
(2006) 03 AHC CK 0029
In the Allahabad High Court
Case No : Trade Tax Revision No. 1630 of 2005

Ankur Technocrates

APPELLANT

Vs

Commissioner, Trade Tax

RESPONDENT

Date of Decision : 09-03-2006

Acts Referred:

Uttar Pradesh Trade Tax Act, 1948 — Section 11, 4A

Citation : (2007) 9 VST 679

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Advocate : Kunwar Saksena, for the Appellant;

Final Decision : Allowed

Judgement

Rajes Kumar, J.—Present revision u/s 11 of the U.P. Trade Tax Act (hereinafter referred to as the "Act") is directed against the order of the Tribunal dated 15th June, 2005 by which the appeal filed by the applicant against the order of the Divisional Level Committee (hereinafter referred to as "DLC") dated 22nd February, 2004 has been allowed and the matter has been remanded back to the DLC.

2. The brief facts of the case are that the applicant has set up a Unit for manufacturing of electrical Wire and Cables. The production was started on 13.11.1997 and date of sale was 17.11.1997. Applicant had filed exemption application before the Divisional Level Committee claiming exemption u/s 4-A of the U.P. Trade Tax Act on the ground that unit was new unit as defined u/s 4-A of the Act. The Divisional Level Committee vide order dated 12.8.1999 rejected the application. Applicant filed appeal before the Tribunal. Tribunal vide order dated 14.2.2000 set aside the order and remanded back the matter to the Divisional Level Committee to decide the application after giving opportunity of hearing to the applicant. Divisional Level Committee again rejected the application on 18.11.2002. Against the said order, applicant filed appeal before the Tribunal, which was allowed vide order dated 19.2.2003 and the matter was again

remanded back to the Divisional Level Committee to pass a speaking order after considering all the materials available on record. Divisional Level Committee vide order dated 21.2.2004 again rejected the application and against the order, applicant filed appeal before the Tribunal which has been rejected by the impugned order. Against the said order, applicant filed Revision No. 1020 of 2004 in this Court. This Court vide order dated 3rd February, 2005 allowed the revision and directed the Tribunal to decide the appeal afresh and in pursuance thereof, present appeal has been decided.

3. Heard learned Counsel for the parties.

4. From the perusal of the record, it appears that initially the application u/s 4-A of the Act was rejected by the DLC vide order dated 12.8.1999 on following three grounds.

(1) The unit has purchased the land/buildings from M/S Swastik Udyog. but the copy of the registered lease deed has not been filed.

(2) The generator and boiler used in the unit are old one.

(3) The Machinery used in the unit are said to have been purchased from a Delhi based seller namely M/S Universal Traders from which the chairs, almirah and other material have also been purchased. The purchase made by the unit is fictitious. The serial number given on the bills issued by the seller are doubtful. According to the import declaration Form No. F/BD-3020631 the machine/boiler purchased from the aforesaid seller are old one and, thus, the machines purchased from the said seller are doubtful and old one.

5. The aforesaid order has been set aside by the Full Bench of the Tribunal vide judgment and order dated 14.2.2000 passed in appeal No. 108 of 1999 and the matter was remanded back to the DLC. In its order, Tribunal observed that no lease deed was required in this case in view of the Notification No. TT-II-780 and 781/II-9 (226)-94, dated 31st March, 1995 as the premises of the unit belonged to U.P. State Industrial Development Authority and moreover the registered lease deed was produced by the unit. It was also observed therein that in view of the explanation (2-A) to Section 4-A of the Act, only for the reasons that the generator/boiler was old one, it could not be held that the appellant unit was not a new one.

6. With regard to the third ground. Tribunal observed that only by perusing the import declaration Form No. F/BD-3020631 and the bills issued by M/S Universal Traders, it does not seem justified to hold that the machines of the appellant unit were old one and in case of any doubt, necessary enquiry can be made by the DLC from Delhi.

