

# PATNA HIGH COURT

Commissioner of Commercial Taxes

Vs

Ashoka Marketing Ltd

(N Untwalia, C.J. S.K. Jha, J.)

23.07.1973

## JUDGMENT

**S.K. Jha, J.**

1. A statement of case under Section 25(1) of the Bihar Sales Tax Act, 1947 (hereinafter referred to as the Act), has been submitted by the Commercial Taxes Tribunal, Bihar, Patna. The assessee, Messrs. Ashoka Marketing Ltd., is a registered dealer in cement under the Act and was assessed to sales tax for the years 1955-56 and 1956-57, giving rise to Tax Case No. 25 and Tax Case No. 26, respectively. By an order dated 30th November, 1957, the Superintendent of Commercial Taxes held that the assessee having not included certain sums of money in the gross turnover in respect of its supply of cement representing the total amount of railway freight which was directly paid to the railway administration by the purchasers, these sums were liable to be included in the gross turnover. The Superintendent, accordingly, added the sums of railway freight in question in the gross turnover of the dealer. Two separate orders, one in respect of each year, were passed which are annexures A and A1 to the statement of case.

2. The assessee filed two appeals which were heard by Sri E. Hussain, Deputy Commissioner of Commercial Taxes, who by his appellate order dated 9th November, 1959, disposed of both the appeals by a common judgment. The appellate order is annexure C to the statement. The learned Deputy Commissioner held that the railway freight was not liable to be included in the taxable turnover of the assessee and he, therefore, set aside the order of assessment and remanded the cases to the Superintendent for holding an enquiry as to which sums of railway freight were separately charged. In pursuance of this remand order, the Superintendent of Commercial Taxes by an order dated 2nd April, 1961 (annexures D and D1), excluded the railway freight in accordance with the observations of the appellate court. On 29th March, 1966, two notices were issued by Sri B.N. Sarkar, the successor-in-office of Sri E. Hussain intimating to the assessee that it was proposed to review the order dated 9th November, 1959, passed by Sri Hussain, the then

Deputy Commissioner. The assessee having shown cause, by an order dated 5th December, 1966, a review order was passed by Sri Sarkar, after obtaining the sanction of the Commissioner of Commercial Taxes under Rule 39 of the Bihar Sales Tax Rules, 1949 (hereinafter referred to as the Rules). By this order of review, the learned Deputy Commissioner recalled the earlier order dated 9th November, 1959, and remanded the cases again to the Assistant Commissioner of Commercial Taxes with a direction that the earlier orders of assessment dated 2nd April, 1961, be reviewed by him. The assessee thereafter filed two revision applications before the Commercial Taxes Tribunal, and by an order dated 11th July, 1967, the Tribunal held that the Commissioner of Commercial Taxes, who was one of the prescribed authorities under Section 24(4) of the Act, could not suo motu revise any order passed by any subordinate authority after expiry of four years from the date of that order. The Tribunal, on a parity of reasoning held that though no period of limitation was prescribed for review either in Section 24(5) of the Act or in Rule 39 of the Rules, yet the period of limitation prescribed for the purpose of revision in Section 24(4) of the Act will also be deemed to be the period of limitation for the purpose of review. Having so held, the Tribunal allowed the revision applications of the assessee and held that the order of review passed by the learned Deputy Commissioner of Commercial Taxes was barred by limitation, it having been passed more than four years from 9th November, 1959.

3. At the instance of the Commissioner of Commercial Taxes, the Tribunal has referred the following question to this court under Section 25(1) of the Act. Whether, in the facts and circumstances of the case, the Tribunal is justified in holding that the order of review dated 5th December, 1966, passed by the Deputy Commissioner reviewing his predecessor's order dated 9th November, 1959, is barred by time?

