

(1964) 01 P&H CK 0008
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ No. 2225 of 1963

Shri Om Parkash Seth

APPELLANT

Vs

The Assessing Authority and Another

RESPONDENT

Date of Decision : 09-01-1964

Acts Referred:

Constitution of India, 1950 — Article 226
Punjab General Sales Tax Act, 1948 — Section 10, 11, 11A, 20, 21

Citation : (1964) 15 STC 530

Hon'ble Judges : Mahajan, J

Bench : Single Bench

Advocate : Bhagirath Dass, for the Appellant; D.S. Nehra, for A.G., for the Respondent

Final Decision : Allowed

Judgement

Mahajan, J.—This petition under Article 226 of the Constitution is directed against the order of the Assessing Authority dated the 4th November, 1963, passed in pursuance of an order of the Assistant Additional Excise and Taxation Commissioner, Patiala, remanding the case to him with regard to the year of assessment 1958-59.

2. The petitioner is one Om Parkash Seth, sole proprietor of Kohinoor Woollen and Silk Mills, Kot Atma Singh, Ram Bagh Gate, Amritsar. He is engaged in the manufacture of textiles. The petitioner is a registered dealer under the Punjab General Sales Tax Act—hereinafter referred to as the Act. The petitioner under the Act is required to furnish quarterly returns. The petitioner filed the return for the first quarter, as stated in the petition, for that year. At the stage of arguments, Mr. Bhagirath Dass, learned counsel for the petitioner, has stated that the returns for the first two quarters of that year had been filed. No returns were filed for the subsequent quarters. In this situation, the Assessing Authority proceeded to assess the petitioner to tax on the basis of the best judgment assessment. The tax assessed was paid. The matter was, however, suo motu, taken up by the

Commissioner in exercise of his powers of revision u/s 21 of the Act. The Assistant Additional Excise and Taxation Commissioner, on behalf of the Commissioner, passed the following order :-

I have heard both the parties and have also perused the impugned assessment order dated 16th February, 1960. The order passed by the Assessing Authority in this case is improper and is set aside. The Assessing Authority should have scrutinized necessary declaration forms before giving deductions under Rule 26 on account of sale to registered dealers. Since the case was being decided on best judgment basis, deductions on account of sale to registered dealers should not have been allowed. Moreover, suo motu powers are not confined by any time limit. The case is, therefore, sent down to the Assessing Authority, Amritsar, for a fresh assessment according to law.

3. It may also be mentioned, at this stage, that at the time when the best judgment assessment was made on the 16th February, 1960, another best judgment assessment for the same year was made by the same Assessing Authority on the 16th December, 1960. The notice issued by the Commissioner u/s 21 of the Act was with regard to both the assessment orders, but while passing the revisional order he merely quashed the order of February, 1960. No reference was made to the order of the 16th December, 1960. The revisional order was passed on the 15th March, 1963, and in pursuance of that order, a notice was issued to the petitioner by the Assessing Authority on the 6th May, 1963, for fresh assessment. Admittedly, this notice is beyond the four years of the end of the accounting year. On this matter, there is no dispute between the parties. In pursuance of this notice dated the 6th May, 1963, the Assessing Authority assessed the petitioner on the 4th November, 1963, and demanded purchase tax to the extent of Rs. 3,280- It is against this order that the present petition has been preferred.

4. The contentions of the learned counsel for the petitioner are :-

1. that the order dated the 16th December, 1960, was not set aside and, therefore, so far as the assessment year 1958-59 was concerned, there being an assessment order which was still alive, no fresh assessment could have been made and, therefore, the assessment order dated the 4th November, 1963, is of no consequence ;

2. that no fresh assessment could have been made as the order dated the 4th November, 1963, is an order reopening the assessment u/s 11A of the Act, as the period of four years within which this could be done had expired and, therefore, the Assessing Authority had no jurisdiction to pass the impugned order; and

3. that the order of remand restricted the enquiry to one matter only, i.e., that the deductions under Rule 26 could only be granted after the Assessing Authority had scrutinized the necessary declaration forms with regard to the sales made to registered dealers; and the Assessing Authority could not take into consideration

the returns that had escaped assessment.

