

(2010) 04 AHC CK 0367

In the Allahabad High Court

Case No : Civil Miscellaneous Petition No. 1409 of 2007

Asian P.P.G. Industries Ltd.

APPELLANT

Vs

Additional Commissioner Grade I, Trade Tax, Ghaziabad
Zone, Ghaziabad and Others

RESPONDENT

Date of Decision : 29-04-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1922 — Section 34, 34(1)
Income Tax Act, 1961 — Section 147, 148
Penal Code, 1860 (IPC) — Section 26
Uttar Pradesh Trade Tax Act, 1948 — Section 21, 21(1), 21(2), 22, 4A

Citation : (2011) 37 VST 441

Hon'ble Judges : U.K. Pandey, J

Bench : Single Bench

Final Decision : Allowed

Judgement

U.K. Pandey, Standing Counsel

1. By means of the present writ petition, the petitioner is challenging the orders dated August 18, 2007 passed by the Additional Commissioner, Grade 1, Trade Tax, Ghaziabad Zone, Ghaziabad, by which he has granted approval under the proviso to section 21(2) of the U.P. Trade Tax Act, 1948 (hereinafter referred to as "the Act") to initiate the proceeding beyond the normal period and the notices dated August 30, 2007 issued in pursuance thereof u/s 21(1) of the Act by the assessing authority for the assessment year 2001-02 both under the U.P. Trade Tax Act, 1948 and under the Central Sales Tax Act, 1956.

2. The brief facts of the case are that the petitioner is a company incorporated under the Companies Act, 1956 and is carrying on the business of manufacture and sale of paints. The petitioner was getting the paints manufactured through Asian Paints India Limited (Kasna). The petitioner had a depot at Gurgaon (Haryana). During the year under consideration, the petitioner had disclosed the stock transfer to its Gurgaon depot for Rs. 6,54,91,661.32 and furnished 159

form F for Rs. 6,45,87,874.65. The assessing authority while passing the original assessment order dated March 15, 2004 for the assessment year 2001-02 has examined form F and has accepted the claim of stock transfer on the ground that on the enquiry of the stock transfer invoices, GRs and other documents, no material was found that the goods had been moved in pursuance of prior contract of sale. It appears that a survey was made on September 10, 2004 by the Sales Tax Officer (SIB), Noida, at the premises of M/s. Asian Paints India Limited (Kasna). At the time of survey, one Sri N. Gopalan, Manager of the Asian Paints, was present. From the premises, certain loose parchas were seized. On the basis of loose parchas, it was inferred that the goods had been got manufactured by the petitioner from M/s. Asian Paints India Limited on the basis of the orders of M/s. Hero Honda Motors Limited, M/s. Honda Scooters and Honda Cars and the same had been dispatched to Gurgaon depot (Haryana) for delivery to such parties; therefore, the movements of such goods from the State of U.P. to Gurgaon were in pursuance of prior contract of sale. On the basis of such material, the assessing authority has sought the approval from the Additional Commissioner, Grade I, Trade Tax, Ghaziabad Zone, Ghaziabad, to reopen the proceeding beyond the normal period of limitation. The Additional Commissioner, Grade I, Trade Tax, Ghaziabad Zone, Ghaziabad after giving opportunity of hearing has granted the approval vide order dated August 18, 2007 to reopen the proceeding u/s 21(1) of the Act for the assessment year 2001-02 both under the U.P. Trade Tax Act and under the Central Sales Tax Act. In pursuance thereof, the Deputy Commissioner (Assessment) 4, Trade Tax, Ghaziabad, issued the notices u/s 21(1) of the Act.

3. Heard Sri R.R. Agrawal, learned counsel for the petitioner and Sri U.K. Pandey, learned standing counsel.

4. The learned counsel for the petitioner submitted that after the consideration of the stock transfer invoices, G Rs. and other documents, the assessing authority has accepted the claim of the stock transfer in the original assessment proceeding. He submitted that at the time of survey dated September 10, 2004 made at the premises of the Asian Paints India Limited, no material relating to the year under consideration was found. The alleged parchas were not related to the year under consideration. Before the Additional Commissioner Grade I, Trade Tax, Ghaziabad Zone, Ghaziabad, in reply to the show-cause notice it was specifically contended that there was no material for the year under consideration and, therefore, on the basis of survey dated September 10, 2004 the proceeding u/s 21(1) of the Act cannot be initiated. But despite no material relating to the year under consideration, the approval has been granted and without any material for the year under consideration on the basis of which the belief of escaped assessment could be formed, the notices u/s 21(1) of the Act were issued by the Deputy Commissioner (Assessment) 4, Trade Tax, Ghaziabad.

