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Court : Delhi

Decided On : May-05-2005

Reported in : 120(2005)DLT300; [2005]142STC376(Delhi)

Judge : Swatanter Kumar and; Madan B. Lokur, JJ.

Acts : [Companies Act, 1956](#); Bengal Finance (Sales Tax) Act, 1941; [Delhi Sales Tax Act, 1975](#) - Sections 3(6) and 48; Sales Tax Act; Income-tax Act, 1961 - Sections 34, 35, 35(1) and 154; [Constitution of India](#) - Articles 226 and 336

Appeal No. : WP (C) No. 587 of 1983

Appellant : The East India Hotels Ltd. and anr.

Respondent : The Assessing Authority (Sales Tax)

Advocate for Def. : H.C. Bhatia, Adv.

Advocate for Pet/Ap. : Lalit Bhasin,; Ratna Dwivedi,; Rajeshwar Shukla and;

Disposition : Petition allowed

Judgement :

Swatanter Kumar, J.

1. Petitioner No.1 is a Company registered under the provisions of the [Companies Act, 1956](#). The main object for which the Company was incorporated, was to carry

on the business of hotels and restaurants. The Company was also registered dealer under the Bengal Finance (Sales Tax) Act, 1941/[Delhi Sales Tax Act, 1975](#) in respect of Hotel Oberoi International with a registration certificate No.17/A/34646 and was assessed from time to time by the concerned authorities to Sales Tax under the provisions of the said Act. According to the petitioner, due to misrepresentation of the relevant provisions of the Act and particularly the term 'sale of goods', the petitioner-Company was assessed to sales tax. They were filing quarterly returns for the assessment year 1976-77. However, the misinterpretation of the respondents in relation to provisions of Sales Tax Act was cleared by the decision of the Supreme Court in Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi 42 STC 386 and 45 STC 212. By this decision, Supreme Court held that meals to visitors in the restaurant and also to the residents of the hotel are not taxable under the provisions of Delhi Sales Tax Act. The respondents after considering this decision of the Supreme Court, passed assessment order dated 28th March, 1981. It was held by the Assessing Authority that the petitioner was entitled to refund of Rs.4,34,123.24p being the excess amount paid by the petitioner in the said assessment year. Being entitled to receive refund of the tax, petitioner filed an application for refund on 3rd April, 1981. However, the refund of the amount was deliberately and illegally withheld by the officials of the respondent and the amount was not paid despite various requests made by the petitioner. The petitioner thus was compelled to file a writ petition in the High Court being CW 3742/1982. On 14th January, 1983, the Court passed the following order in that writ petition :-

'From the contentions raised before us and the Explanationn offered by the learned counsel for the respondent there is obviously no defense to this Writ Petition. Learned Counsel for the Respondent says that the payment will be made very shortly. We adjourned the case to February 11, 1983 to see that the payment is made and if not, what action should be taken.

Sd/-D.K. Kapoor, J.

Sd/-S. Ranganathan J.'

2. Further it is the case of the petitioner that with an intention to circumvent the order of the Court, respondent issued show cause notice to the petitioner dated 7th February, 1983 purportedly in exercise of its powers under Section 48 of the Delhi Sales Tax Act, proposing to suo moto review the order dated 21st March, 1981 wherein petitioner No.1 had been allowed the refund of Rs.4,34,123.24p for the year 1976-77. This show cause notice was issued after one year and 11 months from the date of the order of the High Court. Petitioner submitted reply to the show cause notice. The petitioner, inter alia, had taken the objection that there were no cogent reasons, stated in the show cause justifying the review of the assessment under section 48 of the Act. During hearing of the writ petition on 11th February, 1983, it was contended on behalf of the respondents that 46th Amendment of the [Constitution of India](#) had changed the position on the matter of refund and as such the petitioner was not entitled to refund of the amount stated, and it will be the fate of proceedings initiated on the basis of notice dated 7th February, 1983, that will determine the question of refund. This contention was dealt with by the High Court and ultimately the writ petition was disposed of. It was stated in the order of the Court that 46th Amendment would have no bearing at all on the question whether there could be a review or there were facts existing justifying a review either because of the facts raised in the assessment order or because of the 46th Amendment of the Constitution. Ultimately, after permitting certain deductions, the respondents disallowed major part thereof on the basis of the show cause notice and computed an amount of Rs.8,39741.06 as the total tax due from petitioner No.1 for the year 1976-77. A demand notice and challan in furtherance thereto was issued immediately by the respondents. Thus the petitioner challenged the correctness of the show cause notice dated 7th February, 1983, review order and demand order (both dated 24th February, 1983) in the present writ petition.

