
(1988) 02 AHC CK 0070

In the Allahabad High Court

Case No : Sales Tax Revision No's. 120 and 121 of 1987

Shri Khursheed Ahmad

APPELLANT

Vs

Commissioner of Sales Tax

RESPONDENT

Date of Decision : 04-02-1988

Acts Referred:

Uttar Pradesh Sales Tax Act, 1948 — Section 21, 7(3)

Citation : (1990) 76 STC 256

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

Bench : Single Bench

Advocate : Ravi Kiran Jain, for the Appellant;

Final Decision : Dismissed

Judgement

R.K. Gulati, J

1. These two connected revisions have been filed u/s 11(1) of the U.P. Sales Tax Act (hereinafter referred to as "the Act") by Khursheed Ahmad. The assessment years in dispute are 1973-74 and 1974-75. A common question has been raised for decision in both these cases. These cases can be dealt with conveniently by a common judgment.

2. The brief facts leading to the filing of these revisions are : that Shri Khursheed Ahmad was engaged in the sale of watches ; he did not file his returns of turnover for the years in dispute. The residential premises of Shri Khursheed Ahmad (for short "the assessee") were searched on 2nd August, 1975, by Customs Officials and a number of watches of foreign make along with some incriminating documents were seized. These papers related to the assessment years 1972-73, 1973-74 and 1974-75. The information of raid seems to have been received at the Sales Tax Office and copy of seizure, photo copy of the seized documents of the raid were obtained. The Sales Tax Officer being convinced that the assessee had effected sales of foreign watches, took proceedings for assessment against the assessee.

3. For the assessment year 1972-73, he issued notice u/s 21 of the Act, which was served on the assessee on 30th of March, 1977, In due course, assessment for that year was completed with which we are not concerned in these proceedings.

4. For the assessment years 1973-74 and 1974-75 assessments were completed u/s 7(3) of the Act, after due notice to the assessee. These assessments were challenged in appeal before the Assistant Commissioner (Judicial), Sales Tax. The taxable turnover for both these years was partially reduced by the appellate authority. The assessee feeling still aggrieved, approached the Sales Tax Tribunal in second appeal for the years in dispute. The Revenue also filed cross-appeals against the order of the appellate authority. The appeals by the assessee, and those filed by the Revenue were disposed of by a common order passed by the Sales Tax Tribunal along with the appeals for the assessment year 1972-73. Before the Sales Tax Tribunal, one of the contentions of the assessee was that the proceedings u/s 7(3) of the Act were invalid as initially proceedings u/s 21 of the Act were taken and the Sales Tax Officer subsequently, could not take action u/s 7(3) of the Act. This contention was repelled by the Sales Tax Tribunal. On merits, cases for both the years were remanded to the Sales Tax Officer for fresh consideration.

5. The assessee has now come up in revision against the common order passed by the Sales Tax Tribunal.

6. The only contention raised on behalf of the assessee, in these two revisions is that the assessments which were made u/s 7(3) of the Act, were invalid for initially proceedings were taken u/s 21 of the Act, and the assessing authority was not legally competent to have resort to Section 7(3) of the Act.

7. It appears, notices u/s 21 were first issued but they were not served on the assessee. The factual position, as stated by the Sales Tax Tribunal in its order is as under :

"In these cases, the assessing authority clearly mentioned in its order, that the notices u/s 21 were not served and as such, the proceedings were started u/s 7(3) of the U.P. Sales Tax Act. This factual position has been denied by the assessee-appellant by producing photostat copy of the notice u/s 21, Even these photostat copies do not reveal that the service of notice was effected on them."

8. As it is evident from the above, notices u/s 21 were not served and thereafter proceedings u/s 7(3) of the Act were taken for these two years in pursuance to which assessments were completed. The contention raised on behalf of the assessee is that once the notice u/s 21 is issued, the assessing authority exercised his option to proceed under that section and that option cannot be revised or reversed by issuing notice u/s 7(3) of the Act. For this contention reliance is placed on a decision of this Court in *Harinarain Chhotey Lal v. Commissioner of Sales Tax, U.P.* [1974] 33 STC 599 ; 1973 UPTC 513.