7. The DLC accordingly, rejected the review petition vide order dated 21.2.2004 only on the ground (hat the machines installed in the unit were not new and in fact those were previously used by M/S Universal Traders. Delhi, who sold the same to the unit after dismantling, and further the unit failed to establish that

the machines installed in its unit were neither previously used nor acquired for use and, thus, it has failed to discharge its burden as required by Explanation (2-A) to Section 4-A of the Act. Against the said order, applicant filed appeal before the Tribunal, which has been rejected, vide order dated 7.4.2004. Against the said order, applicant filed revision, which was allowed, and the matter was remanded back to the Tribunal with the following observations:

I have perused the order of Tribunal and the Divisional Level Committee. Tribunal is the last Court of fact and is expected to consider the material available on record and the submissions made by both the parties. It appears that the Tribunal while coming to the conclusion that the machines purchased by the applicant from M/S Universal Traders, Gokulpura, New Delhi, were old, the survey made by the Asstt. Commissioner, Trade Tax, report of General Manager, District Industries Centre and the certificate of bank certifying the loan given for new plant and machinery, the affidavit etc. have been considered and therefore, the order of Tribunal is vitiated. It is true that the burden lies upon the applicant to prove that the machinery installed in the unit were not used or acquired for use in any of the factory or workshop. Therefore, what has to be examined is whether the machines were used or acquired for use in any of the factory. For coming to the conclusion, Tribunal may examine all the necessary documents which are available on record, documents on which the applicant relies and the reasons given by the Divisional Level Committee.

8. Before the Tribunal, applicant made the following submissions. It is useful to refer those submissions as such which is incorporated in the order of the Tribunal.

Learned counsel for the appellant unit has submitted that the appellant unit had purchased new plant and machines from M/S Universal Traders, Delhi in the month of July, August, September, 1997 and after importing those machines against 8 Forms 31 had installed them in its unit. M/S Universal Traders, Delhi is registered in the Trade Tax Department of Delhi. By hypothecating its plant and machines, appellant had taken a loan of Rs. 18,00,000/- only from Oriental Bank of Commerce, Ghaziabad. It is a known fact that no bank grants a loan on the strength of old machinery and further before granting the loan, the Bank had satisfied it by physical verification of the machines of the appellant unit through its experts about the fact that the machines were new one and only thereafter the Bank had sanctioned the loan to the appellant which is evident from the loan sanctioning letter dated 9.9.1997 issued by the Bank. The authorities of District Industries Centre Ghaziabad had also physically checked and verified the entire plant and machinery of the appellant unit and thereafter by their report dated 6.8.1998 they have certified that the machines installed in the appellant unit have neither been used nor acquired for use in any other unit. Learned Asstt. Commissioner (Assessment) II, Trade Tax, Ghaziabad had also made a survey of the appellant unit on 17.10.1998 wherein he had found that the plant and entire machinery installed in the appellant unit was "new one". In his enquiry report in connection with appellant's application u/s 4-A of the Act, learned Asstt.

Commissioner (Assessment) 11, Trade Tax, Ghaziabad had further certified that the entire plant and machinery installed in the appellant unit was "new one" and those were neither used nor acquired for use in any other unit. The plant and machineries installed in the appellant unit have been valued by the Chartered Accountant namely, M/S Nagar Acharya & Associates, New Delhi, who after examining the books of account of the appellant units also the documents relating to the plant and machineries has valued the same to the tune of Rs. 25,04,120.10 by treating them to be "new one". The price of the plant and machinery purchased from M/S Universal Traders, Delhi has been paid by means of bank draft/cheques. In spite of aforementioned evidence being there the Id. D.L.C. has rejected the review petition dated 25.8.1999, moved by the appellant on altogether irrelevant grounds. The aforementioned evidence was sufficient to establish the fact that the plant and machineries installed in the appellant unit were neither used nor acquired for use in any other unit and thus, by the said evidence the burden of the appellant unit to establish the fact that the plant and machineries installed therein were neither used nor acquired for use in any other unit, was satisfactorily discharged. The finding recorded by the Id. D.L.C. in its order dated 21.2.2004 for coming to the conclusion that the machineries installed in the appellant unit were previously used or acquired for use by M/S Universal Traders, Delhi, being based on mere suspicion, conjectures and surmises, cannot be sustained under the law, as the suspicion, however, strong, cannot take place of proof. To support his aforementioned arguments, he has relied on the decision given by Hon'ble the Apex Court in the case of State of Kerala v. M.M. Mathew and Ors. 1978 S.T.C. 42 348 ker (at page 349) wherein it is held that strong suspicion, strange coincidence and grave doubts cannot take the place of legal proof. Challenging the impugned order passed by the Id. D.L.C. appellant's counsel has submitted that only for the reasons that the firm M/S Universal Traders, Delhi was registered only for the manufacture and sale of electric wire and cables and not for the manufacture and sale of machineries and further the appellant unit is also registered for production and sale of electrical wire and cable it could not legally and reasonably be presumed that the machineries supplied by the aforesaid firm were old one. In support of the aforesaid contention, appellants' counsel has referred to the decision given by a Full Bench of the Trade Tax Tribunal, U.P. Lucknow in the case of Supreme Caps Industries, Ghaziabad v. Divisional Level Committee, Meerut and others reported in 2003 NTN (Vol. 22) Tribunal-I wherein it was held that the appellant cannot be penalized for default committed by others and since it was not a case of denial by the sellers or the selling firms were not found in existence, therefore, the inference drawn to the effect that the purchases was doubtful or that the machines purchased were old, was legally untenable and erroneous. It was also held therein that the decisions affecting the rights and interest of the dealer should not be presumptive in nature and the decision reached by the D.L.C. was undoubtedly presumptive and that was not based on hard facts or admissible evidence. To support his arguments he has also referred to the decision given by a Division Bench of the Hon'ble High Court of Judicature at Allahabad in the case

