Item no. 07

IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Heard on : 16.03.2023

Delivered on : 16.03.2023

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

MAT 348 of 2023
with
IA NO.CAN 1 of 2023
With
IA No. CAN 2 of 2023

Paritosh Mondal, Proprietor of M/s.
Hindustan Business Concern
Vs.
The Sales Tax Officer, Sealdah Charge & Ors.

Appearance:

For the Appellant : Mr. Rishi Raju
Mr. Suvranil Saha

For the Respondents : Mr. A. Ray, Ld. GP
Mr. T.M. Siddiqui
Mr. D. Ghosh
Mr. D. Sahu

T.S. Sivagnanam J.:

1. There is a delay of 202 days in filing the appeal. We have perused the affidavit filed in support of the application for condonation of delay and we are satisfied that sufficient cause has been shown for not preferring the appeal within the period of limitation. Hence, the application (I.A. No. CAN 1 of 2023) is allowed and the delay in filing the appeal is condoned.

2. This intra-Court appeal by the writ petitioner is directed against the order dated 6th July, 2023 passed in W.P.A. 7307 of 2019. The said writ petition was filed challenging an order dated 10th June, 2016 affirming the order dated 15th March, 2016, which in turn confirmed the order of adjudication dated 1st September, 2011 rejecting the claim of the appellant for production of Form-C declaration and consequently for being entitled to concessional rate of tax. The authorities consistently held that Form-C declaration having not been produced before the assessing officer at the first instance, could not be produced at a subsequent stage. The appellant's case is that the assessment was an *ex parte* assessment and Form-C declaration could not be produced. However, at the appellate stage it was produced, which was refused to be accepted. The decision of the authorities below in refusing to accept Form-C declaration is contrary to the settled legal principles. One of the earliest decisions on the said point is a Full Bench judgment of the High Court of Madras in the case of **State of Tamil Nadu vs. Arulmurugan reported in [51 STC 381]**. The operative portion of the judgment is as follows:-

> *"5. An identical issue came up for consideration before the Hon'ble Full Bench of this Court in the case of State of Tamil Nadu Vs. Arulmurugan [51 STC 381] wherein it has been held as follows:*
>
> > *"16. We would proceed now to advert to the different ways in which the discretion to allow further time for filing C forms is conferred by the proviso to Section 84 of the*