5. I will now proceed to deal with the aforesaid contentions in the order in which they have been set out.

6. So far as the first contention is concerned, the Department has clearly stated in the written statement that no recovery was made under the assessment order dated the 16th December, 1960, and that they did not propose to take advantage of that assessment order and that it might be deemed to have been quashed as a necessary consequence of the order in revision passed by the Commissioner. In this view of the matter, it is not necessary to go further into this question. It also appears that when the notice was issued by the Commissioner u/s 21, the same was with regard to both the orders of February and December, 1960, and it appears that by inadvertence no reference was made to the order of December, 1960, in the revisional order that was passed. That being so, there is no merit in this contention.

7. It is the second contention which has been debated at a considerable length and which is not free from difficulty. The stand taken up by the Department is that by reason of the revisional order, no fresh proceedings for assessment were initiated. The best judgment assessment had initiated the assessment proceedings and those proceedings had been set aside in revision with a direction to make a fresh assessment according to law. Thus it is urged that the proceedings are the continuation of the best judgment assessment proceedings, and are not new proceedings. On the other hand, it is contended by the learned counsel for the petitioner that the proceedings initiated after the remand by the Commissioner are fresh proceedings and are in the nature of proceedings for the purpose of assessing the turnover which had escaped assessment. In a nutshell these are the rival contentions which fall for determination.

8. It has been held by the Supreme Court in *Ghanshyamdas v. Regional Assistant Commissioner of Sales Tax, Nagpur* [1963] 14 S.T.C. Nag 976 that there can be no question of a turnover escaping assessment if the assessment proceedings once initiated have not finally concluded. The assessment proceedings are initiated either by the assessee furnishing the return or by the Sales Tax Department issuing notice to the assessee under the Act calling upon him to furnish the return, or by starting best judgment assessment proceedings. In case no return is filed and no proceedings are initiated by the Department, there would be no question of any proceedings being pending or in a case where the assessment has been completed finally there would be no question of the proceedings pending. This is obvious from the following observations of their Lordships of the Supreme Court in *Ghanshyamdas'* case [1963] 14 S.T.C. 976 at page 986 :-

From the foregoing discussion it is seen that in the case of a registered dealer there are four variations in the matter of assessment of his turnover : (1) He submits a return by the date prescribed and pays the tax due in terms of the said

return ; the Commissioner accepts the correctness of the return and appropriates the amount paid towards the tax due for the period covered by the return. (2) The Commissioner is not satisfied with the correctness of the return ; he issues a notice to him u/s 11(2), and makes an enquiry as provided under the Act, but does not finalize the assessment. (3) The registered dealer does not submit a return ; the Commissioner issues a notice u/s 10(3) and Section 11(4) of the Act. And (4) the registered dealer does not submit any return for any period and the Commissioner issues notice to him beyond three years. If the return was accepted and the amount paid was appropriated towards the tax due for the relevant period, it means that there has been a final assessment in regard to the said period. If any turnover escaped assessment, clearly it can be reopened only within the period prescribed in Section 11A. In the case where a return has been made, but the Commissioner has not accepted it, and has issued a notice for enquiry, the assessment proceedings will certainly be pending till the final assessment is made. Even in a case where no return has been made, but the Commissioner initiated proceedings by issuing a relevant notice either u/s 10(3) or u/s 11(4), the proceedings will be pending thereafter before the Commissioner till the final assessment is made. But where no return has been made and the Commissioner has not issued any notice under the Act, how can it be held that some proceedings are pending before the Commissioner when none existed as a matter of fact ? We are concerned in this case with the last contingency. It is manifest that in the case of a registered dealer the proceedings before the Commissioner starts factually when a return is made or when a notice is issued to him either u/s 10(3) or u/s 11(2) of the Act. The acceptance of the contention that the statutory obligation to file a return initiates the proceedings is to invoke a fiction not sanctioned by the Act. The obligation can be enforced by taking a suitable action under the Act. Taking of such an action may have the effect of initiating proceedings against the defaulter. The default may be the occasion for initiating the proceedings, but the default itself *proprio vigore* cannot initiate proceedings. Proceedings in respect of the assessment of the turnover for the relevant period cannot, therefore, be said to be pending before the Commissioner. Learned counsel for the respondent contends that the certificate of registration is itself a notice to the registered dealer to furnish his returns within the prescribed time. Reliance is placed upon Form II wherein under the appropriate column the particulars in regard to a dealer's return and the date within which he should submit it are given. The main purpose of the registration certificate is to localize dealers with taxable turnovers and to facilitate the collection of taxes. The registration certificate enables the dealer to carry on the business. Neither Section 8 which enjoins such registration on every dealer with taxable turnover nor Rule 8 which prescribes the particulars to be incorporated in a certificate suggests that the certificate itself is a statutory notice to a dealer. The objects of the certificate and the statutory notices under the Act are different and the former cannot be equated with the latter.