9. Before dealing with the aforesaid contention it will be useful to refer to the provisions of Section 7 and 21 of the Act to find out the field in which those provisions operate.

10. Now the machinery for assessment of turnover to tax is contained in Section 7 of the Act. Section 7(1) requires every dealer, liable to pay tax under the Act, shall submit such return or returns of his turnover, at such intervals, within such period, in such form and verified in such manner, as may be prescribed. Section 7(2) provides that if the assessing authority after such inquiry as he considers necessary is satisfied that any return submitted under Sub-section (1) are correct and complete, he shall assess the tax on the basis thereof. Sub-section (3) deals with the cases where no return is filed or incorrect and incomplete return is filed. This provision reads as under :

"(3) If no return is submitted by the dealer under Sub-section (1) within the period prescribed in that behalf or if the return submitted by him appears to the assessing authority to be incorrect or incomplete the assessing authority shall, after making such inquiry as he considers necessary, determine the turnover of the dealer to the best of his judgment and assess the tax on the basis thereof :

Provided that before taking action under this sub-section the dealer shall be given a reasonable opportunity of proving the correctness and completeness of any return submitted by him."

11. Section 21 of the Act provides for assessment of tax on the turnover not assessed during the year. Section 21 consists of seven sub-clauses. Sub-section (1) confers the power of assessment or reassessment on the assessing authority in the circumstances narrated in the said sub-section. Sub-section (2) to Sub-section (7) of Section 21 lay down rules of limitation for making assessment and reassessment in various situations. Subsection (1) of Section 21 is to the following effect :

"21. (1) If the assessing authority has reason to believe that the whole or any part of the turnover of a dealer, for any assessment year or part thereof, has escaped assessment to tax or has been under-assessed or has been assessed to tax at a lower rate than that at which it is assessable under this Act, or any deductions or exemptions have been wrongly allowed in respect thereof, the assessing authority may, after issuing notice to the dealer and making such inquiry as it may consider necessary assess or reassess the dealer or tax according to law :

Provided that the tax shall be discharged at the rate at which it would have been charged had the turnover not escaped assessment, or full assessment, as the case may be."

12. At one time, this Court held the view that Section 21 of the Act was applicable only where the assessment had once been made by the Sales Tax Officer but he has failed to assess either in whole or in part thereof. It had no

application to a case where the assessment was being made for the first time and such an assessment could be made u/s 7(3) of the Act. This view has been superseded by a decision of Full Bench of this Court in Commissioner, Sales Tax, U.P. v. Sujan Chand Shyam Lal [1971] 27 STC 161 , which has been affirmed by a decision of five Judges in the case of Commissioner of Sales Tax Vs. Jag Mohan Nath, . In the former case the view expressed is that on failure of an assessee to furnish his return and the turnover escapes the assessment, it is open to the Sales Tax Officer to proceed either u/s 7(3) or u/s 21 of the Act. When he proceeds u/s 7(3) and makes an assessment, he acts within his jurisdiction and assessment made u/s 7(3) cannot be considered as made u/s 21. In the latter Full Bench decision, it was pointed out that where no returns are filed by a dealer it authorises the assessing authority to make assessment on best judgment both u/s 7(3) and u/s 21 of the Act. Which of these two provisions will apply to a particular case will, however, depend on the circumstances of each case. If the circumstances are such as to attract the provisions of Section 21(1), the assessment will be made under that provision otherwise u/s 7(3) of the Act.

13. The powers contemplated by Section 7(3) and Section 21 are independent of each other and can be resorted to independently according to the material available to the assessing authority. In order the assessing authority may proceed u/s 21, it is necessary that the assessing authority must have reason to believe that the turnover of the assessee had escaped assessment either in whole or in part on account of any of the factors stated in Sub-section (1) of Section 21. The formation of belief regarding escaped assessment, constitutes the sine qua non for taking action under this section. Another condition contemplated by Subsection (1) of Section 21 is that before making an assessment under that section the assessee must be served with a notice as required by the said provision.

Section 7(3) of the Act places no such restriction on the assessing authority for making assessment of an assessee who has not filed a return. It is not necessary that the assessing authority should have reason to believe in order to make assessment u/s 7(3) nor there is any statutory requirement u/s 7(3) that a notice should be served on a dealer who has not filed the return. It may be, that the assessing authority may in its discretion decide to serve the notice. See India Leather House v. Sales Tax Officer, Agra [1972] 30 STC 357 (All.).

