M/S. Kundan Lal Srikishan, Mathura (U.P.)

Vs

Commissioner of Sales Tax, U.P. and Anothers

Civil Appeal No. 625 of 1986

(M. M. Dutt, E. S. Vankataramiah JJ)

03.02.1987

JUDGMENT

VENKATARAMIAH, J. -

1. The short question which arises consideration in this appeal relates to the period of limitation within which in application for rectification of an order of reassessment passed under Section 21 of the Uttar Pradesh Sales Tax Act, 1948 (Uttar Pradesh Act 15 of 1948) (hereinafter referred to as 'the Act') can be preferred under Section 22 of the Act.

2. The brief facts which are necessary for deciding this case are these. The appellant-firm is a dealer carrying on business in Mathura in the State of Uttar Pradesh. An order of assessment was passed in respect of the turnover of the appellant for the year 1975-76 by the Sales Tax Officer, Sector 2, Mathura under the act on February 7, 1979. Thereafter on January 8, 1980 the Sales Tax officer issued a notice to the appellants under Section 21 of the act proposing to make a reassessment in respect of the said assessment year, i.e., 1975-76 on the ground that the mandi cease and aerate (commission) which should have been included in the turnover had escaped assessment and directed the appellant to appear before them along with its account books on January 18, 1980. After looking into the books of accounts and hearing the advocate who appeared on behalf of the appellant, the Sales Tax Officer passed the order under Section 21 of the Act on the same date holding that the appellant was not liable to pay any more tax under the Act. The order passed by the Sales Tax officer reads thus :

> # Office of the Sales Tax Officer Sector 2, MathuraS/Shri Kundan Lal SrikishanLala Ganj, Mathura.Year : 75-76 Section 21 ORDER UNDER SECTION 21##

The original tax assessment order in respect of you was passed on February 7, 1979. The audit, however, had objected that the business man's arhat (commission) and Mandi cess amount was left out from taxation. On this basis the businessman was called by issuing him notice under the said section. On the appointed day, his advocate appeared and submitted the accounts books. On examination it was found that the businessman had already included the arhat and Mandi cess amount in the taxable income and he had already been assessed. Therefore, no tax is to be levied now and the businessman is declared as free from paying any more tax under Section 21.

> # Sd/- B. Lal Sales Tax Officer Sector 2, Mathura.Dated : January 18, 1980.##

3. In the year 1982, the appellant realised that it was not liable to pay sales tax on purchases made on behalf of Ex-U.P. principals as such purchases had occasioned inter-State movement of the

commodities in question and were as such exempt from the purview of the Act. The appellant, therefore, filed four applications under Section 22 of the Act for rectification of the mistakes in the assessment orders for assessment years 1975-76, 1976-77, 1977-78 and 1978-79 on the ground that the turnover in respect of purchases made on behalf of Ex-U.P. principals had been wrongly assessed to sales tax in the aforementioned four years. The applications for rectification made in respect of assessment years 1976-77, 1977-78 and 1978-79 were all within three years of the assessment orders but the application made in respect of the assessment order in respect of the assessment year 1975-76 was beyond three years from the date of the original order of assessment which had been made on February 7, 1979 but within three years from the date of the order passed by the Sales Tax Officer under Section 21 of the Act. All the four applications made by the appellant were rejected by the Sales Tax officer on merits on January 3, 1983. Thereupon the appellant preferred appeals against the orders rejecting the applications before the Appellate Authority. The said Appellate authority by its order dated January 21, 1983 allowed the appeals relating to the assessment orders for the assessment years 1976-77, 1977-78, on merits but dismissed the appellant's appeal in respect of the assessment order for the assessment year 1975-76 on the ground that the appellant's application for rectification filed under Section 22 of the act had been filed beyond three years from the date of the original order of assessment and was thus barred by limitation. Aggrieved by the order of the Appellate Authority dismissing the appellant's appeal arising out of the application for rectification of the assessment order passed in respect of the assessment year 1975-76, the appellant preferred a second appeal before the Sales Tax Tribunal, Uttar Pradesh. The department also preferred second appeals against the orders of rectification passed by the Appellate Authority in respect of the orders of assessment for assessment years 1976-77, 1977-78 and 1978-79. The Tribunal disposed of all the appeals of the appeals by a common order date February 26, 1985 by which it allowed the appeal of the appellant and dismissed the appeals filed by the department. The Tribunal held that the appellant was entitled to succeed on merits in each of the appeals and further held that the rectification application made in respect of the assessment order for the assessment year 1975-76 was within limitation as the original order dated February 7, 1979 passed in respect of the said assessment year had ceased to exist on the reopening of the assessment by the notice issued under Section 21 of the act and the final order under that section had been passed on January 18, 1980 within three years from the date of the application for rectification which had been filed on November 4, 1982. Aggrieved by the orders of the Tribunal the department filed four revision applications before the High Court to Allahabad. The High Court by its order dated November 15, 1985 dismissed three of the department's revision applications pertaining of the appellant's rectification applications in respect of the assessment orders for the assessment years 1976-77, 1977-78, and 1978-79 on merits holding that the orders of the Tribunal were correct and no ground had been made out to interfere with them. It, however, allowed the revision application filed by the department in respect of the application for rectification of the assessment order for the assessment year 1975-76 on the ground that the application for rectification had been filed beyond three years from the dated of the original order dated February 7, 1979 and that the order dated January 18, 1980 passed under Section 21 of the Act had no effect on the question of limitation. Aggrieved by the said order of the High Court the appellant has filed this appeal by special leave.