Act, on the one hand, and the proviso to Rule 12(7) of the Central Sales Tax (Registration and Turnover) Rules, on the other. The proviso in the Act simply says that the C forms shall be filed before the prescribed authority either within the prescribed time or "within such further time as that authority may, for sufficient cause, permit". As a matter of construction of the proviso in the statute, if there is sufficient cause, further time will have to be allowed. The proviso to the Section does not insist that the assessee should establish before the prescribed authority that he was prevented by sufficient cause from filing the C forms in time. The "sufficient cause" spoken of by Parliament in Section 84 is sufficient cause which appeals to the mind of the authority concerned, and which enables it to allow further time without bothering about any onus on the assessee. The proviso to Rule 12(7), however, is a study in contrast. The power to allow further time under this rule is severely circumscribed by the language of its proviso. This proviso is more or less fashioned after Section 5 of the Limitation Act. Under the requirement laid down by the rule-making authority, the burden is on the assessee to make out sufficient cause by explaining why he did not file, and what prevented him from filing, the C forms before the completion of the assessment. What is more, it is for the assessing authority to be satisfied about the existence of sufficient cause and its having prevented the assessee from filing the declarations within time. The difference between the two provisos is not merely one of language or of emphasis. The difference lies in the basic approach to the substance of the power to allow further time. Under the statutory provision, the prescribed authority can allow further time for sufficient cause, without bothering to see whether anything or any occurrence prevented the assessee from filing the C forms within time, and whether the assessee could have filed the C forms within time even in the position is which he actually found himself. The rule, however, casts the burden on the assessee and makes the position more difficult for him to invoke the power successfully. It also narrows down the discretion of the authority concerned. The question, however, is which is to be the master, the proviso in the Section or the proviso in the rule ? There can be no doubt about the legal position that a rule cannot prevail against the statute, by being repugnant to the statute. A study of the structure of the proviso to Section 84 shows how Parliament's peculiar preferences had worked in this regard. While Parliament was content to leave to the rule-making authority, namely, the Central Government, the task of prescribing a rule laying down the time-limit for furnishing C forms, the power to allow further time, however, was not relegated to the Rules, but deliberately enacted into the very text of the provisos to Section 84. In this statutory format, *with Parliament clearly expressing its mind on the subject, the Central Government must be held to possess no authority whatever to make any rule as respects the power to allow further time, let alone prescribe the conditions subject to which any such power could be exercised. In this sense, the proviso to Rule 12(7) must be held to be ultra vires the rule-making power, to the extent that it is inconsistent with, or lays down tests or standards different from, the proviso to Section 84. It is quite clear that the proviso to Rule 12(7) is both superfluous and badly drafted. The indifferent drafting is all the more regrettable when the remember the legislative history which brought into the statute book the proviso to Section 84 as a necessary part of the taxing enactment. Avowedly, the proviso was introduced by Parliament in Section 84 to fill in the lacuna disclosed by the previous litigations in the country, culminating in the decision of the Supreme Court in Abraham's case. It is a matter for comment that Parliament's effort at clarity should have been neutralized, in part at least, by clumsy and unwanted rule-making. Be that as it may, we are clear in our minds that where an assessee seeks to file C forms beyond the stage of assessment, the relative power which the concerned authority should invoke is the power defined in the proviso to Section 84 and not the power defined in the proviso to Rule 12(7).*

19. We do not think there is any room for the perplexity given expression to by the learned Government Pleader. Given the assessing authority's undoubted power to allow further time for C forms to be filled on sufficient cause, the rest of it is mere procedure or follow up action. Where the assessing authority is satisfied, in a given case, about the existence of sufficient cause, it must necessarily be followed up by appropriate action, such as reopening the assessment already completed. Perhaps the requisite corrective action can be taken by invoking the assessing authority's statutory power of rectification of mistakes. Even otherwise, the implementation, in appropriate cases, of the power to allow further time cannot be withheld on the excuse that there is not express provision either in the statute or in the statutory rules for reopening the assessment. When the power is there and the facts are there demanding its exercise, the implementation must be done as a matter of course, on the doctrine of implied or ancillary powers. Where there is a power, and where there is a will, there will be a way. It is, however, unnecessary to pursue the line of discussion further, because the particular problem we are concerned with in the two cases before us is quite different. What we are asked to consider, and what we have been engaged in discussing so far, is whether an appellate authority has the same power as the assessing authority to allow further time for accepting C forms, and not how and by what process

> *the assessing authority itself could exercise the power after the completion of the assessment."*

3. The above decision was taken note of by the Hon'ble Supreme Court in the case of **State of A.P & Ors. vs. M/s. Hyderabad Asbestos Cement Production Ltd. & Ors.** reported at **(1994) 5 SCC 100** wherein it was held that the appellate authority has sufficient power to receive Form C declaration even at the appellate stage. Thus, the stand taken by the authorities namely, the assessing officer, the appellate authority, revisional authority and the reviewing authority are contrary to law.

4. In the result, the appeal along with the connected application are allowed and the order passed in the writ petition is set aside. Consequently, the writ petition is allowed, the order passed by the authorities are set aside and the matter is remanded back to the assessing officer. The assessing officer is directed to accept the Form C declaration, verify the genuineness and if found genuine, proceed to extend concessional rate of tax. This exercise shall be done by the assessing officer within a period of 30 days from the date on which the Form C declaration is filed by the appellant.

5. There shall, however, be no order as to costs.

6. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T. S. Sivagnanam, J.)

I agree.

(Hiranmay Bhattacharyya, J.)

RP/Pallab (AR. CT.)