(2009) 03 AHC CK 0041

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 695 of 2009

Amber Paper Products, Agra — APPELLANT

Vs

State of U.P.And Others — RESPONDENT

Date of Decision : 05-03-2009

Acts Referred:
Uttar Pradesh Trade Tax Act, 1948 — Section 3H, 9

Citation : (2009) 03 AHC CK 0041

Hon'ble Judges : Rajes Kumar, J and Rakesh Sharma, J

Final Decision : Disposed Of

Judgement

1. Heard Sri Kunwar Saksena, learned counsel for the petitioner and learned Standing Counsel.

2. Learned counsel for the petitioner submitted that the petitioner deals in paper and paying the entry tax at the rate of 5 per cent under the U.P. Tax on Entry of Goods into Local Areas Act, 2007 and under the Notification No. ST2732/II9 (37)/97U.P. Act1548Order (15)2005 dated 7.3.2005 to the extent of the amount of entry tax paid the petitioner is entitled for the benefit of rebate on the payment of trade tax. He submitted that the rate of tax under the entry tax is 5 per cent and under the U.P. Trade Tax Act rate of tax is also 5 percent and, therefore, in view of the Notification No. ST21307/11 (81)/91 U.P. Act1548Order(23)2005, dated 28th April, 2005, petitioner is not liable for payment of State Development Tax under Section 3H of the U.P. Trade Tax Act (hereinafter referred to as "Act"). He submitted that by the Circular dated 7th September, 2006, Annexure 2 to the writ petition, Commissioner has expressed his opinion that in the case of paper and paper product only for limited benefit has been provided and, therefore, the benefit of notification No. 1307 dated 28th April, 2005 is not available. He submitted that this view of the Commissioner is wholly unjustified. He further submitted that under similar circumstances, this Court entertained the writ petition No. 1535 of 2006 on 10th October, 2006 in which an interim order has been granted.

3. Learned Standing Counsel submitted that the petitioner has an alternative remedy by way of appeal under Section 9 of the U.P. Trade Tax Act and under Section 55 of the VAT Act and the argument which the petitioner is raising, the same can be considered by the appellate authority. He submitted that it is open to the petitioner to satisfy the appellate authority that the petitioner is entitled for the benefit of Notification No. 1307 dated 28th April, 2005. He further submitted that the Commissioner''s circular may be considered only as an opinion as held by the Division Bench of this Court and the Apex Court, which may not be binding upon the appellate authority and the appellate authority can proceed in accordance to law without being prejudiced by the circular.

4. In the case of M/s. Mercury Laboratories Pvt. Ltd. v. State of U.P. and others, 2000 UPTC 82, the Division Bench of this Court held as follows:

"After giving anxious consideration to the arguments raised by the learned Counsel for the parties we find that the Commissioner Sales Tax had no authority to either issue a directions, instructions, guidelines, or message or even suggestion to the Assessing Authority or the subordinate authority who has to deal with the matter of assessment, impressing upon them in any manner that the "Life Saving Drugs", which have been notified if are being sold in the Brand name of the respective Companies would not be entitled for exemption. We have yet to see, an Assessing Authority which is subordinate to the Commissioner. Sales Tax would have courage to go beyond the wishes of Commissioner, Sales Tax because that may not only make him liable for adverse remarks or some punitive action but would also make him open for submitting explanation as to why he has caused loss to the State revenue by granting such exemption when the things were made clear in this regard, therefore, the contention of the learned State Counsel that the aforesaid guidelines were not binding on subordinate authorities and was only a view expressed by the Commissioner, Sales Tax in the magazine does not stand to reason.

The message or guidelines issued by the Commissioner undoubtedly interferes in the judicial discretion and the judicial action of the Assessing Authority which cannot be protected under law. The Commissioner, even otherwise was having no occasion to interpret the Notification as he was not dealing with any such dispute, either in his appellate capacity or otherwise. The Commissioner had no authority, otherwise, to guide the subordinate authorities, by his own personal view, in the matter of taxation or exemption, under the notification."

5. In Civil Misc. Writ Petition No. 2344 of 2008, M/s. Aryaverth Chawal Udyog and others v. State of U.P. and others, decided on 22.5.2008, the Division Bench of this Court held as follows:

"In view of the above discussions, we are of the view that though we have upheld the view taken by the Commissioner of Trade Tax in the impugned circular, but we express that the Commissioner of Trade Tax had no authority to issue such circular giving own interpretation in respect of particular provision though no such question in any of the proceeding before him was involved and issuing a direction to the subordinate authority to proceed on the basis of such view amount to interference in the judicial function of subordinate officers. In this view of the matter, we direct that the Commissioner of Trade Tax should refrain himself in issuing such direction in future, which amounts to interference in the judicial function of subordinate officers. In any view of the matter, the view expressed in the circular may amount to his own view and does not constitute material on the basis of which a believe could be formed to reopen the case".

6. The Constitution Bench of the Apex Court in the case of Commissioner of Central Excise, Bolpur v. Ratan Melting & Wire Industries, 2008 AIR SCW 7963 and (2009) 9 VLJ 161 (SC), the Apex Court held as follows:

"Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the Court. It is for the Court to Executive. Look at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.

As noted in the order of reference the correct position visavis the observations in para 11 of Commissioner of Central Excise v. Dhiren Chemical Industries, 2002 (2) SCC 127 has been stated in Kalyani Packaging Industry v. Union of India and another, 2004 (6) SCC 719. If the submissions of learned counsel for the assessee are accepted, it would mean that there is no scope for filing an appeal. In that case, there is no question of a decision of this Court on the point being rendered. Obviously, the assessee will not file an appeal questioning the view expressed visavis the circular. It has to be the revenue authority who has to question that. To lay content with the circular would mean that the valuable right of challenge would be denied to him and there would be no scope for adjudication by the High Court or the Supreme Court. That would be against very concept of majesty of law declared by this Court and the binding effect in terms of Article 141 of the Constitution."

7. In view of the aforesaid facts and circumstances, we are of the view that it would be appropriate that issue involved may be considered by the appellate authority. The appellate authority may be under subordination of the Commissioner so far as administrative matters are concerned but while exercising the appellate power they exercise judicial power and under the statute they have independent power to decide the appeal without being influenced by the opinion of the Commissioner on the basis of the pleadings and the material available on record and Circulars are not binding on them.

8. In the circumstances, we dispose of the writ petition with the direction to the petitioner to file appeal against the assessment order and in case, if any such appeal is being filed, the same may be disposed of expeditiously, preferably within a period of four weeks thereafter after giving opportunity of hearing to the petitioner by a speaking and reasoned order dealing all aspects of the matter. Appellate Authority is further directed to decide the appeal without being prejudiced by the Circular dated 7.9.2006. It will be open to the petitioner to file stay application. In case, if any such application is being filed, the same may be decided within a period of one week thereafter after giving opportunity of hearing.

