
(1988) 04 AHC CK 0018
In the Allahabad High Court
Case No : Sales Tax Revision No. 382 of 1987

Satya Prakash Rajesh Kumar

APPELLANT

Vs

Commissioner of Sales Tax

RESPONDENT

Date of Decision : 14-04-1988

Acts Referred:

Uttar Pradesh Sales Tax Act, 1948 — Section 11(1)

Citation : (1989) 72 STC 208

Hon'ble Judges : R.K. Gulati, J

Bench : Single Bench

Final Decision : Allowed

Judgement

R.K. Gulati, J.—This sales tax revision arises out of a common order passed by the Sales Tax Tribunal, Allahabad Bench-II, Allahabad, for the assessment years 1966-67 and 1967-68. The dispute in this revision is confined to the assessment year 1967-68, as the appeal for the other year was allowed by the Tribunal.

2. M/s. Satya Prakash Rajesh Kumar (hereinafter referred to as "the assessee") in the year in question was dealing in kerosene oil and mobile oil. It filed return for the third quarter only, disclosing a turnover of Rs. 76,000, but did not admit any tax liability. At the assessment stage the assessee filed a statement of account in which turnover in respect of ex-U.P. kerosene oil was disclosed at Rs. 3.80 lac, but without making any admission in regard to tax liability towards it. In due course the Sales Tax Officer passed an assessment order dated 15th July, 1968 by which he taxed the assessee on the turnover of Rs. 6,30,000 which included turnover of ex-U.P. kerosene oil, amounting to Rs. 6,000.

3. Being aggrieved the assessee appealed to the Assistant Commissioner (Judicial), who however, dismissed the appeal on a preliminary ground for the assessee's failure to make payment of admitted tax, a condition precedent, for the maintainability of the appeal.

4. The matter was taken up before the revising authority, where it was

contended that, all the purchases of kerosene oil disclosed by the assessee were from within the State and there was no tax liability, which was required to be paid. It was contended that the assessee wanted to produce purchase vouchers before the appellate authority, but no opportunity was afforded. In view of these allegations the revising authority set aside the appellate order with directions that the Assistant Commissioner (Judicial) should grant opportunity to the assessee, to produce the relevant purchase vouchers and the appeal should thereafter be disposed of according to law.

5. The Assistant Commissioner once again dismissed the assessee's appeal, on the preliminary ground, stated earlier, against which the assessee went up in second appeal, before the Sales Tax Tribunal. The Tribunal also dismissed the appeal by the impugned order. Hence, this revision u/s 11(1) of the U.P. Sales Tax Act (hereinafter referred to as "the Act") has been preferred.

6. Before the Tribunal, apart from the plea, that the disclosed purchases of kerosene oil were from within the State, two other legal contentions were also raised. The first submission was that before the assessing officer, at no stage, the assessee admitted any tax liability on the turnover of kerosene oil. That being so, there was no obligation on the assessee to make any deposit of admitted tax u/s 9 as it stood prior to its amendment effected by Act No. 3 of 1971. The second submission was that during the pendency of appeal before the Assistant Commissioner (Judicial) and after the remand by the revising authority, the assessee had deposited the entire tax at the rate of 7 per cent on the disclosed turnover of Rs. 3,80,000. Accordingly, the appeal could not have been dismissed on the preliminary ground, without a finding by the first appellate authority, that there was no sufficient cause for condoning the delay in making the deposit of tax for which the assessee had made an application.

7. I have heard learned counsel for the parties.

8. Learned counsel appearing for the assessee reiterated the legal submissions which were advanced before the Tribunal. It was argued that the assessee did not admit any tax liability on the turnover relating to the sale of imported kerosene oil in view of a decision of the Judge (Revisions) in the case of Mool Chand Ram Prasad, which held the field at the relevant time, though subsequently that decision was overruled. Thus, the non-payment of tax, if any, was for bona fide reasons. The learned counsel urged that under the proviso to Section 9(1), before its amendment, the assessee was required to file satisfactory proof of the payment of tax admitted by the appellant to be due or such installments thereof as may have become payable. The concept of admitted tax has gone under change after coming into being of Act No. 3 of 1971. Before the amendment, the liability was to pay such tax as was admitted by the assessee, but after the amendment the tax must be paid, which is found due under the Act. Since the assessee had not admitted any tax liability on the sales of ex-U.P. purchases, its appeal could not have been dismissed under the un-amended provisions for the payment of tax, which may have been found due,

under the Act.

9. Section 9 before and after amendment, read as under :

Section 9 before amendment:

9. Appeal.-(1)

Provided that no appeal against an assessment shall be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due, or of such installments thereof as may have become payable.