4. The material part Section 21 of the Act, which is relevant for the purpose of this case, reads thus :

> 21. Assessment of tax on the turnover not assessed during the year - (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 underassessed or has been assessed to tax at a rate lower 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....

5. Section 22 of the Act provides that the assessing, appellate or revising authority or the Tribunal may, on its own motion or on the application of the dealer or any other interested person rectify any mistake in its order, apparent on the record within three years from the date of the order sought to be rectified. The question for consideration is whether for purposes of limitation the date of the order of assessment for the year 1975-76 in the instant case should be the date of the original assessment order i.e., February 7, 1979 or whether it should be the date of the order passed under Section 21 of the Act, i.e., January 18, 1980.

6. On behalf of the appellant it is contended before us that on the issue of the notice under Section 21 of the Act the original assessment ceased to be in force and that the only order of assessment in respect of assessment year 1975-76 which should be taken into consideration for all purposes including the application for rectification of mistake is the order dated January 18, 1980. In support of the above plea the appellant has relied upon the decision of this Court in Dy. CCT v. H. R. Sir Ramulu ((1977) 2 SCR 593 : (1977) 1 SCC 703 : 1977 SCC (Tax) 246 : (1977) 39 STC 177), which was a case arising under the Mysore (Karnataka) Sales Tax Act, 1957. In that case the original assessment order had been passed on March 21, 1963. Thereafter there was an order of reassessment made under Section 12-A of the Mysore (Karnataka) Sales Tax Act, 1957 on June 8, 1966 because certain amounts had escaped assessment under the original assessment order. Thereafter on June 28, 1967 the Deputy Commissioner of Commercial Taxes passed an order revising the order dated June 8, 1966 as a consequence of the decision of this Court in Shinde Brothers v. Deputy Commissioner (AIR 1967 SC 1512 : (1967) 1 SCR 548). Thereafter the assessee filed an application for rectification of the order passed by the Deputy commissioner of Commercial Taxes requesting him to set aside the order passed on revision under Section 21 of that Act on the ground that the revision of assessment was barred by limitation under Section 21(3) of that Act and as such there was a mistake apparent on the record. The Deputy Commissioner of Commercial Taxes rejected the said application. The assessee questioned the order of the Deputy Commissioner of Commercial Taxes before the Mysore (Karnataka) Sales Tax Appellate Tribunal. The Tribunal too rejected that appeal. The assessee thereafter filed a petition before the High Court under Article 226 of the Constitution of India. The High Court allowed the appeal and quashed the order passed by the Deputy Commissioner of Commercial Taxes on June 28, 1967 on the ground that the said order had been passed without jurisdiction as the power of revision had been exercised beyond the prescribed period of four years from the date of the original assessment order dated March 21, 1963. The Deputy Commissioner of Commercial Taxes filed an appeal against the order of the High Court before this Court. Allowing the said appeal this Court observed thus at page 596 : (SCC pp. 705-06, para 7).

The short question which arises for determination in these appeals is that in the event of an order having been made under Section 12-A of the Act, what is the starting point for computing the period of four years, mentioned in Section 21(3), for the exercise of the powers under Section 21(2). Is it the initial assessment order or is it the order made under Section 12-A ? In the context of the present case, the question to be answered is as to whether the period of four years is to be calculated from March 21, 1963 when the initial assessment orders were made, or from June 8, 1966 when the orders under Section 12-A of the Act were made. So far as this question is concerned, we are of the opinion that the period of four years should be calculated from June 8, 1966 i.e., the date on which

orders under Section 12-A of the Act were made. The reason for that is that once an assessment is reopened, the initial order for assessment ceases to be operative. The effect of reopening the assessment is to vacate or set aside the initial order for assessment and to substitute in its place the order made on reassessment. The initial order for reassessment cannot be said to survive, even partially, although the justification for reassessment arises because of turnover escaping assessment in a limited filed or only with respect to a part of the matter covered by the initial assessment order. The result of reopening the assessment is that a fresh order for reassessment would have to be made including for those matters in respect of which there is no allegation of the turnover escaping assessment. As it is, we find that in the present case the assessment orders made under Section 12-A were comprehensive orders and were not confined merely to matters which had escaped assessment earlier. In the circumstances, the only orders which could be the subject matter of revision by the appellant wee the orders made under Section 12-A of the Act and not the initial assessment orders.