4. Though quite a number of decisions were cited at the Bar to which I shall presently refer, none of them can be said to directly cover the point with which we are concerned in this case. Therefore, this case will have to be decided as a matter of first impression. Before making any reference to the case law on the subject, I think it proper to refer to the relevant provisions for the purpose of deciding the point in issue. Section 24 of the Act deals with the power of appeal, revision and review. Section 24(1) prescribes the provision regarding appeal, and Sub-section (2) expressly lays down the period of limitation which would govern the filing of such appeal. Such a period of limitation has been laid down to be forty-five days of the receipt of the notice issued under Sub-section (4) of Section 14 of the Act. Sub-section (4) of Section 24 deals with the jurisdiction regarding revision. It runs in these terms:

Subject to such rules as may be prescribed and for reasons to be recorded in writing, the prescribed authority may, upon application or of its own motion, revise any order passed under this Act: Provided that where the prescribed authority revises any order of its own motion, no

proceeding for such revision shall be initiated at any time except before the expiry of four years from the date of such order:Provided ...It will thus be seen that the first proviso to Section 24(4) clearly lays down that no proceeding for revision shall be initiated beyond four years from the date of such order. This proviso, more or less, is actually an independent statutory provision, although it has been added as a proviso to Section 24(4), because a provision laying down a period of limitation is a substantive statutory provision. Turning now to subsection (5) of Section 24 which confers the power of review it will be found that no period of limitation has been prescribed for such a power to be exercised. Section 24(5) reads thus:Subject to such rules as may be prescribed, any order passed under this Act or the Rules made thereunder by any person appointed under Section 3 may be reviewed by the person passing it, or by his successor-in-office.The only rule prescribed in regard to the exercise of this jurisdiction of review is that in Rule 39 of the Rules, which reads thus:

(1) When the Commissioner or any other officer reviews any order under Sub-section (5) of Section 24, he shall record his reasons in writing for doing so.

(2) Save with the previous sanction of the Commissioner an order not passed by the Commissioner shall not be reviewed more than twelve months after the passing of the order which is sought to be reviewed.

(3) No officer below the rank of Commissioner shall review any order which has been passed by any of his predecessors-in-office except with the previous sanction of the Commissioner.It will thus be seen that Rule 39 also does not prescribe any period of limitation for the purpose of review. All that this rule prescribes is that if an order of a predecessor-in-office is sought to be reviewed by any officer below the rank of the Commissioner, previous sanction of the Commissioner shall be obtained under Sub-rule (3). It has also been prescribed that no order of review passed by an officer below the rank of Commissioner more than twelve months after the passing of the order which is sought to be reviewed shall be so passed without the previous sanction of the Commissioner. Section 24(5) of the Act read with Rule 39 of the Rules nowhere prescribes any period of limitation for the purpose of reviewing an order. The only limitation prescribed for the exercise of such jurisdiction is that if an officer below the rank of the Commissioner is seeking to review his predecessor's order or if such an officer is reviewing an order passed more than twelve months before the review order is passed, then in either case previous sanction of the Commissioner would be imperative.

5. On general principles of law, there seems to be no contradiction in any statute wherein different periods of limitation are prescribed for the exercise of different jurisdictions. There may be one period of limitation prescribed for an appeal, another period for the exercise of revisional jurisdiction and yet another period for the exercise of review jurisdiction. If there is no anomaly

in such distinct provisions with regard to periods of limitation being made in the same statute book, there seems to be no reason as to why if periods of limitation are prescribed for the exercise of appellate or revisional jurisdiction, it should be incumbent to read by implication unless absolutely necessary as a necessary intend-ment, any such period of limitation in the case of review for which the Legislature was quite at liberty to prescribe no period of limitation at all.

6. Before advertng to the case law on the question of limitation, I may notice here one aspect of the case which was faintly suggested by Mr. Ramanugrah Prasad, learned counsel for the assessee. Mr. Prasad raised a point that the sanction of the Commissioner in the present case was only under Rule 39(3) and not under Rule 39(2) and that, therefore, the order of review beyond twelve months of the previous order could not be sustained. This point was not raised or argued before the Tribunal, nor was the Tribunal invited to record any finding in this regard. It is settled law that a point which was neither raised before the Tribunal, nor canvassed there, nor was decided by the Tribunal, cannot be said to arise out of the order and as such would be beyond the scope of reference. In this connection, reference may be made to the decision of the Supreme Court in *New Jehangir Vakil Mills Ltd. v. Commissioner of Income-tax*<sup>1</sup> This case has since been followed in numerous cases, both by the Supreme Court itself as well as by this court.

