

CASE NO.:
Appeal (civil) 2643-2644 of 2000

PETITIONER:
Sree Balaji Rice Mill, Bellary

RESPONDENT:
State of Karnataka

DATE OF JUDGMENT: 31/03/2005

BENCH:
S.N. VARIAVA, Dr. AR. LAKSHMANAN & S.H. KAPADIA

JUDGMENT:
JUDGMENT

Dr. AR. LAKSHMANAN, J.

These appeals were filed against the order dated 15.11.1999 in S.T.A.Nos.31 and 32 of 1996 on the file of the High Court of Karnataka vide which, the High Court dismissed the appeal filed by the appellant herein.

The appellant is a dealer registered under the provisions of the Karnataka Sales Tax Act, 1957 (hereinafter referred to as 'the Act') engaged in the activity of hulling paddy and is also a trader in rice, paddy husk and rice bran. The Assistant Commissioner of Commercial Taxes, Bellary passed an order of assessment under Section 12(3) of the Act vide order dated 12.07.1990 for the assessment years 1987-88 and 1988-89.

The Additional Commissioner of Commercial Taxes, Devangere Zone, Devangere issued notices dated 16.02.1994 and 21.03.1994 under Section 22A of the Act proposing to revise the order of assessment dated 12.07.1990 passed by the Assessing Authority on the ground that the assessment order was erroneous and prejudicial to the interest of the Revenue. In the notices, the Revisional Authority had made observations to the effect that the books of accounts have not been properly maintained. In response to the notices, the appellant filed reply on 04.04.1994 denying the observations made by the Revisional Authority and had requested the said Authority to drop the proceedings initiated under Section 22A of the Act. The Revisional Authority on 08.04.1994 issued a further notice under Section 22A(1) of the Act making the same proposal as made in the earlier notices and further proposed to levy penalty under Section 18A of the Act. The Revisional Authority confirmed the proposals made in the notices issued under Section 22A of the Act vide order dated 02.06.1994 and modified the set-off granted by the Assessing Authority.

The appellant feeling aggrieved by the revisional orders preferred two appeals in the High Court of Karnataka. The High Court dismissed the appeals by its order dated 15.11.1999. The High Court took the view that the determination of tax contemplated under Section 12 (3) of the Act took within its ambit the levy of penalty under Section 18A of the Act and if the Assessing Authority while passing such an order had not considered the levy of such penalty, the order under Section 12(3) was amenable as such to the jurisdiction under Section 22A of the Act.

Feeling aggrieved, the appellant filed S.L.P. (Civil) Nos.5464 and 5465 of 2000 before this Court. Leave was granted by this Court on 10.04.2000.

We heard Mr.Dhruv Mehta, learned counsel appearing for the appellant and Mr.Sanjay R.Hegde, learned counsel appearing for the respondent-State.

Mr.Dhruv Mehta, learned counsel appearing for the appellant, made the following submissions:

(1) The proceedings for quantification of tax under Section 12(3) of the Act and the levy of penalty under Section 18A of the Act are distinct and separate proceedings requiring separate procedures to be followed. In support of the above proposition, he relied upon the following judgments:

- (a) Additional C.I.T. Vs. J.K.D'Costa, 1982 (133) ITR 7
- (b) CIT Vs. Nihal Chand Rekyan, 2000 (242) ITR 45

(2) It was submitted that unless there is a specific and separate order under Section 18A of the Act, no revisional order under Section 22A can be passed on the ground of the alleged non-levy of penalty and such an order cannot direct the levy of penalty under Section 18A of the Act. He relied on the following judgments in support of the above proposition:

- (a) Khemchand Rajkumar Vs. State of Tamil Nadu, 1974(33)STC 78
- (b) Shetkari Sahakari Sakhar Karkhana Ltd. Vs. State of Maharashtra, 1996(102)STC 157.
- (c) Tata Exports Ltd. Vs. State of Maharashtra 1995(98) STC 314.

(3) Learned counsel further submitted that all the above decisions have taken the view that where the Assessing Authority has failed to pass a statutory order in regard to penalty, the Revisional Authority cannot itself assume the power and pass the original order.

(4) The learned counsel relied on CIT Vs. H.H.Rajkuverva Dowager Maharani Saheb (Karnataka), 1978 (115) ITR 301.