7. In reaching the above conclusion the court relied upon three decisions of this Court, namely CIT v. Jagan Mohan Rao ((1970) 1 SCR 726 : (1969) 2 SCC 389), CST v. M/s. H. M. Esufali ((1973) 3 SCR 1005 : (1973) 2 SCC 137 : 1973 SCC (Tax) 484 : (1973) 10 ITR 271 : (1973) 32 STC 77), and International Cotton Corporation (P) Ltd. v. CTO ((1975) 2 SCR 345 : (1975) 3 SCC 585 : 1975 SCC (Tax) 78 : (1975) 35 STC 1) (P) Ltd. v. CTO ((1975) 2 SCR 345 : (1975) 3 SCC 585 : 1975 SCC (Tax) 78 : (1975) 35 STC 1), was a case arising out of rectification proceedings. In that case this Court held that once an assessment order had been rectified and it was sought to make a further rectification of that order the period of limitation for making such further rectification would commence not from the date of the original assessment order put from the date of the earlier rectification order. In Dy CCT v. H. R. Sri Ramulu ((1977) 2 SCR 593 : (1977) 1 SCC 703 : 1977 SCC (Tax) 246 : (1977) 39 STC 177), this Court has clearly laid down that when once a notice is issued for purposes of making reassessment the assessment proceedings become reopened and the initial order of assessment ceases to be operative. The court has further held that the effect of the reopening of the assessment is to vacate or set aside the initial order of assessment and to substitute in its place the order made on reassessment and that the result of reopening of the assessment is that a fresh order for reassessment would have to be made in respect of all matters including those matters in respect of which there is no allegation of the turnover escaping assessment. The same principle should apply even to a case like the present one where an application for rectification is filed after the completion of the reassessment proceedings.

8. In order to overcome the observation made by this Court in Dy. CCT v. H. R. Sri Ramulu ((1977) 2 SCR 593 : (1977) 1 SCC 703 : 1977 SCC (Tax) 246 : (1977) 39 STC 177). It was argued on behalf of the State Government that since no order of reassessment had actually been passed in the instant case on January 18, 1980 but only an order discharging the notice issued under Section 21 of the Act had been passed the original order of assessment passed on February 7, 1979 continued to remain in force. It is true that after going through the books of accounts produced by the appellant and hearing the advocate who appeared on its behalf the Sales tax Officer was of the view that the assessee had already included in its taxable turnover the arhat (commission) and mandi cess amounts and therefore, no extra tax was leviable under Section 21 of the Act. Even so it has to be held that the order dated January 18, 1980 is an order of reassessment notwithstanding the fact that a regular order of reassessment had not been passed. The order passed on January 18, 1980 should be constructed as a fresh order of assessment passed under Section 21 of the Act and the initial order of assessment dated February 7, 1979 should be deemed to be the order passed again on January 18, 1980. If the assessee is able to show any error apparent on the record from the order of assessment dated February 7, 1979 which as we have observed earlier should be deemed to have been passed again on January 18, 1980, the appellant is entitled to succeed in its application for rectification

provided it is made within the prescribed time, i.e., three years from the date of the order passed under Section 21 of the Act.

9. We do not find any merit in the submission made on behalf of the department that the order passed on January 18, 1980 should be understood as an order discharging the notice issued under Section 21 of the Act and not an order of reassessment as such. This is obvious from the language of Section 21 itself. Section 21 authorises the assessing authority to make an order of assessment or reassessment. It says that 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 underassessed or has been assessed to tax at a rate lower than that at which it is assessable under the 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. The assessing authority gets jurisdiction to make the reassessment by issuing a notice to the dealer as provided by Section 21 of the Act. When once the notice is issued under that section the original order of assessment gets reopened and thereafter any order made under Section 21 of the Act alone would be the order of assessment in respect of the period in question. Section 21 of the Act does not require the assessing authority to pass an order deciding whether it is necessary to proceed with the inquiry under that section or not before passing an order of assessment or reassessment under that section. The only order which the assessing authority is required to make under Section 21 after a notice is issued to the dealer under that section is an order of assessment or reassessment. It is not required to pass first an order whether it should proceed with the reassessment proceedings or not. Such a preliminary order is not contemplated under Section 21 of the Act. Hence the order dated January 18, 1980 has to be treated as an order of assessment even though it is not in the form in which an order of assessment has to be passed and not as an order merely on the question whether the reassessment proceedings under Section 21 of the Act should be proceeded with or not. In other words is should be held that the assessing authority had adopted the earlier order as the order of assessment passed at the conclusion of the proceedings under Section 21 of the Act. The period of limitation for the application for rectification should, therefore, be calculated from the date of the order under Section 21 of the Act. We cannot, therefore, subscribed to the view of the High Court expressed in its observation that since no fresh order of assessment had been passed after examining the accounts of the assessee the 'original assessment order should be considered to remain intact as nothing is added or altered in pursuance of the order under Section 21 of the Act'.

10. No other contention is urged before us. In the result we set aside the judgment of the High Court and restore the decision of the Tribunal. The appeal is accordingly allowed. There shall, however, be no order as to costs.

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