(2005) 03 MP CK 0060

Madhya Pradesh High Court (Indore Bench)

Case No: Writ Petition No. 545 of 2002

D.M. Woollen Mills (P.) Ltd.		APPELLANT
	Vs	
Commercial Tax Department		RESPONDENT

Date of Decision: March 4, 2005

Acts Referred:

- Companies Act, 1956 - Section 17, 446, 446(2)
- Constitution of India, 1950 - Article 226
- Income Tax Act, 1961 - Section 147
- Madhya Pradesh Land Revenue Code, 1959 - Section 147
- Madhya Pradesh Vanijyik Kar Adhiniyam, 1994 - Section 33(1)
- Sick Industrial Companies (Special Provisions) Act, 1985 - Section 22

Citation: (2006) 129 CompCas 587 : (2005) 62 SCL 135 : (2006) 144 STC 253

Hon'ble Judges: S.K. Seth, J

Bench: Single Bench

Advocate: Vijay Asudani, for the Appellant;

Judgement

@JUDGMENTTAG-ORDER

S.K. Seth, J.
Whether Section 446 of the Companies Act, 1956 or Section 22 of Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "1985 Act" for short) bars assessment of tax or bars recovery of tax. This is the short question involved in the present writ petition and arises in the backdrop of following facts which are undisputed.

2. Petitioner No. 1 herein is Private Limited Company engaged in manufacture of yarn. It is also registered as a dealer under the M.P. Vanijya Kar Adhiniyam, 1994 (hereinafter referred to as "1994 Act" for short); Central Sales Tax Act, 1956 (hereinafter referred to as ''1956 Act'' for short); and MP Sthaniya Kshetra Me Mal Ke

Pravesh Par Kar Adhiniyam, 1976 (''Entry Tax Act'' for short). For the assessment years 1994-95 and 1995-96, petitioner No. 1''s turnover was assessed to tax under 1956 Act and Entry Tax Act and demand was raised. For the assessment year 1996-97, tax was assessed and demand was raised under 1994 Act. State Government came out with a settlement scheme to clear off the arrears of taxes. The Scheme is known as ^^e/; izns''k cdk;k jkf''k ljy lek/kku ;ktuk] 2001** Petitioner No. 1 applied for settlement of arrears of tax as aforesaid. Petitioner No. 1 was duly communicated in Form No. 2 settlement amounts. It is not disputed that petitioner No. 1 did not deposit the settlement amount within fifteen days from the date of receipt of Form No. 2. As a result, competent authority rejected applications on 4-4-2002 which have been collectively marked as Annexure P-13. Since the applications for settlement were rejected, competent authority initiated proceedings u/s 147 of M.P. Land Revenue Code, 1959 for the recovery of tax as arrears of land revenue and pursuant to the attachment order-Ann. P-6, attached one Santro Car belonging to petitioner No. 2. The competent authority also issued sale proclamation Ann. P-7. The competent authority, i.e., Assessing Officer also served upon petitioner No. 1 in compliance of provisions contained in Sub-section (3) of Section 33 of 1994 Act, Statutory Notices in Form 40 directing the petitioner No. 1 to deposit the tax assessed under provisions of 1994 Act, 1956 Act and Entry Tax Act which have been collectively marked as Annexure P-8. The assessment period covered by Ann. P-8 is three quarters, viz., from 1-4-2001 to 30-6-2001; 1-7-2001 to 30-9-2001; and 1-10-2001 to 31-12-2001. The Assessing Officer also issued Notice to show-cause against proposed cancellation of registration as Dealer. The show-cause notice and reply thereto is available on record as Annexures P-9 and P-10 respectively. Thus, a writ in nature of certiorari is claimed to quash attachment order of Santro Car vide Ann. P-6; sale proclamation Ann. P-7; Statutory Notices Annexure P-8; show cause against proposed cancellation of registration Ann. P-9 and rejection of applications on 4-4-2002 for settlement under the scheme which have been collectively marked as Annexure P-13.

3. It is contended by Shri Vijay Asudani, learned counsel for petitioners that so far as rejection of applications for settlement under scheme vide order dated 4-4-2002 Ann. P-13 is concerned, deposit of amount within fifteen days from the date of receipt of notice is not mandatory and deposit could be made at any time. Since petitioner No. 1 deposited the requisite amount applications ought to have been accepted and attachment and proclamation for sale for recovery of arrears of tax was uncalled for. As regards the statutory notices-Ann. P-8, demanding payment of tax, learned counsel contended that no amount of tax can be assessed muchless recovered in view of the fact that petitioner No. 1 has been declared sick under the provisions of 1985 Act and as such is protected u/s 22 of 1985 Act. In the alternative, it was submitted that since the winding up proceedings has been initiated before the Company Judge of this Court, therefore, Section 446 of the Companies Act comes to the rescue of petitioner No. 1. It was also one of the submissions that

