
(2005) 05 AHC CK 0052
In the Allahabad High Court
Case No : Trade Tax Revision No. 283 of 1998

Anand Gramodyog Samiti

APPELLANT

Vs

Commissioner of Trade Tax

RESPONDENT

Date of Decision : 25-05-2005

Acts Referred:

Income Tax Act, 1961 — Section 245(7)
Uttar Pradesh General Clauses Act, 1904 — Section 21
Uttar Pradesh Sales Tax Act, 1948 — Section 4
Uttar Pradesh Trade Tax Act, 1948 — Section 11, 18(1), 18(2)

Citation : (2005) 05 AHC CK 0052

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Advocate : Bharat Ji Agrawal, Gaurav Mahajan and Piyush Agrawal, for the Appellant; Bipin Pandey and S.C., for the Respondent

Final Decision : Allowed

Judgement

Prakash Krishna, J.—The basic question involved in the present revision is whether a law abiding tax payer, who has paid tax from his own pocket, should be placed at worst position than the person who has not paid the tax. The facts which are either not disputed or, at this stage beyond the pale of controversy may briefly be noticed. The dispute relates to the assessment year 1995-96. The applicant is holder of a certificate issued by U.P. Khadi and Village Industries Board and the Unit of the applicant carried on the manufacturing and selling of Fan and Pump. According to the certificate granted by U.P. Khadi & Village Industries Board, unit of the applicant, is engaged in the work of "Black smith". The disclosed turnover of sale of Fan and Pump manufactured by the applicant has been accepted by the authorities below. The dispute in the present revision relates to the period 1-4-1995 to 30-9-1995 only. During the aforesaid period the applicant denied its liability to pay any tax on the sale of Fan and Water pump manufactured by it although it deposited the tax, under protest along with monthly returns of the turnover. In the aforesaid period the Fan was taxed at the

rate of 10% and that of Water Pump at the rate of 5%. It may be noticed here that for the remaining period of the relevant assessment year, the assessing authority itself granted exemption from payment of sales tax on the aforesaid goods in view of the notification dated 1-10-1995. The benefit of the circular No. 2444 was not extended to the applicant for the disputed period namely 1-4-1995 to 30-9-1995 on the ground that the applicant has already deposited the tax, therefore, the claim of refund of tax thus deposited was negatived and not liable to be entertained, in absence of any such provision for the refund in the said Circular No. 2444 dated 30-3-1996. In first appeal, the Deputy Commissioner (Appeals) Trade Tax disagreed with the assessing Officer and granted refund of the amount of tax deposited by the dealer applicant for the disputed period. The order of Dy. Commissioner (Appeals) has been set aside by the Tribunal in appeal, filed by the department. The Tribunal has held that within the four corners of U.P. Trade Tax Act, there being no provision of refund of such an amount, no order granting refund can not be passed. Challenging the legality, validity and propriety of the order of the Tribunal dated 8-10-1988 passed in Second appeal No. 675 of 1998 present revision has been filed u/s 11 of U.P. Trade Tax Act.

2. Heard Sri Gaurav Mahajan, Advocate, holding brief of Sri Piyush Agarwal, learned counsel for the applicant and Sri Bipin Pandey learned Standing Counsel for the department.

3. Learned Counsel for the applicant submitted that the Tribunal committed illegality in not allowing refund of the amount of tax deposited by the applicant under protest. It was submitted that it has been found as a matter of fact, by the authorities below that the applicant has not realized any amount from the customers and the tax was deposited by it out of his own pocket. The department by issuing Circular No. 2444 dated 30-3-1996 has directed the assessing authority to grant remission of tax, interest and penalty, if levied on the person holding certificate granted by U.P. Khadi and Village Industries Board. Elaborating the argument it was submitted that the aforesaid Circular was issued on the representation made by certificate holders of U.P. Khadi and Village Industries Board. A representation was made to the State Government that such certificate holders have neither realized the tax nor deposited tax and in this background the aforesaid Circular was issued on the supposition that such persons have neither realized nor deposited the tax. It was never the intention of the said Circular not to extend the benefit to such dealer who have deposited the tax out of their own pocket. On the other hand learned Standing Counsel submitted that there being no express provision for refund of tax, interest or penalty in the said Circular, the applicant is not entitled for refund of tax amount even if it was deposited by it and was not realized from the customers. He laid much emphasis on the finding of the authorities below that the liability to pay tax on the sale of such goods is there on the applicant in view of the relevant notification and as such it cannot be said that tax was not due from the applicant.

