the present case and as such, the respondent could not invoke sub-section (4-A) of Section 21 of the Act.

7. In reply, it was submitted that sub-section (4-A) opens with words if an order of assessment is quashed The words "assessment would include reassessment also". Here, the reassessment order has been set aside on 16th January, 1990 for want of service of notice by the Appellate Authority. Therefore, the resort to Section 21 (4-A) is justified.

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

9. Section 21 of the Act deals with assessment of tax on the turnover not assessed during the year. The said section was amended drastically by U.P. Act No. 8 of 1992. For the sake of convenience, Section 21 is reproduced below:

21. Assessment of tax on the turnover not assessed during the year.-- (1) If the assessing authority has reason to believe that the whole or any part of the turnover of the dealer, for any assessment year or part thereof, has escaped assessment to tax or has been under assessed or has been assessed to tax at a rate lower than that at which it is assessable under this Act, or any deductions or exemptions have been wrongly allowed in respect thereof, the assessing

authority may, after issuing notice to the dealer and making such inquiry as it may consider necessary, assess or reassess the dealer or tax according to law]:

Provided that the tax shall be charged at the rate at which it would have been charged had the turnover not escaped assessment, or full assessment as the case may be.

Explanation [1].--Nothing in this sub-section shall be deemed to prevent the assessing authority from making an assessment to the best of its judgment.

[Explanation II--For the purposes of this section and of Section 22, "assessing authority" means the officer or authority who passed the earlier assessment order, if any, and includes the officer or authority having jurisdiction for the time being to assess the dealer.

Explanation III.--Notwithstanding the issuance of notice under this-section, where an order of assessment or re-assessment is in existence from before the issuance of such notice it shall continue to be effective as such, until varied by an order of assessment or re-assessment made under this section in pursuance of such notice].

[(2) Except as otherwise provided in this section, no order of assessment or the re-assessment under any provision of this Act or any assessment year shall be made after the expiration of two years from the end of such year or March 31, 1998, whichever is later]:

[Provided that if the [Commissioner] [on his own or on the basis of reasons recorded by the assessing authority, is satisfied], that it is just and expedient so to do authorizes the assessing authority in that behalf, such assessment or the reassessment may be made after the expiration of the period aforesaid but not after the expiration of six years from the end of such year or March 31, 2002, whichever is later notwithstanding that such assessment or the re-assessment may involve a change of opinion]:

[Provided further that the assessment or re-assessment for the assessment year 1987-88 may be made by March 31, 1993]:

[Provided also that if the eligibility certificate granted u/s 4-A has been amended or cancelled by the Commissioner under sub-section (3) of Section 4-A, the order of assessment or re-assessment may be made within one year from the date of receipt by the assessing authority of the copy of the order amending or canceling the aforesaid certificate or by March 31, 1995, whichever is later:

Provided also that the assessment or re-assessment for the assessment year 1989-90 may be made by March 31, 1995].

(3) Where the notice under sub-section (1) for any assessment year has been served within the period specified in sub-section (2), the order of assessment or re-assessment in pursuance thereof may be made within six months, after the expiration of such period.

(4) If an order of assessment is set aside and the case is remanded for reassessment 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.

[(4-A) If an order of assessment is quashed on the ground of want of jurisdiction of the assessing authority or any other like ground, by any competent authority or Court, fresh order of assessment may be made by the assessing authority having jurisdiction within one year from the date of receipt by the assessing authority whose order is so quashed, of the copy of the order of such authority or Court by March 31, 1993 whichever is later].

[(5) If an order of assessment or reassessments 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].

[(5-A) If an ex parte order of assessment or re-assessment or penalty passed against a sick unit is set aside by the State Government by an order under sub-section (2) of Section 38, a fresh order of assessment or re-assessment or penalty, as the case may be, for that year may be made within one year from the date of receipt of such order of State Government by the assessing authority concerned].

[(6) Where the proceedings for assessment or re-assessment for any assessment year remain stayed under the orders of any Court or authority, the period commencing on the date of stay order and ending with the date of receipt by the Assessing Authority concerned of the order vacating the stay, shall be excluded in computing the period of limitation provided in this section:

Provided that if in so computing the period of limitation comes to less than six months, such assessment or reassessment may be made within six months from the date of receipt by the Assessing Authority of the order vacating the stay].

[(6-A) The period during which any other assessment [or any other matter] of the assessee remained pending before the High Court or the Supreme Court, involving a question of law having direct bearing on the assessment or reassessment in question, shall be excluded in computing the period of limitation provided in this section].

