Neutral Citation No. - 2023:AHC:236496-DB

Court No. - 39

Case :- WRIT TAX No. - 248 of 2021

Petitioner :- M/S Flipkart India Pvt. Ltd.
Respondent :- State Of U P And 4 Others
Counsel for Petitioner :- Nishant Mishra,Tanmay Sadh
Counsel for Respondent :- C.S.C.

Hon'ble Saumitra Dayal Singh,J.
Hon'ble Shiv Shanker Prasad,J.

1. Heard Mr. Tarun Gulati, learned Senior Advocate assisted by Mr. Kishore Kunal (both through video conferencing) alongwith Mr. Nishant Mishra, learned counsel for the petitioner and Mr. Ankur Agarwal, learned Standing Counsel for the State-respondents.

2. The present petition was originally filed to assail the proposal dated 29.05.2018 issued by the Additional Commissioner, Grade-I, Commercial Tax, Ghaziabad Zone-I, Ghaziabad issued under Section 29 (7) of the Uttar Pradesh Value Added Tax Act, 2008 (hereinafter referred to as the “Act”) as also the consequent order dated 30.01.2021 (as modified on 08.02.2021) passed by that authority, granting permission to the petitioner’s assessing authority, namely, Deputy Commissioner, Sector-7, Commercial Tax, Ghaziabad, to re-assess the petitioner for the A.Y. 2012-2013 (U.P. and Central), in the extended period of limitation provided under Section 29 (7) of the Act. The petition was entertained vide order dated 22.03.2021. Further, the operation and effect of the order dated 30.01.2021 and the consequential notice dated 15.02.2021 (issued by the assessing authority) were stayed.

3. Despite that stay order an *ex-parte* reassessment order was passed by the assessing authority. The revenue claims, that reassessment order had been passed on 17.03.2021 itself (i.e. few days before grant of the interim order dated 22.03.2021). However, it was first uploaded on the web portal of the revenue, on 24.03.2021. Occasioned by this development, an Amendment Application was filed to challenge the reassessment order dated 17.03.2021 for the A.Y. 2012-2013 (U.P. and Central). It was allowed. Further, vide order dated 29.07.2021, the operation and effect of the reassessment order was stayed.

4. Pleadings have been exchanged and the matter has thus been heard. The petitioner is a duly incorporated company registered under the Act. It is engaged in the activities of trading in goods and providing warehousing and fulfilment services to retailers of goods and services through a website. It manages the inventory, packing and invoicing on behalf certain retailers. At the same time, according to the petitioner, it has not made sale of goods to individual customers.

5. At present, it is also not in dispute that in the year 2013, the petitioner shifted its principal place of business from Cabin No.-2, First Floor, G-50, Sector-3, Noida to D-510-513, Buffer Godown Compound, Devi Mandir Road, Dasna Ghaziabad-201001.

6. For the A.Y. 2012-2013 (U.P. and Central), the petitioner filed its annual return under the Act on 25.12.2013 through online mode. The physical copy of that return was filed on 19.01.2014. First, the assessing authority proceeded to frame an *ex parte* provisional assessment order dated 25.01.2014 (under Section 25 (1) of the Act), creating a demand of

tax of Rs. 85,25,811/-. Consequently, attachment notice was issued to recover that tax due. The petitioner challenged the same through process of appeal.

7. In the Second Appeal therefrom, the Commercial Tax Tribunal vide its order dated 30.01.2015 set aside the *ex parte* provisional assessment order dated 25.01.2014 and remitted the matter to the assessing authority to pass a *de novo* assessment order. That order attained finality.

8. At that stage, occasioned by the above noted change of address, further application was moved by the petitioner on 05.12.2015 to record the change of address in the registration and assessment records of the petitioner. Yet, a fresh notice was issued to the petitioner on 19.12.2015 at its old address to assess the petitioner for A.Y. 2012-13. That led to the second *ex parte* proceedings. Vide order dated 04.01.2016, the petitioner was subjected to regular assessment for the A.Y. 2012-2013 under Section 28(b)(iii) of the Act. This time, tax was assessed at Rs. 3,72,94,000/-.

9. Being aggrieved, the petitioner filed an application before the assessing authority under Section 32 of the Act to set aside that *ex parte* assessment order dated 04.01.2016. It was allowed by the assessing authority on 01.02.2016. Consequently, the petitioner's regular assessment proceeding for A.Y. 2012-13 was reopened.