Rule 33 provides that the assessing authority shall maintain a register in Form

XIII in which he shall enter the details of each case initiated under Rules 31 and 32. Rule 31 says that on receipt of a return or returns required under Rule 19, 20 or 22 from any dealer, the assessing authority shall serve on him a notice in Form XI Rule 32 prescribes, inter alia, the manner of assessment under Sub-section (3) of Section 10, Clause (a) of Sub-section (4) of Section 11 and Sub-section (5) of Section 11. Form XIII gives the serial number, name of the dealer, nature of the business, gross turnover, taxable turnover as determined for the relevant years and the date of issue of notice in Form XI or Form XII. A perusal of the said rules and the forms discloses that the proceedings in the case of a registered dealer start only on the receipt of a return or returns required to be furnished under the rules. Under Rule 33 a register is maintained giving the details of each case "instituted" under Rules 31 and 32. Rule 34 enacts that a case instituted would be pending till an order of assessment was made. No doubt it would be pending till a final order of assessment was made by the highest tribunal or court under the Act.

9. In the present case, return was filed by the petitioner for the first two quarters. There was no return filed for the subsequent quarters. The Assessing Authority proceeded to assess the petitioner on the basis of the best judgment assessment and the assessment was completed and tax was paid. The petitioner was satisfied by this assessment because he preferred no appeal u/s 20 of the Act. The matter was, however, taken up suo motu by the Commissioner, Excise and Taxation, u/s 21 of the Act. Section 21 is in these terms:-

21. (1) The Commissioner may, of his own motion or on application made to him, call for the record of any proceedings which are pending before, or have been disposed of by, any assessing or appellate authority appointed under this Act, for the purpose of satisfying himself as to the legality or propriety of such proceedings or of any order made therein and may pass such orders in relation thereto as he may think fit:

* * * * *

10. The question that arises is what is the effect of the order of the Commissioner u/s 21 of the Act vis-a-vis the finality of the assessment. I am not determining the question whether there is any period of limitation prescribed for the Commissioner within which he can exercise his powers u/s 21. It appears to me that his orders u/s 21 do not disturb the finality of the assessment order. The only stage up to which the assessment order does not become final is the conclusion of the appeal. Once the appellate order is made, the assessment becomes final and the finality is not disturbed by the order of the Commissioner in revision. The power of supervision which a revisional court has is by its very nature limited to see that the court or authority whose order is sought to be revised has acted within the bounds of law or on the basis of the material before it. This power does not affect the finality of the decisions of the courts or authorities subjected to the same. In this situation the learned counsel for the petitioner is right in his submission that the fresh assessment is one that is being

made u/s 11A of the Act. The Assessing Authority's order of assessment clearly shows that it proceeded to assess the turnover which had escaped assessment and thus in substance the Assessing Authority was acting u/s 11A.

