

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4931 OF 2008
(Arising out of S.L.P.(C) No.4074/2007)

Udaipur Cement Works ...Appellant(s)

Versus

Commercial Taxes Officer, Udaipur ...Respondent(s)

WITH

CIVIL APPEAL NO.4932 OF 2008
(Arising out of S.L.P.(C) No.4208/2007)

ORDER

Leave granted.

In this matter, the question which arose for determination before the Rajasthan High Court in S.B.Civil (Sales Tax) Revision No.99/2002 and S.B.Civil (Sales Tax) Revision No.98/2002 was: Whether reopening of assessment by the Assessing Officer (AO) was erroneous on the ground that it was based on "change of opinion".

After the assessment proceedings stood concluded, the AO gave notice to the assessee alleging escapement of tax on the ground that surcharge was not taken into account in the original assessment order which was brought to his notice by the Auditors. On this ground, the AO gave notice to reopen the concluded assessment. The appellant-assessee herein

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objected to the reopening on the ground that it constituted change of opinion and, on such change, it was not open to the adjudicating authority to reopen the assessment. This contention of the appellant was rejected. Aggrieved by the said decision, the matter was carried in appeal to the Appellate Authority which took the view that once an order of assessment is passed, it is not open to the AO to reopen the said assessment on the ground of change of opinion. This order of the Appellate Authority was confirmed by the Board. The Department carried the matter to the Rajasthan High Court in S.B.Civil (Sales Tax) Revision Nos.99/2002 & 98/2002.

By the impugned order, the High Court came to the conclusion that there was escapement of tax in the sense that the surcharge was not taken into account in the original order of assessment and, consequently, it allowed the Revision Petitions filed by the Department. Against the impugned judgment, the assessee has come to this Court by way of these Civil Appeals.

It appears from the record that the impugned order has been passed by the High Court ex-parte. The appellant herein was not heard. An additional affidavit has been filed before us in which it has been alleged and not controverted that the observation made by the High Court in the impugned judgment, namely, "None present for the respondent (assessee)" was

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incorrect inasmuch as the Authorized Representative of the appellant herein and his advocate were present in the High Court on 9th November, 2006. On that date, the matter was shown for final hearing in the list. However, the impugned judgment was delivered by the learned Judge in his Chambers without prior notice to the appellant herein even though the matter was listed for final hearing in the cause list of 9 th November, 2006. It is submitted that the advocate of the appellant did not have any knowledge of the fact that the matter was being heard in the Chamber. The appellant came to know about the impugned order dated 9th November, 2006 only during the course of conversation with the counsel for the Department.

Having regard to the above facts, which, as stated above, are not fairly controverted by the counsel for the Department, we are of the view that the question as to whether the AO was entitled to reopen the assessment on the basis of the report from the Auditor needs to be gone into by the High Court. That question ought to have been decided by the High Court after hearing both sides. This has not been done. Therefore, we set aside the impugned judgment and remit the matter to the High Court for fresh consideration in accordance with law.

Before concluding, we may point out that two points

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arises for determination in this case. First is with regard to reopening of assessment. In this connection, it is the case of the appellant-assessee that there was a change of opinion and, therefore, it was not open to the AO to reopen the assessment on that ground. Secondly, whether surcharge was at all payable by the appellant under the Rajasthan Sales Tax Act on the sales effected by it. In this connection, the High Court has to decide on the nature of the subject- transaction.

Civil Appeals are allowed accordingly.

No order as to costs.

.....J.
(S.H. KAPADIA)