10. Section 9 after amendment:

9. Appeal.-(1)

Provided that no appeal against an assessment order under this Act shall be entertained unless the appellant has furnished satisfactory proof of the payment of not less than,-

(a) where return is filed,-the amount of tax or fee due under this Act on the turnover of sales or purchases, as the case may be, admitted by the appellant in the return filed by him or at a later stage in proceedings before the assessing authority, whichever is greater ; or

(b) where no return is filed,-the amount of tax or fee due under this Act on the turnover of sales or purchases, as the case may be, admitted at any stage in proceedings before the assessing authority, or 20 per cent of the amount of tax or fee assessed, whichever is greater.

11. Before proceeding further it may be pointed out that the assessment for the year in question was made on 15th July, 1968 and the assessee had also filed its appeal, prior to the amendment in the year 1971, which was registered as Appeal No. 2813 of 1968.

12. In Commissioner, Sales Tax Vs. Tika Ram Arhti, , after reviewing a large number of authorities, it was held that the right of appeal is a substantive right and not merely a matter of procedure. The right of appeal from the decision of an inferior tribunal to a superior tribunal becomes vested in a party when proceedings are first initiated in and before a decision is given by an inferior court. It was further pointed out that proceedings for assessment or reassessment are initiated either by issuing of notice or by filing of the return.

13. For the view which appealed to this Court, reliance was placed on a decision of the Supreme Court in Hoosein Kasam Dada (India) Ltd. v. State of Madhya Pradesh [1953] 4 STC 114(all), wherein at page 118, the following passage appears :

That the amendment has placed a substantial restriction on the assessee's right of appeal cannot be disputed, for the amended section requires the payment of

the entire assessed amount as a condition precedent to the admission of its appeal. The question is whether the imposition of such a restriction by amendment of the section can affect the assessee's right of appeal from a decision in proceedings which commenced prior to such amendment and which right of appeal was free from such restriction under the section as it stood at the time of the commencement of the proceedings. The question was answered in the negative by the Judicial Committee in the Colonial Sugar Refining Co. Ltd. v. Irving [1905] AC 369.

14. It was further held on page 122 that:

This right of appeal from the decision of an inferior tribunal to a superior tribunal becomes vested in a party when proceedings are first initiated in and before a decision is given by, the inferior court.

15. In the instant case, as noted earlier, the assessment order giving rise to the appeal before the Assistant Commissioner (Judicial), Sales Tax, was passed on 15th July, 1968. In view of authorities noted above, the proceeding having been initiated prior to the coming into being of Act No. 3 of 1971, the appeal filed by the assessee was liable to be considered according to the provisions of Section 9 as they stood before their amendment.

16. Under the un-amended provisions, a person before filing an appeal was required to pay such amount of tax as was admitted by him and as might be due from him, whereas under the amended provision the appeal had to be filed accompanied by satisfactory proof of payment of tax in respect of which the appeal has been preferred.

17. The Sales Tax Tribunal found that the assessee had made import of kerosene oil against form C, which was filed along with the statement of account before the assessing authority. The Tribunal also recorded a categorical finding, that as a matter of fact, the assessee had not admitted any tax liability on the turnover of imported kerosene oil, during the course of assessment proceedings before the assessing officer or in the memorandum of appeal filed before the first appellate authority. In the opinion of the Tribunal, non-admission of the tax liability on the part of the assessee was immaterial, inasmuch as, its admitted liability could be taken to be to which the assessee was legally liable and that would be the amount due, which the assessee was required to deposit in order to maintain the appeal before the Assistant Commissioner. To put it in the words of the Tribunal, it observed :

The fact that remains is that the assessee despite having disclosed its turnover in respect of ex-U.P. kerosene oil had not admitted any tax liability whereas in view of Notification No. S.T.-6438/X-1012-1962 dated 1st December, 1962 it was liable to tax on such turnover at the rate of 7 paise per rupee, i.e., at 7 per cent on "M or I". Evidently, the assessee is not found to have made deposit of tax which had become due on it on the turnover disclosed by it, hence its first appeal has rightly been held to be not entertainable.

18. For taking the aforesaid view, the Sales Tax Tribunal purported to rely on a decision of the Supreme Court in *Kanpur Vanaspati Stores, Kanpur v. Commissioner of Sales Tax, U.P., Lucknow* 1973 UPTC 685.

19. Section 9(1), as it stood before its amendment was subject-matter of consideration before a Division Bench of this Court in *Commissioner of Sales Tax, U.P. v. Mangala Emporium, Varanasi* 1976 UPTC 58. In that case, the assessee had made certain purchases of agate stones against C form and did not admit before the assessing authority any tax liability on such purchases. The assessee's claim was not accepted and the assessment was made on best judgment. Appeal against the assessment order was dismissed by the appellate authority on the ground that the assessee had not deposited the admitted tax due as required by Section 9(1) of the Act as it then stood. The dispute related to the assessment year 1967-68. The order of the appellate authority was, however, set aside by the revising authority with the direction to hear and decide the appeal on merits. The Sales Tax Commissioner being aggrieved by the order of the revising authority sought opinion of this Court in a reference on the following two questions :

(i) whether, in view of above facts and in the circumstances of the case, the dealer was not liable to admit any tax on the turnover of goods imported against C form as-provided u/s 3(1)(b) ?; and

(ii) whether, in view of above facts and in the circumstances of the case, the appeal of the dealer was maintainable without the deposit of admitted tax ?