[(7) Where in the assessment or reassessment of a dealer for any assessment year, any Assessing Authority--

(a) has included any turnover and any superior authority or Court has, in exercise of the powers lawfully vested in it, held such turnover to relate the assessment--

(i) of such dealer for any other assessment year, or

(ii) of such dealer under the Central Sales Tax Act, 1956, or

(iii) of any other dealer, whether under this Act, or under the Central Sales Tax Act, 1965,

(b) has not included any turnover on the ground that it relates to assessment under the Central Sales Tax Act, 1956 and any superior authority or Court has, in exercise of the powers lawfully vested in it, held such turnover to relate to the assessment of that dealer under this Act, whether for such assessment year or any other assessment year,

then nothing contained in this section limiting the time shall apply to assessment or re-assessment whether under this Act or under the Central Sales Tax Act, 1956 of such dealer or such other dealer, relating to such assessment year or such other assessment year, as the case may be.

10. From a reading of the aforesaid provisions it is clear that sub-section (1) of Section 21 of the U.P. Act empowers the assessing authority to assess or re-assess the dealer if he has reason to believe that the whole or any part of the turnover of the dealer, for any assessment year or part thereof, has escaped assessment to tax or has been under assessed or has been assessed to tax at the rate lower than that which it is assessable under the U.P. Act. Under sub-section (2) limitation for assessment or re-assessment has been provided. In the main clause it is two years from the end of the assessment year or March, 31, 1998 whichever is later. However, in the first proviso the Commissioner has been empowered to authorize the Assessing Authority to make assessment or re-assessment after expiry of the period mentioned in the main provision of sub-section (2) but not after the expiration of six years from the end of such assessment year or March 31, 2002, whichever is later notwithstanding that such assessment or re-assessment may involve a change of opinion. In the second proviso assessment or re-assessment for the assessment year 1987-88 can be made upto 31st March, 1993. In the fourth proviso assessment or re-assessment for the assessment year 1989-90 can be made upto 31st March, 1995. The period of limitation prescribed in sub-section (2) of Section 21 of the U.P. Act will not apply if the case falls under any other sub-sections to Section 21 of the U.P. Act as it starts with "except as otherwise provided in this section". Under sub-section (3) of Section 21 of the U.P. Act if the notice under sub-section (1) has been served within the period specified in sub-section (2), the order of assessment or re-assessment can be made within six months after the expiration of the period provided under sub-section (2). However, under sub-Section (4) if an order of assessment is set aside and the case is remanded for re-assessment by any authority under the provisions of the U.P. Act or by a competent Court, the order of re-assessment has to be made within one year from the date of receipt of the copy of the remand order by the Assessing Authority or by December 31, 1982 whichever is later. Under sub-section (4-A) the Assessing Authority has been empowered to pass fresh assessment order within one year from the date of receipt by the Assessing Authority whose order is so quashed, on the ground of want of jurisdiction or by 31st March, 1993 whichever is later.

However, under sub-section (5) if the order is set aside u/s 30 of the U.P. Act, a fresh order of assessment or re-assessment for that year has to be made within six months from the date when such order is set aside. However under sub-section (5-A) this limitation of six months has been extended to one year in a case of sick unit. Under sub-section (6) the period during which the proceeding have been stayed has to be excluded while computing the limitation with the stipulation that the minimum period of six months should be available with the Assessing Authority for making the assessment or re-assessment. Under Sub-section (6-A) where the matter involving a question of law having a direct bearing on the assessment or re-assessment in question in respect of the assessee is pending before the High Court or Supreme Court, such period is to be excluded in computing the period of limitation. Under sub-section (7) the bar of limitation has been lifted in certain circumstances.

11. The crux of the matter is whether "assessment" will include the "reassessment" in Section 21(4-A) also. Learned counsel for the respondents submits that the words "assessment" occurring in sub-section 4-A will include reassessment order. The word "assessment" has not been defined in the U.P. Trade Tax Act. "Assessment" is a comprehensive word and can denote entirety of the proceedings which are taken with regard to it, and does not mean a final order of assessment alone unless there is something in the context of a particular provision which compels such meaning being attributed to it. In Kalyan kumar Ray Vs. Commissioner of Income Tax, West Bengal-IV, Calcutta, , the Apex Court has held that "assessment" is one integrated process involving not only the assessment of total income but also determination of the tax. In Kalawati Devi Harlalka Vs. Commissioner of Income Tax, West Bengal and Others, , the Apex Court has observed that the word "assessment" can bear a very comprehensive meaning, it can comprehend the whole procedure for ascertaining and imposing liability upon tax-payer. In A.N. Lakshmana Shenoy Vs. The Income Tax Officer, Ernakulam and Another, , the Supreme Court has held as follows:

The word "assessment" has to be understood in each section of Income Tax Act, 1922 with reference to the context in which it has been used. In some sections it has a comprehensive meaning and in some of the restricted meaning, to be distinguished from "reassessment" or even a "fresh assessment".

