
(2001) 12 J&K CK 0026

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. (SR) 441 Of 1984

Prem Wati and Anr.

APPELLANT

Vs

Assessing Authority and Ors.

RESPONDENT

Date of Decision : 28-12-2001

Acts Referred:

General Sales Tax Act, 1962 — Section 7(1)

Citation : (2002) KashLJ 111

Hon'ble Judges : T.S.Doabia, J

Bench : Single Bench

Advocate : Subash Dutt, M.A.Goni, M.A.Bhat, Advocates appearing for the Parties

Judgement

1. Assessment regarding two assessment years is required to be examined in the present litigation. The two assessment years are 197778 and

197879.

2. Before examining the question raised in the petition it would be apt to notice in brief the scheme visavis filing of returns and the assessments

which are made under Sales Tax Laws. Relevant Section 7 of the Jammu and Kashmir General Sales Tax Act. 1962 (hereinafter referred to as the

Act). Under Section 7(1) every registered dealer has to furnish returns by such date as may be prescribed. Under SubSection (2) if any dealer

discovers an omission or error in any return furnished by it, it may furnish revised re turns. This is, however, to be done before the assessment is

made on original return. The further provision is contained in sub Section (4). This is to the effect that if the assessing authority is satisfied that a

dealer for a reasonable cause has been unable to furnish any return within the pre scribed period and the said Authority may extend the period for

filing such return. Again under subsection (6) if the Assessing authority is satisfied that the annual return submitted under subsection (1) or subsection (3) of the Act is correct and complete, he is supposed to assess the amount of tax due from the dealer on the basis of return filed by the assessee. SubSection (10) deals with an eventuality where return is not submitted before the assessing authority. In such a case, the assessing authority has to make best judgement assessment within a period of four years after the expiry of the date fixed for purposes of assessment. In making best judgement assessment reasons are supposed to be given. However, where the assessing authority is not satisfied that the return furnished is correct and complete, the assessing authority is supposed to issued a notice in the prescribed manner calling upon the assessee to produce or cause to be produced any evidence on which the assessee may wish to reply the after giving due opportunity, assessment is made in terms of Section 7(7) of the Act. Two other subsections which are required to be taken note of are subsection (11) and subsection (12). Under subsection (11) where the assessing authority has reason to believe that by reason of omission or failure on the part of a dealer to make a return under subsection (1) or subsection (3) for any year, to the assessing authority or to disclose fully and truly all material facts necessary for assessment for that year, the turn over chargeable to tax has escaped assessment, or has been assessed at the lower rate for the year in whole or in part; or if there has been no omission or failure as mentioned in subsection (11) (a) on the part of the dealer, but the assessing authority has some information in his possession and on that basis, it has reason to believe that the turn over chargeable tax has escaped assessment or has been assessed at a lower rate, then the assessing authority subject to the provisions of subsection (12) and (13) can assess or reassess the dealer. Sub section (12) deals with the procedure i.e. before making assessment or reassessment under subsection (11), the assessing authority is supposed to serve the dealer with notice in the prescribed form which should indicate full particulars on which action is proposed to be taken with a view to assess or reassess the assessee. It is in the light of the aforementioned provisions contained in Section 7, or the Act, the factual and legal submissions which have been made in the present petition are being noticed.

3. As indicated above, the Assessment years are 197778 and 197879. for the assessment year 197778, the returns were filed on 10.11.1979. The

gross sales were fixed at Rs. 6,61,945.23. The taxable turn over was shown as Rs. 4,64,426.00, The return as filed by the assessee was not

accepted. The Assessing authority was of the view that the taxable turnover is Rs. Ten lacs. On this, assessment was made. This order was

appealed against. The appellate authority set aside the order. This is annexure ""A"" with the petition. The matter was remanded for de novo

assessment. The further fact is that on 20.02.1981, the assessing authority issued a notice in form ST19, calling upon the assessee to appear on

09.03.1981. This notice was issued in terms of Section 7(12) of the act. The form which was used was form ST19. The further fact which is

pleaded by the petitioner is that on 16.03.1981 notice in form ST18 for reassessment was issued for 07.04.1981. Some proceedings were taken

before the said authority on 07.04.1981, 14.05.1981 and 05.06.1981. Thereafter, another notice in form ST19 came to be issued on 10.11.1982.