20. Both the above questions were answered against the Commissioner. In recording the opinion this Court observed as under:

We find from the statement of the case that the assessee neither in his written statement nor at any time during the proceedings before the assessing authority admitted any amount payable as tax. Thus, there was no amount of tax admitted by him, before the assessing authority under the proviso to Section 9(1) of the U.P. Sales Tax Act, as it stood then.

It was, however, contended by the learned counsel for the Sales Tax Commissioner that unless the non-payment of the tax due is bonafide, the assessee is bound to deposit the tax due as a condition for maintainability of the appeal against the assessment order. We do not agree with this submission. The proviso to Section 9(1) of the Act, as it stood then, in our judgment, contemplates the factuality, i.e., what happened before the assessing authority and not the reality, i.e., under the law a certain amount of tax was due. The applicability of the proviso to Section 9(1) of the Act, to our mind, will not depend upon the motive of the assessee or his intention. So long as in the return filed by the assessee or during the proceedings, no tax as due is admitted by the assessee that would clinch the matter in his favour in regard to the maintainability of the appeal.

21. It is obvious from the "above that in order the case is caught by the mischief contemplated by the proviso to Section 9(1) of the Act, it must be established that factually the assessee had admitted tax liability in respect of the disclosed turnover before the Sales Tax Officer. It is immaterial, whether such admission was contained in the return or otherwise during the course of assessment proceedings when the assessment was still pending. In a case where no liability to pay tax is factually admitted, at any stage of proceedings before the assessing officer, then there is no admitted tax though in reality under the law, a certain amount of tax was due. Non-deposit of tax which under the law was due does not attract the proviso to Sub-section (1) of Section 9 as it stood then.

22. In the instant case, as observed earlier, the findings of the Tribunal are that the assessee had not admitted any tax liability, whereas in view of certain notifications, the assessee was liable to pay tax. The explanation given by the assessee for not admitting the tax liability did not find favour with the sales tax authorities including the Tribunal. The rejection of the explanation, however, made no difference in the legal position nor the application of the proviso to Section 9(1) depended upon the motive or the intention of the assessee for which the tax liability was not admitted. Reliance placed by the Sales Tax Tribunal in the case of Kanpur Vanaspati Stores 1973 UPTC 685 (SC) was misplaced as the said decision does not support the proposition for which it was relied upon. On the contrary, it helps the assessee's case. The Supreme Court pointed out:

...to find out the true meaning of the expression "tax admitted" we must take into consideration the remaining words of the proviso, namely, "or such installments thereof as may become payable". Those words furnish a key to the interpretation. If one of the conditions for maintainability of the appeal is payment of the installments, which have become payable under Rule 41(2), it means that the admission, that has got to be taken into consideration is that made before the assessing authority and not before the appellate authority.

23. It is thus the admission of the assessee in respect of tax liability before the assessing officer, which matters. The decision in the case of Mangala Emporium 1976 UPTC 58 was rendered after taking notice of the case in Kanpur Vanaspati 1973 UPTC 685 (SC). As the decision of the Tribunal on the question about the maintainability of the assessee's appeal runs counter to the law laid down by this Court in the case of Mangala Emporium 1976 UPTC 58, the same cannot be sustained. Therefore for the reasons given earlier, the Tribunal was wrong in thinking that the assessee's appeal before the Assistant Commissioner (Judicial) was not maintainable on account of non-payment of tax on the turnover of ex-U.P. purchases of kerosene oil.

24. My decision on the first contention discussed above, is sufficient to dispose of this revision, but as the case was also debated on an alternative plea, it would be only fair to notice the same and to deal with it on merits.

25. As. an alternative case, it was contended, while the appeal was still pending before the Assistant Commissioner (Judicial), the full tax was deposited, therefore, the appeal could not have been thrown out unless the relevant authority came to the conclusion, that there was no sufficient ground for making the belated payment. The Tribunal rejected this contention observing:

We have already seen that law prescribes a stage for deposit of admitted tax, when the assessee has failed to fulfill the requirement of law which had the effect on the maintainability of its appeal and the appeal has been held to be incompetent for non-satisfaction of that requirement of law. That condition cannot now be undone or made ineffective by making remand of the case, holding that even if the deposit is made any time when the appeal is pending, it should be taken to be the due compliance of the proviso appended to Section 9(1) of the Act as it then stood.