3. Counter-affidavit on behalf of the respondents was filed wherein it was stated that in view of the 46th Amendment Act, 1982 of the [Constitution of India](#), the writ petition was not maintainable as the provisions had become effective from 2nd February, 1983 and section 6(2) of the amending Act necessitated a suo moto review of the order of assessment for the year 1976-77. Otherwise, the facts were not in dispute. It was also stated that alternative remedy of appeal under the Sales

Tax Act was available to the petitioner. The issuance of the show cause notice was, therefore, proper and the orders passed by the respondents do not call for any interference by the Court. They prayed for dismissal of the writ petition.

4. Vide order dated 28th March, 1981, the Assessing Officer after examining the records and hearing the counsel for parties, formed an opinion that the case of the petitioner was squarely covered by the judgment of the Supreme Court in Northern India Caterers (India) Ltd. (supra) and they were not liable to pay tax on receipts on account of food/beverages served by the hotel/restaurants within the premises of the hotel/restaurant to its residents and non-residents. After recording this finding, he directed refund of a sum of Rs.4,34,123.24p. This order was not questioned by any of the parties. Till 7th February, 1983 when notice to show cause was issued by the appropriate Assessing Authority as to why the order be not suo moto reviewed in exercise of powers conferred upon the authority under section 48 of the Act, we must notice, at this stage itself, that in the show cause notice no grounds whatsoever was stated for issuing the show cause notice. A bare reading of the show cause notice shows that it was vague, indefinite and spelt out no ground much less a specific ground for exercise of powers for suo moto review of the order of assessment. This show cause notice was replied by the assessed on 9th February, 1982 wherein it was stated that there was no error apparent from the records and there was no such mistake which could be the basis for reviewing the order. The assessed in addition thereto raised a specific plea that no reasons were given in the show cause notice and also that no reasonable opportunity had been given to the petitioner to represent his case in as much as the show cause notice is dated 7th February, 1983 and the date for hearing was fixed as 9th February, 1983 at 10.00 AM. The pleas taken by the petitioner in reply to show cause notice were thus valid and proper. The petitioner was not at all aware as to what is the case or ground which the assessee is to meet for the purposes of satisfying the appropriate Assessing Authority that no case for suo moto review was made out. The purpose of serving a show cause notice in terms of section 48 of the Act is to put the reasons or grounds to the assessed, which the Assessing Authority would like to consider for the purposes of exercising such jurisdiction. The content of the show cause notice should thus specify grounds which would reflect an error or a mistake apparent on the face of the

record. A notice, which lacks these essential ingredients would oppose to the very scheme of the section. In the case of Board of Technical Education, U.P. and Ors v. Dhanwantri Kumar and Ors, : AIR 1991 SC271 , held as under :-

'The notices served on them were found by the High Court to be so vague that they could not have effectively defended themselves in the inquiry. In the absence of proper notices, the inquiry which was held was found by the High Court to be invalid for violation of the rule of natural justice. Accordingly, the High Court directed the appellant-Board to declare the results of the students who had filed the petitions in the High Court.

2. We have perused the records and heard counsel on both sides. On the peculiar facts and in the special circumstances of these cases, we are of the view that the High Court was justified in coming to the conclusion, which it did, that the notices served on the students were so vague and imprecise that they could not effectively defend themselves in the inquiry.'

5. Reliance was also placed upon the judgment of Gujrat High Court in the case of Union of India and Anr v. Narayanbhai Keshavlal Patel AIR 1985 Guj31, where the Court held as under :-

'On the other hand, it may be a case where patently there is an error in the approach and the subscriber may be able to convince the authority of it, given a chance. We read R.421 as needing such an approach and calling for such a construction. If that be so, in as much as whatever has been found against the subscriber was never put to him before the telephone was disconnected, we find no reason to interfere with the interim order made by this Court. After all we see no such prejudice in the interim order so as to compel the Telephone Department to make a complaint and file an appeal to this Court at any rate, the learned Single Judge has directed reconnection of only one telephone and there is no reason, why despite this, the matter should have been taken in appeal by the Telephone Department.'

