
(2000) 07 KL CK 0049
In the High Court Of Kerala
Case No : T.R.C. No. 181 of 2000

S. Unnikrishnan

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 31-07-2000

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 35, 35(2A)

Citation : (2000) 120 STC 530

Hon'ble Judges : S. Sankarasubban, J;A. Lekshmikutty, J

Bench : Division Bench

Advocate : K.B. Mohamed Kutty, for the Appellant; V.V. Ashokan, Special Government Pleader, for the Respondent

Judgement

S. Sankarasubban, J.—Assessee is the revision petitioner. The revision is filed against the order of the Sales Tax Appellate Tribunal, Thiru-vananthapuram dated September 15, 1999 in T.A. No. 28 of 1994. Revision-petitioner is a dealer in jewellery. For the assessment year 1991-92, he filed a return for a total turnover of Rs. 18,88,058 and the taxable turnover was Rs. 18,74,739. On the ground of alleged stock variation consequent on two inspections on August 9, 1991 and January 4, 1992, the turnover was estimated and enhanced to Rs. 58,57,130 by the assessment order dated November 30, 1992.

2. The revision petitioner filed appeal against the best judgment assessment on various grounds including the illegality of the excessive nature of the estimate. While the appeal was pending, the Deputy Commissioner of Agricultural Income Tax and Sales Tax, Kollam, invoked suo motu power, u/s 35 of the Kerala General Sales Tax Act, 1963 stating that the estimation of turnover in the assessment is low considering the quantum of suppression which in his view comes to Rs. 29,26,734 as against Rs. 16,20,415 arrived at by the assessing authority. Petitioner submitted that a mere change of opinion by a different authority as to the quantum of estimate of suppression cannot be a ground for suo motu revision, particularly when the appeal was pending. The Deputy Commissioner

rejected the objection and set aside the assessment and remanded the case to the assessing authority for fresh disposal.

3. Subsequently, a revised assessment was passed on September 22, 1997. The action of the Deputy Commissioner was challenged before the Sales Tax Tribunal. Against the revised original assessment, an appeal had been filed and that appeal was dismissed as per annexure D order dated July 31, 1998. Against annexure D, appeals were filed before the Sales Tax Appellate Tribunal as T.A. Nos. 28 of 1994 and 194 of 1998. The appeals were heard together and a common order was passed by the Appellate Tribunal, which is evidenced by annexure E. The Appellate Tribunal took the view that the suo motu power exercised by the Deputy Commissioner was valid. But the assessment was set aside and the matter was remitted back to the assessing authority. It is against the above order in T.A. No. 28 of 1994 that the present revision is filed.

4. Learned counsel for the petitioner submitted that the Deputy Commissioner had no jurisdiction to exercise the power u/s 35(2A) of the Kerala General Sales Tax Act, 1963 in the facts and circumstances of the case. According to the petitioner, the return filed by the assessee was not accepted and the assessment order was passed on the best judgment assessment in the light of the two inspections. The assessing officer found suppression of Rs. 16,93,696. This was challenged before the appellate authority. u/s 34 of the above Act, the appellate authority has got power while deciding the appeal to enhance the assessment. According to the petitioner, it was not a case where the revisional authority wanted a fresh point to be decided. A perusal of annexure B will show that according to the Commissioner, a good portion of the actual suppression of the purchases and sales had not been considered while finalising the assessment. Thus, the assessment completed for the year 1991-92 was found to be improper and irregular. It is on the basis of that the Commissioner was claiming his suo motu power. Further he contended that this power can be exercised only when the appeal has been disposed of. But here, the power has been exercised even when the appeal was pending.

5. Learned Government Pleader submitted that u/s 35(2A) of the Kerala General Sales Tax Act, 1963, the Deputy Commissioner has got power to invoke jurisdiction even when the appeal is pending. According to him, the Deputy Commissioner interfered in this case because, he found that the matter was not in challenge in appeal.