of Calcutta Silicate and chemical Industries, Meerut and Anr. v. State of U.P. and Ors. reported in 2003 NTN (23) 635 in which it is held that the exemption application u/s 4-A of the Act cannot be rejected on the ground of use of old machinery without adverting to the contention of the dealer, the document filed by the dealer cannot be ignored and the machineries cannot be held to be old without making proper inquiry. It is further submitted from the side of the appellant that it is not necessary for any supplier of the goods to sell or supply only those very goods which are manufactured by it and further the supplier can sell or supply the goods after purchasing from manufacturer thereof or after getting those goods fabricated. It is also submitted that M/S Universal Traders, Delhi was assessed for the year 1998-99 by order dated 1.12.1998 passed by the Ld. Assessing authority u/s 23 of the Delhi Sales Tax Act, 1975 which shows that during the said year M/S Universal Traders, Delhi had shown its turnover to the tune of Rs. 24, 97,372.30. The disclosure of the aforesaid turnover is itself an evidence of the fact that it was manufacturing the goods in the said years as the aforesaid manufacturer of the goods was not possible without machineries. Since the appellant unit had purchased the machines in the year 1997 and the supplier firm M/S Universal Traders, Delhi continued to manufacture the goods in its unit during the year 1998-99, which was not possible without machineries, therefore, it could not be imagined that the machineries sold by M/S Universal Traders, Delhi to the appellant unit were those very machines which were previously installed or used in the unit of M/S Universal Traders, Delhi. Apart from that the unit of M/S Universal Traders, Delhi which was established in the year 1992-93, as is evident from the registration certificate of the aforesaid unit had become 15 years old by the time of supplies of machines to the appellant unit in 1997. According to the Income Tax Rules, the depreciation upto 20% per year was admissible on machines and in view of this situation by the year 1997 the written down value of machineries installed in the unit of M/S Universal Traders, Delhi had become almost Zero and those in fact had acquired the shape or machinery scrap. In view of these circumstances it could not be imagined that by paying the value of new machineries the appellant unit would have purchased the old machineries installed in the unit of M/S Universal Traders, Delhi. It is further submitted by the appellant's counsel that by the Full Bench Judgment dated 14.2.2000 passed in Appeal No. 108 of 1999 filed by the appellant it has already been concluded that merely on the basis of perusal of import declaration form No. F/BD-3020631 and the sales vouchers issued by M/S Universal Traders it would not be justified to hold that the machineries installed in the appellant unit were old one. In view of the aforesaid finding recorded by the Tribunal it was quite illegal and improper for the Ld. D.L.C to reiterate the findings about the machineries being old one on the basis of aforementioned facts, it is also submitted by the appellant's counsel that only for the reasons that the import declaration form were bearing an endorsement to the effect (plant and machineries in loose condition) it could not necessarily be inferred that the machineries being imported under those forms were the machineries dismantled from the unit of M/S Universal Traders, Delhi. The machineries purchased and