5. The learned standing counsel submitted that the material available on record is the parchas found at the time of survey dated September 10, 2004 at the

premises of the Asian Paints India Limited (Kasna). He submitted that the modus operandi adopted in the year 2004 has also been adopted in the year under consideration. Therefore, the material found in the year 2004-05 is also relevant for the year under consideration on the basis of which the assessing authority has formed the belief of escaped assessment.

6. We have considered the rival submissions of learned counsel for the parties and perused the impugned orders dated August 18, 2007 passed u/s 21(2) of the Act by the Additional Commissioner, Grade-I, Trade Tax, Ghaziabad Zone, Ghaziabad, and notices u/s 21(1) of the Act issued by the Deputy Commissioner (Assessment) 4, Trade Tax, Ghaziabad, and the original assessment orders dated March 15, 2004. A perusal of the original assessment orders reveals that the assessing authority has examined the stock transfer in detail through the stock transfer invoices, GRs and other documents and has recorded the finding that the goods had not been moved in pursuance of the prior contract of sale. Perusal of the impugned order passed u/s 21(2) of the Act and the notices issued u/s 21(1) of the Act reveal that no material was found relating to the year under consideration at the time of survey dated September 10, 2004 made at the premises of the Asian Paints India Limited (Kasna). It is not the case of the Department that the alleged loose parchas relate to the year under consideration. It is a settled principle of law that unless the parchas relate to the year under consideration no adverse inference can be drawn. In the facts and circumstances, we are of the view that there was no relevant material to form the belief that there was escaped assessment of tax under the U.P. Trade Tax Act and under the Central Sales Tax Act. The stock transfer has been examined in detail in the original assessment proceeding. Therefore, in the absence of any specific material relating to the escaped assessment, the initiation of the proceeding appears to be on account of only change of opinion which is not permissible.

7. Section 21(1) and (2) of the Act reads as follows :

21. Assessment of tax on the turnover not assessed during the year.--(1) If the assessing authority has reason to believe that the whole or any part of the turnover of the dealer, for any assessment year or part thereof, has escaped assessment to tax or has been under-assessed or has been assessed to tax at a rate lower than that at which it is assessable under this Act, or any deductions or exemptions have been wrongly allowed in respect thereof, the assessing authority may, after issuing notice to the dealer and making such inquiry as it may consider necessary, assess or reassess the dealer or tax according to law;

Provided that the tax shall be charged at the rate at which it would have been charged, had the turnover not escaped assessment, or full assessment as the case may be.

Explanation I.--Nothing in this sub-section shall be deemed to prevent the assessing authority from making an assessment or full assessment to the best of

its judgment.

Explanation II.--For the purposes of this section and of section 22, assessing authority" means the officer or authority who passed the earlier assessment order, if any, and includes the officer or authority having jurisdiction for the time being to assess the dealer.

Explanation III.--Notwithstanding the issuance of notice under this sub-section, where an order of assessment or reassessment is in existence from before the issuance of such notice it shall continue to be effective as such, until varied by an order of assessment or reassessment made under this section in pursuance of such notice.

(2) Except as otherwise provided in this section, no order of assessment or reassessment under any provision of this Act for any assessment year shall be made after the expiration of three years from the end of such year or March 31, 1996, whichever is later :

Provided that if the Commissioner on his own on the basis of reasons recorded by the assessing authority, is satisfied that it is just and expedient so to do authorizes the assessing authority in that behalf, such assessment or reassessment may be made after the expiration of the period aforesaid but not after the expiration of eight years from the end of such year notwithstanding that such assessment or reassessment may involve a change of opinion :

Provided further that the assessment or reassessment for the assessment year 1987-88 may be made by March 31, 1993 :

Provided also that if the eligibility certificate granted u/s 4A has been amended or cancelled by the Commissioner under sub-section (3) of section 4A, the order of assessment or reassessment may be made within one year from the date of receipt by the assessing authority of the copy of the order amending or cancelling the aforesaid certificate or by March 31, 1995, whichever is later :

Provided also that the assessment or reassessment for the assessment year 1989-90 may be made by March 31, 1995.

8. Section 21(1) of the U.P. Trade Tax Act contemplates assessment and reassessment is equivalent to section 147 of the income tax Act, 1961. Both the sections relate to the assessment of the escaped assessment to tax. In both the sections the proceeding can be initiated only if the assessing authority "has a reason to believe" that there is escaped assessment.