4. The State Government issued Notification No. ST-II-7037/X-7 (23)/83- U.P. Act XV/ 48 Order 85- dated 31-1-1985. Relevant portion of the said Notification is quoted below:

"In exercise of the powers under Clause (b) of Section 4 of the Uttar Pradesh Sales Tax Act, 1948 (U.P. Act No. XV of 1948), read with Section 21 of the Uttar Pradesh General Clauses Act, 1904 (U.P. Act No. 1 of 1904) and in suppression of all previous notifications issued under the aforesaid clause, the Governor is pleased to exempt with effect from 1st February 1985 the sale or purchase of the goods mentioned in column 2 of the Schedule hereunder by the persons or the class of persons mentioned therein, from tax under the said Act of 1948, subject to the conditions, if any, specified in Column 3 thereof.

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3. Institutions in U.P. certified by the All India Khadi & Village Industries Commission or the U.P. Khadi & Village Industries Board

(a) on the sale of products of Village Industries specified below, and (b) on the purchase of any goods connected with the manufacture of products of village industries or purchases of products of village industries specified below:

On condition that the dealer selling such goods to the said institution furnishes a certificate from the said institution duly counter signed by the District Village Industries Officer of the U.P. Khadi & Village Industries Board to the effect that the goods purchased by it are connected with the manufacture of products of the aforesaid Village Industries or are products of such Village Industries."

5. The aforesaid column No. 3 of the above notification was deleted by the notification No. TT-2/1903/XI-7(6)/94-U.P dated 31-6-1994.

6. The result of the deletion of the said clause was that the turn over of certificate holder of U.P. Khadi and Village Industries Board ceased to be exempt and became liable to sales, tax. However the notification dated 31-1-1985 as subsequently amended from time to time was again amended by another notification No. TT-2-3409/ XI- 9 (53)/ 91 U.P. Act-15/ 48-Order-94 dated 1-10-1994. Relevant portion of the said notification is quoted below:

"In exercise of the powers under Clause (c) of Section 4 of the U.P. Trade Tax Act, 1948 (U.P. Act No. XV of 1948) read with Section 21 of the Uttar Pradesh General Clauses Act 1904 (U.P. Act No. 1 of 1904) the Governor is pleased to make with effect from 1st October 1994, the following amendment in the Government Notification No. ST- II/ 7073/X-7 (23)/ 83- U.P. Act- 15/48- Order-85 dated 31st January 1985, as amended from time to time.

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3. Sale of products of village industries on the conditions that specified below by the institutions certified by the All India Khadi and Village Industries Commissions or Uttar Pradesh Khadi And Village Industries Board:

(1) The exemption shall be available on such products only as are manufactured by such institutions themselves.

(2) Exemption may be withdrawn if such institutions misuses any of the conditions subject to which exemption is admissible.

(3) Limit of ; exemption of turnover in respect of products of industries mentioned in columns (a) to (d) shall be as mentioned against them. Institutions falling under sub section (1) or sub section (2) of Section 18 of the U.P. Trade Tax Act, 1948 shall be allowed exemption in proportion to the period during which the business is carried on. The turnover in excess of the exempted turnover or the proportionate exempted turnover, as the case may be, shall be liable to tax at the rate applicable to the sale of commodity to which the turnover relates."

7. Turnover of Black smithy and Carpentry was exempted up to Rs. 5,00,000/- in an assessment year. By a subsequent notification No. TT-2-2454/XI-9 "(53)/91 dated 5-10-1995, the State Government again amended the earlier notification No. 7037 dated 31-1-1985 and granted full exemption on the sale of products of Village. Industries specified therein which also includes Black smithy, on certain conditions not relevant for the present case.

8. From the above discussion it is clear that sale of specified goods of Khadi Gram Udyog Product was exempt from payment of tax for the period prior to 1-4-1995 and subsequently up to 1-10-1995, under the notifications referred to above. However for the period 1-4-1995 to 30-9-1995 initially sales tax liability of such certificate holder was there, but in view of the Circular No. 2444 dated 30-3-1996 the State Government decided not to recover any sales tax, interest or penalty if levied on such dealer.

9. It is not in dispute that Commissioner of Trade Tax issued a Circular dated 30-3-1996. In the Circular it is mentioned that In pursuance of the Notification dated 31-1-1985, the certificate holder of Akhil Bhartiya Khadi Gram Udyog Board and U.P. Khadi & Village Industries Board was allowed total exemption on the sale of specified goods for the Village Industries and on the raw material for products of such goods. By the subsequent notification dated 31-5-1994 With effect from 1-6-1994 the benefit: of total exemption of tax on the purchase of goods used in the manufacture of specified agricultural product, was withdrawn. By the subsequent notification dated 5-10-1995 with effect from 1-10-1995 total exemption on the sale of specified goods(on the sale of Products of U.P. Khadi and Village Industries Board) was withdrawn. This caused a lot of inconvenience to such certificate holders and they represented to the Government for remission of tax on sale of such goods for this period. The State Government after taking into consideration the entire facts and difficulties faced by such dealers granted remission on sale of specified product of Khadi Gram Udyog Board for the period

1-10-1994 to 30-9-1995. A copy of the said Circular has been annexed as Annexure-2 to the stay application.