6. Section 35 of the Kerala General Sales Tax Act, 1963 empowers the Deputy Commissioner to call for and examine any order passed by an officer subordinate to him, which in his opinion is prejudicial to the Revenue and may make such enquiry or cause such enquiry to be made as he thinks fit. Section 35(2){a) prohibits the Deputy Commissioner from interfering in revision when the time for filing the appeal against the original order has not expired and when the matter has been subject to an appeal to the Appellate Assistant Commissioner or the Appellate Tribunal or of a revision in the High Court or more than four years have

expired after the passing of the order.

7. By Act 21 of 1978, an amendment was inserted in the section by introducing Sub-section (2A). Sub-section (2A) clearly says that : "Notwithstanding anything contained in Sub-section (2), the Deputy Commissioner may pass an order under Sub-section (1) on any point which has not been decided in an appeal or revision referred to in clause (b) of Sub-section (2), before the expiry of a period of one year from the date of the order in such appeal or revision or before the expiry of the period of four years referred to in clause (c) of that sub-section, whichever is later". Thus, originally, the power was given in cases where no appeal had been filed against the order or an appeal has been filed before the Appellate Assistant Commissioner or the Appellate Tribunal or of a revision in the High Court. By the amendment, the power is given to the Deputy Commissioner to deal with the case where orders have been passed in appeal or revision when a particular point has not been decided in appeal. A plain reading of Sub-section (2A) will show that normally, power can be exercised by the Appellate Assistant Commissioner or the Deputy Commissioner only after the appeal has been decided, because only when the appeal is decided, it will be known whether a point has been decided or not.

8. A division Bench of this Court in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. Cherian P. Varghese [1995] 97 STC 626, held that there may be situations where the Deputy Commissioner will be entitled to exercise the power even before the appeal is disposed of. In paragraph 10 of the above decision, the division Bench held thus :

"Various contingencies can be visualised in the interpretation of this section. A point might have been expressly decided by the assessing authority in favour of the assessee ; or he might have omitted to consider a particular point, and not levied tax, as in the case of the rubber cess in the assessment before us. In that event, the appeal before the Appellate Assistant Commissioner at the instance of the assessee will be only on other points and there is no likelihood of his deciding on this point at all."

The court then posed a question in that situation whether it is necessary for the Deputy Commissioner to wait till the disposal of the appeal. Another contingency is that of an appeal disposed of by the Appellate Assistant Commissioner, without any decision by him on a particular point. Hence, pendency of the appeal before the Tribunal need not in such cases preclude exercise of the revisional power under Sub-section (2A). But the Division Bench held that there will be a cautious approach when a power is exercised u/s 35(2A) of the Kerala General Sales Tax Act, 1963. According to the Division Bench, a balancing of this consideration is required in discharging the issue. If a particular point is not likely to arise for decision at all before the appellate authorities or before the court because of the nature of the decision rendered by the assessing or other authority the Deputy Commissioner could exercise his power of revision under Sub-section (2A) even during the pendency of an appeal or revision, without waiting for the termination

of these proceedings. At the same time, if the matter is an issue before an appellate authority, or there is a likelihood of the appellate authority speaking on the point, the exercise of the revisional power is precluded. Thus, it is only in certain exceptional circumstances that if the Deputy Commissioner is convinced that the point will not be discharged by the appellate authority, then it can exercise of suo motu power during the pendency of the appeal. As to what is meant by "any point not decided in appeal", this Court in the decision reported in Deputy Commissioner (Law), Board of Revenue (Taxes), Ernakulam v. Cochin Agencies [1989] 74 STC 389, observed as follows : "We understand the words "on any point which has not been decided in an appeal or revision" to mean, "any particular aspect or plea, which was not specifically, the subject-matter of an adjudication in the appeal". The emphasis is on "any point" not decided in an appeal. The word "point" has many shades of meaning as could be seen from standard dictionaries". In that case, the court held that though the Appellate Assistant Commissioner dismissed the appeal from the original assessment, point regarding excise duty paid by the assessee was not in issue ; nor considered or decided in the appeal.

