(1988) 04 OHC CK 0028

In the Orissa High Court

Case No : Tax Appeal No. 1 of 1980

Orient Paper Mills — APPELLANT

Vs

State of Orissa and Others — RESPONDENT

Date of Decision : 05-04-1988

Acts Referred:

Constitution of India, 1950 — Article 226
Limitation Act, 1963 — Section 5

Citation : (1989) 67 CLT 49 : (1988) 70 STC 333

Hon'ble Judges : H.L. Agrawal, C.J;K.P. Mohapatra, J

Bench : Division Bench

Advocate : B.K. Mohanty, for the Appellant; A.B. Misra, Standing Counsel (Commercial Tax), for the Respondent

Final Decision : Allowed

Judgement

K.P. Mohapatra, J.—The appellant has challenged the impugned order dated 7th January, 1980 (annexure 9) passed by the Commissioner of Sales Tax, Orissa, respondent No. 2 ("Commissioner" for short) in exercise of his suo motu power of revision conferred u/s 23(4) (a) of the Orissa Sales Tax Act read with Rule 80 of the Orissa Sales Tax Rules (hereinafter referred to as the "Act" and the "Rules") by which orders passed by the Special Additional Commissioner of Sales Tax, Orissa, on 24th May, 1978 (annexure 6 series) allowing interest to the appellant u/s 14-C were set aside.

2. Facts which are not in dispute are stated below. The appellant, Messrs Orient Paper Mills, a manufacturer of paper having its factory premises at Brajarajnagar, is a registered dealer under the Act and was assessed by the Sales Tax Officer, Jharsuguda (for short "S. T. O.") for the assessment years 1967-68, 1970-71 and 1971-72. On 2nd July, 1974 the Additional Sales Tax Tribunal in second appeal directed refund of tax for the year 1967-68. On 30th December, 1974 the appellant filed a refund application. On 31st January, 1975 the Assistant Commissioner of Sales Tax, Sambalpur Range, in appeal directed refund of sales

tax for assessment years 1970-71 and 1971-72. On 4th April, 1975 the appellant filed refund applications. The refund applications referred to above were not promptly attended to by the S.T.O., but on 15th March, 1977 he intimated the appellant by letters (annexure 1 series) that the applications were defective in certain particulars requiring rectification. On 17th March, 1977 the appellant filed a memo rectifying the defects. Thereafter on 19th March, 1977 the S. T. O. passed orders on the refund applications and made adjustments against outstanding sales tax demand payable by the appellant for the assessment years 1973-74, 1974-75 and 1975-76.

3. On 30th March, 1977 the appellant filed three applications (annexure 2 series) before the S. T. O. claiming interest on the amounts refunded/adjusted u/s 14-C of the Act. After giving the appellant an opportunity of showing cause (annexures 3 and 4) the S. T. 0. by orders dated 16th January, 1978 (annexure 5 series) rejected the applications and refused to pay interest. Against the orders of rejection, the appellant preferred revisions before the Commissioner which came to be disposed of by the Special Additional Commissioner of Sales Tax, who having observed that the S. T. 0. had committed long and avoidable delay in disposal of the refund applications, directed payment of interest on the amounts sought to be refunded and adjusted and thus allowed the appellant''s revision applications (annexure 6 series). The Commissioner, in exercise of his suo motu power of revision, registered a case to revise the orders (annexure 6 series) passed by the Special Additional Commissioner of Sales Tax, Orissa and after hearing the appellant set aside the orders taking the view that defective applications for refund were not applications according to law and could have been immediately rejected as such. They became applications according to law only after the defects were removed and as the S. T. O. had directed refund/ adjustment within a couple of days of rectification of defects by the appellant, payment of interest was unwarranted. This order of the Commissioner has been impugned in this appeal.

4. Mr. B. K. Mohanty, learned counsel appearing for the appellant, contended that the Special Additional Commissioner disposed of the revision applications in exercise of powers delegated to him by the Commissioner u/s 17 of the Act. Therefore, the Commissioner had no further jurisdiction to revise on his own motion the orders passed by the Special Additional Commissioner. Therefore, he acted wholly without jurisdiction in passing the impugned order. He further urged that according to the provisions of Section 14-C of the Act, the petitioner was entitled to interest which was rightly allowed by the Special Additional Commissioner of Sales Tax.