In the above case, there was failure to charge interest under Section 217 of the Income Tax Act. The Commissioner of Income Tax initiated action under Section 263 of the Income Tax Act, issuing notices to the assessee calling upon them to show cause as to why an order should not be made charging interest under Section 217 of the Income Tax Act. The Karnataka High Court held that since an order under Section 217 of the Income Tax Act does not form part of an order of the assessment, the mere omission of the Income Tax Officer to refer to the penal interest payable thereunder in the order of assessment cannot lead to the inference that the Income Tax Officer has waived the interest payable without giving any reason for doing so. It was held that as there was in existence no such order passed by the Income Tax Officer which would clothe the Commissioner with the jurisdiction to make an order under Section 263 of the Income Tax Act, the action taken by the Commissioner was a premature one.

(5) Learned counsel further submitted that no penalty under Section 18A of the Act can be levied by any person other than the Assessing Authority and the same cannot be levied by any higher authority like Additional Commissioner of Commercial Taxes exercising revisional power. It was submitted that otherwise the assessee would be deprived of the right of appeal under Section 20 of the Act against an order passed under Section 18A of the Act.

(6) Concluding his arguments, learned counsel appearing for the appellant, submitted that the order dated 12.07.1990 under Section 12(3) of the Act neither impliedly nor expressly purported to deal with the provisions of Section 18A of the Act and in fact, he would not have dealt it with and therefore, it was not open to the Revisional Authority acting in exercise of power under Section 22A of the Act to levy penalty under Section 18A of the Act.

In view of the above submissions, the learned counsel submitted that the impugned order of the High Court is liable to be

set aside.

Mr. Sanjay R. Hegde, learned counsel appearing for the respondent-State submitted that the order passed by the Revisional Authority cannot be treated as being without jurisdiction, illegal or improper or prejudicial to the appellant herein since the appellant had been made aware of the proposed action for levy of penalty, had been heard in the matter and the order had been passed in accordance with law and all these essentials of law and natural justice have been complied with in this case and therefore, the impugned order cannot be faulted with on any ground whatsoever.

He would further submit that the argument of the learned counsel for the appellant that the Revising Authority is not competent to levy penalty for the first time when no penalty has been levied by the Assessing Authority is wholly untenable, without statutory basis and unreasonable from any point of view. The non-levy of penalty by the Assessing Authority is itself an illegality caused by a failure to exercise jurisdiction and therefore, prejudicial to the interest of the revenue. Hence, he submitted that the levy of penalty by means of an order in revision proceedings is reasonable, just and proper and therefore, not liable to be faulted.

The following questions of law arise for consideration by this Court:

(a) What is the scope and effect of Section 22A of the Karnataka Sales Tax Act, 1957?

(b) Whether a penalty order under Section 18A of the Act forms a part of an assessment order?

(c) While purporting to revise an order under Section 12A which neither expressly nor impliedly refer to any proceeding under Section 18A and were thus not within the contemplation of the assessing authority while passing the order under Section 12(3), it is open for the Commissioner, while purporting to act under Section 22A in respect of the order under Section 12(3) to pass an order under Section 18A either as a part of the order under Section 22A or separately as such under Section 18A?

(d) On the facts and in the circumstances of the appellant's case, whether the Revisional Authority was right in levying penalty under Section 18A of the Act for the first time when the language employed in Section 18A of the Act did not confer any power on him for doing the same?

We have carefully perused the pleadings, the orders passed by the authorities below and also of the High Court and perused the grounds of appeal and other annexures etc.

Before proceeding further, it is beneficial to reproduce Sections 18, 18A and 22A of the Karnataka Sales Tax Act:

"Section 18: Collection of tax by dealers:

(1)(a) A person who is not a registered dealer liable to pay tax shall not collect any amount by way of tax or purporting to be by way of tax under this Act; nor shall a registered dealer collect any amount by way of tax or purporting to be by way of tax at a rate or rates exceeding the rate or rates at which he is liable to pay tax under the provisions of this Act.

(b) No person shall collect any amount by way of tax or purporting to be by way of tax in respect of sales of any goods (or any transaction) on which no tax is payable by him under the provisions of this Act.

(2) Notwithstanding anything contained in sub-section (1), a dealer who has been permitted to pay any amount by way of composition under sub-section (1) or sub-section (4) or sub-section (8) of

Section 17 or a dealer who is exempted from sales tax by virtue of recognition granted under the provisions of this Act, shall not collect any amount by way of tax or purporting to be by way of tax on the sales or purchases of goods made during the period to which such composition or recognition applies.

