

LALTA PRASAD KHINNI LAL

v.

ASSTT. COMM. (JUDL.) SALES TAX, KANPUR & ANR.

October 6, 1971

[K. S. HEGDE AND A. N. GROVER, JJ.]

U.P. Sales Tax Act, 1948, s. 9(6) and Limitation Act, 1908 s. 5—Sales Tax Appeal filed within period of limitation—Amount admitted to be due deposited in full after expiry of limitation—Resulting delay in filing appeal whether may be condoned.

The appellant was a Hindu undivided family carrying on the business of manufacturing oils. For the assessment year 1963-64 the appellant filed its quarterly returns under the U.P. Sales Tax Act, 1948. The Sales Tax Officer made an assessment enhancing the turnover which resulted in increase of the amount of tax. The appellant filed an appeal on October 21, 1965 which was three days' before the period of limitation prescribed for filing the appeal was to expire. There was some difficulty about the encashment of a cheque which had been deposited along with the rest of the cash amount towards payment of the amount of tax the liability for which stood admitted. The total payment was not made if the entire amount until May 27, 1966 when the treasury challan was produced. The assessee filed an application praying for condonation of delay, if any, in filing the appeal under s. 5 of the Indian Limitation Act 1908 which was applicable by virtue of s. 9(6) of the U.P. Sales Tax Act, 1948. The Assistant Commissioner (Judl.) Sales Tax rejected the memorandum of appeal as defective on the ground that the deposit of the amount of tax admitted to be due had not been made within the period of limitation and that the delay in doing so could not be condoned under s. 5 of the Limitation Act. The appellant's petition under Art. 226 challenging the Assistant Commissioner's order was dismissed. In appeal by certificate,

HELD: It is true that an appeal filed under s. 9 of the Act cannot be entertained by the appellate authority unless satisfactory proof is adduced of the payment of tax admitted by the appellant to be due but in a case where the amount of admitted tax is deposited after the period of limitation has expired all that will happen is that the appeal will become entertainable only on the day on which satisfactory proof of payment of that amount is produced. In other words the appeal will be deemed to have been properly filed on the date on which the amount of admitted tax is paid. If that is beyond the period of 30 days the appeal will be barred by time. Section 9(6) will immediately become applicable to that appeal and it will be open to the appellant to apply for condonation of delay under that provision. It was not possible to accept the argument that the deposit of the amount of admitted tax must be made within 30 days even though the delay in filing the appeal can be condoned under sub-s. (6). The correct approach is to treat the appeal as having been preferred on the date on which proof of payment of the tax was furnished and then to see whether under sub-s. (6) of s. 9 there was sufficient cause for excusing the delay in preferring the appeal. [1013 E—1014 B]

Gangadharan Pillai v. Sales Tax Officer (Reserve) Ernakulam, 16 S.T.C. 578 and *Raja of Venkatagiri v. Commissioner of Income-tax, Madras*, 28 I.T.R. 188, approved.

A *Janta Cycle & Motor Mart v. Asstt. Commissioner (J.) III, Sales Tax Kanpur Range & Ahr.* 22 S.T.C. 94, disapproved.

Lakshmiratan Engineering Works Ltd. v. Asstt. Commissioner (J), I Sales Tax, Kanpur, 21 S.T.C. 154, distinguished.

B In the present case when the assessee produced the necessary documents which showed that the deposit of the full amount had been made by May 27, 1966 the appeal became entertainable. It only suffered from the defect that it was barred by time on that date. The assessee could, therefore, apply under s. 9(6) for extending the period of limitation in accordance with s. 5 of the Limitation Act. The appellate authority was wrong in disposing of the appeal on the short ground that it had no jurisdiction to extend the period of limitation. [1015 B—D]

C [Appeal allowed and case remitted to High Court for making appropriate directions for reconsideration and rehearing of the appeal by the appellate authority under the Act.]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2571 of 1969.

D Appeal from the judgment and order dated March 25, 1968 of the Allahabad High Court in Civil Misc. Writ No. 2200 of 1966.

S. Markandeya, for the appellant.

L. M. Singhvi and *O. P. Rana*, for the respondents.

The Judgment of the Court was delivered by

E **Grover, J.** This is an appeal by certificate from a judgment of the Allahabad High Court in which the main point involved relates to the provisions of s. 9 of the U.P. Sales Tax Act, 1948, hereinafter called the 'Act'.