petitioner No. 1 has been declared a ''relief undertaking'' under the provisions of M.P. Sahayata Upkram (Vishesh Upbandha) Adhiniyam, 1978 therefore also amount of tax cannot be recovered by the respondents. Learned counsel for petitioner placed reliance on the following decisions in Bank of Bihar Ltd. v. Secretary of State AIR 1932 Pat. 1; Governor General in Council v. Shiromani Sugar Mills Ltd. AIR 1946 FC 16; Union of India (UOI) and Another Vs. India Fisheries (P) Ltd., ; Life Insurance Corporation of India Vs. Asia Udyog (P) Ltd. and Others, (FB) and Tata Davy Ltd. Vs. State of Orissa and Others, .

4. Per contra, Shri Agarwal, learned Government Advocate on the basis of pleadings made in the reply and additional reply submitted that so far attachment of car and sale proclamation thereof is concerned, no sooner it was established that the car does not belong to petitioner No. 1, the car was released on 12-4-2002 and attachment proceedings have been withdrawn. As regards plea of protection u/s 22 of the 1985 Act is concerned, learned counsel submitted that amount covered by the RRC Ann. P-6 was issued long after petitioner No. 1 was declared sick by the BIFR on 10-4-1990. No provision was made for payment of tax dues pertaining to subsequent years in the rehabilitation scheme initially sanctioned by the BIFR on 7-4-1993. As such, protection of Section 22 of 1985 Act is not available to the petitioner No. 1. He placed reliance on the decision of the Supreme Court in the matter of Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others, . It was further contended that on 30-3-2000, BIFR declared earlier rehabilitation scheme failed and issued further directions for preparation of second rehabilitation scheme. BIFR did not approve the second rehabilitation scheme as per order dated 4-10-2001 and ultimately reference made by the petitioner No. 1 under 1985 Act stood rejected by the BIFR by order dated 22-9-2002. As such, now the protective umbrella of Section 22 is no longer available to petitioner No. 1. As regards the plea of invoking of Section 446 of the Companies Act is concerned making of an assessment order before raising the demand for payment of tax is not covered by Section 446 of the Companies Act. In support of this contention, he placed reliance on the decision of the Supreme Court in S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co. Ltd. Vs. V.M. Deshpande, Income Tax Officer, Companies Circle I(8), Bombay and Another, .

5. I have heard learned counsel for parties at length. Perused the material available on record.

Contention No. I

6. According to learned counsel for the petitioners, rejection of applications for settlement under Scheme of 2001 is arbitrary. He submitted that settlement amount could be deposited at any time as long as the scheme was operative. He submitted that even if it is held that payment of settlement amount was mandatory, nevertheless in certain circumstances the Court could extend the time-limit. On the

other hand, learned Government advocate submitted that in order to avail the benefit of scheme, petitioner No. 1 must adhere to time-limit provided in the scheme. I find force in the contentions urged by learned Government Advocate. Scheme envisaged submission of applications for settlement up to 31-1-2002. Settlement was permissible of arrears of tax or penalty due on 1-4-2001 under the 1994 Act; 1956 Act or Entry Tax Act relating assessment proceeding completed by 31-3-1997. For the implementation of scheme, State Government also framed rules known as ^^e/; izns''k cdk;k jkf''k ljy lek/kku ;kstuk fu;e] 2001** Rule 5 thereof contemplated that ''competent authority'' would assess the settlement amount within fifteen days from the date of receipt of application and communicate the same in Form No. 2 and upon receipt of Form No. 2, the settlement amount was required to be deposited within 15 days and challan evidencing deposit was to be produced within seven days from the date of deposit. The Scheme, Rules and instructions are available on record as Annexures R/4 and R/5 with additional reply to rejoinder. Close scrutiny of the scheme further reveals that not only deposit of amount within fifteen days but also furnishing of satisfactory proof of withdrawal of appeal or revision pending before the departmental authorities was must before the settlement certificate could be issued. Even after deposit, if a person failed to furnish satisfactory proof of withdrawal of proceeding, no certificate could be issued. Thus, the consequences itself was provided in the scheme. When such a consequence is provided, in the considered opinion of this Court, requirement cannot be held to be directory. Recently similar question came for consideration of the Supreme Court in the context of payment of Income Tax u/s 67 of the Voluntary Disclosure of Income Scheme, 1997 in Hemalatha Gargya Vs. Commissioner of Income Tax, A.P. and Another, . It was held by their Lordships that where the assessee seeks to claim the benefit under the statutory scheme they are bound to comply strictly with the conditions under which the benefit is granted.