9. u/s 21(1) of the Act the words are "has reason to believe" and not "reason to suspect". The belief entertained by the assessing officer must not be arbitrary or irrational. It must be reasonable and based on reasons, which are relevant. It must be in good faith and not in mere pretence, should have a rational connection and relevant bearing on the formation of the belief, and should not be extraneous or irrelevant. The material should be relating to the particular year

for which the assessment is sought to be reopened. It is not any and every material, howsoever vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief relating to escapement of income.

10. Perusal of section 21(2) of the Act reveals that the proceedings can only be initiated if there is reason to believe that there is escaped assessment. The word "reason to believe" came up for consideration before the apex court and various High Courts in several decisions. The apex court held that the belief must be formed on the basis of the material, which has a nexus to the escaped turnover.

11. In *Joti Prashad v. State of Haryana* (1992) 6 JT 94 (SC), the honorable Supreme Court while dealing with the meaning of expression "reason to believe" in section 26 of the Indian Penal Code held that the reason to believe is not the same as suspicion and a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning, conclude or infer regarding the nature of the thing concerned.

12. It is a settled principle of law that in a writ jurisdiction under article 226 of the Constitution of India, this court cannot look into the sufficiency of the material on the basis of which a belief has been formed and notice u/s 21 of the Act has been issued. This court can only examine whether there was any material and whether the material is relevant to form the belief of escaped income. (Vide *Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das*, *Indra Prastha Chemicals (P) Ltd. and Others Vs. Commissioner of Income Tax and Another*,

13. In the case of *Commissioner of Income Tax, Gujarat II Vs. Kurban Hussain Ibrahimji Mithiborwala*, the apex court has held that it is well-settled that the income tax Officer's jurisdiction to reopen an assessment u/s 34 of the income tax Act, 1922, depends upon the issuance of a valid notice. If the notice issued by him is invalid for any reason the entire proceedings taken by him would become void for (sic) of jurisdiction.

14. In the case of *Johri Lal (H.U.F.), Agra Vs. The Commissioner of Income Tax*, the apex court has held as follows (at page 439)

The formation of the required belief by the income tax Officer before proceedings can be validly initiated u/s 34(1)(a) is a condition precedent : The fulfillment of this condition is not a mere formality, it is mandatory, and failure to fulfill that condition would vitiate the entire proceedings. Further, the formation of the required belief is not the only requirement : The officer is further required to record his reasons for taking action u/s 34(1) (a) and obtain the sanction of the Central Board or the Commissioner, as the case may be.

15. In *Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das*, the honorable Supreme Court held that the reasons for the formation of the belief contemplated by reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates

that there must be a direct nexus or live link between the material coming to the notice of the income tax Officer and the formation of his belief. The honorable Supreme Court further observed that though it is true that the court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the income tax Officer on the point as to whether action should be initiated for reopening the assessment yet at the same time we have to bear in mind that it is not any and every material, however, vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment.

16. The question whether the assessing officer had reasons to believe is a question of jurisdiction, a vital thing, which can always be investigated by the court under article 226 of the Constitution as held in *Daulatram Rawatmal Vs. Income Tax Officer and Another*, *JAMNA LAL KABRA Vs. Income Tax OFFICER, B WARD, BAREILLY, AND OTHERS.*, , *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, *C.M. Rajgharia and Another Vs. Income Tax Officer and Others*, *Madhya Pradesh Industries Ltd. Vs. Income Tax Officer, Special Investigation Circle "B", Nagpur*, .

17. If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the assessing officer could not have reason to believe. In such a case, the notice issued by him would be liable to be struck down as invalid as held in the case of *Ganga Saran and Sons P. Ltd. Vs. Income Tax Officer and Others*,

18. In the case of *Indra Prastha Chemicals (P) Ltd. and Others Vs. Commissioner of Income Tax and Another*, this court held as follows (at page 119 of ITR) :

Thus, it is well-settled that the "reason to believe" u/s 147 must be held in good faith and should have a rational connection and relevant bearing on the formation of the belief and should not be extraneous or irrelevant. Further this court in proceedings under article 226 of the Constitution of India can scrutinize the reasons recorded by the assessing officer for initiating the proceedings u/s 147/148 of the Act. The sufficiency of the material cannot be gone into but relevancy certainly be gone into.