From the above discussion, it is evident that where an assessee does not file any return, the Sales Tax Officer may proceed against that assessee either u/s 7(3) of the Act or u/s 21, depending upon the circumstances. The learned counsel for the assessee, as stated earlier, has argued that the proceedings u/s 21 having been initially taken it was not open to the Sales Tax Officer to proceed u/s 7(3) of the Act. He drew my attention to a passage in the decision of Harinarain Chhotey Lal Vs. Commissioner of Sales Tax, , which read as under :

".....where an assessee does not file a return nor does he pay any tax during the assessment year, the turnover of that year escapes assessment and Section 21

and 7(3) both apply simultaneously. The choice is to be made by the Sales Tax Officer depending on the circumstances of each case. Now in the instant case, the assessee had not filed any return nor had paid any tax under the assessment year in dispute. The Sales Tax Officer proceeded u/s 21, thus, exercising the choice vested in him. Once the choice is made and proceedings are initiated u/s 21, the assessment order when passed must be justified with reference to that section. It cannot be justified with reference to Section 7(3) of the Act."

14. On first blush it does appear the above decision supports the assessee's case. However, on a closer scrutiny, I find the said decision is clearly distinguishable on facts and is of no assistance to the assessee on the facts of the present case. What had happened in that case, was that a notice u/s 21 for the assessment year 1959-60 was served on the assessee by affixation. The assessee did not appear on the appointed date, and the assessment was made on best judgment. In appeal, the assessee questioned the service of notice u/s 21 of the Act. The appellate authority held the service was legal and proper, but it remanded the case, to the Sales Tax Officer as in its opinion, proper opportunity was not allowed to the assessee to produce his books, etc., and further there was no basis for estimate of the turnover. The assessee went up in revision contending assessment was liable to be annulled as there was not a valid service of notice u/s 21. The revising authority, was of the opinion, that as it was a case of first assessment, Section 21 of the Act was not applicable and the assessment could be justified u/s 7(3) of the Act. He, accordingly, dismissed the revision without going into the contention about the service of notice. The assessee contested the matter further by way of reference before this Court. Out of three questions referred for the opinion of this Court, question Nos. 1 and 2 were as under :

(1) Whether on the facts and circumstances of the case, the question of service of notice u/s 21(1) of the Act was material ?

(2) Whether under the facts and circumstances the assessment order can be deemed to be an assessment u/s 7(3) ?

The question No. 1 was answered in the affirmative. The question No. 2 was answered by saying the assessment order could not be deemed to have been passed u/s 7(3) as it had been passed in pursuance of the notice u/s 21. While answering question No. 1, the case was remanded for deciding the question of service on merits. It was observed, that a notice u/s 21 is a jurisdictional notice and until it is properly served upon the assessee, no valid assessment could be made. In the above case, the proceedings taken by notice u/s 21 finally culminated in an assessment order which was passed in pursuance to the said notice. The appellate authority had held service of notice u/s 21 was valid. In further proceedings, the revising authority upheld the assessment u/s 7(3) on the view which found favour with it, namely, there being no earlier assessment for the year in question, the assessment could only be made u/s 7(3). The question about the validity of service of notice u/s 21, thus was not gone into.

The observations of this Court about the option having been exercised by the Sales Tax Officer have to be read in the background of facts of that case and in the context in which they were made. The assessment order itself was made u/s 21 by the Sales Tax Officer, which was not allowed to be sustained, under another provision by changing the option exercised by the assessing authority.