F The facts lie in a narrow compass. Lalta Prasad Khinnj Lal a Hindu undivided family which is the assessee carried on business of manufacturing oils. For the assessment year 1963-64 it was assessed to sales tax under the Act by an order dated July 28, 1965. The assessee had been filing its quarterly returns and had deposited a sum of Rs. 3,153.01 which was the admitted amount of its tax liability. The Sales tax Officer, however, made an assessment enhancing the turnover which resulted in increase of the amount of tax. The assessee filed an appeal on October 21, 1965 which was three days before the period of limitation prescribed for filing the appeal was to expire. There was some difficulty about encashment of a cheque which had been deposited along with the rest of the cash amount towards payment of the amount of tax the liability for which stood admitted. The total payment was not made of the entire amount until May 27, 1966, when the treasury challan was produced. The assessee filed an application under s. 5 of the Indian Limitation Act praying for

condonation of delay, if any, in filing the appeal. The Assistant Commissioner (Judicial) Sales Tax rejected the memorandum of appeal as defective on the ground that the deposit of the amount of tax admitted to be due had not been made within the period of limitation and that the delay in doing so could not be condoned under s. 5 of the Limitation Act.

The assessee filed a petition under Art. 226 of the Constitution in the High Court challenging the order of the Assistant Commissioner (Judicial) Sales Tax. That petition was dismissed on the ground that although the appeal was filed within time there was delay in making the necessary deposit of the admitted tax and that delay could not be condoned under s.5 of the Limitation Act.

Section 9 of the Act deals with an appeal against an order of assessment. It provides that any dealer objecting to an order under the various sections mentioned in sub-s.(1) may within 30 days appeal to such authority as may be prescribed. The proviso to sub-s. (1) is material and is set out below :

“Provided that no appeal against an assessment shall be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due or of such instalments thereof as may have become payable:

Provided, secondly, that the appellate authority shall not exercise any powers or perform any other function except those conferred on or entrusted to him as such authority.”

Sub-s.(6) of s.9 provides that s.5 of the Indian Limitation Act 1908 shall apply to appeals under the Act. The relevant Rules may next be reproduced:

Rule 66(2) “The memorandum of appeal shall be accompanied by adequate proof of payment of the fee payable and a certified copy of the order appealed against and the challan showing deposit in the treasury of the tax admitted by the appellant to be due, or of such instalments thereof as might have become payable”.

Rule 67(3) “If the memorandum of appeal is not in order it may be rejected or be returned, after the necessary endorsement on its back about its presentation and return, to the applicant for correction and re-presentation within the time to be fixed by the Assistant Commissioner (Judicial) or be amended then and there”.

- A A full bench of the Allahabad High Court considered the question of the applicability of s.5 of the Limitation Act to a case where the admitted amount of tax is not deposited by the appellant within the time prescribed for filing the appeal in *Janta Cycle and Motor Mart v. The Asstt. Commissioner (J.) III, Sales Tax Kanpur Range & Anr.*⁽¹⁾. The full bench relied on an observation of this Court in *Lakshmiratan Engineering Works Ltd. v. Asstt. Commissioner (J.) I, Sales Tax, Kanpur & Another*⁽²⁾ with regard to the meaning of the word "entertain". According to that decision "entertain" meant the first occasion on which the court took up the matter for decision. It might be at the admission stage or if by the rules of the appellate Tribunal the appeals were automatically admitted it would be the time of the hearing of the appeal. The High Court considered that according to the aforesaid decision of this Court when the first proviso is read with the main provision of s.9(1) of the Act the deposit also had to be made within limitation. The High Court came to the conclusion that s.9(6) of the Act could not be applied and s.5 of the Limitation Act was not attracted when the question arose whether the delay in depositing the admitted tax should be condoned.

- We are wholly unable to comprehend and appreciate the above reasoning or the conclusion of the High Court on the point under consideration. It is true that an appeal filed under s.9 of the Act cannot be entertained by the appellate authority unless satisfactory proof is adduced of the payment of tax admitted by the appellant to be due but in a case where the amount of admitted tax is deposited after the period of limitation has expired all that will happen is that the appeal will become entertainable only on the day on which satisfactory proof of payment of that amount is produced. In other words the appeal will be deemed to have been properly filed on the date on which the amount of admitted tax is paid. If that is beyond the period of 30 days the appeal will be barred by time. Section 9(6) will immediately become applicable to that appeal and it will be open to the appellant to apply for condonation of delay under that provision. We are wholly unable to follow the argument that the deposit of the amount of admitted tax must be made within 30 days even though the delay in filing the appeal can be condoned under sub-s.(6). A proper and correct reading of s.9 cannot justify such an approach. If a petition of appeal has been filed without proof of payment of tax accompanying it that appeal can be said to have been preferred only when proof of payment of tax is furnished. Such furnishing of the proof may take place within the period prescribed for preferring the appeal or after the lapse

(1) 22 S.T.C. 94.

