(2003) 09 AHC CK 0236

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No.1073 of 2003

Banda Tent House Association APPELLANT

Vs

State of U.P. and Others RESPONDENT

Date of Decision : 23-09-2003

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 15
Constitution of India, 1950 — Article 366
Uttar Pradesh Trade Tax Act, 1948 — Section 3F, 7D

Citation : (2006) 146 STC 355

Hon'ble Judges : Umeshwar Pandey, J;M. Katju, J

Bench : Division Bench

Advocate : Siddharth Srivastava and Shashi Nandan, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

M. Katju, J.—This writ petition has been filed with a prayer for a mandamus directing the respondent-trade tax authorities not to take any action against the petitioner and its members under the provisions of the U.P. Trade Tax Act, 1948 as they are not dealers covered by the Act.

2. Since the question involved in this case is a purely legal one we did not deem it necessary to call for a counter-affidavit and hence after hearing learned Counsel for the petitioner and learned Standing Counsel we reserved judgment.

3. In paragraph 3 of the petition it is alleged that the petitioner is an association of members involved in the activity of giving articles such as chairs, tents, pillows, bed-sheet, crockery, etc., to other persons and other members of the association for the use of specific purposes, but the effective control always remains with the tent house owner or owner of the other articles, and the person using the same is not free to use it for any purpose than the one for which it is given, e.g., marriage, birthday party, etc. It is alleged in paragraph 4 of the petition that all the above articles given for use always remain in the custody of

the owner through its agents who have effective control of the articles. The owner charges hire-charges from the users for the same. By means of this petition the petitioner has challenged the validity of the decision taken by the respondents for imposing trade tax from the members of the petitioner-association u/s 3-F of the U.P. Trade Tax Act, 1948.

4. It is alleged in paragraph 6 of the writ petition that no written contract is executed between the parties as that is the normal practice in the trade. The members of the petitioner-association carry on the above activities but they received notice dated August 5, 2003 issued by the respondent No. 3, the Assistant Commissioner of Trade Tax, Banda, copy of which is annexure-1 to the writ petition.

In this notice it is mentioned that the members of the petitioner-association are carrying on the business without registration and hence they were called upon to get themselves registered by August 8, 2003 and file the relevant documents otherwise action will be taken against them.

5. It is alleged in paragraph 15 of the writ petition that before receiving notice dated August 5, 2003 no notice or demand regarding tax liabilities was issued against the members of the petitioner- association. On enquiry the petitioner learnt that on May 19, 2003 a circular has been issued by the respondent No. 2, the Commissioner of Trade Tax, U.P., copy of which is annexure 2 to the petition. This circular formulated a compounding scheme u/s 7-D of the Act. The petitioner received a letter dated August 23, 2003 from the office of the respondent No. 3 requiring it to get registered and get the benefits of the compounding schemes, vide, annexure 3 to the writ petition. It is alleged in paragraph 20 of the petition that the tent house and other owners give different articles for use for hire for specific purposes, but the effective control always remain with the tent house or other owner over all the aforesaid articles, and the person using the same is not free to use them for any purpose other than that for which it was given.

The user is also not free to take away the articles out of the place specified for this purpose, e.g., house, marriage hall, etc. It is alleged that there is no transfer of right to use such goods and hence there is no taxable event. It is alleged that petitioners'' members cannot be treated as dealers and hence no trade tax can be imposed on its members.

6. It may be mentioned that by the Constitution (Forty-sixth Amendment) Act, 1982 Clause (29A) was inserted in Article 366 of the Constitution which states:

(29A). ''tax on the sale or purchase of goods'' includes--

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or any system

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specificed period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

7. Section 3-F was inserted in the U.P. Trade Tax Act by the U.P. Act No. 31 of 1995 which reads as follows:

Section 3-F. Tax on the right to use any goods or goods involved in the execution of works contract.--(1) Notwithstanding anything contained in Section 3-A or Section 3-AAA or Section 3-D but subject to the provisions of Sections 14 and 15 of the Central Sales Tax Act, 1956, every dealer shall, for each assessment year, pay a tax on the net turnover of:

(a) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration; or

(b) transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

at such rate not exceeding (twenty per cent) as the State Government may, by notification, declare and different rates may be declared for different goods or different classes of dealers.

8. Thus, Section 3-F is clearly within the ambit of Clause (29A) of Article 366 of the Constitution and hence where there is a transfer of a right of use of any goods for cash or deferred payment or other valuable consideration, it is deemed to be a sale within the meaning of the U.P. Trade Tax Act. Thus, Section 3-F and Clause (29A) of Article 366 of the Constitution have introduced a legal fiction. Legal fictions are well-known in law and there can be no objection to the same. However, learned Counsel for the petitioner has relied on the decision of the Supreme Court in State of Andhra Pradesh and Another Vs. Rashtriya Ispat Nigam Ltd., and has contended that in view of the aforesaid decision the transactions of the petitioners'' members do not involve transfer of the right to use the goods since effective control of the goods even while they were being

used by the hirer was with the petitioners'' members and the hirer was not free to use the goods for a purpose other than the one for which it was given to him.

9. On the other hand, learned Standing Counsel has relied on the decision of the Supreme Court in State of Uttar Pradesh v. Union of India [2003] 130 STC 1 : 2003 UPTC 404 . This decision has referred to the decision in State of Andhra Pradesh and Another Vs. Rashtriya Ispat Nigam Ltd., and it has not been passed in ignorance of that decision. Hence we have to be guided by the latest decision of the Supreme Court, i.e., State of Uttar Pradesh v. Union of India [2003] 130 STC 1 : 2003 UPTC 404. In that decision in paragraph 30 (para 31 in STC) it has been observed:

Thus the Supreme Court has clearly held in the above case that handing over possession is not a sine qua non of completing the transfer of the right to use any goods.

10. In the above case of State of Uttar Pradesh v. Union of India [2003] 130 STC 1 : 2003 UPTC 404, the facts were that the Department of Telecommunication, Government of India, supplied telephone connections to subscribers and collected rental on the same. The question was whether the Department of Telecommunication is a dealer and hence liable to pay trade tax. The Supreme Court held that the supply of telephone connection satisfied the requirement of the transfer of the right to use for consideration. The telephone and all other accessories giving access to the telephone exchange are goods, and hence the requirement of Section 3-F are satisfied and the Department of Telecommunication is a dealer and is liable to pay tax under the Act.

11. It has been clearly held in the above decision that the fact that the goods remain within the ultimate control of the owner is irrelevant for deciding whether there was a transfer of use. Hence we have to hold against the petitioner as we are bound by the aforesaid decision of the Supreme Court in State of Uttar Pradesh v. Union of India [2003] 130 STC : 2003 UPTC 404.

12. For the reasons given above this petition is dismissed.