5. In order to examine the contentions raised by Mr. Mohanty it is necessary to quote a few provisions of the Act and the Rules:

3. Taxing authorities.-(1) The State Government may appoint any person to be the Commissioner of Sales Tax, Orissa and he shall exercise such powers and discharge such functions as are or may be conferred or imposed by or under the

provisions of this Act.

* * * (3) The State Government may appoint such other persons under any prescribed designation including an Additional Commissioner and a Deputy Commissioner to assist the Commissioner and they shall exercise such powers and perform such duties as may be conferred or imposed by or under the provisions of this Act within such local area as may be assigned to them by the Commissioner.

14. Refunds.-The Commissioner shall, in the prescribed manner, refund to a dealer applying in this behalf any amount of tax, penalty or interest paid by such dealer in excess of the amount due from him under this Act, either by cash payment or by deduction of such excess from the amount of tax, penalty or interest due in respect of any other period :

Provided that no claim to refund of any tax, penalty or interest paid under this Act, shall be allowed unless it is made within twenty-four months from the date on which the order of assessment or order imposing penalty, as the case may be, was passed or from the date of the final order passed on appeal, revision or reference in respect of the order earlier mentioned, whichever period is later :

Provided further that no claim to refund of any tax, penalty or interest paid under this Act shall be allowed in cases where there is an order for reassessment, until the reassessment is finalised.

14-C. Payment of interests on refundable amount.-Amounts refundable u/s 14, if not refunded within ninety days from the date of receipt of the application in that behalf from the dealer, shall carry interest at the rate of eighteen per cent per annum for the first ninety days and thereafter at the rate of twenty-four per cent per annum, with effect from the date of expiry of the period specified above.

17. Delegation of Commissioner''s functions.-Subject to such conditions and restrictions as the State Government may, by general or special order, impose, the Commissioner may, by order in writing, delegate any of his powers and duties under this Act or the rules made thereunder, to any person appointed u/s 3 to assist him.

23. Appeals and revisions.-

* * * (4)(a) Subject to such rules as may be made and for reasons to be recorded in writing, the Commissioner may, upon application by a dealer or person or on his own motion revise any order made under this Act or the rules made thereunder by any person other than the Tribunal, appointed under Sub-section (3) of Section 3 to assist him :

Provided that the Commissioner shall not entertain any such application for revision if the dealer or the person filing the same having a remedy by way of appeal under Sub-section (1), or Sub-section (3) did not avail of such remedy or the application is not filed within the prescribed period.

* * * (d) Notwithstanding anything contained in Section 17, the Commissioner shall not, except with the prior approval of the State Government delegate his powers under this sub-section to any other person appointed under Sub-section (3) of Section 3 to assist him.

29. Power to make Rules.-(1) The State Government may, subject to the condition of previous publication, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may prescribe-

* * * (s)(i) the procedure for, and other matters including fees incidental to the disposal of appeals and applications for revisions u/s 23;

(ii) the manner of deposit and the amount of fees to be paid on an appeal or application for revision u/s 23;

Orissa Sales Tax Rules :

39. Application for refund.-(I) An application from a dealer for a refund of any amount of tax, penalty or interest, if any paid by him in excess of the amount and interest due or security paid shall be made to the Commissioner in form XII and shall clearly specify the grounds upon which the refund is claimed.

(2) If the refund application is found to be incorrect, incomplete or otherwise not in order, the Assistant Sales Tax Officer or the Sales Tax Officer, as the case may be, after making such enquiry as he considers necessary, and after giving the dealer an opportunity of being heard, pass such orders thereon as he thinks fit.

40. Order sanctioning refund.-When the Commissioner is satisfied that a refund is due, he shall record an order sanctioning the refund and payment of interest, if any, as provided u/s 14-C and communicate the order to the applicant.

42. Payment by adjustment-Refund adjustment order.-Where amounts are due against the dealer, the Commissioner shall issue a refund adjustment order in form XIV accompanied by a challan for adjustment.