On this also, some proceedings were taken on 23.11.1982 and 26.11.1982. Therefore, an order was passed. Proceedings initiated on the basis of

form ST19 were ordered to be dropped. This happened on 27.11.1982. The requisite averments in this regard are made in paragraph ""6"" of the

writ petition. This para reads as under:

On 27.11.1982 Respondent No. 1 passed the following order: ""Proceedings initiated on ST19 are dropped Information intimated to dealer to be verified at the time of assessment.

The information of dropping proceedings was conveyed to the petitioner by respondent No. 1 by his letter dated 28.02.1983 alongwith again the

Respondent No. 1 enclosed new annexures for the years 197778 and 197879. The petitioner counsel again sought classification of Bills mentioned

in the Annexures by his letter dated 10th March 1983. It was also pointed out that inspite of earlier requests the correct material has neither been

divulged to the petitioner nor the so called bills of purchase have been exhibited for rebutal purposes. Copy of the letter issued and reply filed are

enclosed as Annexurs 'H' & T to the petition.

4. The further fact is that not only order dated 27.11.1982 was passed but a letter was written to the assessee that the notice in form ST19 issued

by the said Officer stands withdrawn. As per the petitioner, the proper words which should have been used while issuing a communication was to

reproduce the contents of the order dated 27.11.1982 i.e. proceedings should be deemed to have been dropped rather than assumed to have

been withdrawn. Yet another fact which is being pleaded is that on 10.03.1983 the assessee gave information to the assessing authority that

books of accounts have since been lost.

5. The notice of assessment for the year 1977-78 have been placed on the record as Annexure "O". The notice of assessment for the year 1978-79

has been placed on the record as annexure "I". It is the case of the petitioner that the assessment with regard to the assessment year 1977-78 was

completed on 28.03.1983. That assessment of both the years was completed on 28.03.1983. Thereafter re assessment order was passed under

Section 7(11) of the Act on 31.03.1983. This led to a revised demand notice. This action of assessing authority was challenged in appeal. Appeal

was dismissed on 14.11.1983. A revision was filed. This was partly allowed on 24.02.1984. A modification was made visavis rate of tax.

otherwise the liability mentioned in notice under section 7(12) and the reassessment which was made under section 7 (11) of the Act was

sustained. It is this reassessment made under Section 7 this petition. It is stated:

I). That once the proceedings initiated on the basis of notice issued on form ST19 stood dropped, no further action could be taken;

II). That the question of making reassessment could not arise, when assessment proceedings were not finalized. According to the assessee, the

assessment was finalized on 28.03.1983;

III). It is also urged that unless and until there is a finalized assessment in terms of section 7(7) of the Act, the question of taking further action in

terms of Section 7(11) or issuing a notice under SubSection (12) could not arise.

6. As indicated in the very beginning, the scheme of the Act is to first pass an assessment order. At that stage when the assessing authority is not

satisfied that a return furnished is correct and complete, the assessing the prescribed form requiring him on a date and place specified therein, either

to attend in person or to produce or cause to be produced any evidence on which such dealer may rely upon on such return. It is only after the

assessment proceedings are complete and it is found that the assessing authority

for any reason, whether on account of some omission or commission on the part of an assessee or any omission on the part of assessing authority, feels that the taxable turn over or tax assessed has to be enhanced, then a notice has to be given under section 7(12) of the Act and thereafter, further action has to be taken in terms of section 7(11). It is on this basis urged that before any order of reassessment could be made, there has to be an order of assessment. It is in that event if some lacuna is found to be there and it is only thereafter, further proceedings can be taken under Section 7(12). It is also sought to be urged that when proceedings initiated on issuance of notice in form ST19 were dropped on 27.11.1982, and these having been dropped, no further notice could be issued for the same purpose. It is precisely for this reason that the latter proceedings initiated with a view to reassess on 26.02.1983 visavis both the assessment years are said to be void abinitio.

7. The learned counsel for the petitioner on the basis of the decision given by the Supreme Court in the case reported as *Ghanshyamdas vs. Regional Assistant Commissioner of Sales Tax, Nagpur and others*, 1963 (14) STC 976, submits that the question as to whether a turn over could be said to be escaped assessment, couple arise only if proceedings in respect of the first assessment are pending and no final order of assessment was made therein. It is urged that the answer to this was given by Rankin, C.J., in *In re Lachhiram Basantlal*, (1930) I.L.R. 58 Calcutta 909, wherein it was observed;

Income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessee's income which have not yet terminated in a final assessment therefore.