19. In the case of *Royal Trading Co., Saharanpur v. Trade Tax Officer, Saharanpur* reported in (2000) 16 NTN 290, the Division Bench of this court while considering section 21 of the U.P. Trade Tax Act held as follows :

Therefore, action u/s 21 of the Act cannot be taken on the whims of the assessing officer by resorting to conjecture of imagination. He has to have before him the facts which are germane to the issue and on the basis of which a rational man can have reason to believe that the whole or any part of the turnover has escaped assessment or has been under-assessed. In *Income Tax Officer and Others Vs. Madhani Engineering Works Ltd., Calcutta*, the honorable Supreme Court while dealing with somewhat similar provision u/s 147 of the income tax

Act, 1961 held that the existence of reason to believe on the part of the ITO was a justiciable issue and it was for the court to be satisfied whether in fact the ITO had reason to believe that income had escaped assessment. In *Joti Parshad Vs. State of Haryana*, the honorable Supreme Court while dealing with the meaning of expression "reason to believe" in section 26 of the Indian Penal Code held that the reason to believe is not the same as suspicion and a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning conclude or infer regarding the nature of the thing concerned. In *Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das*, the honorable Supreme Court held that the reasons for the formation of the belief contemplated by section 147(a) of the income tax Act, 1961, for the reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the income tax Officer and the formation of this belief. The honorable Supreme Court further observed that though it is true that the court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the income tax Officer on the point as to whether action should be initiated for reopening the assessment yet at the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. This view was reiterated by the honorable Supreme Court while dealing with the provisions of section 21 of the U.P. Trade Tax Act in *Commissioner of Sales Tax v. Bhagwan Industries (P) Ltd.* (1973) 31 STC 293 in which it was held that reasonable grounds necessarily postulate that they must be germane to the formation of the belief regarding escaped assessment. If the grounds are of an extraneous character, the same would not warrant initiation of proceedings under this section. If however, the grounds are relevant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under this section.

20. It is settled principle of law that the notice u/s 21 of the Act cannot be issued on account of change of opinion on the basis of material available on record.

21. In the case of *Kalpana Kala Kendra, Kanpur v. Sales Tax Officer, Circle 20, Kanpur* reported in (1989) 75 STC 198 (All) : (1989) UPTC 597, the Division Bench held as follows (at pages 203 and 205 of STC) :

Section 21 of the Act is based upon the theory that the taxes must be paid by the assessee in correct sum and likewise it must be collected by the statutory machinery. The escapement from assessment whether it results on account of concealment practiced or fraud played by the assessee or as a result of negligence or ignorance of the assessing authority, in our opinion, is of no consequence, provided the action to reopen the assessment is otherwise justified and the assessing officer is not acting arbitrarily or in a capricious manner. The

escapement of assessment contemplated under that section may be due to various reasons. The term "turnover has escaped assessment to tax" which includes underassessment, may as well be result of lack of care on the part of the assessing officer or by reason of inadvertence on his part. Section 21 does not prohibit obtaining of information from the investigation of material on the record of the original assessment. The scope of that section is not circumscribed by a rider like the one that exists in section 147(a) of the income tax Act, 1961, namely, the income tax Officer has reason to believe that by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for that year, income chargeable to tax has escaped assessment for that year. The escapement envisaged by section 21 of the Act for the purposes of reassessment need not necessarily spring from a source extraneous to the original record. However, a second thought or a mere change of opinion, by the assessing authority on the same set of facts and the material on record would not clothe the assessing authority with a valid jurisdiction.

...

We are not impressed by the argument that the instant case is a case of change of opinion. The change of opinion necessarily postulates that the assessing authority had an occasion to consider the material earlier, and on the same set of facts another opinion was sought to be formed. The question of change of opinion cannot arise where there has been no previous proceeding of assessment in respect of a turnover in dispute. As pointed out by the Calcutta High Court in *Income Tax Officer, "I" Ward and Others Vs. Mahadeo Lal Tulsyan*, a change of opinion by the assessing officer contemplates, formation of two different opinions or to make two different inferences at two stages on the same set of primary facts. The distinction between an inadvertent mistake or omission and change of opinion was pointed out by one of us after reviewing a large number of decided cases, both by this court and by the Supreme Court, in *Commissioner of Sales Tax Vs. Madhu Chemical Works*, It was held that in a case where a particular point has been considered on merits, and a view is taken, it would not be a case of inadvertent mistake or omission, if it is found that the view taken earlier was wrong. It would be a case of change of opinion, but if it is not so, then it would be a case of non-application of mind and an action would be justified u/s 21 of the Act.

22. In the case of *Commissioner of Sales Tax v. Gopalji, Varanasi* reported in (1974) UPTC 277, the Sales Tax Officer got second thought about the applicability or effect of the survey and hence notice u/s 21 was issued. It was held that this would not constitute reason to believe within the meaning of section 21 of the said Act, Hence notice u/s 21 was held invalid.