15. The position, in the instant cases, is different. The findings of the Tribunal are that assessments itself were made u/s 7(3) of the Act. The notices u/s 21 were not served on the assessee. As seen earlier, in order to take valid proceedings u/s 21(1) of the Act, mere issuance of notice under the said provision is not enough. The jurisdictional requirement is that notice must also be served and that too validly, in accordance with law. For taking action under Sub-section (1) of Section 21, amongst other requirements, those provisions provide that assessment could only be made "after issuing notice to the dealer". The words "after issuing notice to the dealer" occurring in Section 21(1) were considered by a Full Bench of this Court in *Laxmi Narain Anand Prakash v. Commissioner of Sales Tax* [1980] 46 STC 71 ; 1980 UPTC 125 where it was held :

"4. In view of these authorities it cannot be disputed that no proceedings could be initiated without issue and service of notice. Service of a notice for purpose of initiating proceedings u/s 21 is not a mere procedural requirement but is a condition precedent. If no notice is issued or the notice issued is shown to be invalid or no notice has been served on the dealer the proceedings and the consequential order u/s 21 will be illegal and void irrespective of the fact that the dealer gets knowledge of the proceedings u/s 21. The words, "after issuing" also do not make any difference as it has been held to mean the entire process of sending the notice and serving it. In *Banarasi Devi Vs. Income Tax Officer, Calcutta*, , it was observed by the Supreme Court :

"To summarize : The clear intention of the legislature is to save the validity of the notice as well as assessment from an attack on the ground that the notice was given beyond the prescribed period. That intention would be effectuated if the wider meaning is given to the expression "issued". The dictionary meaning of the expression "issued" takes in the entire process of sending the notice as well as the service thereof. The said word used in Section 34(1) of the Act itself was interpreted by courts to mean "served". The limited meaning, namely, "sent" will exclude from the operation of the provision a class of cases and introduce anomalies. In the circumstances, by interpretation, we accept the wider meaning the word "issued" bears."

It cannot, therefore, be said that mere issue of notice was sufficient. The jurisdiction to proceed u/s 21 could be exercised only if condition precedent was satisfied and notice for assessment or reassessment u/s 21 was not only issued but validly served on the assessee."

16. The distinction between the notice u/s 7(3) and Section 21 and the consequence of non-service of such notices was considered and pointed out by

another Full Bench of this Court in Commissioner of Sales Tax, U.P. v. Mukti Nath Singh Ram Lakhan Singh [1979] 44 STC 381 ; 1979 UPTC 1077. In this case, it was pointed out that the proceedings u/s 21 without service of notice are invalid and unless such a notice is served there is no initiation of proceedings for assessment under the Act. Whereas the same results do not follow when the action is taken u/s 7(3) of the Act. It was observed :

".....it has been held that where no return is filed the assessing authority is empowered to proceed either u/s 7(3) or Section 21. But what procedure should be followed shall depend on initiation of proceedings. If proceedings are initiated u/s 7(3), then the procedure provided therein shall be followed, but, if it was initiated u/s 21 then the procedure of escaped assessment shall be followed. From a comparison of the two sub-sections, namely, Section 7(3) and Section 21(1) the difference not only in procedure but in consequences is brought out. In one, notice may be issued in the process of inquiry, while in the other, inquiry to reassess cannot be initiated without issuing notice. In Section 7(3) notice is procedural. It is issued in exercise of jurisdiction to determine turnover to the best of judgment. In Section 21, it is condition precedent. The use of the words "after issuing such notice to the dealer" before the words "making such inquiry" makes it amply clear that, in the one, it is procedural, but jurisdictional in the other. In a case of escaped assessment, no inquiry can be made unless notice has been issued, whereas in respect of best judgment assessment u/s 7(3), jurisdiction may be assumed, but the turnover shall not be determined without making such inquiry as the assessing authority considers necessary."

17. From the decisions cited above, it follows that for a valid initiation of proceedings u/s 21, a valid service of notice u/s 21 is necessary. Unless there is a service of notice u/s 21, it cannot be held that there was any initiation of proceedings under that section. On mere issuance of notice but without service thereof, it cannot be said that the Sales Tax Officer had foreclosed the option he had under the Act to proceed u/s 7(3). The findings recorded are that there was no service of notice u/s 21 on the assessee. Thus being the factual position obtaining for the assessment years in dispute, in my opinion, the Sales Tax Officer was not debarred from proceedings u/s 7(3) of the Act. Admittedly, the assessee had not filed any returns for the years in dispute and the Sales Tax Officer was competent to take action for assessment u/s 7(3) of the Act.

In view of the aforesaid discussion, these revisions are without merits and are, accordingly, dismissed with costs.