This dictum laid down a clearly understandable principle. How can an escape of a turnover from assessment be predicated before the assessment is completed ? The Judicial Committee in *Rajendernath Mukherjee vs. Income Tax Commissioner* (1934) 2 I.T.R. 71, relied upon his dictum in rejecting the contention to the contrary raised by the assessee before them, and endorsed the said view.

8. The argument which has been raised in this petition is that as there was no assessment made under Section 7(7) of the Act, the question of making reassessment would not arise. It is also urged that even proceedings with a view to make reassessment were initiated by issuance of a

notice in form ST19. This, as noticed above, was ordered to be dropped on 27.11.1982. It is thus, urged that unless and until assessment order is

passed under Section 7(7), the question of making reassessment would not arise.

9. The fact that reassessment can be made only when there is an assessment, is supported by the view expressed by the Supreme Court in the

case reported as Commissioner of Sale Tax M.P. vs. Filter Company 1997 (107) STC 210. In this case the assessee had filed his returns on

01.11.1977 and that was set aside, and the returns were not accepted. The taxable turn over was fixed at rupees ten lakhs.

This order passed by the assessing authority was set aside on 13.11.1980. Thereafter, what was required to be done, was to pass an order of

assessment under Section 7(7) of the Act. This was not done. On the other hand, notice in form ST + 19 was issued. Accordingly to the learned

counsel for the petitioner and rightly so, this could not be issued after the appellate authority had set aside the order dated 13.11.1980. The proper

course was to pass an order of assessment and unless and until this was done, the question of making reassessment would not arise. Thus, the fact

remains that there is no order or assessment passed under Section 7(7) of the Act. Unless and until there is an order of assessment under

Subsection (7) of Section 7, no order or reassessment could be made. If this be the situation, then the order passed on 31.03.1983 and which

order was affirmed in appeal and revision, cannot be sustained. The above reasoning would be applicable to the assessment year 1977-78.

10. So far as assessment year 1978-79 is concerned, the argument which is sought to be pressed is that once proceedings were ordered to be

dropped on 27.11.1982, then the same authority i.e. the assessing authority could not take any further steps. The proper course as per the

petitioner was to get the order dated 27.11.1982 revised from a higher authority or a review, appeal or revision could have been preferred against

the order of assessing authority. It is urged that unless and until the order dated 27.11.1982 passed after proceedings under for, ST19 were

ordered to be dropped, continued to remain in force, the question of further order being passed by the same authority, would not arise. It is

submitted that even an invalid order terminating the proceedings has the effect of terminating the proceedings and in such a case, the appropriate

method for creating the liabilities is to have the order revised by an appellate or higher authority having jurisdiction to deal with the matter. It is

urged that as long as order dropping proceedings continued no further action could be taken. This is sought to be substantiated by placing reliance

on the decision given by the Supreme Court in the case reported as Commissioner of Income Tax Calcutta vs. Bidhu Bhushan Sarka, 1966(62)

ITR 278. In the above case, the word used in the order was 'filed'. This word was taken as equivalent to the word 'disposed of' In the present

case, the intention is clear. The word used is 'dropped'. Therefore, even without resorting to the principles of interpretation, it can conveniently be

said that for all intents and purposes, the assessing authority was not keen to continue with the proceedings pursuant to issuance of notice in form

ST19. If this order was to be ignored, then the proper course was to adopt the same procedure as has been suggested by the Supreme Court in

the case of B.B. Sarkar (supra), it is, accordingly held;

i. that the question of making reassessment would arise only where assessment order has been passed;

ii. That unless and until there is a valid order of assessment under Section 7(7) of the Act, the question of initiating proceedings with a view to make

reassessment would not arise;

iii. That what is said at S. No's I and II (Supra) would apply to the assessment year 1977-78;

iv. That once the assessing authority issued notice in form ST19 and decide to drop the proceedings by issuance of an order dated 27.11.1982, it

would lead to the result that the proceedings attained finality. If this order was to be ignored then this could be ignored by getting it reviewed or

getting it set aside by the Higher hierarchy under law. This having not been resorted to, the assessing authority could not initiate proceedings u/s

7(12) and make reassessment interms of Section 7(12) of the Act.

11. In view of the above, this petition is allowed. Order dated 27.11.1982 as affirmed by the appellate authority on 14.11.1983 and by the

revisional authority on 24.02.1984 i.e. annexures 'A.L. and N' are set aside.

12. Disposed of as such.