7. The learned Advocate-General appearing for the department placed great reliance on a judgment of the Supreme Court in the case of *Indian Copper Corporation Ltd. v. The State of Bihar*<sup>2</sup> In that case, the Supreme Court was concerned with the scope of Rule 39 of the Bihar Sales Tax Rules, 1949, with Rwhich we are also concerned in the present case. The point which arises for consideration in this case, however, was not directly dealt with by the Supreme Court. In that case, the Supreme Court was merely considering the true effect and scope of the provisions of Rule 39(2) and (3), as the question which was raised before the Supreme Court was that the limit of time prescribed in Rule 39(2) related to the time for the commencement of the proceedings. While repelling that argument, the Supreme Court observed:

The only question is whether the time-limit under Sub-rule (2) of Rule 39 for review has expired and the contention is that this time marks out the commencement of the proceedings. In our opinion, Sub-rule (2) cannot be read in this way. It says that an order not passed by the Commissioner shall not be reviewed more than 12 months after the passing of the order which is sought to be reviewed save with the previous sanction of the Commissioner. The emphasis is no doubt on the passage of time but the rule indicates that within the period specified the sanction of the Commissioner is not necessary. Even after the passage of the time action can be taken but with the previous sanction of the Commissioner. This limit of time does not apply to orders passed by the Commissioner himself. The learned Advocate-General laid great stress on the last sentence quoted above, viz., that the limit of time does not apply to orders passed by the

Commissioner. There being nothing to the contrary in Section 24(5) nor in any of the rules, the aforesaid observation of the Supreme Court, even though it may be said to be an obiter, cannot be said to be not binding on us.

8. Mr. Ramanugrah Prasad, learned counsel for the assessee, placed reliance on a number of cases. I propose to deal with each of them. The learned counsel referred to the case of *State of Orissa v. Debaki Debi*<sup>3</sup> There the question before the Supreme Court was whether the Orissa Sales Tax Act, 1947, actually set a time-limit for making an order under Section 23(3) revising an order of assessment. In the Orissa Sales Tax Act there was a proviso in general terms laying that no order assessing the amount of tax shall be passed after the lapse of thirty-six months from the expiry of the period, and it was held by the Supreme Court that this provision was in substance not a real proviso to the section in which it was placed, but was, in fact, a period of limitation prescribed for all orders of assessment made under any other provision of the Act. The Supreme Court having thus held that there was a specific statutory bar of limitation in so far as the orders of revision were concerned under the Orissa Act, it was held that any assessment by it in the shape of original assessment or in pursuance of an order of revision could not be made beyond the period of limitation prescribed. This is how the Supreme Court itself has viewed its own decision in the above-mentioned Orissa case in *Swastik Oil Mills Ltd. v. H.B. Munshi*<sup>4</sup> The learned counsel for the assessee next invited our attention to the case of *Sir Sobha Singh and Company v. Commissioner of Sales Tax*<sup>5</sup> That case, in my view, has no relevance to the question which is being considered. There a learned single Judge of the Punjab High Court, relying upon the decision of the Supreme Court in the Orissa Sales Tax case [1964] 15 S.T.C. 153 (S.C.), held that an order under Section 20(4) of the Bengal Finance (Sales Tax) Act, 1941, as extended to Delhi, was in effect an order of assessment under Section 11(1) of that Act and could not be made after the expiry of the period prescribed under Section 11 (2a) of that Act. Wherever an express statutory bar of limitation is prescribed, no one disputes the proposition that any proceeding in clear violation of such a statutory provision would be held to be illegal. What we are concerned with in the present case is whether any period of limitation is prescribed under the Act or the Rules in so far as the exercise of review jurisdiction is concerned. The learned counsel then places great realinace on three cases of this court. In *Province of Bihar v. Khetra Mohan Kumar* [1949] 17 I.T.R. 286(Supra), on which learned counsel has relied, a Bench of this Court was dealing with the provisions of the Bihar Agricultural Income-tax Act (7 of 1938), and interpreting the sections of that Act, it was held that Section 26 of that Act was not confined to cases where income had not been returned at all, but also applied to such cases where an item of income was included in the return made by the assessee, but after it was assessed by the Agricultural Income-tax Officer, the assessment was cancelled by the appellate authority. In that case, this court was concerned with the interpretation of Sections 26 and 27 of that Act which are not in pan materia with the statutory provisions of the present Act. The learned counsel next