6. In view of the above enunciated principle, the respondents were under obligation to spell out definite grounds in the notice to show cause and indicate in

definite terms what were the grounds on the basis of which the appropriate Assessing Authority intended to exercise power of review suo moto as contemplated under section 48 of the Act. Learned counsel appearing for the respondent-Department relied upon the judgment of the Kerala High Court in the case of Kil Kotagiri Tea and Coffee Estates Co.Ltd. v. Income-tax Appellate Tribunal and Ors. : [1988]174ITR579(Ker) and judgment of the Supreme Court in the case of Shenoy & Co. v. The Commercial Tax Officer, Bangalore and Ors. : [1985]155ITR178(SC) . On facts both these judgments have no application to the present case. The judgment of the Division Bench had not been challenged by the Department which specifically recorded a finding that case of the petitioner was not effected by 46th Constitutional Amendment. It cannot be said that the mistake is one apparent on the face of the records as no such mistake or ground was even stated in the notice served by the respondents upon the petitioner.

7. Jurisdiction of review cannot be equated to an exercise of an ordinary jurisdiction exercisable by the Assessing Authority while passing the assessment order. The authorities would exercise power of review only if the grounds are made out for exercise of such jurisdiction and the ingredients of section 48 of the Act are satisfied. Section 48 empowers the authorities to exercise on his own motion power to rectify any mistake apparent from the records. A bare reading of this provision, further shows that it is only the rectification of any mistake which could be corrected under this provisions and the change in opinion of the authority subsequent to passing of the Assessment Order would be no ground for exercising such a jurisdiction. Proviso to this section 48 clearly contemplates and require the authorities concerned to give a notice in writing to the person likely to be effected by the order of his intention to do so and allow such person reasonable opportunity of being heard. In the present case, both these essential features of the proviso have apparently being violated. As already mentioned, the show cause notice issued by the authorities did not specify any grounds and it called upon the assessed to appear before the Court on the second day of the date when the notice was issued. This certainly offends the principles of natural justice. The authorities are expected to exercise such powers upon due consideration and application of mind. Recourse to such powers in a mechanical manner or on the ground of mere change of opinion, would destroy the very essence of vesting such

power in the authorities concerned. The Supreme Court in the case of Income-tax Officer V Circle , Madras and Anr. v. S.K. Habiulla : [1962]44ITR809(SC) while discussing the scope of power vested in the Income-tax Officer under Section 35(1) of the Income-tax Act held as under :-

'As observed by the Judicial Committee of the Privy Council in Commissioner of Income Tax v. Khemchand Ramdas:

'.....when once a final assessment is arrived at, it cannot, in their Lordships' opinion, be reopened except in circumstances detailed in section 34 and 35 of the Act.... and within the time limited by those sections.'

8. The orders of assessment are, subject to the provisions relating to appeals, revisions, reassessment and rectification, final; it is not open to the Income-tax Officer to reopen the assessment because he thinks fit to do so. The provisions relating to assessments and rectification or reopening thereof are exhaustive, and may not be extended by analogies. The right to rectify an assessment order may therefore be exercised in strict compliance with conditions prescribed by the statute in that behalf.'

9. In another case titled as T.S. Balaram, Income-tax Officer, Company Circle IV, Bombay v. Volkart Brothers and Ors. : [1971]82ITR50(SC) again the same view was expressed and it was held as under :-

'A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions. As seen earlier, the High Court of Bombay opined that the original assessments were in accordance with law though in our opinion the High Court was not justified in going into that question. In Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale, this court while spelling out the scope of the power of a High Court under article 226 of the Constitution ruled that an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the face of the record. A decision on debatable point of law is not a mistake apparent from the record-see

Sidhramappa Andannappa Manvi v. Commissioner of Income-tax. The power of the officers mentioned in section 154 of the Income-tax Act, 1961, to correct 'any mistake apparent from the record' is undoubtedly not more than that of the High Court to entertain a writ petition on the basis of an 'error apparent on the face of the record.' In this case it is not necessary for us to spell out the distinction between the expressions 'error apparent on the face of the record' and 'mistake apparent from the record'. But suffice it to say that the Income-tax Officer was wholly wrong in holding that there was a mistake apparent from the record of the assessments of the first respondent.'