80. Revision by the Commissioner suo motu.-The Commissioner may on his own motion at any time within three years from the date of passing of any order by the Sales Tax Officer or within two years from the date of passing of any order by the Additional Commissioner, Special Additional Commissioner or Assistant Commissioner, as the case may be, call for records of the proceedings in which such order was passed and if he considers that any order passed therein is erroneous in so far as it is prejudicial to the interest of the revenue, he may after giving the dealer an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary revise any such order :

Provided that the Commissioner shall not revise any order under this rule-

(1) Where an appeal against the order is pending before the appellate authority

u/s 23, or

(2) Where time-limit for filing an appeal u/s 23 has not expired.

It is also necessary to quote the following notification :-

Notification No. 5118-III(i)-62/71-CT. The 10th February, 1971.- In exercise of the powers conferred by Section 17, read with Clause (d) of Sub-section (4) of Section 23 of the Orissa Sales Tax Act, 1947 (Orissa Act 14 of 1947), I, Shri B.K. Mishra, I.A.S., Commissioner of Sales Tax, Orissa, with the prior approval of the State Government do hereby delegate the powers exercisable by the Commissioner of Sales Tax under Clause (a) of Sub-section (4) of Section 23 of the said Act and Rule 79 of the Orissa Sales Tax Rules, 1947 to the Special Additional Commissioner of Sales Tax and direct that the powers and duties under the said provisions shall be exercised and discharged by him.

From the aforesaid provisions it appears that the Special Additional Commissioner was appointed to assist the Commissioner so as to exercise such powers and perform the duties as may be conferred, or imposed or under the provisions of this Act within such local area as may be assigned by the Commissioner according to Sub-sections (1) and (3) of Section 3 of the Act. Sections 14 and 14-C empower the Commissioner to allow refund and for payment of interest at specific rates on the refundable amount and it was not disputed that such original powers are not being exercised by the Commissioner himself and the same had been delegated to the Sales Tax Officers and as a matter of fact and practice, the Sales Tax Officers are entertaining and disposing of the refund applications, as well as applications for payment of interest on the refundable amounts. Section 23(4)(a) confers powers of revision on the Commissioner either upon application, or on his own motion to revise any order made under the Act or the Rules made thereunder by any person other than Tribunal appointed to assist him u/s 3(3), including Additional Commissioner and Deputy Commissioner of Sales Tax. Therefore, normally, when an Additional Commissioner which includes a Special Additional Commissioner has passed an order, the Commissioner can revise his order either upon application or on his own motion. There is, however, an exceptional provision in Clause (d) of Sub-section (4) of Section 23, according to which, the Commissioner with prior approval of the State Government may delegate his revisional power under Sub-section (4) to another person appointed u/s 3(3), such as, an Additional Commissioner or a Deputy Commissioner. By Notification No. 5118 dated 10th February, 1971, the Commissioner with prior approval of the State Government delegated the powers exercisable by him u/s 23(4)(a) of the Act and Rule 79 of the Rules to the Special Additional Commissioner of Sales Tax and directed that the powers and duties under the said provisions shall be exercised and discharged by him. The effect of this notification read with Section 23(4)(a) and (d) is that the Commissioner did not retain the power of revision either upon application or suo motu, but, on the other hand, delegated all such powers to the Special Additional Commissioner and, in exercise of such delegated authority, the

Special Additional Commissioner in this case disposed of the applications of the appellant claiming interest u/s 14-C of the Act. In other words, the Special Additional Commissioner exercised the same power of revision which the Commissioner could have originally exercised, if the power would not have been delegated by Notification No. 5118 dated 10th February, 1971. It is, therefore, clear from the aforesaid provisions and notification that in ordinary course disposal of the revision applications (annexure 6 series) by the Special Additional Commissioner was as good as disposal made by the Commissioner himself.

6. The Commissioner, however, exercised the power of revision for the second time and passed the impugned order setting aside the revisional orders of the Special Additional Commissioner (annexure 6 series) in purported exercise of powers u/s 23(4)(a) read with Rule 80. It is to be considered if the Commissioner still retains power to revise an order which could be passed by himself and had been delegated to the Special Additional Commissioner. In other words, has the Commissioner powers to revise an order which, according to law, was passed by him through a concurrent authority ?

