(2014) 07 P&H CK 0095

In the Punjab And Haryana At Chandigarh

Case No : VATAP No. 88 of 2014 (O and M)

Printtech APPELLANT

Vs

State of Haryana RESPONDENT

Date of Decision : 25-07-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 31(c), 32E, 32E(1), 32F, 35E — Delhi Municipal Corporation Act, 1957 - Section 126(4) — Haryana Value Added Tax Act, 2003 - Section 15, 15(4), 36, 56(3) — Kerala General Sales Tax Act, 1963 - Section 35

Citation : (2015) 80 VST 351

Hon'ble Judges : Ajay Kumar Mittal, J;Jaspal Singh, J.

Bench : Division Bench

Advocate : Rajesh Jain and Amit Jhanji, for the Appellant

Judgement

Ajay Kumar Mittal, J.?This appeal has been preferred by the asses-see under section 36 of the Haryana Value Added Tax Act, 2003 (in short, "the HVAT Act") against the order dated May 21, 2014, annexure A4 passed by the Haryana Tax Tribunal, (in short, "the Tribunal") in STA Nos. 351-352 of 2013-2014, claiming following substantial questions of law:

"(i) Whether the Tribunal was justified in rejecting the contention of limitation raised by the appellant in the aforesaid case?

(ii) Whether an assessment order can be said to be made or passed by simply retaining it on file without it being dispatched within the period of limitation?

(iii) When admittedly the demand notice in form N. 4 and the assessment orders under both the Acts as well as the envelope carrying these documents bearing No. 857/A-Sing/2.7.2013 would it not mean that till July 2, 2013, the Assessing Authority was seized of the matter and the assessment order had not gone out of his hands?

(iv) When admitted by the Department that the assessment orders had not been dispatched before July 2, 2013, can it be assumed that the Assessing Authority had lost his locus poenitentiae on the assessment orders?

(v) Whether the Tribunal was justified in holding that the instructions dated December 13, 2004 and March 14, 2006 issued by the Excise and Taxation Commissioner, Haryana, are not binding on the assessing authority for not being issued under section 56(3) of the Act?"

A few facts relevant for the decision of the controversy as narrated in the appeal may be noticed. Ex parte best judgment assessment order dated July 2, 2013, annexure A1, was passed whereby demand of tax and interest of Rs. 8,33,398 and Rs. 11,55,047 were created under the HVAT as well as the Central Sales Tax Act, 1956, respectively. Along with the order, a demand notice in form VAT N. 4 was issued under the provisions of rule 39(1) of the Haryana VAT Rules, 2003 (in short, "the HVAT Rules"). The assessment order, the demand notice as well as the envelope dated July 2, 2013 were served on the appellant on July 13, 2013. The appellant filed CWP No. 16805 of 2013 in August 2013 contending that the assessment orders dispatched on July 2, 2013 were barred by limitation. Vide order dated August 5, 2013, annexure A2, the writ petition was disposed of by this court with a direction to exhaust the alternative remedy first. Further direction was given to the authorities to go into the question of wrong assumption of jurisdiction on the plea of limitation. As directed by this court, the appellant filed appeals before the Joint Excise and Taxation Commissioner (Appeals), Faridabad (JETC (A)) raising various grounds including the ground of limitation. Vide order dated November 18, 2013, annexure A3, the (JETC (A)) rejected the appeals of the appellant. On the issue of limitation, he held that there was no requirement to serve the order on the dealer before the expiry of limitation for framing the assessment. Aggrieved by the order, the appellant filed two appeals before the Tribunal. Vide order dated May 21, 2014, annexure A4, on the preliminary issue of limitation, the Tribunal did not find any merit in the submissions of the appellant. The appellant produced instructions dated December 13, 2004 and March 14, 2006 to the effect that assessment orders for 2003-04 were not only to be made but served on the assessee within the period of three years. The Tribunal held that the said instructions were not binding on the Assessing Authority for not being issued under section 56(3) of the HVAT Act. Certified copy of the order dated May 21, 2014 was dispatched from the Tribunal on June 12, 2014. The appellant received the said copy on June 22, 2014. The Tribunal decided the preliminary issue of limitation and the appeals are yet to be decided on merit. There being no alternative remedy available, the appellant is before this court through the instant appeal.

2. The learned counsel for the appellant submitted that the order was passed by the Assessing Officer on March 29, 2013 which was issued to the appellant dealer on July 2, 2013. It was urged that date of issue of assessment order would constitute the passing of the assessment order and the same being after March 31, 2013 was beyond limitation. Reference was made to the following judgments:

(i) Municipal Corporation of Delhi Vs. Qimat Rai Gupta and Others, ;

(ii) Collector of Central Excise, Madras Vs. M.M. Rubber and Co., Tamil Nadu, ;

(iii) Qualimax Electronics Pvt. Ltd. Vs. Union of India (UOI) and Others, ;

(iv) Government Wood Works Vs. State of Kerala, ;

(v) Commissioner of Agricultural Income Tax Vs. Kappumalai Estate, ;

(vi) Commissioner of Income Tax, Delhi, Central-I Vs. Escorts Farms P. Ltd., ;

(vii) Ambuja Cements Ltd. Vs. Union of India (UOI) and Others, .