23. In the case of *Palco Lining Company and Another Vs. The Sales Tax Officer*, assessment order recorded that the assessing authority has after elaborately considering the evidence taken the view what was being sold by the petitioner

was nothing but collar lining and its turnover of sale was held exempt from the Sales Tax Act. Under a notification the assessing authority, however, issued notice u/s 21 of the said Act for reassessing the same matter, hence it was held notice u/s 21 to be invalid.

24. In the case of Delhi Cloth and General Mills Co. Ltd. Vs. State of Rajasthan and Others, , the apex court held as follows :

This observation is from Palco Lining Company and Another Vs. The Sales Tax Officer, It does not permit reassessment of turnover which after the due consideration, had been found eligible to tax merely because the assessing authority subsequently comes to take different view of the matter.

25. To the similar effect is another decision where we find u/s 34 of the income tax Act, 1922, which is similar to the provision of section 21 of the U.P. Sales Tax Act, after considering the provision of section 34 of the said Act the following observation has been made by the apex court in the case of Commissioner of Income Tax, Gujarat Vs. Bhanji Lavji, Porbandar, which is quoted as under (at page 583 of ITR) :

When the primary facts necessary for assessment are fully and truly disclosed to the income tax Officer at the stage of the original assessment proceedings, he is not entitled, on a change of opinion, to commence proceedings for reassessment u/s 34(1)(a).

26. To the similar effect is also the decision in Commissioner of Income Tax, West Bengal II Vs. Dinesh Chandra H. Shah and Others, wherein it is held that (at page 371 of ITR) :

... It appears that the income tax Officer clearly sought to justify the reopening of the assessment u/s 34(1)(b) merely on the ground of change of opinion. It is well-settled by now, and Mr. Desai quite rightly does not dispute the proposition, that mere change of opinion could not be a valid ground for reopening the assessment u/s 34(1)(b) of the Act. We would accordingly uphold the answer returned by the High Court on the short ground that the reassessment for the year in question was sought to be reopened for the reason that the successor of the income tax Officer who had made the original assessment had changed his opinion which did not furnish a justifiable reason for taking action u/s 34(1)(b).

27. While considering section 147 of the said Act in the case of the Income Tax Officer, Income Tax-cum-Wealth Tax Circle II, Hyderabad Vs. Nawab Mir Barkat Ali Khan Bahadur, Hyderabad, the same view has been taken. Having second thought on the same material does not warrant initiation of proceedings u/s 147 of the income tax Act.

28. In the case of Harbans Lal Malhotra v. Assistant Commissioner of Sales Tax, Ghaziabad reported in (1997) 107 STC 98 : (1994) UPTC 1041, the Division Bench of this court held that the authority cannot issue any notice on account of change of opinion nor in the absence of any material for the year in question. It

has been further held that in the original assessment order all the documents of the petitioner including the agreement in question the transfer of the goods has been held as stock transfer. The notice u/s 21 of the Act has been held amounts to re-examining the same matter again and to make fresh enquiry in the same matter, which is not permissible.

29. In the case of Ratan Industries Pvt. Ltd., Agra v. Additional Commissioner, Trade Tax, Agra reported in (2006) 148 STC 111 : (2004) 24 NTN 384, the Division Bench of this court in page 117 of STC; paragraph 22 of NTN observed that "it is a well-settled principle of law that the question which has been examined in detail in the original assessment proceeding and thereafter the assessment order has passed, then the said assessment order cannot be reopened u/s 21 of the Act on mere change of opinion".

30. In the case of IL and FS Investment Managers Ltd. Vs. Income Tax Officer and Others, the Bombay High Court held that the proceeding cannot be reopened merely because the assessing authority is of the view that the depreciation has been wrongly allowed merely on change of opinion.

31. In the case of Anil Kumar Bhandari Vs. Joint Commissioner of Income Tax and Others, the deduction was allowed u/s 80HHC. The case has been reopened on the ground that the deduction has been wrongly allowed. The Division Bench of the Calcutta High Court held that the initiation of reassessment proceeding by the assessing authority purported to reopen the assessment upon the change of opinion, the same fact is not justified.

32. In the facts and circumstances, we are of the view that the orders passed u/s 21(2) of the Act are not sustainable and are liable to be set aside, inasmuch the notices u/s 21 of the Act are based on no relevant material.

33. In the result, the writ petition is allowed. The order dated August 18, 2007 passed by the Additional Commissioner Grade-I, Trade Tax, Ghaziabad Zone, Ghaziabad and the notices issued u/s 21(1) of the Act for the assessment year 2001-02 both under the U.P. Trade Tax Act and under the Central Sales Tax Act are quashed.