installed in the appellant unit included heavy machineries and heavy parts thereof which could only be carried and transported only in the loose condition and, therefore, on account of the fact that the machineries purchased by the appellant unit were imported or transported in loose condition, it could not be concluded that machineries installed in the unit of the appellant were old one or previously used in the unit of M/S Universal Traders, Delhi. Further it is submitted by the appellant's counsel that only on account of the fact that the sales of machineries to the appellant unit was not shown by M/S Universal Traders in its returns submitted in the Sales Tax Department, Delhi, neither any doubt over the aforesaid transaction of purchase/sale could be raised there nor it could be inferred that in fact old machineries were sold by M/S Universal Traders, Delhi to the appellant unit because it was not for the appellant unit to ensure the fact as to whether the sales of machineries to the appellant unit has been shown or not by the seller M/S Universal Traders in its returns for the relevant year, and for the aforesaid lapse on the part of the seller M/S Universal Traders the appellant unit could not be blamed under the law. In support of the aforesaid contentions appellant's counsel has inferred to the decision given by a Full Bench of Tribunal in the case of *Supreme Caps Indust. Ghaziabad v. D.L.C., Meerut and Ors.* (supra), principles laid down wherein have been stated in the earlier part of this judgment. The observations made by the Ld. D.L.C. to the effect that in spite of repeated request the appellant unit did not disclose about the particulars of M/S Universal Traders, are absolutely incorrect and in fact the Ld. DLC was aware from the very beginning about the name address and registration number etc of the seller firm. The observation of the Ld. DLC to the effect that services of Sri Devashish Mukherjee were, according to the need, being taken both by the seller and purchaser is absolutely incorrect. In fact Sri Devashish Mukherjee has been working as supervisor in the appellant unit. The certificate dated 30.9.1999 issued by the M/S Universal Traders and the bill enclosed with form 31 bearing number 3020631 do not bear the signature of Sri Devashish Mukherjee and in fact those signatures of another person and in view of this situation on the basis of those signatures it could not be concluded that the machineries installed in the appellant unit were old one. Since the relations in between Smt. Shubhra Schroff proprietress of the appellant unit and her husband Sri Alok Kumar Schroff a partner of M/S Universal Traders, are presently strained and as a result thereof both are living separately. More than 5 years have elapsed since the closure of the supplier firm and the factory in which the machineries sold by the supplier were got fabricated has been closed much earlier, therefore, it was quite impracticable to enquire about the transaction of sale made by M/S Universal Traders, to the appellant unit from the original source. By putting the aforementioned arguments, appellant's counsel has submitted that the evidence available from the side of the appellant was absolutely sufficient to discharge its burden regarding the fact that the machineries installed in its unit were new one and those were neither used nor acquired for use in any other unit and contrary to that the department has utterly failed to rebut or controvert the evidence supporting the version of the appellant. Referring to the decisions given in the

case of Sumara Industries, Kanpur v. CTT U.P. 2000 NTN (17) 812 Agarwal Coke Industries v. CTT., U.P. 2002 UPTC 82 CTT, U.P. v. Chandra Rice Mills 2004 NTN (25) 889 Agarwal Iron & Steel Co. v. CTT., U.P. 2005 (37) STJ 151 Tribeni Motor Car Co. v. CST., U.P. 1983 STD 4 Mool Chand Daudayal v. CST 1985 1 STR 364 and Raja Ram Ram Prakash v. CST 1987 5 STR 282. Appellant's counsel has submitted that the matter has already been remanded twice to the Ld. DLC and the entire material required for final disposal of the matter being available on the record, it would be proper to decide the matter finally by disposal of this appeal and not to remand it again to the Ld. DLC.

9. On consideration of the aforesaid submissions, Tribunal has recorded its finding as follows.

We have considered the submissions made by the Id. Representatives of the parties with reference to the material available on the records as also the case laws cited during the arguments on this appeal.

By the impugned order dated 21.2.2004 learned has concluded that all the plant and machineries installed in the appellant unit were previously used or acquired for use in the unit of M/S Universal Traders, Delhi and has recorded various reasons therefore, which are obviously based on the report of Joint Commissioner (Executive) Trade tax, Range-B-Ghaziabad.

Now we shall discuss the reasons recorded by the id. DLC for coming to the above mentioned conclusion.