3. After hearing learned counsel for the appellant, we do not find any merit in the appeal.

4. What meaning is to be assigned to the word "made or passed" while framing assessment under section 15 of the HVAT Act, is the question agitated by the learned counsel for the appellant in this appeal.

5. The order of assessment had been passed under section 15(4) of the Act which reads thus:

"15. (4) If a dealer, having furnished returns in respect of a period, fails to comply with the terms of a notice issued under sub-section (2) or sub-section (3), the Assessing Authority shall, before the expiry of three years from the close of the year to which such returns relate, assess to the best of its judgment the amount of tax due from him."

6. A plain reading of the aforesaid provision shows that it nowhere requires that assessment order must be served on the assessee before the expiry of period of limitation prescribed for framing assessment. No doubt, an order passed after the expiry of period of limitation prescribed under the statute would be a nullity. There would be distinction between "communication" of the order and "passing or making" of an order. The communication of an order is essential to enable the aggrieved person to prefer an appeal against the order of assessment but it would not necessarily mean that "passed or made" encompasses communication thereof unless statute so specifically provides. The order of assessment can be communicated to the assessee within reasonable time without any specific time-limit, and liability would accrue from the date of its communication. The limitation for purposes of appeal or revision would commence only after the order is communicated to him. In other words, the provision of section 15 of the HVAT Act, nowhere envisages that the order of assessment is required to be communicated within the period of three years. It only contemplates exercise of jurisdiction in passing assessment order within a period not exceeding three years. Once that jurisdiction has been exercised within the stipulated period, the communication thereof being ministerial act can be even after the expiry of period of three years. It is not provided under section 15 of the HVAT Act that the date of dispatch or service of the assessment order on the dealer would constitute the date of the passing of the order. It is also not provided that it is the sine qua non for treating the date of passing of the assessment order.

7. The Supreme Court of India in the case of State of Punjab Vs. Amar Singh Harika, has held that:

"An order ordinarily would be presumed to have been made when it is signed. Once it is signed and an entry in that regard is made in the requisite register kept and maintained in terms of the provisions of a statute, the same cannot be changed or altered. It, subject to other provisions contained in the Act, attains finality. Where, however, communication of an order is a necessary ingredient for bringing an end result to a status or to provide a person an opportunity to take recourse to law if he is aggrieved thereby, the order is required to be communicated."

8. Further the apex court in the case of The Commissioner of Sales Tax, U.P. Vs. Mangal Sen Shyam Lal, has laid down the principle that "''service'' of an order of assessment in the context of the scheme of the Act and the Rules made thereunder means something subsequent and distinct from the mere making of the order of assessment. It implies formal communication of the order after it has been passed on termination of the proceedings, so that the party to whom it is communicated may, if aggrieved, seek redress in a higher forum in the manner prescribed by law."

9. Still further, the Andhra Pradesh High Court in Rajmal Multanmal and Company and Another Vs. Commercial Tax Officer and Others, had expressed as under (page 258 in 37 STC):

". . . There is nothing in the language of sub-section (3) which is susceptible of an interpretation that communication of an order passed by the Deputy Commissioner should also be within the period of four years. It only contemplates exercise of revisional jurisdiction within a period not exceeding four years. Once that jurisdiction is exercised by passing an order, the fact that it was communicated to the petitioner after the expiry of the period of four years is not at all material."

10. Similar view has been expressed by the Andhra Pradesh High Court in Sri Balaji Paddy and Rice Merchant Vs. State of Andhra Pradesh, , Khetmal Parekh and Company Vs. State of Andhra Pradesh, , A.M. Safiulla and Co. Vs. The State of Madras, , RM. P.R. Viswanathan Chettiar Vs. Commr. of Income Tax, Madras, and the Mysore High Court in K.N.K. Reddy Vs. Commissioner of Income Tax, .

11. In all fairness, we now advert to the judgments relied upon by learned counsel for the appellant.

12. In Municipal Corporation of Delhi Vs. Qimat Rai Gupta and Others, , the apex court was dealing with the provisions of section 126(4) of the Delhi Municipal Corporation Act, 1957. It was explicitly held that "We are, therefore, not in a position to persuade ourselves to follow the line of reasoning adopted by the division Bench of the High Court that unless the order is communicated, it should be deemed to have not been made". In fact, the aforesaid observations in no

way advance the case of the appellant.

