(2015) 10 AHC CK 0140

In the Allahabad High Court

Case No : Civil Misc. Writ Petition (Tax) No. 777 of 2015

Bharti Airtel Ltd. APPELLANT

Vs

State of U.P. and Others RESPONDENT

Date of Decision : 27-10-2015

Acts Referred:

Uttar Pradesh Trade Tax Act, 1948 — Section 3-B, 4-B, 7, 8(1), 8(1B)
Uttar Pradesh Value Added Tax Act, 2008 — Section 15, 24, 33, 33(1), 33(1)(2)

Citation : (2015) 10 ADJ 250

Hon'ble Judges : Tarun Agarwala and Surya Prakash Kesarwani, JJ.

Bench : Division Bench

Judgement

Tarun Agarwala, J.—The background leading to the filing of the writ petition is that the petitioner is a licensee under provisions of the Indian Telegraph Act and has been licensed by the Government of India for establishing, maintaining and operating telecom services in the State of U.P. For the purposes of establishing the telecom infrastructure the petitioner Company had purchased, procured, brought and even fabricated electronic telephone transmission and receiving equipment component devices, instruments etc.

2. The State Government promulgated U.P. Tax on Entry of Goods into Local Areas Act, 2007 (hereinafter referred to as the "U.P. Act of 2007"). The petitioner challenged levy of Entry Tax under the provisions of the U.P. Act of 2007. A Division Bench of this Court by judgment dated 23.12.2001 upheld the vires of the Act against which the petitioner preferred a Special Leave Petition in which an interim order was passed by the Supreme Court staying the operation of the judgment of the High Court subject to the condition that the petitioner would deposit 50% of the accrued tax liability/arrears under the U.P. Act of 2007 and furnish bank guarantee for the balance amount within four weeks. The petitioner was also required to deposit 50% of the tax liability/arrears including interest and penalty and furnish bank guarantee for the balance amount as and when a demand notice was issued under the U.P. Act of 2007 for the past period. The petitioner was also directed to pay the tax at the prevailing rate for the future

period. Pursuant to the interim order the petitioner contends that it has deposited 50% of the disputed amount and also furnished guarantee for the remaining 50% and have complied with the order of the Supreme Court.

3. In the meanwhile, assessment orders for the assessment years 2001-02, 2003-04, 2004-05, 2005-06 and 2006-07 were passed in respect of the tax on entry of goods in the years 2007, 2008 and 2009. Reassessment orders were passed on 14.1.2013. These assessment and re-assessment orders were set aside by the Tribunal and the matter was remitted for reassessment on two occasions in the years 2008 and 2014. Fresh assessment orders were passed on 10.2.2015 determining tax liability on the goods imported by the petitioner treating it as "machinery". Against this reassessment order dated 10.2.2015, the petitioner has preferred a statutory appeal, which is pending consideration before the appellate authority.

4. Pursuant to the interim order passed by the Supreme Court, the petitioner contended that it has deposited a sum of Rs. 18 Crores and odd and submitted bank guarantee of Rs. 22 Crores and odd in pursuance to the earlier assessment order.

5. During the pendency of the appeal the Deputy Commissioner (Assessment), Commercial Tax, Khand 10, Meerut, respondent No. 3, issued a notice dated 4.7.2015 directing the petitioner to pay an amount of Rs. 26,93,90,392/- towards interest. The petitioner moved a representation before the Deputy Commissioner praying that the details of computation of interest be provided. This representation remained pending and, on the other hand, the respondents proceeded to attach the bank account of the petitioner. This action of the respondent led the petitioner to file Writ Tax No. 631 of 2015, which was disposed of with the direction to the Deputy Commissioner (Assessment) to decide the petitioner''s representation within four weeks and provide the calculation, on the basis of which the amount of interest had been calculated. The Court directed that till the disposal of the petitioner''s representation no attachment for recovery, as per the impugned notice dated 4.7.2015, would take place.