10. While its assessment for A.Y. 2012-13 was pending, the petitioner felt further aggrieved by the inaction of the revenue authorities in not recording the change of address; in not uploading the correct/changed address of the petitioner and in continuing to pass *ex parte* orders without due service of

necessary notice. Thus, the petitioner approached this Court by means of **Writ (Tax) Nos. 80 of 2016** and **168 of 2016** to assail the *ex parte* assessment orders for the A.Ys. 2011-2012, 2013-2014 and 2014-2015. Those writ petitions (for other assessment years) were allowed vide order dated 29.02.2016. *Ex parte* orders were set aside and refund Rs. 49.24 crores was directed to be made. That refund was also received by the petitioner on 31.03.2016.

11. Then for the A.Y. 2012-2013, fresh notice of assessment was issued to the petitioner under Section 28 (2) (iii) of the Act on 30.03.2016. Also, territorial jurisdiction to assess the petitioner to tax was transferred to the petitioners' assessing authority at Ghaziabad. Still, pursuant to the above notice, the third *ex parte* assessment proceedings for A.Y. 2012-2013 were concluded on 04.05.2016, by the Noida authority. It created a demand of tax at Rs. 1,49,34,487/-. Similar assessment orders were framed for A.Ys. 2013-2014 and 2014-2015.

12. Thereafter, the petitioners' assessing authority at Noida, again passed an order under Section 31 of the Act. He rectified and thus annulled the third ex parte assessment order dated 04.05.2016. The only reason given in that order is the inherent lack of jurisdiction with the Deputy Commissioner, Commercial Tax, Noida to assess the petitioner to tax on 04.05.2016 as that jurisdiction stood transferred to Deputy Commissioner, Commercial Tax, Sector – 7, Ghaziabad w.e.f. 31.03.2016, by virtue of order of the Additional Commissioner, Commercial Tax (Law), Lucknow.

13. In the meantime, the petitioner had filed **Writ (Tax) No. 546 of 2016** arising from similar *ex parte* assessment order for the A.Y. 2014-2015. That came to be allowed with cost Rs. 50,000/-, on 02.08.2016.

14. Also, by way of another/fourth *ex parte* assessment proceedings, assessment order was framed in the case of the petitioner for A.Ys. 2012-2013 (U.P. and Central), on 31.03.2017. That and another assessment order for A.Y. 2013-14 were challenged by the petitioner in **Writ (Tax) No. 760 of 2017**, on the ground of limitation etc. The writ petition was entertained by this Court and on 14.11.2017 and operation and the effect of the fourth (*ex parte*) assessment orders for the A.Y. 2012-2013 and for A.Y. 2013-2014, was stayed.

15. While that writ petition remained pending, acting *suo moto,* the fourth (*ex parte)* assessment order passed in the case of the petitioner for the A.Y. 2012-2013 (U.P. and Central) was rectified by the petitioners' assessing authority under Section 31 of the Act. Thus, on 23.04.2018, the petitioners' assessing authority *suo moto* rectified the assessment order dated 31.03.2017. Since that order may not have been communicated to the petitioner earlier, we required the learned Standing Counsel to produce the original records. The record reveals that the assessing authority was of the view that the limitation to frame regular assessment order for A.Y. 2012-2013 expired on 30.09.2016. On that self-appraisal on facts and law made, he further opined that the fourth *ex parte* assessment order dated 31.03.2017 had been passed beyond limitation. Therefore, he rectified such mistake in the order and practically nullified that assessment order while it

was pending consideration in the writ proceedings being **Writ (Tax) No. 760 of 2017**.

16. For reasons not disclosed to us, neither party informed the coordinate bench about this/last development. In such facts, it was not disclosed to the co-ordinate bench that the fourth *(ex parte)* assessment order dated 31.03.2017 for A.Y. 2012-13 had been rectified and thus nullified on 23.04.2018. In ignorance of that fact, the co-ordinate bench quashed the assessment order dated 31.03.2017, vide judgment and order dated 28.08.2019.

17. Meanwhile, the Additional Commissioner had already issued a notice proposing to grant permission to the petitioners' assessing authority to re-assess the petitioner for the A.Y. 2012-2013 (U.P. and Central) in the extended period of limitation. Later, the Additional Commissioner had issued a consequential notice dated 29.05.2018 to the petitioner seeking to re-assess it, for the A.Y. 2012-2013 (U.P. and Central) by invoking the extended period of limitation. Also, the petitioner applied to the authorities to keep those proceedings in abeyance during the pendency of **Writ (Tax) No. 760 of 2017**. Still, the petitioner was visited with another notice dated 13.06.2018. In response thereto, on 18.07.2018, it applied to Additional Commissioner to supply the reasons for invocation of the extended period of limitation. The reassessment proceedings thus initiated, remained pending during pendency of the aforenoted writ petition.