In view of the law laid down by the Supreme Court I have no hesitation to reject the first submission made by learned counsel for the petitioner and hold that respondents rightly rejected application for settlement under the 2001 Scheme on account of non-deposit of the required amount, within prescribed time-limit. In view of aforesaid discussion no interference is warranted with Annexure P-13.

Contention No. II

7. The second contention that no tax could be assessed as has been done vide Annexure P-8 in view of Section 22 of 1985 Act or Section 446 of the Companies Act, learned counsel placed strong reliance on the Federal Court decision in the matter of Shiromani Sugar Mills Ltd. (supra) and India Fisheries (P.) Ltd. (supra). In fact in S.V. Kondaskar''s case (supra), Supreme Court considered Section 446 of the Companies Act in the context of initiation of reassessment proceedings by the Income Tax Officer u/s 147 of Income Tax Act, 1961. Their Lordships held expression ''other legal proceeding'' in Sub-section (1) and ''legal proceeding, in Section 446 of

the Companies Act, convey same sense and proceedings'' in both sub-sections must be such as can be appropriately dealt with by the winding up Court. Supreme Court not only noticed the scheme of both the Income Tax Act and Companies Act but also the decision of Federal Court in Shiromani Sugar Mills Ltd. ''s case (supra) arid India Fisheries (P.) Ltd.s case (supra) and held that assessment proceedings for computing the amount of tax can be initiated and for that no prior permission of the Company Judge is required.

8. In view of the aforesaid decision of Supreme Court in S.V. Kondaskar''s case (supra), I find no force in the submissions of learned counsel for petitioner that no assessment proceedings can be initiated against a company which is under liquidation. Similarly reliance placed on the decision of Patna High Court in The Bank of Bihar Ltd. Vs. Secy. of State and Others, and Delhi High Court in LIC v. Asia Udyog (P.) Ltd. [1984] 55 Comp. Cas. 187 are of no avail. While making assessment proceedings the Commercial Tax Officer does not, in the considered view of this Court, perform the functions of a Court as contemplated by Section 446(2) of the Act. No prior permission of learned Company Judge u/s 446 is, therefore, required for assessing tax. As noticed earlier, the BIFR ultimately rejected the reference vide order dated 22-9-2002 and thereafter, learned Company Judge has already initiated the winding lip proceedings. Once the BIFR rejected the reference, Section 22 of 1985 Act will cease to play any role and the protection provided thereunder would not be available. Learned counsel for petitioners could not point out the fate of the appeal preferred against the order of BIFR. Nor any order of the appellate authority was placed on the record. Learned Company Judge is already seized of the matter and Official Liquidator has been appointed. However, learned Company Judge has stayed the further proceeding in the Company Petition in order to enable the petitioner to obtain Stay from AIFR. Since the winding-up proceedings have been started, or if the appeal is pending before AIFR, Learned Company Judge or the AIFR as the case may be, would have full power to scrutinise the claim of the revenue after tax has been determined and its payment is demanded. It may be clarified at this stage that the Revenue is not required to wait and prove the claim in respect of tax or penalty in view of provisions contained in Section 17 of the 1956 Act. See Imperial Chit Funds (P) Ltd. Vs. Income Tax Officer, Ernakulam, . Similarly, subject to Section 530, the first charge would be on the property of a dealer regarding payment of tax or penalty u/s 53 of 1994 Act, which is a complete code in itself for assessment of tax and penalty under the Act of 1956 and Entry Tax Act of 1976 as well. In view of the above discussion, respondents are restrained from recovering tax pursuant to Annexure P-8. Tax can be recovered with the permission of Learned Company Judge or the AIFR as the case may be.

9. As regards the attachment and sale proclamation of Santro Car, respondents themselves have withdrawn the proceedings. In view of this, relief in this regard has now become infructuous. As regards the cancellation of registration certificate, the matter is at the stage of show-cause notice and it is settled law that ordinarily this

Court would not interfere with the show-cause notice in exercise of its extraordinary writ jurisdiction under Article 226 of the Constitution of India. As regards the contention that no tax can be recovered because petitioner No. 1 has been, declared a "relief undertaking" under the provisions of M.P. Sahayata Upkram (Vishesh Upbandha) Adhiniyam, 1978 in the considered opinion of this Court has no merit and is to be noted and rejected.

10. The upshot of the whole discussion is that taxing authorities can initiate the assessment for computation of tax amount but for recovery, they will have to seek permission of the Learned Company Judge or the AIFR if appeal is pending. Accordingly, the writ petition is disposed of, however, in view of the facts and circumstances of the case, there shall be no costs.