6. Based on the aforesaid direction, the impugned order dated 22.9.2015 was passed. The respondent rejected the petitioner''s representation and further directed the petitioner to deposit a sum of Rs. 49,63,69,454/- towards interest as per the provision of Section 8(1) of the U.P. Trade Tax Act, 1948 (hereinafter referred to as the "Act") read with Section 33(1)(2) of the U.P. Value Added Tax Act (hereinafter referred to as the "U.P. VAT Act"). The petitioner, being aggrieved by the said order, has filed the present writ petition contending that quite apart from the fact that the impugned notice dated 4.7.2015 only required the petitioner to deposit Rs. 26.93 Crores towards interest, the same has now swelled to Rs. 49.63 Crores. Further, the calculation has not been indicated in the impugned order nor was provided to the petitioner, which was in gross violation to the direction of this Court.

7. In this back drop we have heard Sri V.B. Upadhyay, the learned Senior Counsel assisted by Sri Ashish Mishra, the learned counsel for the petitioner and Sri C.B. Tripathi, the learned Special Counsel for the State.

8. While entertaining the writ petition, we directed the authority to file a short counter affidavit providing the calculation of interest. A short counter affidavit has been filed enclosing the chart by which calculation has been made, which is extracted here under:-

9. From the aforesaid chart, interest now demanded is Rs. 49,49,43,796.00. The short controversy, which is involved in the present writ petition is, as to what would be the amount of interest payable by the petitioner. According to the petitioner, the interest payable, if any, has to be determined under the provisions of Section 8(1B) of the U.P. Trade Tax Act, 1948 read with Section 33(4) of the U.P. VAT Act. According to the Department interest has to be determined under Section 8(1) of the Tax Act read with Section 33(2) of the U.P. VAT Act. For facility, the provision of Section 8(1) and 8(1B) of the Act read with Section 33(1) , 33(2) and 33(4) of the U.P. VAT Act are extracted hereunder:

Section 8(1) and 8(1-B) of the U.P. Trade Tax Act:

"8. Payment and recovery of tax. - (1) The tax admittedly payable shall be deposited within the time prescribed or by 31st day of August, 1975, whichever is later, failing which simple interest at the rate of [fourteen percent per mensem] shall become due and be payable on the unpaid amount with effect from the day immediately following the last date prescribed till the date of payment of such amount whichever is later, and nothing contained in Section 7 shall prevent or have the effect of postponing the liability to pass such interest.

Explanation.- For the purpose of this sub-section, the tax admittedly payable means the tax which is payable under this Act on the turnover of sales, or, as the case may be, the turnover of purchases, or of both as disclosed in the accounts maintained by the dealer, or admitted by him in any return or proceeding under this Act, whichever is greater, or, if no accounts are maintained, then according to the estimate of the dealer, and include the amount payable under Section 3-B or sub-section (6) of Section 4-B .

...

8(1-B) If the tax, other than the tax referred to in sub-section (1), assessed by any Assessing Authority is not paid within the period specified in the notice of assessment and demand referred to in sub-section (1-A), simple interest at the rate of [one percent] per mensem on the unpaid amount calculated from the date of expiration of the period specified in such notice shall become due and be payable."

Section 33(1) ,33(2) & 33(4) of the UP VAT Act

"33. (1) Any amount of tax or fee or penalty or any other amount, which a dealer or other person is liable to pay under this Act, shall be deposited by the dealer or such other person in the prescribed manner.

(2) Subject to provisions of section 42 , the tax admittedly payable, shall be deposited within the time prescribed, failing which simple interest at the rate of one and quarter percent per mensem shall become due and be payable on unpaid amount with effect from the day immediately following the last date prescribed till the date of payment of such amount and nothing contained in section 24 shall prevent or have the effect of postponing liability to pay such interest:

Explanation: For the purposes of this sub-section, the tax admittedly payable for a tax period or an assessment year, as the case may be, shall be computed in accordance with provisions of section 15 .