(2) 21 S.T.C. 154.

of that period. If the proof of payment of admitted tax is furnished within the period prescribed the appeal must be entertained. If the furnishing of that proof is done after the expiry of the period of limitation the question will arise whether the appeal should be entertained or not. In such cases s.9(6) will come into operation and the question will arise whether there has been sufficient cause for not preferring the appeal within the statutory period. The correct approach is to treat the appeal as having been preferred on the date on which proof of payment of the tax was furnished and then to see whether under sub-s. (6) of s.9 there was sufficient cause for excusing the delay in preferring the appeal. The decision of the Kerala High Court in *Gangadharan Pillai v. Sales Tax Officer (Reserve) Ernakulam*⁽¹⁾ is to this effect and we entirely agree with the reasoning and the conclusion therein. In *Raja of Vankatagiri v. Commissioner of Income tax, Madras*⁽²⁾ a division bench of the Andhra Pradesh High Court consisting of Subha Rao C. J. as he then was and Bhimasankaram J. had to consider the provisions of the Indian Income tax Act 1922 similar to s.9 of the Act. According to the proviso to s.30(1) of that Act no appeal lay against an order under sub-s.(1) of s.46 unless the tax had been paid. Sub-s.(2) of that section provided that the appeal was to be ordinarily presented within 30 days but the Appellate Assistant Commissioner could admit the same after the expiration of the period if he was satisfied that the appellant had sufficient cause for not presenting it within that period. It was held that the payment of the tax was condition precedent to the maintainability of the appeal. If an appeal was filed, though after the prescribed period of time the Assistant Commissioner had the jurisdiction to hear the appeal after the tax due was paid. The only possible objection that could have been raised was that the appeal was barred as having been filed beyond the period prescribed by s.30(2). But the appellate authority had the jurisdiction to excuse the delay. The ratio of this decision is that even though the payment of tax was a condition precedent to the maintainability of the appeal the delay could be condoned under s.30(2) thus treating the appeal as having been filed when the amount of tax was paid.

The Allahabad High Court appears to have been greatly influenced by the decision of this Court in *Lakshmiratan Engineering Works Ltd. v. Asstt. Commissioner (J.) I Sales Tax, Kanpur*⁽³⁾ and by the meaning of the word "entertain" as explained there. We have found considerable difficulty in discovering how that decision could afford any assistance to the respondents in the present case. Indeed according to that decision the words

(1) 16 S.T.C. 578.

(3) 21 S.T.C. 154.

(2) 28 I.T.R. 188.

- A “no appeal shall be entertained” in the proviso to s.9 do not denote the filing of the memorandum of appeal but refer to the point of time when the appeal is being considered. Therefore, though the memorandum of appeal filed within time is not accompanied by the treasury challan showing payment of tax if before the appeal is being considered satisfactory proof of payment of tax is given then the proviso to s.9 is satisfied.
- B In the present case when the assessee produced the necessary documents which showed that the deposit of the full amount had been made by May 27, 1966 the appeal became entertainable. It only suffered from the defect that it was barred by time on that date. The assessee could, therefore, apply under s.9(6) for extending
- C the period of limitation in accordance with s.5 of the Limitation Act. It is entirely a different matter whether on the facts of the present case the appellate authority would have condoned the delay or not but to say that the appellate authority had no jurisdiction to extend the time simply because the amount of admitted tax had been deposited beyond the period of 30 days would be
- D wholly erroneous and would not represent a true and correct view of the provisions of s.9. It may be pointed out that the case of *Lakshmiratan Engineering Works*⁽¹⁾ on which the High Court largely relied did not involve the question of the extension of the period of limitation under s.9(6). Indeed in our judgment the word “entertain” in s.9(1) has hardly any material bearing on the point under consideration.
- E

- As the appellate authority disposed of the appeal on the short ground that it was barred by time and that it had no jurisdiction to extend the period of limitation this matter will have to go back for reconsideration and redecision of that authority. In the result the appeal is allowed and the judgment of the High
- F Court is set aside. The case is remitted to the High Court for making appropriate directions for reconsideration and rehearing of the appeal by the appellate authority under the Act. The assessee will be entitled to costs in this Court.

G.C.

Appeal allowed.

(1) 21 S.T.C. 154.