Halari Store Vs. Commissioner of Sales Tax and anr.

Halari Store Vs. Commissioner of Sales Tax and anr.

SooperKanoon Citation : sooperkanoon.com/532594

Court : Orissa

Decided On : Feb-12-1996

Reported in : 1996(I)OLR493

Judge : D.P. Mohapatra, Acting C.J. and ;R.K. Patra, J.

Acts : Orissa Sales Tax Act, 1947 - Sections 23, 23(2) and 23(4); Orissa Sales Tax Rules, 1947 - Rule 80

Appeal No. : Original Jurisdiction Case Nos. 4496 and 4497 of 1995

Appellant : Halari Store

Respondent : Commissioner of Sales Tax and anr.

Advocate for Def. : Standing Counsel and ;Addl. Standing Counsel (CT)

Advocate for Pet/Ap. : Amalkrishna Ray, A. Mohanty, S.P. Das and S. Dey

Disposition : Petition allowed

Judgement :

R.K. Patra, J.

1. Both the writ petitions are directed against the notices dated 9-6-1995 (Annexure-1) issued by the Additional Commissioner of Sales Tax, Orissa, Cuttack-opp. party No. 2 under Section 23 (4) (a) of the Orissa Sales Tex Act,

1947 (hereinafter referred to as 'the Act') read with Rule 80 of the Orissa Sales Tax Rules, 1947 (hereinafter referred to as 'the Rules') for suo motu revision of the first appellate orders passed by the Assistant Commissioner of Sales Tax, Cuttack I Range, Cuttack. The impugned notices-in both the cases are identically worded. OJC No. 4496 of 1995 relates to the assessment year ending 1993-94, the order of assessment of the concerned Sales Tax Officer is dated 22-6-1994 and the order of the Assistant Commissioner of Sales Tax passed in appeal is dated 14-9-1394. OJC No. 4497 of 1996 relates to the assessment year ending 1992-93, the order of assessment of the Sales Tax Officer is dated 6-8-1993 and the order of the Assistant Commissioner, Sales Tax passed in appeal is dated 3-5-1994. Parties In both the cases being common and the point involved being the same, they were heard together and are disposed of by this judgment;

2. Petitioner M/s. Halari Store is registered dealer under the Act. It carries on wholesale business in purchase and sale of betel-nuts at Malgodown, Cuttack. In response to notices issued under Section 12 (4) of the Act, the petitioner appeared before the concerned Sales Tax Officer and produced the books of accounts for the relevant years for verification. According to the petitioner, the Sales Tax Officer without properly examining the purchase and sate accounts, purchase invoices and sales memos rejected the books of accounts illegally and completed the assessment to the best of his judgment. Aggrieved by the assessment orders, the petitioner filed appeal before the first appellate authority, i. e., the Assistant Commissioner of Sales Tax. Cuttack I Range, Cuttack under Section 23 (1) of the Act. The said appellate authority by making elaborate discussion in the orders referred to above allowed the appeal in part for the year 1992-93 and in full for the year 1993-94. The allegation of the petitioner is that the Revenue did not choose to challenge the orders of the Assistant Commissioner of Sales Tax by filing second appeals within the time stipulated and instead, has resorted to unauthorised means by issuing the impugned notices through the Additional Commissioner of Sales Tax to nullify the first appellate orders which have become final.

3. We may extract the impugned notices below :

In OJC 4496/95.

'Whereas it appears that the order dated 14-9-1994 passed by the learned A. C. S. T., Cuttack I Range, Cuttack for the year 1993-94 is erroneous so far as it is prejudicial to the interest of revenue for the reasons given below :

(i) The allegation of suppression although established was not properly appreciated by the learned A. C. S. T. The order passed by him on 14-9-1994 detrimental to the interest of the revenue.

(ii) There is reason to believe that you have under-invoiced the purchase as well as the sale price of the commodities dealt by you.

(iii) There is apparent mistake in calculation. You are therefore directed to appear before the undersigned on 20-7-1995 at 11.15 a. m. with the relevant books of accounts to defend your case failing which action will be taken as per materials available in record'.

In OJC 4497/95.

'Whereas it appears that the order dated 3-5-1994 passed by the learned A. C. S. T., Cuttack I Range, Cuttack for the year 1992-93 is erroneous in so far as it is prejudicial to the interest of revenue for the reasons given below : You have returned a safe price for your commodities which is comparatively fess than the prevalent market price under-invoicing of sale price is further supported by exhibition of low profit. That is why the appeal order is to be revised under Section 23 (4) (a) read with Rule 80 of the O. S. T. Rules, 1947. You are therefore directed to appear before the undersigned on 20-7-1995 at 11.15 a. m. along with books of accounts to defend your case failing which the case will be decided ex parte basing on available materials in record'.