13. In Collector of Central Excise, Madras Vs. M.M. Rubber and Co., Tamil Nadu, , the point for consideration before the apex court related to limitation under section 35E(3) of the Central Excises and Salt Act, 1944. Section 35E(3) of the Act prescribed that no order thereunder would be passed after the expiry of one year from the date of decision or order of the adjudicating authority. Examining the factual matrix therein, an order in favour of the respondent-assessee was passed by the Collector of Central Excise, as an adjudicating authority on November 28, 1984. Its copy was supplied to the respondent on December 21, 1984. The Central Board of Excise and Customs however in exercise of its power under section 35E(1) directed the Collector on December 11, 1985 to make an appeal to the Customs, Excise and Gold (Control) Appellate Tribunal against this order. The point at issue was whether limitation under section 35E(3) of the Central Excises and Salt Act, 1944 for the order of the Board under section 35E(1) commenced from November 28, 1984 or December 21, 1984. The said Appellate Tribunal rejected the Collector''s application on the ground that it was beyond limitation period of one year commencing from November 28, 1984. Declaring this decision as valid, the apex court held that:

"An order or a decision comes into force from the date it is passed and the concerned authority loses power to change it. However, the commencement of limitation period depends upon the intention of relevant statutory provision. If the intention is to provide a remedy to the person adversely affected, the statutory provision has to be so constituted that limitation commences from the date of communication of order. If however the relevant provision lays down only period in which competent authority should exercise its power, the date on which such power was exercised by making an order, is relevant. This is based on the principle that Government is bound by the proceedings of officers but persons affected are not, unless the proceedings are communicated to them. Section 35E comes under the latter category. The period of one year fixed under section 35E(3) should therefore be given its literal meaning and limitation period determined from the date of order."

14. It nowhere provided that the order made or passed is required to be communicated within the period of limitation, otherwise it would be time-barred. The factual matrix being different, the judgment relied upon does not come to the rescue of the appellant.

15. In Qualimax Electronics Pvt. Ltd. Vs. Union of India (UOI) and Others, , the issue before the Delhi High Court was relating to sections 31(c), 32E and 32F of the Central Excise Act, 1944. Under section 32E(1) of the said Act, an assessee in respect of a "case" relating to him, can make an application, "before adjudication" to the Settlement Commission to have the case settled. The requirement for proceeding with a settlement application is that the order in original must not have been passed or made before the application is filed by the assessee to have his case settled. In this case, dispute arose when order in

original passed by the adjudicating authority was dated December 24, 2009 though it was received by the petitioners after January 8, 2010, which was the date on which the petitioners had filed their settlement applications under section 32E of the said Act. In this context, the High Court while dismissing the writ petition held that the proceeding would be regarded as pending before an adjudicating authority till the order does not go out of his control which happened on December 31, 2009. Thus, on January 8, 2010, when the settlement applications were filed by the petitioners, the matter before the adjudicating authority had already been adjudicated. There is no parallel between this case and the instant case. The present case pertains to the Haryana Value Added Tax Act and the remedy for aggrieved appellant-dealer from the assessment order is to prefer an appeal against assessment order and undoubtedly clock of limitation would not start ticking till order is communicated to the aggrieved party.

16. In Government Wood Works Vs. State of Kerala, , the question before the Kerala High Court related to reassessment under section 35 of the Kerala General Sales Tax Act, 1963 whereas the present case relates to section 15(4) of the HVAT Act, 2003 which did not speak of any communication of assessment order. What is of the essence under section 15(4) of the HVAT Act is to assess to the best of assessing authority''s judgment the amount of tax due from the assessee and not communication of assessment order. Hence the assessment had been made within the time prescribed and the date of the communication could not be taken as the date of making of the order as per observations of the apex court in State of Punjab Vs. Amar Singh Harika, and The Commissioner of Sales Tax, U.P. Vs. Mangal Sen Shyam Lal, . In Commissioner of Agricultural Income Tax Vs. Kappumalai Estate, , the Kerala High Court again applying the principles laid down in Government Wood Works Vs. State of Kerala, has taken similar view.

17. In Commissioner of Income Tax, Delhi, Central-I Vs. Escorts Farms P. Ltd., , the Delhi High Court was considering the question where the assessment was barred by time, then any decision on merits would be of no consequence. In view of our answer above, the same does not help the assessee in the present facts and circumstances.

18. In Ambuja Cements Ltd. Vs. Union of India (UOI) and Others, , the issue was relating to binding nature of circulars issued by the Department. The Instructions dated December 13, 2004 and March 14, 2006 issued by the Excise and Taxation Commissioner on which reliance has been placed in the ground H of the appeal only provides that the orders be supplied by particular date. It cannot be taken to be meaning that any order supplied beyond that date would render the assessment proceedings nullity being barred by time. Thus, no advantage can be derived by the assessee from this pronouncement. In view of the above, we do not find any merit in the appeal. Accordingly, the same stands dismissed.