Section 18A: Penalty for collection in contravention of Section 18:

If any person contravenes any of the provisions of Section 18, the assessing authority may, after giving such person reasonable opportunity of being heard, by order in writing, impose upon him by way of penalty a sum (not less than one half but not exceeding an amount equivalent to):

Provided further that no prosecution for an offence under Section 29 shall be instituted in respect of the same facts on which a penalty has been imposed under this Section.

Section 22A: Revisional Powers of Additional Commissioner and Commissioner:

(1) The Additional Commissioner may on his own motion call for and examine the record of any proceeding under Section 20 or Section 21 of this Act and if he considers that any order passed therein by any Officer who is not above the rank of a Joint Commissioner, is erroneous in so far as it is prejudicial to the interests of the revenue, he may, if necessary, stay the operation of such order for such period as he deems fit and after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such orders thereon as the circumstances of the case justify, including an order, enhancing or modifying the assessment, or cancelling the assessment or directing a fresh assessment.

(2) The Commissioner may on his own motion call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by any officer subordinate to him is erroneous in so far as it is prejudicial to the interests of the revenue, he may, if necessary, stay the operation of such order for such period as he deems fit and after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment or directing a fresh assessment.

(3) The Additional Commissioner or the Commissioner shall not exercise any power under sub-section (1) or sub-section (2), as the case may be, if -

(a) the time for appeal against the order has not expired;

(b) the matter has been subject to an appeal under Section 22 or a revision in the High Court; or

(c) more than four years have expired after the passing of the order sought to be revised.

(4) Notwithstanding anything contained in sub-section (3), the Additional Commissioner or the Commissioner, may pass an order under sub-section (1) or (2), as the case may be, on any point which has not been raised and decided in an appeal or revision referred to in clause (b) of sub-section (3), before the expiry of a period of one year from the date of the order in such appeal or revision or before the expiry of a period of four years referred to in clause (c) of that sub-section whichever is later.

(5) Every order passed in revision under sub-section (1) shall, subject to the provisions of sub-section (2) of this section, sections 23, 24 and 25A, be final.

(6) Every order passed in revision under sub-section (2) shall, subject to the provisions of sections 23, 24 and 25A, be final.

Explanation I: If the order passed or proceedings recorded by the appropriate authority referred to in sub-section (1) or (2), involves an issue on which the High Court has given its decision adverse to the revenue in some other proceedings and an appeal to the Supreme Court against such decision of the High Court is pending, the period spent between the date of the decision of the High Court and the date of the decision of the Supreme Court shall be excluded in computing the period preferred to in clause (c) of sub-section (3).

Explanation II: In computing the period of limitation for the purpose of sub-section (3), any period during which any proceeding under this section is stayed by an order or injunction of any Court shall be excluded.

Explanation III: For the purpose of this Section, 'record' shall include all records relating to any proceedings under this Act available at the time of examination by the Additional Commissioner or the Commissioner."

Section 18A of the Act prohibits excess collection of tax by an assessee. If any person contravenes Section 18, penalty is provided under Section 18A of the Act. The question is when at the time of assessment, if no penalty is imposed by the Assessing Authority, can the Revisional Authority, by invoking his suo motu powers under Section 22A of the Act impose penalty for the first time on the ground that the order of assessment is prejudicial to the interests of the Revenue?

Section 22A of the Act is extracted above. The words used in the Karnataka Act are different from the words used in other States' Sales Tax enactments. The words viz., 'pass such order thereon as the circumstances of the case justify' is not incorporated in the other Acts. Also under Section 22A of the Act, the revisional authority may enhance or modify the assessment or even cancel an assessment and direct fresh assessment. This indicates that the assessment proceedings are before the revisional authority who can pass such orders which the adjudicating authority could or should have done. Hence, if penalty under Section 18A is warranted, and the same is not levied by the Assessing Authority, then, the Additional Commissioner/Revisional Authority in his suo motu powers may impose penalty on the ground that 'the circumstances of the case justifies the levy of penalty'.

However, in the following cases, it has been held that assessment proceedings and penalty proceedings are distinct and different. Therefore, if no penalty is levied in the order of assessment, then legally there is no 'order' imposing penalty. In the absence of an order imposing penalty, the Revisional Authority cannot invoke its powers of suo motu revision.