9. So far as the present case is concerned, according to us, interference by the Deputy Commissioner was not called for, for exercising his power u/s 35 of the Act. The judgment was a best judgment assessment by the assessing officer. The assessment was completed on the basis of certain inspections conducted and on the basis of certain suppression. The assessing officer took the view that the suppression was to the tune of Rs. 15,98,696. It was this assessment that was pending in appeal. So, the question in issue before the appellate authority was whether the additions made by the assessing officer on the basis of the suppression were correct or not. It cannot be said that the question of suppression and the actual suppression are not the subject-matter of the appeal. The Deputy Commissioner, in annexure B order says that a good portion of the actual suppression of the purchases and sales had not been considered while finalising the assessment. Thus, the assessment completed for the year 1991-92 was found to be improper and irregular. Thus, the Deputy Commissioner was of the view that since the assessment was improper and irregular, he can interfere. According to us, the Deputy Commissioner had exercised his jurisdiction illegally and an interference was uncalled for, since the question raised in the appeal was the same question.

10. In this context, we wish to further highlight the fact that even when exercising his power u/s 35(2A) of the Kerala General Sales Tax Act, 1963 he can interfere only if the order is prejudicial to the Revenue. In Venkatakrishna Rice Company Vs. Commissioner of Income Tax, , Balasubrahmanyam, J. speaking for the Division Bench held as follows :

"In our judgment, the expression "prejudicial to the interests of the Revenue" is not to be construed in a petty-fogging manner, but must be given a dignified construction. It may be noted that the use of the expression "Revenue", in our

opinion, is significant. It denotes some kind of abstraction or symbol in the same sense in which the expression "crown" is used to distinguish it from any person enthroned. The interests of the Revenue is not to be equated to rupees and paise, merely. There is a biblical saying that we do not live by bread alone. Varying this saying, it may be said that the Revenue does not live by tax alone. In this sense, therefore, the interests of the Revenue are not tied up merely with realising as much Revenue as possible, willy nilly, merely looking to the productivity aspect of taxation. The jurisdiction of the Commissioner u/s 263 is undoubtedly a supervisory jurisdiction. It is intended for interference in special cases to counteract orders which are erroneous as well as prejudicial to the interests of the Revenue. In this context, therefore, the expression "prejudicial to the interests of the Revenue" must be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the order passed by the Income Tax Officer, which might set a bad trend or pattern for similar assessments...".

In *Bismillah Trading Co, v. Intelligence Officer, Squad No. II, Agricultural Income Tax and Sales Tax* [2000] 119 STC 558, a division Bench of this Court held that an order, in order to be prejudicial to the interests of the revenue, should be erroneous and prejudicial to the revenue administration. In the above case, the Bench observed thus :

"The word "prejudice" must be judicially examined. What constitutes "prejudice to the revenue" has been the subject-matter of a judicial debate. One view was that "prejudicial to the interests of the revenue" does not necessarily mean loss of revenue. The expression "prejudicial to the interests of the revenue" is not to be construed in a petty-fogging manner, but must be given a dignified construction. The interests of the revenue are not to be equated to rupees and paise merely. There must be some grievous error in the order passed by the Income Tax Officer which might set a bad trend or pattern for similar assessments which, on a broad reckoning, the Commissioner might think to be prejudicial to the revenue administration. The prejudice must be prejudice to the revenue administration."

Thus, it is not a mere loss of revenue that should be the sole consideration for invoking the power of revision. In matters fixing the estimate, there may be difference of opinion. But this difference of opinion cannot be equated with an erroneous view in law.

11. Thus, considering the entire matter, we are of the view that the exercise of power by the Deputy Commissioner u/s 35 of the Kerala General Sales Tax Act, 1963 when the appeal is against the original assessment was illegal and consequently, annexure D order and the order in T.A. No. 28 of 1994 of the Sales Tax Appellate Tribunal, Thiruvananthapuram are set aside. The appeal filed by the revision petitioner against annexure A will be restored to file and will be disposed of by the competent authority.