18. It is extremely strange, though both parties were already involved in intense litigation and were fully aware of all facts yet, neither informed the coordinate bench about the same. In such ignorance, on 28.09.2019, the

coordinate bench allowed **Writ (Tax) No. 760 of 2017**. The fourth *(ex parte)* assessment order dated 31.03.2017 for the A.Y. 2012-2013 was quashed. At the same time, the coordinate bench set aside the assessment order dated 31.03.2017 for the A.Y. 2013-2014.

19. Relevant to A.Y. 2012-13, the coordinate bench made the following observations:

> *"Learned counsel for the respondent could not justify the action of the respondent passing the orders for the assessment year 2012-13 both under Act 2008 and CST Act in question after the expiry of period of limitation as provided under Section 29(6) of the Act.*
>
> *In view of above mentioned facts that the limitation as prescribed under Section 29(6) of Act 2008 for the assessment year 2012-13 has expired. On 13th September, 2016 and the impugned orders both under Act 2008 and CST Act for assessment year 2012-13 have been passed on 31st March, 2017 which are apparently much beyond the period of limitation prescribed therein. Therefore, the impugned orders for the assessment year 2012-13 both under Act 2008 and CST Act are hereby quashed.*
>
> *The learned Senior Counsel now raised an objection for the order passed for the assessment year 2013-14 both under the Act 2008 and CST Act."*

20. In contrast, for A.Y. 2013-2014, the coordinate bench granted following relief:

> *"In view of the facts and circumstances of the case as stated above, the impugned order dated 31.3.2017 for the assessment year 2013-14 under the U.P. Act 2008 and CST Act are hereby set aside.*
>
> *It is made clear that respondents are permitted to initiate the proceeding by issuing notice at the current address of the petitioner, if any, in accordance with law.*
>
> *The writ petition is accordingly allowed."*

21. Thereafter, on 10.08.2020 the petitioner received further notice proposing to extend the period of limitation to reassess the petitioner for the A.Y. 2012-2013. On 28.08.2020, it again applied for the reasons to believe.

Thereafter, the Additional Commissioner issued another assessment notice dated 06.01.2021 fixing the date 14.01.2021. The petitioner appeared and again applied for reasons to believe. On 31.01.2021 an order was passed by the Additional Commissioner granting permission to the petitioner's assessing authority to re-assess the petitioner in the extended period of limitation for the A.Y. 2012-2013 (U.P. and Central). That order was modified on 08.02.2021. Consequently, the assessing authority issued assessment notice to the petitioner dated 15.02.2021.

22. Learned Senior Counsel for the petitioner has submitted, in the scheme of the Act, in absence of any assessment order being passed by the assessing authority on a conscious application of mind, the assessment made by way of self-assessment arises on a deemed basis, as an enforceable consequence in law, under Section 27 of the Act.

23. For ready reference, the provisions of Section 27 of the Act are quoted below:

> *"27. Self assessment*
>
> *(1) Subject to provisions of section 28, every dealer, who has submitted the annual return of turnover and tax, in the prescribed form and manner, shall be deemed to have been assessed to an amount of tax admittedly payable on the turnover of purchase or sale or both, as the case may be, disclosed in such return, and to an amount of input tax credit shown admissible in the return.*
>
> *(2) For all purposes under this Act and rules made thereunder-*
>
> *(a) annual return of turnover and tax, referred to in sub-section (7) of section 24, submitted by a dealer, shall be deemed to be an assessment order and facts disclosed or figures mentioned in such return shall be deemed part of such assessment order; and*
>
> *last date of the assessment year succeeding the assessment year in which the date prescribed for submission of such*

annual return falls, shall be deemed to be the date of such assessment order."

24. It is his submission, unlike the earlier statutory law (U.P. Trade Tax Act, 1948), the Act makes a clear departure and creates a deeming fiction in law - in favour of the assessee. Thus, even in the absence of a conscious/scrutiny assessment proceedings being undertaken and specific assessment order being framed (in black and white), it may not be said that such an assessee was not assessed to tax. In that event, an assessment order would arise, on a deemed basis being the disclosure made by that assessee in its annual return filed within time. Relying on Section 27 (2) (a) of the Act, he would submit, the Act leaves no element of doubt as to what would constitute a deemed assessment order. The annual return would itself constitute such deemed assessment order.

