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HOMELY INDUSTRIES

v.

THE SALES TAX OFFICER, SECTOR V, KANPUR

March 24, 1976

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[H. R. KHANNA AND P. K. GOSWAMI, JJ.]

U.P. Sales Tax Act—Secs. 7C(3)-8(1)(2)—Liability of heirs and legal representatives of a deceased assessee—Whether service of a notice condition precedent, to recovery proceedings.

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Rashidul Hasan was a dealer registered under the U.P. Sales Tax Act. During the lifetime of Rashidul Hasan, the Sales Tax Officer sent a notice to him asking him to appear and to produce all books of account, cash memos, bills, receipts, bank pass books, statement of income and expenditure which he may desire to produce. He died in December, 1968 leaving behind three adult sons. At the time of his death assessment proceedings relating to the assessment years 1960-61 and 1961-62 were pending before the Sales Tax Officer. After the death of Rashidul Hasan, the business was continued by his sons by forming a partnership. His legal representatives obtained a number of adjournments in order to make an effective representation. After granting 6 adjournments the 7th Application for adjournment was rejected by the Sales Tax Officer and an ex-parte order of assessment was made in April, 1969. The Sales Tax Officer thereafter initiated recovery proceedings in pursuance of the assessment orders and the demand was sought to be realised from the sons of the deceased by coercive measure.

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Section 7C(3) of the Act provides that where a person having furnished a return dies and the assessing authority may determine the turnover of such person and assess the tax payable by him on the basis of such determination and for this purpose may by notice require from the legal representative of the deceased person any accounts, documents or other evidence which he might under the provisions of this Act require from the deceased person. Section 8(1) provides that the tax assessed under the Act shall be paid within such time not being less than 15 days from the date of service of the notice of assessment. It further provides that in default of such payment the same may be recovered as arrears of land revenue. The appellant filed two Writ Petitions before the High Court of Allahabad challenging the orders and recovery certificates issued under section 8 of the Act. The High Court rejected the application.

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On appeal by certificate under Article 133(1)(a) of the Constitution, the appellant contended :

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- (1) The assessment orders are invalid as they are made against a dead person, and that no notice as required by section 7C(3) was served on the legal representative to produce accounts, documents and other evidence.
- (2) A proper and valid notice which is a condition precedent for fixing liability under section 8 has not been served on the legal representatives and therefore the recovery proceedings were illegal.

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HELD : (1) The notice was already served on the deceased when he was alive. It was not necessary to serve the notice on legal representatives again under Sec. 7C(3). The legal representatives would have been entitled to a notice to produce documents and evidence if the deceased had not earlier been served with a similar notice during his life time. The orders of assessment cannot, therefore, be held to be invalid on account of non-service of notice for production of documents upon the legal representatives in this case. Besides the legal representatives were aware of the proceedings and took several adjournments and if they did not choose to produce any further evidence it was entirely their fault. [865 E, G, 866 A-B]

(2) It is clear that before a certificate proceeding can be instituted under section 8 a notice of demand is condition precedent. There can be no recovery without service of a demand notice. It is admitted that such notice has not been served on the legal representatives. That being the position, the recovery proceedings are not maintainable in law and are invalid and the same along with certificates are liable to be quashed. [867 C-D]

Sahu Rajeshwar Nath v. Income-Tax Officer I.C. Ward Meerut, 72 I.T.R. 617 S.C. distinguished.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1176-77 of 1971.

From the Judgment and order dated the 17th March, 1970 of the Allahabad Court in Civil Misc. Writ Nos. 2681-82 of 1968.

S. C. Manchanda, J. D. Jain, Ujjal Singh and Miss Kawaljit Miglani for the Appellant.

G. N. Dikshit and O. P. Rana for the Respondent.

The Judgment of the Court was delivered by

GOSWAMI, J.—These are two appeals on certificates by the High Court of Allahabad from the judgments and orders of March 17, 1970.