(a) Dy. Commissioner of Commercial Taxes, Madurai Division, Madurai vs. K.M. Thomas & Co., 31 STC 529 (Madras)

(b) Khemchand Rajkumar vs. State of T.N., (supra)

(c) Bhavnagar Chemical Works (1946) Ltd. vs. Commissioner of Sales Tax, Ahmedabad, 83 STC 409 (Gujarat): In this case, power to impose tax for the first time by the Revisional Authority is justified. However, it was held that when the Revisional Authority did not impose penalty then the Revisional Authority cannot impose the same for the first time.

(d) Tata Exports Ltd. vs. State of Maharashtra, 98 STC 314 (Bombay): In this case, the Bombay High Court followed the judgment in Shetkari Sahakari Sakhar Karkhana Ltd. & Anr. Vs. State of Maharashtra & Ors., (supra). Shetkari Sahakari Sakhar Karkhana Ltd.'s case (supra), the Bombay High Court also followed the judgment in Khemchand Rajkumar's case (supra).

In the case of State of Haryana vs. Dasunda Singh Waryam Singh, 103 STC 128 (Punjab & Haryana) Ashok Bhan, J followed the judgments in Dy. Commissioner of Commercial Tax, Madurai Division, Madurai vs. K.M Thomas & Co. (supra) and Bhavnagar Chemical Works's case (supra).

Other State Enactments: provisions based on which the above cases were decided:

(i) Section 32(1) of Tamil Nadu General Sales Tax Act, 1959: Special Powers of the Deputy Commissioner:

The Deputy Commissioner may, on his own motion, call for and examine an order passed or proceeding recorded by the appropriate authority under Section 4A, Section 12, Section 12A, Section 14, Section 15, or sub-sections (1) and (2) of Section 16 and if such order or proceeding recorded is prejudicial to the interests of Revenue, may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may initiate proceedings to revise, modify or set aside such order or proceedings and may pass such order thereon as he thinks fit.

(ii) Section 34(1) of Tamil Nadu General Sales Tax Act, 1959: Special Powers of Joint Commissioner of Commercial Taxes:

The Joint Commissioner of Commercial Taxes may, on his own motion, call for and examine an order passed or proceedings

recorded by the appropriate authority under Section 4A, Section 12, Section 12A, Section 14, Section 15 or sub-section (1) or (2) of Section 15 or an order passed by the Appellate Assistant Commissioner under sub-section (3) of Section 31 or by the Appellate Deputy Commissioner under sub-section (3) of Section 31A or by the Deputy Commissioner under sub-section (1) of Section 32 or sub-section (3) of Section 33 and if such order or proceeding recorded is prejudicial to the interests of the Revenue, may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may initiate proceedings to revise, modify or set aside such order or proceedings and may pass such order thereon as he thinks fit.

(iii) Provisions of Section 67(1)(a) of the Gujarat Sales Tax Act, 1969 (1 of 1970):(considered in 83 STC 409)
Section 67(1)(a):

The Commissioner on his own motion within three years (or on application made to him within one year) from the date of any order passed by any Officer appointed under Section 27 to assist him, may call for and examine the record of any such order and pass such order thereon as he thinks just and proper.

(iv) Provisions of Section 57(1)(a) of the Bombay Sales Tax Act, 1959 (51 of 1959), as considered by the Bombay High Court in Tata Exports Ltd.'s case(supra):

Section 57(1)(a):

Revision: (1) Subject to the provisions of Section 56 and to any rules which may be made in this behalf-

(a) the Commissioner may, on his own motion, call for and examine the record of any order passed (including an order passed in appeal) under this Act, or the Rules made thereunder by any officer or person subordinate to him and pass such order thereon as he thinks just and proper.

(v) Provisions of Section 40(1) of the Haryana General Sales Tax Act (20 of 1973): (as considered by Punjab and Haryana High Court in State of Haryana vs. Dasunda Singh Waryam Singh (supra).

Section 40: Revision:

(1) The Commissioner may on his own motion call for the record of any case pending before, or disposed of by, any assessing authority or appellate authority, other than the Tribunal, for the purpose of satisfying himself as to the legality or to the propriety of any proceedings or of any order made therein and may pass such order in relation thereto as he may think fit:

Provided that no order shall be so revised after the expiry of a period of eight years from the date of the order:

Provided further that the aforesaid limitation of period shall not apply where the order in a similar case is revised as a result of the decision of the Tribunal or any Court of law:

Provided further that the assessee or any other person shall have no right to invoke the revisional powers under this sub-section.