25. In view of that statutory provision and effect caused in law, Mr. Gulati would further submit, the assessing authority and the Additional Commissioner have completely misapplied themselves to the correct facts and law. It could never be said with any amount of certitude that the turnover of the petitioner for the A.Y. 2012-2013 (U.P. and Central), had escaped assessment. The annual return had been filed by the petitioner for A.Y. 2012-2013, within time. Therefore, the mandatory and binding consequence of deemed assessment arose on 31.09.2016 i.e. at the end of the normal period of limitation to make an assessment, as provided under Sections 29 (1) and 29 (6) of the Act. Till then the petitioners assessing authority had time to frame a regular assessment. For ready reference, provision of Sections 29 (1) and 29 (6) of the Act are quoted below:

“29. Assessment of tax of turnover escaped from assessment
(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 under assessed 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 re-assess the dealer to tax according to law :

Provided that the tax shall be charged at the rate at which it would have been charged had the turnover not escaped assessment or full assessment as the case may be.

Explanation I: *Nothing in this sub-section shall be deemed to prevent the assessing authority from making an assessment to the best of its judgment.*

Explanation II: *For the purpose of this section and of section 31, " assessing authority" means the officer or authority who passed the earlier assessment order, if any, and includes the officer or authority having jurisdiction for the time being to assess the dealer.*

Explanation III: - *Notwithstanding the issuance of notice under this sub-section, where an order of assessment or re-assessment is in existence from before the issuance of such notice it shall continue to be effective as such, until varied by an order of assessment or re-assessment made under this section in pursuance of such notice.*

….”

(6) Where an order of assessment or re-assessment has been set aside by the assessing authority himself under section 32, a fresh order of assessment or re-assessment may be made before expiry of the assessment year in which such order of assessment or reassessment has been set aside:

Provided that if an order of assessment or re-assessment made ex parte is set aside on or after first day of October in any assessment year, fresh order of assessment or re-assessment may be made on or before thirtieth day of September of the assessment year succeeding the

assessment year in which such ex parte order of assessment or re-assessment was set aside.

Provided further that where second or subsequent time any order of assessment or reassessment is made ex parte and where such second or subsequent ex parte order of assessment or reassessment is to be set aside and a fresh order of assessment or reassessment may be made within the time aforementioned when the first ex parte order is set aside."

26. Alternatively, it has been submitted, merely because a conscious assessment may not have been made by the assessing authority, it may not itself constitute a "reason to belief" that any part of the turnover had therefore, escaped assessment for A.Y. 2012-13. In absence of any material being available at the hands of the assessing authority and/or the Additional Commissioner as may have led to formation of a belief that any part of the turnover of the petitioner had escaped assessment, there could never arise any reason for such a belief to be entertained. In other words, it has been submitted, there is neither any relevant material nor any reason was formed "to believe" that any part of turnover had escaped assessment at the hands of the petitioner. Consequently, it has been asserted that the re-assessment proceedings had been initiated against the petitioner for the A.Y. 2012-2013, on pure whims, fencies and conjectures. He has relied on a coordinate bench decision of this Court in ***M/s Manaktala Chemical Pvt. Ltd. Vs. State of U.P. (2006) SCC Online All 1569***.

27. Third, it has been submitted, in any case in face of the order passed by the coordinate bench dated 28.08.2019 (extracted above) in **Writ (Tax) No. 760 of 2017**, the assessment proceedings against the petitioner for A.Y. 2012-13 remained quashed. Neither this Court granted any liberty to the

assessing authority to pass a fresh assessment order in the case of the petitioner for the Assessment Year 2012-2013 (U.P. and Central) nor the revenue challenged that order before the Supreme Court. Therefore, the order of the coordinate bench dated 28.08.2019 attained finality. The narration to the contrary made in the re-assessment order for the A.Y. 2012-2013 is plainly against the record. Liberty had been granted only with respect to A.Y. 2013-2014.

28. Last, it has been submitted, the entire exercise has been made by the revenue authorities in abuse of their powers, despite earlier orders wherein certain adverse observations had also been made. The limitation to make the assessment order existed up to 31.03.2016, in the first place. Upon the *ex parte* assessment order dated 04.01.2016 being set aside by the assessing authority, in exercise its power under Section 32 of the Act, on 01.02.2016, that limitation stood extended under Section 29(6) of the Act, up to 30.09.2016. No fresh order or assessment was passed within that limitation. For reasons best known to the jurisdictional assessing authority (at Ghaziabad), chose to pass a fresh order for A.Y. 2012-13 not earlier than 31.03.2017. On that date the limitation to draw regular assessment proceedings in the case of the petitioner for that assessment year stood lapsed. The further orders passed by the assessing authority with reference to his powers under Section 31 of the Act i.e. for rectification of mistakes did not cause extension of limitation that stood lapsed from before. Reliance has been placed on a decision of the Supreme Court in ***Fag Precision Bearings Vs. Sales Tax Officer (I) and Another (1997) 3 SCC 486***.