4. Shri A.K. Ray, learned counsel for the petitioner submitted that the Assistant Commissioner of Sales Tax who is the competent authority to decide the first appeals has disposed of the appeals and those appellate orders could have been challenged by the Revenue by filing second appeals as provided in Section 23 (3) of the Act and without taking recourse to the same, the Additional Commissioner

of Sales Tax is not competent to invoke suo motu jurisdiction under Section 23 (4) of the Act by issuing the impugned notices and set at naught the orders of the first appellate authority which have otherwise become final.

5. Counter-affidavit has been filed on behalf of the opp. parties contending, inter alia, that under the scheme of the Act no right accrues to any person until proceeding attains finality and the exercise of statutory power of suo motu revision was necessitated as the appellate orders of the Assistant Commissioner of Sales Tax were erroneous and prejudicial to the interest of the Revenue.

6. To appreciate the contention involved in the matter, it is necessary to read Section 23 of the Act and the Rules framed thereunder. Section 23 deals with appeals and revisions. Sub-section (1) thereof provides, inter alia, that any dealer or person may appeal to the prescribed authority against an order of assessment under Section 12, 12-A or 12-B or an order directing payment of interest under Section 12, (4-a) or an order imposing penalty under Section 3-B (3) or 11 (3). Sub-section (2) Section 23 deals with the power of the appellate authority in disposing of appeal preferred under Sub-section (1), Sub-section (3) (a) of Section 23 deals with second appeals which provides, inter alia, that any dealer or State Government, as the case may be, dissatisfied with an appellate order may appeal to the Sales Tax Tribunal against such order. Since the scope and ambit of Section 23 (4) (a) and Rule 80 are involved, it would be appropriate to quote them. They are as follows :

'23. Appeals and Revision-

(1) xx xx xx(2) xx xx xx(3) xx xx xx (4) (a) Subject to such rules as may be made and for reasons to be recorded in writing, the Commissioner may upon application by a dealer (or person) or on his own motion revise any order made under this Act or the rules made there under by any person other than the Tribunal (x x), appointed under Sub-section (3) of Section 3 to assist him :

Provided that the Commissioner shall not entertain any such application for revision if the dealer (or the person) filing the same having a remedy by way of appeal under Sub-section (1), or Sub-section (3) did not avail of such remedy or the application is not filed within the prescribed period.' '80. Revision by the Commissioner suo motu-

The Commissioner may on his own motion at any time within three years from the date of passing of any order by the Sales Tax Officer or within two years from the date of passing of any order by the Additional Commissioner, Special Additional Commissioner or Assistant Commissioner, as the case may be, call for the records of the proceedings in which such order was passed and if he considers that any order passed therein is erroneous in so far as it is prejudicial to the interest of the revenue he may after giving the dealer an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary revise any such order:

Provided that the Commissioner shall not revise any order under this rule-

(1) Where an appeal against the order is pending before the appellate authority under Section 23, or

(2) Where time-limit for filing an appeal under Section 23 has not expired.'

7. We may state here that when the familiar words of 'appeal' and 'revision' are found mention in Section 23, it would be reasonable to assume that the well-known distinction between the appellate and the revisional jurisdiction was also accepted by the legislature. An appeal being a continuation of the proceedings, the entire proceedings are before the appellate authority who is competent to dispose of the appeal subject to the statutory limitation, if any, prescribed. As we find, the appellate authorities viz. the first appellate authority as well as the second appellate authority may confirm, reduce, enhance or annul the assessment or the penalty or interest or set aside the assessment or the penalty or interest and direct the assessing authority to pass a fresh order after such other enquiry as may be directed. The aforesaid being the position, the question that arises for our consideration is whether the Commissioner in exercise of revisional power, be it at the instance of the revenue or suo motu can revise an order passed by the first appellate authority under Sub-section (2) of Section 23 of the Act.

At this stage, we may consider the position of Rule 80 which deals with the suo rnotu revisional jurisdiction of the Commissioner vis-a-vis Section 23 (4) (a). It is now fairly settled that the Rules made under an Act cannot override the specific provisions of the Act. If the rule is in excess of the provision of the Act or in contravention of or inconsistent with such provision it must be declared as ultra vires. Before declaring so, the Court must endeavour to reconcile them that is to say, the rule may be so read if the phraseology permits it, as to make it consistent with the specific provision. In the event, the rule comes into coflict with the specific provision of the Act, the former must yield to the latter. It may now be noticed that Sub-section (4) (a) of Section 23 starts with the expression 'Subject to such rules as may be made ' from which it follows that Rule 80 cannot override Sub-section (4) (a) of Section 23. To put is pithily, the said rule does not enlarge or confer any extra power of revision to the Commissioner.