12. Keeping the above pronouncements in the background of mind, on turning to the U.P. Trade Tax Act, we find that section 7 of it deals with the determination of turnover and assessment of tax. Every dealer who is liable to pay tax under the U.P. Trade Tax Act shall submit such return of his turnover at such intervals as has been prescribed.

13. The heading of Section 21 with which we are presently concerned, is "assessment of tax on a turnover not assessed during the year", which is suggestive of the fact that Section 21 deals with the assessment of tax on the escaped turnover. The said section has seven sub-sections. Except sub-sections

(4) and (4A), in all other its sub-sections the words used are "assessment" or "reassessment". This is indicative of the fact that the legislators were conscious that the word "assessment" may or may not include "reassessment" and therefore, with a view to bring clarity, they have used as a precautionary measure the word "reassessment" also wherever they desire to do so. Non use of word "reassessment" in sub-sections (4) and (4-A) suggests that these sub-sections are attracted if an order of assessment is set aside or quashed. There is a clear demarcation of "reassessment" and "assessment" in the scheme of Section 21 of the Act. For the turnover escaped assessment sub-sections (1), (2), (3), (5), (5A) and (6) have been enacted. In respect of setting aside or quashing of an assessment, sub-sections (4) and (4A) have been enacted.

14. Justice G.P. Singh in his book namely Principles of Statutory Interpretation under the heading "SAME WORD SAME MEANING" has made the following observation:

When the Legislature uses same word in different parts of the same section or statute, there is a presumption that the word is used in the same sense throughout. The presumption is, however, a weak one and is readily displaced by the context. It has been said that the more correct statement of the rule is that "where the draftsman uses the same word or phrase in similar contexts, he must be presumed to intend it in each place to bear the same meaning".

15. Sri S.P. Kesharwani, learned Additional Chief Standing Counsel has placed reliance upon decision of the Apex Court in the case of Kalawati Devi (supra), paragraph-14 is particular. The said paragraph is reproduced below:

It is quite clear from the authorities cited above that the word "assessment" can bear a very comprehensive meaning; it can comprehend the whole procedure for ascertaining and imposing liability upon the tax-payer. Is there then any thing in the context of Section 297 which compels us to give to the expression "procedure for the assessment" the narrower meaning suggested by the learned counsel for the appellant? In our view, the answer to this question must be in the negative. It seems to us that Section 297 is meant to provide as far as possible for all contingencies which may arise out of the repeal of the 1922 Act. It deals with pending appeals, revisions, etc. It deals with Don-completed assessments pending at the commencement of the 1961 Act and assessments to be made after the commencement of the 1961 Act as a result of returns of income filed after the commencement of the 1961 Act. Then in clause (d) it deals with assessments in respect of escaped income; in clauses (f) & (g) it deals with levy of penalties; clause (h) continues the effect of elections or declarations made under the 1922 Act; clause (i) deals with refunds; clause (i) deals with recovery; clause (k) deals generally with all agreements, notifications, orders issued under the 1922 Act; clause (l) continues the notifications issued u/s 60(1) of the 1922 Act and cl. (in) guards against the application of a longer period of limitation prescribed under the 1961 Act to certain applications, appeals, etc. It is hardly believable in this context that Parliament did not think of appeals and revisions in

respect of assessment orders already made or which it had authorised to be made under clause (a) of Section 297(2).

16. Further reliance was placed on The Commissioner of Sales Tax, Madhya Pradesh Vs. H.M. Esufali, H.M. Abdulali, Siyaganj, Main Road, Indore, . This case relates to best judgment of assessment.

17. Reference was made to Chatturam Horilram Ltd. Vs. Commissioner of Income Tax, Bihar and Orissa, , wherein the Apex Court has reproduced a portion of judgment given by the Federal Court in (1947) 15 ITR 302 (Federal Court) . The same is reproduced below:

The income tax Act is a standing piece of legislation which provides the entire machinery for the levy of income tax. The Finance Act of each year imposes the obligation for the payment of a determinate sum for each such year calculated with reference to that machinery. As has been pointed out by the Federal Court in -- (1947) 15 ITR 302 (Federal Court) (quoting from the judgment of Lord Dunedin in -- Whitney v. Commrs of Inland Revenue, (1926) A.C. 37 (F).