The first reason that has been assigned by the Id. DLC is to the effect that all machineries (except generator) worth Rs. 22,16,180/- were purchased from M/S Universal Traders, Delhi against Bill No.5 to 13 and after inquiry being conducted from Sales Tax Department, Delhi it was informed by the Trade Tax Officer, Ward 74, Delhi vide letter dated 24.6.1999 that M/S Universal Traders is not registered for manufacture and sale of machineries and that is registered for manufacture and sale of machineries and that is registered for manufacture and sale of electrical wire and cables.

In our considered opinion abovementioned facts could not be a ground for reasonably coming to the conclusion that the machines installed in the appellant unit were previously used or acquired for use in the unit of M/S Universal Traders, Delhi because it was not uncommon to effect the sale of an article which was neither manufactured nor ordinarily sold by the seller and further no prohibitions was there under the law for effecting the sale of an article by the seller who was neither manufacturer nor dealer thereof.

The second ground taken by the Id. DLC is that the appellant unit as also M/S Universal Traders, are manufacturers of electrical wire and cables and both required the same machinery for their unit.

In our considered opinion above mentioned facts could not reasonably lead to a conclusion that the machineries alleged to have been sold by M/S Universal

Traders, Delhi to the appellant unit, were those very machineries, which were being used or acquired for use in the unit of seller M/S Universal Traders, Delhi. Reasons for this conclusion is obvious as no such presumption can arise under the law that if the seller and purchasers both are manufactures of one and the same goods and both require same machineries for production of their goods, then the sale of those machineries shall be presumed to have been used or acquired for use in the unit of the seller.

The third reasons assigned by the Id. DLC that the machineries are said to have been purchased by the appellant unit in between the period 28.7.1997 to 22.9.1997 and the firm M/S Universal Traders has been closed in the year 1998.

On the strength of above mentioned facts no adverse inference could be drawn against the appellant unit as the alleged purchase of machineries by the appellant unit from M/S Universal Traders, Delhi was prior to the closure of M/S Universal Traders as is evident from the above mentioned facts themselves.

The fourth reason assigned by the Id. DLC is that all the machineries, accessories, components and equipments etc., have been purchased from a single seller M/S Universal Traders whereas no such manufacturer or seller is there in India dealing in entire plant and machineries required for installation of any factory.

In our opinion the above mentioned reason recorded by the Id. DLC is not tenable under the law as it is not difficult or uncommon to acquire various machineries, plants accessories, components, equipments and articles required for installation of a particular unit from various sources/sellers/manufacturers/fabricators and thereafter effect sale thereof.

The fifth reason recorded by the Id. D.L.C. is that the appellant unit has purchased 3 P.V.C. extruder and one rubber extruder from M/S Universal Traders. These machineries are very constly. A very big plant is required for manufactures thereof and further very few units are there in India manufacturing these machineries which do not include M/S Universal Traders.

In our opinion above mentioned ground taken by the Id. D.L.C. is also not sustainable under the law for those very reasons which we have recorded in respect of the reason No. 4 assigned by the Id. D.L.C.

The sixth ground taken by the Id. D.L.C. is that 14 machineries of different type have been installed in the appellant unit and even the biggest manufacturers do not manufacture those machineries together.

Above mentioned ground taken by the Id. D.L.C. could not be sufficient for coming to a conclusion that the machineries alleged to have been sold by MAS Universal Traders to the appellant unit were the machineries which were previously used or acquired for use in the unit of the seller. Reasons for this conclusion are obvious as observed in the findings on reason number four recorded by the Id. D.L.C. However, we may clarify it further that it is neither

impossible nor uncommon for a seller to acquire different type of machineries from various sources and effect the sale therefore together.

The seventh reason assigned by the Id. D.L.C. is that apart from the plant and machineries iron drums, tray set, iron stool, other plant, accessories furnitures, boiler, finished goods (telephone cable, earthing wire) as also the raw-material have been purchased by the appellant unit from M/S Universal Traders, Delhi. In our opinion the above mentioned factum of purchase of various articles from M/S Universal Traders, could by no stretch of imagination be a ground for legally and reasonably coming to a conclusion that the machines installed in the appellant unit were those very machineries which were previously used in the unit of the seller, because the purchase of various used and old articles from M/S Universal Traders, could not if so facto be a ground for coming to a conclusion as arrived at by the Id. D.L.C.