8. Now coming back to the issue involved we find that Sub-section (4) (a) of Section 23 expowers the Commissioner to revise any order made under the Act or the rules made thereunder by any person other than the Tribunal appointed under Sub-section (3) of Section 3 to assist him. Rule 80 provides that the Commissioner may suo motu call for the records of the proceedings in which any order was passed by the Sales Tax Officer or the Assistant Commissioner or the Additional Commissioner or the Special Additional Commissioner and may revise such order. The question is whether the words 'any order' in Sub-section (4) (a) of Section 23 and Rule 80 mean an appellate order passed by the appellate authority under Sub-section (2) of Section 23. We have in the preceding paragraph indicated the scheme of Section 23 which provides that an order of assessment (since the cases at hand deal with the orders of assessment, we have not referred to other orders which are appellable under Sub-section (1) of Section 23) is appellable and the appellate authority may dispose of the appeal by confirming, reducing enhancing or annulling the assessment or set aside the assessment and direct the assessing authority to pass fresh order after such further enquiry as may be directed. Such order passed by the appellate authority us further appellable to the Tribunal. The statute having mentioned a clear and specific provision for filing second appeal to the Tribunal against the order of the first appellate authority passed under Section 23 (2), the aggrieved party cannot by-pass the appellate

forum and follow a short-circuit by invoking the revisional jurisdiction of the Commissioner. We state that the expression 'any order' in Sub-section (4) (a) of Section 23 and Rule 80 does not mean an appellate order made under Sub-section (2) of Section 23. Any other construction would run contrary to the scheme of Sec 23 and such construction should be avoided. It is well known that the provision should be considered to ensure consistency within the law as a whole and to avoid undesirable consequences. The Commissioner in exercise of revisional jurisdiction under Sub-section (4) (a) of Section 23 and under Rule 80 cannot revise an appellate order made by the appellate authority under Sub-section (2) of Section 23 is apparent from the restrictions contained in the proviso to Sub-section (4) (a) as well as the proviso contained in Rule 80. The proviso to Sub-section (4) (a) of Section 23 states that the Commissioner shall not entertain any such application for revision if the dealer or the person filing such revision having remedy by way of appeal under Sub-section (1) or Sub-section (3) did not avail of such remedy. The proviso to Rule 80 further clarifies by stating that the Commissioner shall not revise an order where an appeal against such order is pending before the appellate authority under Section 23. The appellate authority here includes the first appellate authority as well as the second appellate authority.

9. In view of the aforesaid, let us examine whether the Commissioner (Additional) was within his bounds to issue the impugned notices purported to be in exercise of his revisional power under Sub-section (4) (a) of Section 23 read with Rule 80, It is not disputed before us that the first appellate authority i. e. the Assistant Commissioner of Sales Tax in exercise of his powers conferred under Sub-section (2) of Section 23 has partly set aside the order of assessment for the year 1992-93 and annulled the entire assessment for the year 1993-94. Both the orders passed by him as per Annexure-3 were available to be appealed against under Sub-section (3) of Section 23, but the Revenue did not prefer any appeal. Consequently, those orders have become final and they are not available to be intermeddled with by the Commissioner in purported exercise of his revisional power under Sub-section (4) (a) of Section 23 read with Rule 80.

10. Shri Lal, learned Standing Counsel for the Commercial Department has referred to a decision of the Supreme Court in State of Andhra Pradesh v. T.R.

Lakshmaiah Setty and Sons : (1994) 94 STC 190 in support of his submission that the Commissioner is competent to issue the impugned notices. We have carefully perused the said decision and found that the ratio of that case has no application to the case at hand. The question that arose for consideration before the apex Court in that case was whether an assessee can file revision under Section 20 (2) of the Andhra Pradesh General Sales Tax Act 1957. By interpreting the said provision, the Court held that assessee cannot invoke the suo mow power of the authorities under Section 20. In that case, the question as to whether revisional jurisdiction can be invoked to assail the order of the first appellate authority without challenging the said order in the second appeal did not come up for consideration. Accordingly, the said decision is of little assistance to the learned Standing Counsel.

11. For the aforesaid reasons, we hold that the impugned notices, Annexure-1 in both the petitions issued by the Additional Commissioner of Sales Tax are without jurisdiction and are accordingly quashed.

12. In the result, both the writ petitions are allowed. There will be no order as to colts.

D.P. Mohapatra, A.C.J.

I agree.