The facts may briefly be stated :

The appellant Homely Industries is registered under the Uttar Pradesh Sales Tax Act (briefly the Act). Its sole proprietor was one Rashidul Hasan. He died on December 10, 1968, leaving behind three adult sons, namely, Syed Mohd. Ibrahim, Syed Mohd. Ismail and Syed Mohd. Ilias. The business was carried on by Rashidul Hasan under the name and style of Homely Industries. At the time of his death the assessment proceedings relating to the assessment years 1960-61 and 1961-62 were pending before the Sales Tax Officer on remand from the Assistant Commissioner (Judicial), Sales Tax, in pursuance of his order dated October 26, 1966.

It is said that after the death of Rashidul Hasan the business was continued by the sons by forming a partnership and Nazir Husain continued as the munim and also appeared before the Sales Tax Officer in the pending proceedings.

On December 19, 1968, Syed Mohd. Ibrahim, as legal heir and partner, sent an application through Nazir Husain informing the Sales Tax Officer, Kanpur, in connection with the two assessment proceedings that his father had expired on December 10, 1968 and that it was not possible for them to proceed with the case on that day.

It appears that the Sales Tax Officer during the life time of Rashidul Hasan had addressed a notice to Homely Industries calling upon it to appear in person or through pleader, or authorised representative on November 29, 1968, and to produce all books of accounts, cash memos, bills, receipts, bank pass-books, statement of income and expenditure and other documents which it may desire to produce in connection with the assessment. This notice was served on November 20, 1968, on the son of the proprietor of Homely Industries.

It appears that a number of adjournments were taken after the death of Hashidul Hasan, sometimes on the application of the munim

A and once even on the application of the son, Syed Mohd. Ismail, to enable the assessee to make an effective representation. While as many as six adjournments were granted on the application of Nazir Husain and once of the son of the deceased between 19-12-1968 and 26-4-1969, on the last date a further application by Nazir Husain for adjournment was rejected by the Sales Tax Officer and an ex-parte order of assessment was made on April 28, 1969.

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The Sales Tax Officer initiated recovery proceedings in pursuance of the assessment orders and the demand was sought to be realised from the sons of the deceased proprietor by coercive measures. That led to two writ applications before the High Court of Allahabad challenging the assessment orders and the recovery certificates issued under section 8 of the Act. The High Court rejected the applications and granted certificates under Article 133(1)(a) of the Constitution.

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It is contended by Mr. Manchanda on behalf of the appellant that the assessment orders are invalid as they were made against a dead person. Secondly, he submits that a proper and valid service of a demand notice is a condition precedent for fixing liability on the person from whom the tax is sought to be recovered and in this case there was no service of notice on the heirs and legal representatives prior to the attempt of recovery through a coercive process.

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With regard to the first submission, the learned counsel draws our attention to section 7C of the Act which reads as follows :—

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“7-C(1). Where a person dies, his executor, administrator or other legal representative shall be liable to pay out of the estate of the deceased person, to the extent to which the estate is capable of meeting the charge, the tax assessed as payable by such person, or any penalty which would have been payable by him under this Act, if he had not died.

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(2) Where a person dies before the service upon him of the notice, if any, issued in pursuance of section 7, his executor, administrator or other legal representative shall, on the serving of the notice aforesaid, comply therewith and the Assessing Authority may proceed to assess the turnover of the deceased person as if such executor, administrator or other legal representative were the assessee.

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(3) Where a person dies without having furnished a return which he has been required to furnish under the provisions of section 7 or having furnished a return which the Assessing Authority has reason to believe to be incorrect or incomplete, the Assessing Authority may determine the turnover of such person and assess the tax payable by him on the basis of such determination, and for this purpose may, by notice, require from the executor, administrator or other legal representative of the deceased person any accounts, documents, or other

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evidence which he might under the provisions of this Act have required from the deceased person".