29. Responding to the above, learned Standing Counsel for the revenue contends, irrespective of the lapse of limitation on 30.09.2016, the revenue authorities were well within their right to seek reassessment of the petitioner for A.Y. 2012-13 in the extended period of limitation i.e. eight years from the end of that assessment year, subject to observance of conditions prescribed under Section 29 of the Act. Those requirements are met.

30. Second, since the first regular assessment order (for A.Y. 2012-13) dated 04.01.2016 had been set aside under Section 32 of the Act on 01.02.2016, it has been asserted, the limitation to make the assessment existed till 30.09.2016. No assessment order made within that limitation; the case of the petitioner has been described to be one of no assessment.

31. Based on the principle that the assessing authority had inherent jurisdiction to make an assessment order for every assessment year, it has been vehemently urged, in the absence of any assessment order the entire turnover of the petitioner had escaped assessment. In that context, learned counsel for the revenue asserts, there is no error on part of the assessing authority in making the proposal to reassess the petitioner for the A.Y. 2012-13 as no part of the turnover for that assessment year had been assessed to tax.

32. As to reasons, we have perused the record. It is an admitted case of the revenue as well - there exists no objective material to establish that any part of the return file by the assessee was either false or wrong or incomplete. It is also not the case of the revenue that there is any material on the assessment record to establish that the assessee had made any excessive claim or shown less tax liability. There is no allegation of

suppression of turnover etc. The learned Standing Counsel would candidly admit, there is no such material on record.

33. As to the effect of the earlier order of the coordinate bench dated 28.08.2019, learned counsel for the revenue has relied on the operative portion of that order to submit that the writ court left it open to the assessing authority to make a fresh assessment order. At the same time, it is undisputed that the revenue never challenged that order before the Supreme Court. It has not sought review or clarification of that order.

34. Last, it may be specifically noted, the revenue is not relying on the subsequent orders passed by the assessing authority on 31.03.2017. In that regard it has been fairly stated that the normal period of limitation to make a regular assessment expired on 30.09.2016. Thereafter, there did not survive any provision of law to extend the limitation to make a regular assessment. It is that mistake (committed in law), that the assessing authority later corrected by the order dated 23.04.2018. At the same time, it is admitted that the revenue authority did not inform the writ Court about that order in **Writ Tax No. 760 of 2017** which was decided on 28.08.2019.

35. Having heard the learned counsel for the parties and having perused the record, the first issue to be dealt with in the present proceedings is the effect of Section 27 of the Act. There did not pre-exist any principle of law where under an assessee could claim a deemed assessment or a consequence in law, equivalent to that. The U.P. Trade Tax Act that was repealed by the Act, did not contain a concept of a deemed assessment. Under that law, whenever limitation to frame assessment lapsed, no assessment arose. However, Section 27 of the Act made a clear departure

from that pre-existing law. In no uncertain terms it provided that the annual return of turnover and tax filed under Section 24(7) of the Act would constitute a deemed assessment. It would arise on the last day of filing of the annual return. Further, the facts disclosed, and figures mentioned in that return were deemed to be part of the assessment order.

36. For the deeming fiction in law to arise, the legislature had further provided that the last date to file the annual return for an assessment year would be as prescribed. Section 24(7) of the Act read as below:

> *"(7) Every taxable dealer, including a dealer who has carried on business during part of an assessment year, shall, for such assessment year or part thereof as the case may be, submit Annexures of Consolidated Details within such time and in such form and manner as may be prescribed."*

37. Then Rule 45(7) of the Rules framed under the Act provided the annual return could be filed by 31st October of the subsequent assessment year. The same could be extended by the Commissioner or the State Government, for adequate reasons. For ready reference the provisions of Rules 45(7) of the Rules are quoted below:-

> *"(7) Every dealer liable to pay tax shall, alongwith the last return of the financial year but not beyond 31st October of the subsequent assessment year, submit to the Assessing Authority the Annexures of Consolidated Details of his turnover and tax,-*
>
> *(a) in **Form LII** in case of a dealer other than a dealer referred to in clauses (b) and (c) below*
>
> *(b)" in form **Form LII-A** in case of dealer exclusively dealing sale and purchase within the State;*

*(c) in form **Form LII-B** in case of a dealer executing works contract or transfer of right to use any goods or both, as the case may be;*

for the preceding assessment year alongwith copies marked "Original" of all forms of declaration or certificates, on the basis of which exemption or reduction in the rate of tax is claimed or which determine the nature of a transaction and annexure as described in the relevant forms:

Provided that the Assessing Authority may, for adequate reasons to be recorded in writing, extend the time for filing such Annexures of Consolidated Details upto a period of ninety days beyond the period prescribed under this sub-rule:

Provided Further that the Commissioner or the State Government may, for adequate reasons to be recorded in writing, by an order in general, extend the time for filing the Annexures of Consolidated Details beyond the period prescribed under this sub-rule."