10. Now the question arises, a dealer who has not realized the tax which had been deposited by it for the period 1-10-1994 to 30-9-1995 (for which remission of tax has been granted), can claim refund of the tax deposited by it out of his own pocket.

11. A similar kind of controversy has been considered by the Apex Court in the matter under Central Excise Act, in the case of W.P.I.L. Ltd., Ghaziabad Vs. Commissioner of Central Excise, Meerut, U.P., , Power driven pump as well as part thereof which are used for the manufacture of Pump were exempt from levy of excise duty since 1978. Various notifications have been issued from time to time granting exemption of both i.e. Power driven pump as also part of the power driven pump which were used in the manufacture of power driven pump. Subsequently, the earlier notification were rescinded and consolidated notification incorporating earlier notification was issued vide notification No. 46 of 1994 dated 1-3-1994. In the said notification power driven pump were shown as exempted item. But part of power driven pump used in the manufacture of pump within factory which were all along exempted from 1978 were omitted.. This omission was brought to the notice of the Government by the industries and the Central Government being satisfied issued amended notification No. 46 of 1994 by issuing another notification No. 95 of 1994 on 25th April, 1994, correcting the mistake and clarifying the position that part of power driven pump which were used in the manufacture of power driven pump would also be exempted. A dispute arose with, regard to the exemption on the part of power driven pump used in the manufacture of the pump for the intervening period. The Apex Court held that in view of consistent policy of the Government of exempting part of power driven pump utilized by the factory within the factory premises, it cannot be said that while issuing Notification No. 46 of 1994 on 1st March 1994 the exemption in respect of such item which was operative was either withdrawn or revoked. The policy remained as it was and in view of the demand being made by the department, a representation was made by the industries and on being satisfied the Central Government issued clarificatory notification No. 95 of 1995 on 25-4-1994. It was held that it was not a new notification granting exemption for the first time in respect of power driven pump to be used in the factory.

12. The controversy in hand is fully covered by the judgment of Apex Court. Here also the intention of the Government was not to levy any tax on sales made by the manufacturer who is having certificate issued by U.P. Khadi and Village Industries Board in respect of specified agricultural products. This is further strengthened by the fact that the State Government on the representation having been made issued a Circular No. 2444 granted remission to such dealers from the sales tax, interest and penalty, if levied.

13. Learned Standing Counsel submitted that there being no provision for refund of tax, no order/ refund of tax can be passed in favour of the applicant. In

support of this proposition reliance has been placed on two Division Bench decision of this Court, (1) S/S Shyam Sunder Gharib Das and Ors. v. Sales Tax Officer and Ors. reported in 1991 UPTC 1258, and (2) Ram Bhajan Lal Gupta v. Commissioner of Sales Tax reported in 1993 OPTC 820. The argument of learned Standing Counsel appears to be attractive but does not hold water when the matter is examined in depth. Both the above cases are distinguishable on facts as the object sought to be achieved therein was entirely different. The Commissioner of Trade Tax Lucknow had issued a Circular granting benefit to those classes of dealers who deposited the amount for a particular year subsequent to the issuance of the Circular and not to the persons who have deposited earlier. This Court held that benefit of such circulars cannot be extended to all dealers irrespective of the date of deposit of tax by them. The circular was issued with a view by motivate the dealers whose dues are outstanding since very long time and dealer being small and it has become difficult to search such dealers, hence the Scheme was propounded. The second reason that on account of out- standing tax dues standing since long, huge interest has I accumulated and even in such case dealers who are interested to deposit the main amount of tax, would not deposit the same, because accumulated huge amount of interest. It was on account" of these facts that in order to get deposit made in the State Ex- chequer the aforesaid dues, relief by way of circular was granted. Keeping these object in mind this Court interpreted the Circular and held that benefit of Circular would not be extended to persons who have deposited the tax earlier as it was not the object of the circular. The same view has been reiterated in the subsequent decision of Ram Bhajan Lal Gupta (supra) wherein it was held that benefit of the circular was available only to those who were in arrears of tax at the commencement of the Scheme which were to be paid during the period for which scheme remained operative.

14. The aforesaid two judgments relied upon by the learned Standing Counsel have no relevance to the controversy in hand. The object of the circular in question is to remedy the difficulty faced by such dealer during the interregnum period for which there was no exemption under the relevant notifications. The State Government realized the difficulty of such class of dealers and issued a Circular granting remission of tax, interest and penalty, if levied.

15. Learned Standing Counsel then contended that all three authorities below have found that the liability of tax on sale of self manufactured fans and water pump was there for the disputed period. Therefore, the grant of remission of tax if levied by the assessing authority will not entitle the applicant to claim refund of tax, deposited by it under protest.