7. From Notification No. 5118 dated 10th February, 1971 it is quite clear that with regard to exercise of power of revision u/s 23(4)(a) and (d), the Commissioner delegated his function to the Special Additional Commissioner and in exercise of such power of latter disposed of the revisions by his orders dated 24th May, 1978 (annexure 6 series). After delegation of powers to the Special Additional Commissioner, according to law the Commissioner had no jurisdiction to revise the revisional orders. The scheme of Section 23 in fact does not provide for a second revision. Nevertheless, an enabling Rule 80 providing for a suo motu revisional jurisdiction to the Commissioner was introduced by way of amendment to the Rules with effect from 1st June, 1976 by Notification No. 22029-F dated 4th May, 1976. According to this rule, the Commissioner has a general power of revision of all orders passed by the Sales Tax Officer, Assistant Commissioner, Additional Commissioner and Special Additional Commissioner under any of the provisions of the Act, if he considers that any such order was passed erroneously prejudicial to the interest of the Revenue. The Commissioner initiated the suo motu revision proceeding in purported exercise of jurisdiction under Rule 80 and ultimately passed the impugned order (annexure 9). With regard to the legality and applicability of Rule 80 the following aspects need consideration :

(1) Can the Commissioner in purported exercise of jurisdiction under Rule 80 revise an order passed by an authority to whom he has delegated his function under the Act ? and

(2) Is Rule 80 an excess of delegation of power not envisaged in Section 29(2)(s)(i) and (ii) of the Act ?

8. It is not difficult to consider the first aspect in view of the delegation of power by the Commissioner in favour of the Special Additional Commissioner under Notification No. 5118 dated 10th February, 1971 by which the Special Additional

Commissioner exercised the power of revision of the Commissioner u/s 23(4)(a) and (d) of the Act. So the orders dated 24th May, 1978 passed by the Special Additional Commissioner in annexure 6 series were in fact deemed to be orders passed by the Commissioner himself in exercise of power of revision. Therefore, in purported exercise of power under Rule 80, the Commissioner could not revise the orders which by legal fiction were deemed to have been passed by himself. As a concept of law, it is unthinkable that a quasi-judicial authority having delegated his quasi-judicial function to a subordinate or co-ordinate authority shall again revise the order passed by that authority. An identical question arose for consideration before the Gujarat High Court in a case reported in 1981 TLR 2965 (Ashwin Industries v. Deputy Commissioner of Sales Tax, Baroda). According to Section 67(1) of the Gujarat Sales Tax Act, the Commissioner has power of revision of any order passed by any officer appointed to assist him on his own motion. According to Section 27(2) of the aforesaid Act, Deputy Commissioners, Assistant Commissioners and Sales Tax Officers were appointed to assist the Commissioner. According to Sub-section (5) thereof, the Commissioner is authothorised to delegate powers in favour of a Deputy Commissioner and after such delegation the Deputy Commissioner is authorised to perform all functions of the Commissioner delegated to him. According to Sub-section (7) thereof, the State Government can delegate functions of the Commissioner to Additional Commissioners. In view of the aforesaid provisions, it was held that suo motu power of revision delegated to the Additional Commissioner or the Deputy Commissioner can be exercised by them and their orders passed in revision cannot further be revised by the Commissioner. The second aspect does not also present any difficulty. As would appear from Section 29(2)(s)(ii), framing of rules is permissible according to law to lay down the procedure for appeals and revisions. In the guise of framing rules substantive law giving a fresh quasi-judicial power of revision unconnected with procedure could not be introduced to the Rules. Rule 80 is a substantive quasi-judicial power given to the Commissioner to be exercised in general on his own motion to correct errors prejudicial to the interest of the Revenue. Such a general, substantive and all pervasive quasi-judicial function could be contemplated in the statute but not under the Rules framed thereunder, particularly when the rule making power does not authorise for framing of such a rule. Rule 80 is, therefore, an excessive delegation of substantive quasi-judicial power in favour of the Commissioner which ex facie seems unsupportable. But this Court exercising its power as a court of appeal u/s 23(4)(c)(i) cannot quash Rule 80 being itself a creature of the statute. This rule could only be quashed in an appropriate proceeding under Article 226 of the Constitution.