(3) ...

(4) If the tax {other than the tax admittedly payable to which sub-section (2) applies} assessed, re-assessed or enhanced by any authority or court remains unpaid after expiration of the period specified in the notice of assessment and demand, simple interest at the rate of percent per mensem on the unpaid amount calculated from the date of such expiration shall become due and be payable:"

10. In Pepsico India Holdings Ltd. Vs. Commissioner of Trade Tax, Lucknow, U.P., , a question arose as to when interest on tax becomes payable. The Supreme Court after considering the provision of Section 8(1) and 8(1B) of the Act held, that once it is confirmed that the tax is payable under the Act, the same becomes payable from the date when it became due and not from the date when the judicial verdict was pronounced. The Supreme Court, held that once it is confirmed by the Court that the tax is payable under the Act, it would be covered within the definition of the term "tax admittedly payable" as defined in the explanation to Section 8(1) of the Act and, in case, the tax has not been paid, then the same becomes payable along with interest as mentioned in Section 8(1) of the Act. The Supreme Court further held that the provision of Section 8(1B) of the Act would only come into operation if the case was not covered under Section 8(1) of the Act.

11. In The Commissioner Sales Tax Vs. Satna Cement Works--> , the learned Single Judge held that since the dealer did not admit its liability on freight charges, it became a disputed question whether freight charges would form part of the turnover or not and, therefore, the tax liability on the amount of freight charges could not be treated to be an admitted tax and, therefore, interest could not be levied under Section 8(1) of the Act and that interest under Section 8(1B) could only be demanded.

12. In Commissioner of Sales Tax Vs. Hindustan Aluminium Corporation, , the Supreme Court on a plain interpretation of provision of Section 8(1) of the Act

held that the assessee was required to deposit the tax that was admittedly payable by it. The Supreme Court held that the words "tax admittedly payable" means the tax payable under the Act on the assessees turnover as disclosed in its accounts or admitted by it in its return or other proceedings under the Act.

13. In the light of the aforesaid, we find from a perusal of the assessment order that the department has imposed the tax liability on the goods imported by the Company treating it to be a "machinery". The petitioner has disputed the liability of tax under the Act from the very outset and has contended that the goods imported by the petitioner are "electrical equipments" and not a "machinery" and was, therefore, not liable to pay any tax. On the other hand the department contends that the petitioner had challenged the vires of the Act of 2007. The validity of the entry tax was upheld by the High Court and consequently, the petitioner was required to deposit the entry tax along with returns which was legally due and payable. Since the same was not deposited, the tax would be deemed to be the admitted tax in view of Section 8(1) of the Act read with Section 33 of the U.P. VAT Act.

14. Having heard the learned counsel for the parties and having perused the impugned order as well as the assessment orders, we find that even though the vires of the Act of 2007 had been upheld, the petitioner nonetheless disputed the liability of payment of tax under the Act of 2007 on the ground that the petitioner was importing "electrical equipments" and that the petitioner was not liable to pay any tax as it was not a "machinery". This fact, that the petitioner has disputed its liability under the Act is not disputed by the respondents. The fixation of the liability under the Act of 2007 in the assessment orders are being contested by the petitioner in the appeal. We are consequently of the opinion that since the petitioner has disputed its liability from the very inception, the same cannot be treated to be the admitted tax for the purpose of Section 8(1) of the Act read with Section 33(2) of the U.P. VAT Act. Thus, for the purpose of imposition of interest, the provisions of Section 8(1B) of the U.P. Act read with Section 33(4) of the U.P. VAT Act would be applicable for the purpose of determining the interest liability.

15. The impugned order dated 22.9.2015 is quashed. The writ petition is allowed and the Deputy Commissioner (Assessment) Commercial Tax, Khand-10, Meerut is directed to redetermine the interest in accordance with the provisions of Section 8(1B) read with Section 33(4) of the U.P. VAT Act after giving due opportunity of hearing to the petitioner.