16. The said argument is misconceived and cannot be accepted for the simple reason that India is a welfare State. A person who has deposited tax out of his own pocket cannot be permitted to be placed in a disadvantageous position than those who have not deposited tax at all. All the three authorities have concurrently found that the dealer applicant has deposited the tax from its own

pocket and did not realize the same from the customers. If the argument of learned Standing Counsel is accepted that under Circular there is no provision for remission of tax, fee penalty if levied, but since there is no specific provision for refund of tax, no refund of tax can be ordered even if tax was deposited by the dealer out of his own pocket, would lead to absurd situation. Keeping in mind the object of the Circular and the factual background for which it was issued, it is implied that the persons who have not paid tax etc. if already levied, tax etc. shall not be realized and if already paid by a person without passing on the burden to the customer, the same shall be refunded to the dealer. This view, which I am taking is not only reasonable but is also within the Constitutional Scheme that India is a Welfare State. The provision for refund of tax on the facts of the present case is very much implicit and can be read in the Circular otherwise it would amount to denial of justice to the dealer. Very recently the Hon'ble Supreme Court in the case of B.P. Achala Anand Vs. S. Appi Reddy and Another, has observed that unusual facts and situation posing the issue for resolution is an opportunity for innovation of law. It has observed that the law, as administered by Courts, transforms into justice. It has quoted the definition of justice mentioned in Justinian's Institutes (adopted from the Roman Jurist Ulpian) states "justice is constant and perpetual will to render to every one that to which he is entitled". Similarly Cicero described "justice as the deposition of the human mind to render everyone his due". The law does not remain static. It does not operate in a vacuum. As social norms and values change laws too have to be interpreted and recast. Law is really a dynamic instrument fashioned by society for the purposes of achieving harmonious adjustment, human relations by elimination of social tensions and conflicts. Lord Denning once said "Law does not stand still; it moves continuously once this is recognized then the task of a Judge is put on a higher plain. He must consciously seek to mould the law so as to serve the needs of time."

17. The Supreme Court in the case of Upper India Publishing House (P) Ltd. Vs. Commissioner of Income Tax, Lucknow, interpreting Section 245(7) of the Income Tax Act, 1961, where in interpretation of the phrase "assessee shall not be deemed to have been withdrawn the appeal from the Appellate Tribunal.", was involved took into consideration the obvious object of Clause (7). It held that the expression "assessee" should be, construed in a wider way so as to include all parties affected by the subject matter of assessment. Two cross appeals against the first appellate order were pending before the Tribunal, one at the instance of the assessee and the other at the instance of the department. The assessee withdrew his appeal with a view to approach the Settlement Commission. The Settlement Commission did not entertain the application of the assessee and therefore the assessee moved an application for revival of his appeal before the Tribunal. The Supreme Court held that, the appeal filed by the department would also be revived although there was no such express provision in the aforesaid Section. The Supreme Court by giving "an equitable and purpose oriented construction" to the clause held that the expression "assessee" would also

include all parties affected by the subject matter of the assessment. Further in Para 45 of the judgment it has observed that in this case strictly grammatical construction is departed from in this process and a mildly legislative flavour is imparted by this interpretation. It further observed that the judicial process does not stand helpless with folded hands but engineers its way to discern meaning when a new construction with a view to rationalization is needed. It quoted the observation of Lord Denning, which are reproduced below:

" Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsman of Acts of Parliament have often been unfairly criticized. A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else laments that the draftsmen have not provided for this or that or have been guilty of some or other ambiguity.. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot: simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and he must do this not only from the language of the statute, but: also from a consideration of the social conditions which give rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature. That was clearly laid down by the resolution of the Judges in *Heydon's* case and it is the safest guide today.-Good practical advice on the subject was given about the same time by Plowden...but into homely metaphor it is this. A Judge should ask himself the question. If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A Judge must not alter the material of which it is woven, but he can and should iron out the creases."

18. The argument of the learned Standing counsel that there being no provision for refund of tax in the Circular, therefore, no refund can be granted, is liable to be rejected on another ground. As stated, in the earlier part of judgment that the aforesaid Circular was issued on the representation made by such persons who had not deposited tax. On this basis the Government granted remission from deposit of tax. The observation made above by me should not be misconstrued, therefore by way of clarification it is mentioned that a persons who has realized tax and deposited the same will not be entitled for refund under the aforesaid Circular. To put it differently only such person and who have not realized tax but deposited it out of their own resources, will be entitled for refund of tax.

19. In the result the order of the Tribunal cannot be sustained. The revision is allowed and the order of the Tribunal under revision is set aside. The order of

first appellate authority is restored, with a cost of Rs. 1000/-