The eight reason recorded by the Id. D.L.C. is that at the time of import of machinery by the appellant Unit under import declaration form No. 3020631 an endorsement was made by the check post officer on the said form about the machineries being old and the similar endorsement was also made on the said form by the dealer, which is indicative of the fact that the machineries supplied by M/S Universal Traders to the appellant unit were previously used in the unit of the seller.

Regarding above mentioned ground taken by the Id. D.L.C. it has been already concluded by a Full Bench decision dated 14.2.2000 of this Tribunal in Appeal No. 108/99 filed by the appellant that by mere perusal of import declaration form as well as sale voucher it cannot be justifiably be held that the machineries are old one.

It may be added here that the bill enclosed with import declaration form No. 3020631 is bearing the names of three items in column of description of goods and below the last item i.e. the item No. 3, the boiler, there is a cutting of writing which is altogether illegible and any other material is not there on the said bill to conclude that the items mentioned therein were old one. Admittedly the endorsement about the machineries being old on import declaration form No. 3020631 was made by the check post authorities. No evidence is there to establish the fact that any such endorsement about the machine, the machineries being old was made by the seller M/S Universal Traders on the said import declaration form. In view of this situation on the strength of aforementioned endorsement made by the check post authority on the import declaration form, it could not reasonably be held that the machineries imported through that form were old one.

Ninth reason recorded by the Id. D.L.C. is that all the six import declaration forms used by the appellant unit for import of plant and machineries were bearing endorsement to the effect "plant and machineries in loose condition" and not the names thereof which was indicative of the fact that the machineries

installed earlier were being imported after dismantling thereof otherwise their names would have found place in those forms.

In our opinion, the above mentioned grounds taken by the Id. D.L.C. do not stand to reasons, because it is not unusual to carry or transport the heavy machineries in a loose condition and in fact those are ordinarily transported in the loose condition. Further, only for the reasons that the names of the machineries were not disclosed in the import declaration form, no inference about their being old could be drawn as even in the case of old machineries it was neither difficult nor impossible to describe those machineries by their names.

The tenth reason assigned by the Id. D.L.C. is that the sales of machineries to the appellant unit have not been shown by M/S Universal Traders in their sales tax returns.

In our opinion for the above mentioned lapses on the part of M/S Universal Traders, appellant could not be blamed as it was not duty bound under the law to ensure as to whether the machineries sold to it have been disclosed or not by the seller thereof in its sales tax returns. In view of this situation no adverse inference could be drawn against the appellant on the strength of the above mentioned facts.

Above mentioned reasons recorded by the Id. D.L.C. either individually or collectively could not reasonably lead to a presumption about the machineries being old or their being previously used or acquired for use in the unit of M/S Universal Traders, Delhi. Utmost a suspicion could arise from the facts stated by the Id. D.L.C. in above grounds that the machineries installed in the appellant unit were previously used or acquired for use in the unit of M/S Universal Traders,. But that suspicion could not be said to be proof of the aforementioned fact as it is the settled law that the "suspicion, howsoever strong and the confidence howsoever strong cannot take place of legal proof.

According to the provisions of Section 4-A of the Act, for availing the benefit of exemption there under, it was required to be proved that the machineries and plant, equipments, apparatus or components installed in the unit were neither previously used nor acquired for use in any other unit and the burden to prove the aforesaid fact lies on the unit claiming exemption under the provisions of Section 4-A of the Act. Now we have to see as to whether and how far the appellant unit has succeeded in discharging the aforesaid burden.

It appears from the letter dated 9.9.1997 issued by the Oriental Bank of Commerce, Kavi Nagar, Ghaziabad that the appellant unit was sanctioned a loan of Rs. 18,00,000/- only on the strength of plants and machineries installed therein. It further appears from the report dated 6.8.1998 of the authorities of D.I.C. Ghaziabad that after physical verification and checking of the entire plant and machineries of the appellant unit, it was found by them that those machineries were neither used nor acquired for use in any other unit. It also appears from the report dated 17.10.1998 prepared by the Id. Asstt.