38. Thus, in the present facts the last date of filing of return for the A.Y. 2012-13 would have been 31.10.2013. The petitioner had filed it's annual return on 25.12.2013. Admittedly, it was extended till 31.12.2013. Upon the provisional assessment order set-aside, since the assessing authority chose to pass the conscious/ specific assessment order for A.Y. 2012-13 on 04.01.2016, the deeming fiction in law stood replaced by that order dated 04.01.2016. At the same time, it being further undisputed between the parties that that specific assessment order was recalled on 01.02.2016, it left no trace in law to eclipse the effect in law of a deemed assessment order that had otherwise arisen on 31.12.2013.

39. In other words, the deeming fiction in law revived upon order dated 01.02.2016 being passed. Earlier, it may have remained in the shadow and thus dormant in face of the specific/conscious assessment order dated

04.01.2016 yet, in view of that order being recalled on 01.02.2016, it got resurrected by the force of law. It became absolute upon expiry of period of limitation to make a fresh assessment i.e. on 30.09.2016. Since, the assessing officer failed to make any specific order of assessment in terms of Section 29(6) of the Act till 30.09.2016, his powers to make the regular assessment stood exhausted. It is on the occurrence of that passive event on 30.09.2016 i.e. lapse of limitation to make a regular assessment that the deeming fiction of law created by Section 27 of the Act became absolute.

40. What survived with the assessing authority thereafter was his jurisdiction to make a reassessment for A.Y. 2012-13. At the same time, the jurisdiction to make a reassessment remained hinged to the scope created under Section 29 of the Act. It is too far well settled in law to merit any fruitful discussion that a reassessment proceeding could be initiated under the Act only against valid 'reason to believe' to be recorded by the assessing authority. It was a *sine qua non* for valid assumption of jurisdiction.

41. Again, it is well settled in law that for a ‘reason to believe’ to arise, there must exist cogent material. That and not a purely subjective opinion may give rise to any reason - that any part or whole of turnover had escaped assessment. A simple belief as to escapement could never sufficient to assume jurisdiction to reassess an assessee.

42. Further, even if such jurisdictional fact may exist i.e. the assessing authority may have held in his possession, objective/cogent material as may give rise to a ‘reason to believe’ to reassess and assessment, the jurisdiction could not be validly assumed by an assessing authority, acting

on his own, unless he first formed and recorded his ‘reason to believe’ - as to escapement.

43. For that purpose, the relevant date would remain as prescribed under Section 29(1) of the Act being 3 years from the end of the relevant assessment year. In present facts, that date expired on 31.03.2016. The order dated 01.02.2016 passed by the assessing authority under Section 32 of the Act to recall the earlier / regular assessment order dated 04.01.2016, had no bearing on that date. That event only caused the effect of extending the period of limitation to make a fresh assessment (regular), by 30.09.2016.

44. Section 29(1) and Section 29(6) were mutually exclusive provisions. They did not overlap or interject the applicability of the other. Section 29(6) of the Act was applicable to situations where an *ex parte* order of assessment or reassessment had been set aside by the assessing authority. In contrast, Section 29(1) governed the limitation to initiate a reassessment proceeding. Thus, if an assessment or reassessment proceeding had been validly initiated and consequently, an ex parte assessment / reassessment order was passed then upon it being set aside under section 32 of the Act, the limitation to make a fresh assessment / reassessment order would stand extended in terms of Section 29(6) of the Act.

45. If however, as in the present case, jurisdiction to reassess had remained from being assumed within the normal period of limitation - that expired on 31.03.2016, the subsequent setting aside of the regular *ex parte*

assessment order would have no effect as to jurisdiction to initiate such reassessment proceeding.

46. Therefore, in the present facts the assessing authority was obligated to first obtain an approval of his higher authority namely the Additional Commissioner to proceed to reassess the petitioner in the extended period of limitation namely eight years.