26. As seen earlier, Section 9 of the Act deals with an appeal against an order of assessment. It provides that any dealer objecting to any order under the various sections mentioned in Sub-section (1) may within 30 days, appeal to such authority as may be prescribed. Under the first proviso to Sub-section (1) of Section 9 (extracted earlier) an appeal could not be entertained by the appellate authority unless satisfactory proof is adduced of the payment of tax admitted by the appellant to be due. Sub-section (6) of Section 9 of the Act provides that Section 5 of the Indian Limitation Act, 1908 shall apply to appeals under the Act. The result is, in a case where the amount of admitted tax is deposited after the prescribed period for filing an appeal, the appeal becomes entertainable only on the day on which satisfactory proof of payment of admitted tax is produced, but subject to the condonation of delay, by the appellate authority.

27. This view is supported by a decision of the Supreme Court in *Lalta Prasad Khinni Lal v. Assistant Commissioner (Judicial), Sales Tax, Kanfiur Range-I* [1972] 29 STC 201(all). In that case the Supreme Court was concerned with the provisions which fall consideration in the case on hand. There also the deposit of admitted tax was made beyond a period of 30 days, within which appeal could have been filed in time. After referring to the relevant provisions, it was observed :

We are wholly unable to follow the argument that the deposit of the amount of admitted tax must be made within 30 days even though the delay in filing the appeal can be condoned under Sub-section (6). A proper and correct reading of Section 9 cannot justify such an approach. If a petition of appeal has been filed without proof of payment of tax accompanying it that appeal can be said to have been preferred only when proof of payment of tax is furnished...operation and the question will arise whether there has been sufficient cause for not preferring the appeal within the statutory period. The correct approach is to treat the appeal as having been preferred on the date on which proof of payment of the tax was furnished and then to see whether under Sub-section (6) of Section 9 there was sufficient cause for excusing the delay in preferring the appeal.

28. The reasoning of the Tribunal, that law prescribes a stage for deposit of admitted tax and the maintainability of the appeal was impaired irretrievably for failure to deposit the admitted tax in time, cannot be accepted, in view of the decision in *Lalta Prasad Khinni Lal Vs. The Asstt. Commissioner (Judl.) Sales Tax, Kanpur and Another*, . It appears the Tribunal was influenced in its decision by another decision of the Supreme Court in *Lakshmiratan Engineering Works Ltd. v. Assistant Commissioner (Judicial) I, Sales Tax, Kanpur Range* [1968] 21 STC 154 (all), where the word "entertain" used in the proviso to Section 9(1) was interpreted to mean the first occasion on which the court takes up the matter for consideration. It was observed :

The words "no appeal...shall be entertained" in the proviso to Section 9(1) do not denote the filing of the memorandum of appeal but refer to the point of time when the appeal is being considered. Therefore though the memorandum of appeal filed within time is not accompanied by the challan showing payment of tax, if before the appeal is being considered satisfactory proof of the payment of tax is given, then the proviso to Section 9 is satisfied.

29. The above decision of the Supreme Court in no way affected the question, which was come up for consideration before the Tribunal. In that case it was ruled that proof of payment could be filed, even at the stage when the appeal was being considered. In the present case, the assessee had deposited the full amount of tax, while the appeal was still pending consideration before the Assistant Commissioner. On the deposit of full tax, being made, the appeal became entertain able, as having been filed beyond time. The assessee became entitled to invoke Section 9(6) of the Act seeking extension of the period of limitation as provided u/s 5 of the Limitation Act. Whether the assessee was entitled to condonation of delay, is a question which does not require consideration in these proceedings. The case of *Lakshmi Rattan Engineering Works Ltd. Vs. Asstt. Commr. Sales Tax, Kanpur and Another*, on which the Tribunal relied was noticed by the Supreme Court itself in *Lalta Prasad's case* [1972] 29 STC 201 (all) and it observed :

The case of *Lakshmi Rattan Engineering Works Ltd. Vs. Asstt. Commr. Sales Tax, Kanpur and Another*, did not involve the question of the extension of the period of limitation u/s 9(6). Indeed in our judgment the word "entertain" in Section 9(1) has hardly any material bearing on the point under consideration.

30. As the Tribunal dismissed the appeal on alternative contention on the ground that the assessee's request seeking remand of the case was futile, inasmuch as, the payment of tax during the pendency of the appeal will not meet the requirement of the proviso appended to Section 9(1) of the Act, this matter will have to go back for reconsideration and rededcision of the Sales Tax Tribunal.

31. In the result, finding of the Sales Tax Tribunal on both the questions discussed earlier, cannot be sustained. The Tribunal shall pass an appropriate consequential order, in giving effect to this order u/s 11(8) of the Act.

32. This revision succeeds and is allowed with costs.