11. Mr. M. Nehra's contention, however, was that the provisions of Section 11A did not control the power of the Commissioner u/s 21 and, therefore, the Commissioner could by his order direct an assessment to be opened beyond the period of four years prescribed by Section 11A which the Assessing Authority itself could not admittedly do. In support of this contention, Mr. Nehra relied upon the decision of the Patna High Court in *Gajo Ram Basant Ram v. State of Bihar* [1956] 7 S.T.C. 248. The observations on which the learned counsel has relied are to be found at page 252 and are in these terms :-

In my opinion, this argument fails to take note of several important distinctions which exist between the provisions of the Bihar Agricultural Income Tax Act, 1938, and the Indian Income Tax Act on the one hand and the provisions in the Bihar Sales Tax Act, 1944, on the other. First of all Section 24 of the Bihar Agricultural Income Tax Act, 1938, says in clear terms that the power of revision given by Sub-section (2) of that Section is "subject to the provisions of this Act". Therefore, in express terms Section 24 is made subject to the provisions of Sections 26 and 27. The position is the same with regard to the Indian Income Tax Act. Sub-section (2) of Section 33 of the Indian Income Tax Act (before the amendments of 1939 and thereafter) stated in express terms that the power of review given to the Commissioner was "subject to the provisions of this Act". Therefore, Section 33 was subject to the provisions of Sections 34 and 35. The Bihar Sales Tax Act, 1944, however, contains no provisions similar to the provisions of Sections 26 and 27 of the Bihar Agricultural Income Tax Act, 1938; nor does it contain provisions similar to the provisions of Sections 34 and 35 of the Indian Income Tax Act. Moreover, Sub-section (4) of Section 20 of the Bihar Sales Tax Act states that the power of review is "subject to such rules as may be prescribed". The power is not subject to the other provisions of the Act" so as to attract the operation of the proviso to Sub-section (6) of Section 10. Then there is another very important distinction. The general rule is that the operation of a proviso should be confined to that clause or portion of the statute which directly precedes it. The position has been thus explained in *Clay Centre State Bank v. McKelvie* 19 Fed. (2) 308 [I am quoting from Crawford on the Construction of Statutes (1940 edition) page 606]:-

Its grammatical and logical scope is confined to the subject-matter of the principal clause...While it is sometimes used to introduce independent legislation, the presumption is that it is used in accordance with its primary purpose and refers only to the provision to which it is attached.

It is true that the aforesaid general rule is not always applicable, and all the provisions of the statute must be construed in such a way as to avoid any repugnancy or absurdity. I agree that the placing of the proviso to Sub-section (6) of Section 10 of the Bihar Sales Tax Act, 1944, is somewhat unhappy. I take