47. Seen in that light, besides the initial missteps (committed during pendency of Writ Tax No. 760 of 2017), it has to be examined if there existed any material with the assessing authority and whether the belief of escapement formed by the assessing authority was founded on any reason referable to any material on record. Here, as we have noted above the assessing authority has not raised any doubt as to the correctness of the facts and figures disclosed by the assessee in the annual return filed on 25.12.2013 (through online mode) and on 19.01.2014 (through offline mode). The assessing authority has merely recorded, since the petitioner had not been assessed to tax by way of regular assessment order for the A.Y. 2012-13, its entire turnover had escaped assessment.

48. Whatever doubt may have existed under the provision of Section 21 of the U.P. Trade Tax Act as to the consequence in law that may arise in such facts, it is beyond the scope of any discussion in the present proceeding that arise under the Act. As discussed above, by virtue of Section 27 of the Act, not only the petitioner was visited with the consequence of a deemed assessment, but the shape and character of that order stood defined by the annual return filed by the petitioner. That return filed within the limitation prescribed under Rule 45(7) of the Rule framed

under the Act, it never became open for the assessing authority to claim that the present was a case of no assessment. The observation and reasoning to that effect is perverse and contrary to the law.

49. Once, the consequence of an assessment order arose and that assessment order was defined by the disclosure of facts and figures in the annual return filed by the assessee for A.Y. 2012-13, jurisdiction to reassess the petitioner for A.Y. 2012-13 may have been assumed only against a valid reason to believe recorded in the context of the facts and figures that found mentioned in such assessment order/ annual return. We may have been tempted to consider the figures in the annual return and the disclosure made therein, yet, it is an undisputed fact that such return was filed and was subjected to provisional assessment proceeding (once) and regular assessment proceeding (once). At both stages that return was considered. Therefore, no further discussion is required as to the existence of facts and figures disclosed in such annual return.

50. Even if the assessing authority was seeking to reassess the petitioner on the strength of its annual return, it was incumbent on the assessing authority to record his reasons with respect to and/or in contrast to the facts and figures disclosed by the assessee in its annual return. It was further incumbent on the assessing authority to form reasons on the strength of objective material on record that any part of petitioner's turnover had escaped assessment.

51. The burden to establish existence of recorded reasons was entirely on the revenue. Neither the petitioner was obligated to provide any material, nor it was required to assist in the formation of the reasons. Since the

assessing authority wanted to assume the jurisdiction to reassess the petitioner for the A.Y. 2012-13 he took it upon himself to bring on record both, the relevant material as may have led to formation a reason - to believe, that any turnover had escaped assessment and he further burdened himself to record the relevant reasons as to the belief of escapement of turnover from assessment. The burden thus cast, was not discharged.

52. The assessing authority laid an incorrect premise by observing that the assessee had not been assessed to tax. That we have dealt with above. More critically the assessing authority failed to bring on record any material and most crucially he failed to record any reason for the belief entertained by him that the turnover had escaped assessment.

53. In view of above, there was neither any relevant material nor any reason was recorded by the assessing authority that any part of the turnover of the petitioner had escaped assessment. Consequently, the jurisdiction to reassess the petitioner never arose with the assessing authority for A.Y. 2012-13. Unfortunately, that basic aspect escaped the attention of the Additional Commissioner, who appears to have granted the permission to the petitioner- assessing authority to reassess the petitioner in the extended period of limitation, in a mechanical exercise of his power. In paragraphs 10, 11 and 13 of ***M/s Manaktala Chemical Pvt. Ltd. (Supra)*** it was held as below:-

> *"10. The proviso confers power and gives jurisdiction/authority to the Commissioner if he is 'satisfied' either on his own or on the basis of the reasons recorded by the assessing authority that it is just and expedient to either assess or reassess the dealer, only then, he would authorise the assessing authority to make such assessment or reassessment within the*

extended period of limitation. The plain and simple meaning of the aforesaid proviso is that the permission/approval for such reassessment of alleged escaped turn over is to be granted by the Commissioner only on being satisfied either on his own or on the basis of the reasons recorded by the assessing authority that it is just and expedient to reopen the assessment.

11. Once the proviso postulates recording of reasons by the assessing authority, it necessarily obligates the Commissioner or the Additional Commissioner to consider such reasons and make them known to the assessee, before he finally forms his satisfaction and even if the Commissioner or the higher authority on his own reasons feels satisfied that it is just and expedient to reopen the assessment, it would still require that such reason must be made known to the dealer also so that before the assessment is reopened he may have an opportunity to satisfy the higher authority that the reasons assigned by the assessing authority are not relevant or they are incorrect or they do not make out a legal ground for reopening of the assessment and likewise if the Commissioner or the higher authority proposes to authorise the assessing authority for reopening the assessment on his own, then also reasons for such satisfaction have to be supplied to the dealer, so that he may have a say to convince the higher authority for not authorising the assessing officer for reopening the assessment.