There are three stages in the imposition of a tax. There is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery if the person taxed does not voluntarily pay.

18. Reference was made to Addl. Commissioner (Legal) and Another Vs. Jyoti Traders and Another, , wherein the proviso to Section 21(2), as inserted by U.P. Act No. 8 of 1991, was up for consideration. The Apex Court was called upon to interpret the proviso to Section 21(2). It repelled the argument of the assessee that the said proviso will not apply in such cases where the period of limitation has already expired. However, the Apex Court was neither called upon nor considered sub-section (4-A) of Section 21.

19. The fate of writ petition depends upon the question as to whether the reassessment order is also included in the phrase "if an order of assessment is quashed...". The word "assessment" has various meanings and shades. It will include reassessment or not, will depend in the context of the particular statute.

20. On a fair reading of sub-section (4A), we are of the opinion that the word "assessment" has been used in a restricted sense to exclude "reassessment". The reason is obvious. So far as the reassessment proceedings are concerned, adequate provisions have been made in other sub-sections of Section 21. Even for the sake of argument the words--"if an order of assessment" are read to include "if an order of reassessment", it would create anomalous position. The law attaches finality to assessment orders. Only under exceptional circumstances, such as where the tax has escaped the assessment, a power has been given to the Tax Authority to bring the escaped income or turnover to tax

and not otherwise. The limitation for initiation of reassessment proceedings could be extended for further specified period. The object of insertion of sub-section (4A) appears to be that where an assessment order is set aside on the ground of want of jurisdiction of the Assessing Authority or any like other ground and the matter has not been remanded back to the Assessing Authority, the competent Assessing Authority may take resort to sub-section (4A) of the Act. Meaning thereby, the technical objection regarding jurisdiction should not come in the way of assessing the tax.

21. On a plain and simple reading of sub-section (4-A) setting aside or quashing of reassessment on the ground of want of jurisdiction of the Assessing Authority is not included therein. The expression "order of assessment" occurring in sub-section (4-A) of Section 21 cannot be regarded as including with in its meaning an order of reassessment. We find that similar view has been taken by the Madhya Pradesh High Court in J.K. Textiles Vs. Additional Sales Tax Officer, . The relevant para is paragraph No. 5, which is reproduced below:

Having heard the learned counsel for the parties, we have come to the conclusion, that this petition deserves to be allowed. The only question for consideration is whether the notice (Annexure G) was issued within the period provided by sub-section (1) of Section 19 of the Act. As held by this Court in Jeewakkhan's case (1970) 3 VKN 51 the expression "order of assessment" occurring in Section 19(1) of the Act cannot be regarded as including within its meaning an order of reassessment. We respectfully agree with that decision. The decision in The Commissioner of Sales Tax, Madhya Pradesh Vs. H.M. Esufali, H.M. Abdulali, Siyaganj, Main Road, Indore, is distinguishable on facts. In that case, the question for consideration before the Supreme Court was whether the assessing authority had power to make a best judgment assessment u/s 19(1) of the Act. It was in that context that the Supreme Court held that reassessment was nothing but fresh assessment. The question of limitation did not arise directly or indirectly in that case. That question directly arose in Jeewakkhan's case (1970) 3 VKN 51 and no decision taking a view contrary to that taken in Jeewakkhan's case (1970) 3 VKN 51 was brought to our notice. It must, therefore, be held that for initiating reassessment proceedings for the second time, time commences to run from the date of the order of assessment and not from the date of order of reassessment. In this view of the matter, the reassessment proceedings in this case initiated by notice (annexure G) dated 26th December, 1981, must be held to be without jurisdiction.

22. Having regard to the fact, the case on hand, as the order of assessment has not been set aside, the Assessing Authority could not have invoked Section 21(4-A) of the Act. It is not a case of setting aside of assessment order. If the Assessing Authority was of the opinion that the turnover of the dealer has escaped assessment, the proper course was to reopen the assessment if permissible under law, after obtaining permission as provided for in the proviso to Section 21(2) of the Act and not otherwise. In the result, the impugned order

is bad in law and cannot be allowed to stand. The impugned order is quashed. All the three writ petitions succeed and are allowed. No order as to costs.