(vi) Under the Tamil Nadu General Sales Tax Act, 1959, Sections 32 and 34 provide that the revisional authority 'may make such inquiry or cause such inquiry to be made and subject to the provisions of this Act, may initiate proceedings to revise, modify or set aside such order or proceeding and may pass such order thereon

as he deems fit.'

(vii) Under the Gujarat Sales Tax Act, Section 67(1)(a) provides that 'the Commissioner on his own motion within three years (or on application made to him within one year) from the date of any order passed by any Officer under Section 27 to assist him, may call for and examine the record of any such order and pass such order thereon as he thinks just and proper.'

(viii) Under the Bombay Sales Tax Act, Section 57(1)(a) provides that 'the Commissioner may, on his own motion, call for and examine the record of any order passed (including an order passed in appeal) under this Act, or the Rules made thereunder by any Officer or person subordinate to him and pass such order thereon as he thinks fit and proper.'

(ix) A close scrutiny of Section 40(1) of the Haryana General Sales Tax Act would show that the revisional authority can call for the record of any case pending or disposed of for the purposes of satisfying himself as to the legality or to the propriety of any proceedings or of any order made therein and may thereafter proceed to pass such order in relation thereto as he deems fit.

(x) In 24 STC 491, a Bench of three Judges of this Court held that while exercising revisional jurisdiction, the revisional authority would be restricted to the examination of the record for determining whether the order of assessment was according to law.

(xi) In view of the words viz., "...pass such order thereon as the circumstances of the case justify..." including an order enhancing or modifying the assessment or cancelling the assessment or directing a fresh assessment in the Karnataka Sales Tax Act, it is possible to hold that even if no penalty is levied in the order of assessment, the revisional authority is justified in imposing the same by virtue of the special powers given to him under the statute.

It must be noted that there is a difference between exercise of revisional powers over orders passed by lower authority and exercise of revisional powers in the assessment proceeding itself. A revision of an order may be confined to what the order contains or dealt with. But when the assessment proceedings themselves are before the revisional authority it can go beyond the order of the assessing authority and pass such orders as the assessing authority could or should have passed.

The special provision available under Section 22A (4) of the Karnataka Sales Tax Act enables the Commissioner/Additional Commissioner not only to revise the order but also to reassess and pass orders on a point not decided, or dealt with in the order of assessment.

We have also perused the assessment proceedings. It has been concluded in the said proceedings that the assessee had filed an incorrect return and therefore, the amount of tax payable by the assessee concerned was determined. The said determination has not been questioned and, therefore, has become final. The Assessing Authority had not considered the question of the excess sales tax illegally collected by the assessee and therefore, the assessee had not been dealt with in respect of its said violation of Section 18 of the Act. On a departmental statutory review of the assessment order, the Revising Authority having come to the conclusion that the assessment order was erroneous and prejudicial to the interest of the State decided to initiate suo motu revision proceedings under Section 22A of the Act.

It would be seen that the revisional proceedings were commenced, on the sole ground relating to levy of penalty and the said aspect of the matter was specifically put to the assessee by means of Annexure R-1, notice. Hence, in any view of the matter, the revisional proceedings whether treated as a part of the assessment

proceedings the matter had been initiated and disposed of solely on the question of levy of penalty.

At the time of hearing, no procedural or substantive error in the passing of the impugned order of the Revising Authority has been brought to light. The requirements of law relating to the passing of an order under Section 18A read with Section 22A of the Act have been duly complied with and no legal prejudice has been shown to be caused to the assessee-appellant. The quantum of penalty levied being a discretionary matter, it is not normally liable to be questioned or reviewed.

The argument of the learned counsel for the appellant that the Revising Authority or the Appellate Authority higher than the Assessing Authority is not competent to levy a penalty for the first time when no penalty has been levied by the Assessing Authority is wholly untenable, without statutory basis and unreasonable from any point of view. The said plea is liable to be rejected. The necessity for there to be an order under Section 18A for the exercise of revisionary jurisdiction under Section 22A is once again fallacious. The non-levy of penalty is itself an illegality caused by a failure to exercise the jurisdiction by the Assessing Authority and therefore, prejudicial to the interests of the Revenue.

Hence, in our opinion, the levy of penalty by means of an order in revision proceedings is reasonable, just and proper and therefore, not liable to be faulted. The order passed by the Division Bench of the High Court of Karnataka is perfectly justified and is in order. For the foregoing reasons, we see no merit in these two appeals. Accordingly, both the appeals shall stand dismissed. However, there will be no order as to costs.