13. When an order is passed on the basis of the reasons recorded, it naturally means that the reason must be rationale, genuine and relevant. Any reason which cannot be termed as rationale, genuine or relevant would not make out a case for reopening of the assessment and for that matter also, the dealer has to be associated in the proceedings initiated seeking approval from the Commissioner or the Additional Commissioner, as case may be."

54. Also, we find it never survived with the assessing authority to contemplate if he could assess the present petitioner for the A.Y. 2012-13. The order of the coordinate bench dated 28.08.2019 in Writ Tax No. 760 of 2017 is specific. As noted above, that writ petition had been filed by the petitioner to assail the regular assessment orders for the A.Ys. 2012-13 and 2013-14. While deciding that writ petition the coordinate bench specifically quashed the assessment order for the A.Y. 2012-13 (U.P. and Central). Only thereafter it proceeded to take up the submissions advanced for the A.Y. 2013-14. It is in that context only that the discussion as well records that the order dated 31.03.2017 for the A.Y. 2013-14 is set aside.

55. No doubt ever existed as to the outcome of proceeding. The coordinate bench had distinctively used the words 'quashed' and 'set aside'

to cause a different legal effect *qua* the assessment proceedings for A.Ys. 2012-13 and 2013-14. Once the proceeding for A.Y. 2012-13 had been quashed, nothing survived for reconsideration or further consideration. In contrast after setting aside the assessment order for A.Y. 2013-14, the matter was remitted to the petitioner's assessing authority to pass a fresh assessment order. Those different conclusions arose from different fact considerations made by the coordinate bench while considering the assessment orders for the A.Ys. 2012-13 and 2013-14. For A.Y. 2012-13 it was specifically recorded that the assessment proceedings had become time barred whereas for the A.Y. 2013-14, that satisfaction was not reached.

56. Learned counsel for the revenue is correct in his submission that the aforesaid order of the coordinate bench would remain confined to regular assessment proceedings, and it may not be read to prejudice a reassessment proceedings. That technical construction would be of no avail as in the present case reassessment proceedings were initiated against the petitioner for A.Y. 2012-13, in absence of jurisdictional fact and without recording relevant reason to believe. As held in ***Fag Precision Bearings (Supra),*** lapse of time is no reason to reassess an assessee. Paragraph 9 of that report reads as below:-

> *"9. Under the terms of Rule 37-A, the Commissioner must put the reasons and circumstances necessitating stay of assessment proceedings in writing. In the instant case, the reasons and circumstances necessitating stay are that the assessment was in progress and "since some more time will be taken and the assessment proceedings are not likely to be completed within the prescribed time … it is considered proper to stay the assessment …". To accept the aforesaid as good reason to stay assessment proceedings is to hold that the Commissioner, or the State Government, can give a go-by to the statutory provision prescribing the period during which assessment proceedings shall be completed only because the sales tax authorities have not completed the assessment proceedings within the stipulated time. We cannot accept this as a good reason. The aforestated power to stay*

> *assessment proceedings can be exercised only in extraordinary circumstances and for supervening reasons which cannot be attributed to the default or failure of the assessing authorities. It would be a valid exercise of the power to stay assessment proceedings of a class of assessees, for example, when a point of law involved in such assessments is pending decision in a higher court. It would be a valid exercise of such power in an individual case where, for example, search and seizure of the assessee's premises has unearthed material which requires to be sifted and analysed before a satisfactory assessment order can be passed. It is not enough that the order should state, as has been done in the present case, that the assessment proceedings were pending and would take "some more time"."*

57. In view of the above, we are not inclined to examine whether the reassessment order dated 17.03.2021 is *ante dated* or not. Since the jurisdiction never arose, the entire proceedings were conducted without jurisdiction and are a nullity.

58. Consequently, we have no hesitation to record our satisfaction that the order dated 30.01.2021, as modified on 08.02.2021 passed by that authority, granting permission to the assessing authority, namely, Deputy Commissioner, Sector-7, Commercial Tax, Ghaziabad as well as the reassessment order dated 17.03.2021 for the Assessment Year 2012-2013 (U.P. and Central) are a nullity. They are quashed.

59. Consequently, the writ petition **is allowed**. No order as to costs.

(Shiv Shanker Prasad, J.) (Saumitra Dayal Singh, J.)

Order Date :- 13.12.2023
Sushil/S.K. Srivastava/-