9. On the above analysis, I am of the view that the Commissioner (respondent No. 2) acted without jurisdiction in passing the impugned order (annexure 9) which is unsustainable in law.

10. In view of the conclusion reached above, it is strictly not necessary to decide the second question as to whether the appellant is entitled to interest u/s 14-C of

the Act, or is not entitled, because the applications filed by it were not duly constituted applications according to law until removal of the defects pointed out by the S. T. O. But I feel it necessary to decide the question to give finality to this judgment.

11. The appellant claimed refund of the excess tax for the year 1967-68 on 30th December, 1974. For the years 1970-71 and 1971-72 the refund applications were filed on 4th April, 1975. The refund applications were kept pending without being attended to by the S. T. O. till 15th March, 1977 when he directed the appellant to rectify minor defects in the applications for refund, such as, the challan numbers and dates when the admitted tax was deposited. Within four days the appellant rectified the defects and a ample of days thereafter refund by way of adjustment of sales tax dues for subsequent years was allowed. Interest u/s 14-C of the Act, however, was refused on the ground that there was no delay in disposing of the refund applications. The Special Additional Commissioner who dealt with the revision applications filed by the appellant at the first instance held that there was inordinate delay in attending to the refund applications. Had the S. T. 0. directed for rectification of the minor defects immediately after the applications for refund were filed, the appellant could have complied with the requirements soon thereafter and in that case there would have been some justification for disallowing interest on the ground that there was no delay in passing orders on the refund applications. Otherwise also the S. T. 0. could have verified the challan numbers and the dates of deposit which were available in the assessment records themselves. But without adopting any of these courses, interest was refused and so it was held that the, appellant was entitled to interest on account of the long delay committed by the S. T. O. In the impugned order, the Commissioner placed reliance on a decision of the Supreme Court reported in Lalta Prasad Khinni Lal Vs. The Asstt. Commissioner (Judl.) Sales Tax, Kanpur and Another, . It was a case of presentation of a memorandum of appeal within period of limitation but without proof of payment of the amount of admitted tax. Subsequently, the defect was removed and proof was furnished though after expiry of the period of limitation. It was held that the appeal became entertainable on the day the deposit of the full amount was made and suffered from the defect that it was barred by limitation. The appellant could apply for extension of the period of limitation in accordance with Section 5 of the Limitation Act. The action of the appellate authority in rejecting the memorandum of appeal on the ground that limitation could not be condoned for delay in depositing the admitted tax was disapproved. The facts of this case are clearly distinguishable. In that case, the question of bar of limitation and condonation of limitation u/s 5 of the Limitation Act was essentially in issue. In the present case, the question of bar of limitation was not in issue. Therefore, it could not be said that because the applications were barred by limitation, only after condonation of limitation it could be said that the applications were properly presented. On the other hand, in a recent decision of the Allahabad High Court reported in Modi Industries Limited and Another Vs. Commissioner of Sales Tax

and Others, it was held that there was no justification on the part of the Sales Tax Officer to commit delay for four years to dispose of 3. refund application. Setting aside the order of rejection, not only refund but interest was also allowed on the refundable amount.

12. It is shocking to conscience that a Sales Tax Officer should keep quiet over the refund applications for a long time and then take quick action just to disallow interest to an assessee. If such a practice is encouraged, it will undoubtedly be a fraud on the statute. Therefore, the action of the S. T. O. for committing delay in dealing with the refund applications and then refusing interest cannot, in the facts and circumstances, be condoned. I am, therefore, of the view that the Special Additional Commissioner took a legal and reasonable view of the matter in allowing interest to the appellant. On the other hand, the impugned order of the Commissioner, in which he took a lop-sided view of the case in support of the Revenue ignoring the long delay committed by the S. T. O., is factually unsupportable.

13. The aforesaid analysis will show that the Commissioner had no jurisdiction to pass the impugned order (annexure 9) and on facts also it is unsupportable. In either view, the appeal is bound to succeed.

14. In the result, the appeal is allowed and the impugned order of the Commissioner (annexure 9) is set aside. Parties to bear their own costs.

H.L. Agrawal, C.J.

15. I agree.