referred to *Hare Krishna Singh v. State of Bihar*<sup>6</sup>. That was also a case under the Bihar Agricultural Income-tax Act (32 of 1948). Section 29 of that Act prescribes a period of limitation for assessment of escaped tax, and Section 27A conferred the power of review on the authorities concerned. While there was no period of limitation expressly prescribed under Section 27A of that Act, yet in view of the provisions of Section 29, which did provide a period of limitation for assessment of escaped income, it was held that the only harmonious construction that could be put upon the two statutory provisions would be that the period of limitation prescribed in Section 29 would be deemed to be incorporated for proceedings under Section 27A of that Act. In the instant case, there is no anomaly to be resolved. The case of *Hare Krishna Singh* 1964 B.L.J.R 786(supra), cited above, would have been relevant if we were dealing with a case under the Bihar Sales Tax Act, 1959, under which by insertion of Section 18(1), a provision corresponding to Section 29 of the Bihar Agricultural Income-tax Act, 1948, has been incorporated. The Act and the Rules with which we are concerned have no provision for reassessment of an escaped turnover.

9. The learned counsel lastly, relied on, rather vehemently, on the case of *Commissioner of Commercial Taxes, Bihar, Patna v. Sheodutta Prasad Chandeskwar Singh*<sup>7</sup> That was a case in which the provisions of this very Act and the Rules were being considered by this court. Before turning to the rationale of the case it is necessary to set out some salient facts with which this court was concerned in that case. The dealer in that case was assessed to sales tax for the year 1955-56 on a turnover of Rs. 72, 189 and odd by an assessment order dated 31st July, 1957. On 24th October, 1959, as a result of the seizure of the books of account of the dealer, the department found that the dealer had suppressed certain sales, and on 18th October, 1960, the assessing officer issued a notice to the dealer for producing his books of account for review of the previous assessment order, and by an order dated 25th April, 1961, fresh assessment was made. It was contended that the order of review passed on 25th April, 1961, by which the assessment was reopened was more than four years from the year of assessment in question, viz., 1955-56, and that, therefore, the first part of the proviso to Section 13(6) was a bar to any such assessment being made more than four years after the expiry of the year in question. Their Lordships having held in that case that the case was one of assessment which was expressly covered by the provisions of the first part of the proviso to Section 13(6), the so-called order of review was held to be beyond the period prescribed under that section. In the last-mentioned case, as already noticed, this court was concerned with the assessment by the assessing officer himself. It will be seen that the second part of Section 13(6) prescribes a period of two years' limitation for assessment proceedings to be initiated in pursuance of any order under appeal, revision or review. In the present case, by order dated 5th December, 1966, the learned Deputy Commissioner has not initiated any proceeding for assessment, but has merely remanded the case to the assessing officer. If and when the assessing officer in pursuance of this remand order

chooses to assess or reassess after recalling the previous order dated 2nd April, 1961, the point will be relevant as to whether such an assessment could be said to attract the periods of limitation prescribed in the proviso to Section 13(6) of the Act. It would then also be relevant to consider as to whether the period prescribed in the first part, namely, four years or that prescribed in the second part, namely, two years from the date of the appeal, revision or review order would be applicable. But so far as the question which has been referred to us in the present case is concerned, suffice it to say that in view of the foregoing discussions the question must be answered in the negative. It is, accordingly, held that in the facts and circumstances of the case, the Tribunal was not justified in holding that the order of review dated 5th December, 1966, passed by the Deputy Commissioner, reviewing his predecessor's order dated 9th November, 1959, is barred by time. There will be no order as to costs.

N.L. Untwalia, C.J.

I agree.

#### Cases Referred.

- 11959J 37 I.T.R. 11 (S.C.)
- 2[1965] 16 S.T.C. 772 (S.C.)
- 3[1964] 15 S.T.C. 153 (S.C.)
- 4[1968] 21 S.T.C. 383 (S.C.)
- 5[1966] 18 S.T.C. 416
- 61964 B.L.J.R 786
- 7[1970J 25 S.T.C. 114