Commissioner (Assessment)-II, Trade Tax Ghaziabad that after making a survey of the appellant unit he had found that the entire plant and machineries installed in the appellant unit was "New one". Further in the inquiry report prepared by the learned Asstt. Commissioner (Assessment)-II, Trade Tax, Ghaziabad in connection with the application moved by the appellant unit u/s 4-A of the Act, it is certified that the entire plant and machinery installed in the appellant unit is new one and those were neither used nor acquired for use in any other unit. It also appears from the report dated 17.10.1998 prepared by the Id. Asstt. Commissioner (Assessment)-II, Trade Tax, Ghaziabad that after making a survey of the appellant unit he had found that the entire plant and machineries installed in the appellant unit was "new one". Further in the inquiry report prepared by the learned Asstt. Commissioner (Assessment)-II, Trade Tax, Ghaziabad in connection with the application moved by the appellant unit u/s 4-A of the Act, it is certified that the entire plant and machinery installed in the appellant unit is new one and those were neither used nor acquired for use in any other unit. Apart from that the Chartered Accountants, namely Nagar Acharya & Associates, New Delhi after examining the books of accounts of the appellant unit as also the documents produced has valued the plants and machineries installed in the appellant unit to the tune of rupees 25,04,120.10. No doubt the aforementioned evidence supports the appellant's version to the effect that the plants and machineries installed in the appellant unit were new one and those were neither used nor acquired for use in any unit other than the appellant unit.

10. After recording the aforesaid conclusive findings in favour of the applicant, Tribunal prefer to remand back the matter to the DLC for further enquiry. For the remand of the case, Tribunal has given the following reasons.

No doubt the afore mentioned evidence supports the appellant's version to the effect that the plant and machineries installed in the appellant unit were new one and those were neither used nor acquired for use in any unit other than the appellant unit. But the facts remains there that the aforesaid evidence is only a corroborative evidence and not the substantive evidence. In our considered opinion the substantive, basic, primary and the best evidence in this connection could have been the bills/vouchers/invoices issued by M/S Universal Traders, New Delhi in connection with the alleged sale of plants and machinery to the appellant unit and the oral evidence if any, in support thereof. Since it is an undisputed fact that the alleged seller M/S Universal Traders was neither manufacturer nor dealer of the plants and machinery said to have been sold by it to the appellant unit, therefore, a reasonable suspicion could be there regarding genuineness/truthfulness of the aforesaid transaction of sale/purchase. Unless and until this suspicion was removed the aforesaid bills/vouchers/invoice could safely be relied on. That suspicion could certainly be removed by making an enquiry regarding the fact as to when and from whom the machineries said to have been sold to the appellant were acquired by the seller M/S Universal Traders, New Delhi and also by giving an opportunity in this connection to the appellant unit to disclose and establish the aforementioned facts, but neither that

enquiry has been held by the DLC nor the said opportunity has been afforded to the appellant unit. Of course if the appellant unit would have adduced the prima facie and satisfactory evidence in support of its version that the plant and machinery installed therein were neither used nor acquired for use in any other unit, then the burden would have shifted on the department to rebut or controvert that evidence. But in view of the aforementioned suspicion the said burden cannot be said to have been discharged by the appellant by means of prima facie and satisfactory evidence, unless and until it was disclosed and established that when and from whom the plant and machinery said to have been sold to the appellant unit were acquired by the seller M/S Universal Traders, New Delhi, appellant's claim could neither be accepted nor rejected under the law. In view of this situation we are of the opinion that the aforesaid enquiry and affording of an opportunity to the appellant was extremely necessary for the ends of justice. We may add here that the substantive evidence has to be considered along with another evidence available in the matter.

11. Learned Counsel for the applicant submitted that the Tribunal has erred in remanding back the matter to the DLC for making further enquiry even after dealing with each and every objections raised by the DLC and holding that such objections are not justified and even after coming to the conclusion that the evidences adduced by the applicant supports the case of the applicant to the effect that plant and machinery installed in the unit were new one and were neither used nor acquired for use in any unit other than the applicant unit. He submitted that for the purposes of exemption, authority concerned has to be satisfied that the machines are not old and have not been used or acquired for use in any factory or workshop in India. Once on the basis of the survey and other evidences adduced by the applicant, satisfaction has been arrived that the installed machines were new one and have not been used or acquired by any factory or workshop, there was no justifications to make any further enquiry to arrive to the same satisfaction. He submitted that it is unfortunate that the unit was established in the year 1997. Exemption was claimed for the period of eight years, which has been expired in the year, 2005. but the issue relating to the exemption has not yet been finalized. He submitted that twice the matter has already been remanded by the Tribunal to the DLC and once by the High Court to the Tribunal and this is the third remand by the Tribunal to the DLC. He submitted that this Court in several cases has consistently held that the exemption matter u/s 4-A of the Act has to be decided on priority basis because it leads to serious consequences. Learned Standing Counsel relied upon the order of the Tribunal.