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(4) & (5) x x x x x x

Relying upon section 7C(3), it is submitted that no notice as required under that sub-section was served on the legal heirs and representatives to produce accounts, documents and other evidence for the purpose of determination of the turnover and assessment of tax. Counsel submits that after death of the father no assessment order could be passed without notice under section 7C(3) upon the heirs and legal representatives of the deceased assessee.

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It is true that the Sales Tax Officer did not accept the returns submitted by the dealer. It was, therefore, incumbent under the proviso to section 7(3) of the Act to give a reasonable opportunity to the dealer for the purpose of proving the correctness and completeness of the returns already submitted. If the returns were accepted as correct there was no necessity for giving any opportunity to the dealer as the case will then be governed by section 7(2) of the Act. Mr. Manchanda, therefore, submits that under section 7C(3) read with the proviso to section 7(3) it was obligatory on the part of the Sales Tax Officer to give a reasonable opportunity to the legal representatives to produce the documents and accounts before completion of the assessment. Admittedly no notice under section 7C(3) had been served on the legal representatives. It is, therefore, submitted that the orders of assessment are invalid.

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Although the submission on the first blush is attractive it does not bear a close scrutiny. This is a case where the assessee had submitted the returns and since the Sales Tax Officer was not prepared to accept the returns as correct and complete, he served a notice on the sole proprietor of the assessee, when he was alive, to produce documents and books of accounts under the proviso to section 7(3). We have already referred to the said notice which was served on the son of the proprietor on November 20, 1968, calling upon the dealer to produce the accounts on November 29, 1968. It was, therefore, an obligation on the part of the dealer to produce documents, books of accounts and other evidence to prove before the Sales Tax Officer that the returns were correct. This being the factual position about service of notice on the deceased while he was alive, there was no legal entitlement to any further notice to the dealer even if the sole proprietor were alive.

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Under section 7C(3) the Sales Tax Officer may by notice require from the legal representative of the deceased such accounts, documents or other evidence as "he might under the provisions of the Act have required from the deceased person". The Sales Tax Officer had already demanded by notice from the deceased while he was alive production of documents and the books of accounts. Hence no valid objection can be taken under section 7C(3) that a further notice for production of documents and accounts should have been served on the legal representatives. The legal representatives would have been entitled to a notice to produce documents and evidence if the deceased had not earlier been served with a similar notice during his life time. Section 7C(3)

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A does not entitle the legal representatives to any notice which the deceased, if alive, would not have been entitled to under the provisions of the Act. Since there was no obligation under the Act for service of a second notice on the dealer, if he were alive, the legal representatives were not entitled to a notice as claimed under section 7C(3) of the Act. The orders of assessment cannot, therefore, be held to be invalid on account of non-service of notice for production of documents upon the legal representatives in this case. Besides, we find that the legal representatives were aware of the proceedings and took several adjournments and if they did not choose to produce any further evidence it was entirely their fault and they cannot blame the Officer when the request for adjournment was not granted after so many requests had already been acceded to. We, however, express no opinion on the merits of their claim.

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C Mr. Dikshit appearing on behalf of the respondent strenuously contends that the word "may" in section 7C(3) makes it optional for the Sales Tax Officer to give or not to give notice to the legal representative for production of documents after death of an assessee. We are unable to accede to this submission.

D The scheme of the relevant provisions of the Act is as follows :—

Omitting the non-essentials for the purpose of this case, under sub-section (1) of section 7 a return is required to be submitted by a dealer showing his turnover. Under sub-section (2) of section 7, if the Sales Tax Officer is satisfied that the return submitted by a dealer is correct and complete he shall assess the tax on the basis of that return. Under sub-section (3) of section 7 read with the proviso, if, according to the Officer, the return submitted by a dealer is incorrect or incomplete, he shall make, what is called, a best judgment assessment after making such enquiry as he considers necessary but must, under the proviso thereto, give a reasonable opportunity to the dealer to prove the correctness and completeness of the return submitted by him.