it that the proviso relates to an original order of assessment made u/s 10. In other words, the proviso in its true meaning and effect lays down that no original order assessing the amount of tax due from a dealer in respect of any period shall be passed later than 24 months from the expiry of such period. I do not agree, however, that the proviso should be read as controlling all the other provisions of the statute. Take for example, Section 20. Under Sub-section (2) of Section 20, the appellate authority in disposing of an appeal may confirm, reduce, enhance or annul the assessment or penalty, if any, or both, or the appellate authority may set aside the assessment or penalty, if any, or both and direct the assessing authority to pass a fresh order after such further enquiry as may be directed. Now, it may so happen that by the time the appellate authority passes its order the period mentioned in the proviso to Sub-section (6) of Section 10 is already over. In the second case to which I shall presently refer, that is what actually happened. If the proviso to Sub-section (6) of Section 10 controls the provisions of Section 20, then the appellate authority would not be competent to pass any order in respect of an assessment except perhaps confirming, reducing, enhancing or annulling the assessment when the period of two years had passed from the expiry of the period of assessment. In other words, there will be a conflict or repugnancy between the two provisions. The proviso to Sub-section (6) of Section 10 will render nugatory the powers given to the appellate authority under Clause (b) of Sub-section (2) of Section 20. I do not think that could have been the intention of the Legislature. Such a construction will result in an absurdity ; and after the period mentioned in the proviso to Sub-section (6) of Section 10 is over, it would not be possible for the appellate authority or revisional authority to pass the orders which u/s 20 it would be competent to pass. I think that a distinction must be drawn between an original order of assessment u/s 10, which is subject to the proviso to Sub-section (6) of that section, and a fresh order of assessment directed by an appellate or revisional authority as mentioned in Sub-sections (2) and (3) of Section 20 of the Bihar Sales Tax Act, 1944. I am aware that the only Section dealing with assessment of tax is Section 10 of the Bihar Sales Tax Act, 1944, and a fresh order of assessment will also proceed on the principles laid down in Section 10. That does not, however, mean that a distinction between an original order of assessment u/s 10 and a fresh order of assessment directed by the appellate or revisional authority cannot be made. In my opinion, such a distinction can and ought to be made in order to avoid absurdity and repugnancy between the different provisions of the Bihar Sales Tax Act, 1944.

12. This decision has no relevancy to the facts of the present case. In that case, the order was passed in exercise of the powers of review by the Assessing Authority which in that case was the Commissioner. Moreover, the principal reason that prevailed with the learned Judges was that the provisions of Section 21(2) in that Act were not subject to the other provisions of that Act. In my view no order can be passed under an Act which comes in conflict with any of the provisions of the Act and that was so held by their Lordships of the Supreme

Court in *The Commissioner of Income Tax, Bombay City I, Bombay Vs. Narsee Nagsee and Co., Bombay*, The terms of the Bihar statute are totally different from the terms of the statute with which we are concerned, and, therefore, the Patna authority can be of no assistance in determining the question that falls for determination under the Punjab statute.

13. There is another way of looking at the matter. It has been repeatedly held that appeal is a rehearing of the original proceedings, but this rule has not been extended so far as the revisions are concerned. Unless it could be held that the proceedings before the revisional authority were by way of rehearing and thus were the same proceedings, the assessment order would be a final order and the pendency of the revisional proceedings would not be of any consequence. This conclusion is also supported by the fact that there is no limitation provided for the revision u/s 21 of the Act. If the finality of the assessment is dependent on the result of the revisional proceedings no assessment will ever become final, for the Commissioner has the power to reopen the assessment any time even after a hundred years. It is not conceivable that the Legislature intended that the finality of the order of assessment was to remain dependent on the whim of the Commissioner, for he may after any lapse of time unsettle a settled assessment. Therefore I am not able to accept the suggestion that because the Commissioner can interfere with the assessment u/s 21, the assessment does not become final. In this situation, no assessment under the Act can ever become final and that situation cannot be conceived. Therefore, it must be held that at the stage when the Commissioner interfered with the assessment order in revision he interfered with a final order of assessment and the order was none the less final even if the Commissioner had the right to examine its legality or propriety. Once it is held that the assessment order had become final and its finality did not depend on the revisional powers of the Commissioner, the rule laid down in *Ghanshyamdas*" case [1963] 14 S.T.C. 976 fully applies to the facts of the present case. The fresh proceedings which the Assessing Authority started after the lapse of four years would necessarily be proceedings u/s 11A and thus would be without jurisdiction as they were initiated after the prescribed period for the purpose had elapsed. In this view of the matter, it is not necessary to examine the third contention though in a way I have already dealt with the same while dealing with the second contention.

14. For the reasons given above, this petition is allowed, and the order of the Assessing Authority dated 4th November, 1963, is quashed.

15. In the circumstances of the case there will be no order as to costs.