12. Having heard the learned Counsel for the parties, I have perused the order of the Tribunal and the authorities below.

13. On the facts and circumstances of the case, I am of the view that the remand of the case to the DLC for further enquiry is patently illegal and erroneous. Explanation (2) to Section 4-A of the Act defines "new unit" established after

March 31, 1990 reads as follows:

(2) "new unit", after March 31, 1990, means a factory or workshop setup by a dealer after such date and satisfying the conditions laid down under this Act or Rules or Notifications made thereunder with regard to such factory or workshop and includes an industrial unit manufacturing the same goods at any other place in the State or an industrial unit manufacturing any other goods on, or adjacent to the site of an existing factory or workshop, but does not include-

(a) any factory or workshop using machinery, plant, equipment, apparatus or components already used or acquired for use in any other factory or workshop in India other than (boilers, generators, moulds and dyes) and other than any machinery, plant, equipment, apparatus or component sold to it by any Government Company or any corporation owned or controlled by the Central or State Government; or

(b) any factory or workshop manufacturing the same goods established by a person on or adjacent to the site of an existing factory or workshop manufacturing the same goods wherein such dealer has interest as proprietor or partner or agent or managing director or promoter director or as holding company or subsidiary company (if such existing factory or workshop is closed);

(b) any addition to or extension of an existing factory or workshop not being an extension, diversification or modernization within the meaning of Clause (5) of this Explanation.

14. Under the aforesaid explanation a unit using machinery, plant, equipment, apparatus or components already used or acquired for use in any other factory or workshop in India is not considered to be a new unit. Proviso to Clause (a) to Explanation-II of Section 4-A of the Act says that burden lies on the units to prove that such machinery, plant, equipment, apparatus or components have not been used in any factory or workshop in India. In my view, on evidences being adduced by the new unit, if the authority arrived to a satisfaction that the installed machinery have not been used in any factory or workshop, the onus stand discharged. The quantum and the nature of the evidence is not provided under the statute, thus, even by the small evidence, burden can be discharged.

15. In the present case, the unit has furnished invoice of the seller and claimed to have purchased new machines, which have not been earlier used. In pursuance thereof, authorities of Industries department as well as Assistant Commissioner (Assessment) made survey at the factory and on verification, it was found that the installed machines were new. Oriental Bank of Commerce has also sanctioned the loan against the said installed machines and on verification certified that they were new. Various objections taken by the DLC for disputing the machines as new have been considered by the Tribunal and have been found insufficient. Tribunal on consideration of the material also arrived to the conclusion that the evidence establishes that the machines were new one and have not been used by any factory or workshop. In my opinion, after coming to

the aforesaid conclusion, there was no justification for asking further enquiry and remanding back the matter to the DLC. On the facts and circumstances of the case, I am of the view that the unit has discharged its burden in proving that the installed machines have not been used in any factory or workshop and there is no need of remanding back the matter to the DLC for further enquiry. In the circumstances, I direct the DLC to treat the unit as new unit and issue eligibility certificate u/s 4-A of the Act.

16. Before parting with the case, I must express that unit was established in the year 1997. Exemption was claimed for the period of 8 years, which has been expired in the year 2005, but the issue relating to the exemption has not been finalized. The matter has already been remanded by the Tribunal to Divisional Level Committee twice and this is the third remand made by the Tribunal. The remand of the case again and again cannot be appreciated. This court consistently observed that the exemption matter u/s 4-A of the Act has to be decided on priority basis because it leads to serious consequence, but unfortunately, no heed has been paid.

17. In the result, revision is allowed. The order of the Tribunal is set aside and the appeal before the Tribunal stands allowed. DLC is directed to treat the unit as new unit and issue eligibility certificate u/s 4-A of the Act within a period of one month from the date of filing of certified copy of this order. The applicant is also entitle for the cost, which I assess at Rs. 5000/- (Rs. Five thousand).