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F So far as material for the purpose of this case, section 7C(3), properly construed, provides, *inter alia*, that if a person dies after furnishing a return and his return, which was submitted, is not accepted by the Officer as correct or complete, the obligation to give a reasonable opportunity to prove the correctness and completeness of the return under section 7(3) read with the proviso cannot be given a go-by if the person who submitted the return dies without a notice having been given for such an opportunity. The word "may" in section 7C(3) does not clothe the Sales Tax Officer with arbitrary power of assessment without notice to the legal representative to produce evidence or documents which, if the dealer were alive, he would have been entitled to do under section 7(3) read with the proviso. The submission of Mr. Dikshit is, therefore, devoid of substance.

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H In the view we have taken that no fresh notice to the legal representatives was called for prior to the passing of the assessment orders in this case, we are not called upon to decide whether the legal representatives had waived their right to notice as urged in the alternative by Mr. Dikshit.

We may now deal with the second submission of Mr. Manchanda that no recovery proceedings could be instituted unless a notice of demand had been served on the legal representative under section 8 of the Act. That section reads as under :—

“8(1) The tax assessed under this Act shall be paid in such manner and in such instalments, if any, and within such time, not being less than fifteen days from the date of service of the notice of assessment, as may be specified in the notice. In default of such payment, the whole of the amount then remaining due shall become recoverable in accordance with sub-section (2).

(2) Any tax or other dues payable to the State Government under this Act shall be recoverable as arrears of land revenue”.

It is clear that before a certificate proceeding can be instituted under sub-section (2) of section 8 a notice of demand under sub-section (1) thereof is a condition precedent. There can be no recovery without service of a demand notice. It is admitted that such notice has not been served on the legal representatives. That being the position the recovery proceedings are not maintainable in law and are invalid and the same along with the certificates are liable to be quashed.

Mr. Dikshit has drawn our attention to a decision of this Court in *Sahu Rajeshwar Nath v. Income-tax Officer, C-Ward, Meerut, and Another*⁽¹⁾ and submitted that this decision is an authority for the proposition that no notice on the legal representative is required under the law prior to the institution of recovery proceedings by certificate.

In that case this Court was considering the liability of a partner of an unregistered firm which was the assessee and a notice under section 29 of the Income-tax Act, 1922, had been served on the unregistered firm and all the tax assessed against the firm was sought to be recovered from the partner in proceedings under section 46(2) of the Income-tax Act. It was contended on behalf of the partner that a fresh notice of demand upon the partner was necessary under the law and in its absence the recovery proceedings were invalid. This Court repelled the contention holding that although the unregistered firm was the assessee the partner was liable under section 25 of the Partnership Act and since the appellant, therein, conceded that he was a partner of that firm during the accounting year, no separate notice under section 29 of the Income-tax Act upon the partner was necessary. It was further held that the notice contemplated under section 29 of the Income-tax Act, 1922, was to the assessee or to any other person liable and “any other person liable under section 29” meant “liable under the Income-tax Act” and not under any other law such as the Partnership Act.

That was a case where no question arose about the liability of the appellant therein under the provisions of the Income-tax Act such as section 24B of the Income-tax Act, 1922, which is almost identical with section 7C(1) of the Act and that because of that under section

(1) 72 ITR 617. (30C)

- A** 29 of the Income-tax Act a notice of demand was obligatory as a condition precedent to the institution of certificate proceedings for recovery of the dues as arrears of land revenue. The aforesaid decision of this Court in *Sahu Rajeshwar Nath's* case (supra) is, therefore, of no assistance to the learned counsel.

- B** In the result the judgments of the High Court are affirmed but the orders with regard to the recovery proceedings, which are invalid, are set aside. The appeals are partly allowed. There will be, however, no order as to costs.

We should observe that we express no opinion about the appeals which are said to be pending before the Assistant Commissioner (Judicial), Sales Tax.

P.H.P.

Appeals partly allowed.