10. The Assessing Officer then have passed an order making addition of Rs.8,39,741.06p and issued demand notice on the basis of show cause notice afore referred and despite the objections of the assessed which were obviously well founded in law. In the order for the first time, reference was made to the 46th Amendment to the Constitution on the basis of which the sales made by the petitioner within the premises of hotels and restaurants to residents or non-residents, were treated to be taxable. The case of the petitioner, therefore, was that after passing the order of assessment and the orders of the High Court in CW 3742/82, the right of the parties had fully settled and even if the contention of the Department was to be considered, in light of 46th Amendment, it would no way adversely affect the case of the petitioner. No doubt by section 4 of the Amending Act in Article 366 of the Constitution, Clause 29A was added after Clause 29 and section 6 of the said Act was a saving provision with regard to revalidation and exemption. The settled rights in favor of the assessed would hardly be affected particularly in the facts and circumstances of the present case. These rival contention of learned counsel for parties do not detain us any more because the matter in controversy was put at rest by the order of the High Court in a litigation inter se the parties. While disposing of CW 3742/82 finally, the Court held as under :-

'On 11th February, 1983, it was contended before us that there has been a 46th Amendment of the Constitution which changed the position on the matter of refund. It was also brought to our notice that the Department was trying to avoid the payment of the refund by seeking a review of the order of assessment. We

issued Rule D.B. And have now heard the matter.

The wording of the 46th Amendment of the Constitution has been examined by us. As we are dealing with an assessment order which has become final unless it is altered, it is difficult for us to apply the provisions of the 46th Amendment to the same nor do we think it advisable to make any comment as there may be subsequent proceedings in which the effect of the 46th Amendment on the assessment would have to be determined and spelt out by the Court. We would, therefore, proceed on the basis as far as the case is concerned, that the 46th Amendment does not affect the assessment order. On this assumption, we have no hesitation in granting the mandamus prayed for.

At the same time, a notice has been issued for reviewing the assessment order. If the order is reviewed, then the quantum of refund, etc., will be determined by the order passed in review, assuming that any review is made in the time allowed by law.

It is provided by sub-section (6) of Section 3 of the [Delhi Sales Tax Act, 1975](#), that where there are any pending proceedings, the Commissioner may withhold the refund if it is likely to adversely affect the Revenue. We do not think that the Revenue could be adversely affected in this case because even if a review is granted, the amount can always be realised again from the assessed. However, to avoid any further controversy, we would allow the respondents some time in which they may pay the refund. We would direct the amount to be paid to the petitioners by 7th April, 1983, by which time, the time for the review would be over. In case, there is any alteration in the quantum or refund as a result of review, the altered amount may be refunded. And if the amount remains the same, then the amount mentioned in the original assessment order should be paid by the date mentioned by us.

In view of the nature of the contentions raised before us, we make it clear that the observation contained in this judgment regarding a possible review will have no bearing at all on the question whether there can be a review or, there are facts existing justifying a review either, because of the facts stated in the assessment order or, because of the 46th Amendment of the Constitution, or for any other

reason. The parties will bear their own costs.'

11. It is not in dispute before us that the order of the Division Bench of this Court was never challenged by the Department and the same had attained finality. Once an order becomes final between the parties and their rights are permitted to be settled in furtherance thereto, it cannot be said that now in the present proceedings, this Court could disburse the said decision on a plea of review which itself is founded on a vague show cause and where, even the grounds on which review was sought, were not stated or put to the assessed. The respondents had given an undertaking before the Court that they would refund the amount. Of course, such a direction would have been subject to the order passed in furtherance to the notice to show cause for review but if the said notice itself and the order passed thereupon is vocative of principles of natural justice and is not within the ambit and scope of provisions of section 48 of the Act, none of them can stand the scrutiny of law.

12. For the reasons aforesaid, we find merit in this petition. We allow the same, quash the demand and order dated 24th February, 1983 leaving the parties to bear their own costs.

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