**(2014) 07 AHC CK 0190**

**In the Allahabad High Court**

**Case No :** Sales/Trade Tax Revision No. 1710 of 2007

Commissioner APPELLANT

Vs

Shyam Enterprises Tel Ber. Orai RESPONDENT

**Date of Decision :** 02-07-2014

**Acts Referred:**

Income Tax Act, 1961 — Section 256(2)
Uttar Pradesh Trade Tax Act, 1948 — Section 11, 11(1)

**Citation :** (2014) 74 VST 360

**Hon'ble Judges :** Sudhir Agarwal, J

**Bench :** Single Bench

# Judgement

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Sudhir Agarwal, J.—Heard learned standing counsel for revisionist and perused the record. The question of law, which has been formulated in memo of revision, whereupon revision has been admitted, reads as under:

"Whether, on the facts and in the circumstances of the case, the Trade Tax Tribunal was legally justified to have set aside the penalty order whereas the applicant was neither registered and the Central Sales Tax Act nor transaction in question was entered in the books of account of the dealer?"

2. The revision has arisen from Tribunal''s order dated July 29, 2004, whereby it has allowed second appeal of dealer, for assessment year 1989-90, under the Central Sales Tax Act.

3. This revision is preferred under section 11(1) of the U.P. Trade Tax Act, 1948. The procedure for filing revision is prescribed in Chapter 27 of the High Court Rules. Rules 1 to 13, thereof, basically talk of procedure of filing an application under section 256(2) of the Income-tax Act, 1961, but, vide rule 20, it is provided that Rules contained in the aforesaid Chapter shall, so far as, may be, with necessary modifications and adoptions, would also apply on proceedings of similar nature or revision under any other Tax Act, including certain provisions of

different Acts which are detailed therein. The revision under section 11 of the U.P. Sales Tax Act, 1948, now re-titled as the U.P. Trade Tax Act, 1948 is also one of the provisions mentioned therein. Therefore, procedure in rule 1 to 19(B) subject to modification and adoption, etc., would apply for filing revision also.

4. Rule 5 of Chapter 27 of the High Court Rules contemplates filing of an affidavit of service of the copy of application, which is being filed in this court. If the revision is preferred by the assessee, he shall serve copy of revision upon learned standing counsel and file an affidavit of service giving the facts as stated in rule 5(1) and if the revision is preferred by the Revenue, i.e., Commissioner of Trade Tax, he shall ensure service of revision upon the assessee and file an affidavit of service in the same manner. Chapter 27, rule 5 of the High Court Rules, 1952, reads as under:

5. Certain conditions for an affidavit.--(1) An application made by an assessee shall be accompanied by an affidavit of service stating that two copies of the application together with other papers or affidavit accompanying it have been served on the standing counsel authorised to receive notice on behalf of the Department concerned, and further stating that the standing counsel has been intimated the date of filing in court of the application.

(2) An application made by the Commissioner of Income-tax shall normally be accompanied by an affidavit of service stating that a copy of the application together with other papers and affidavit accompanying it have been served on the assessee in accordance with the procedure prescribed therefore by the Income-tax Act, 1961 and also stating that the assessee has been intimated in writing the date of filing in court and the date of hearing of the application:

Provided that if due to lack of time or other sufficient reason the affidavit of service does not accompany the application filed by the Commissioner of Income-tax, the aforesaid affidavit must be filed within three weeks of the date of institution of the application.

(3) A counter-affidavit if any, may be filed within two weeks of the service of the application after serving a copy thereof on the counsel for the applicant, a rejoinder affidavit may similarly be filed in another one week."

5. Thus, affidavit of service has to accompany revision application, but proviso to sub-rule (2) provides, that, if due to lack of time or for any other sufficient reason, affidavit of service is not accompanying the application filed by the Commissioner of Trade Tax, such affidavit must be filed within three weeks'' of the date of institution of application. Therefore, a revision would be treated to be validly filed by an assessee if it is accompanied by affidavit of service, but in case of revision filed by the Commissioner of Trade Tax, affidavit of service must accompany revision, but for valid reasons, this condition would stand dispensed with, but, the affidavit of service then, must be filed within three weeks'' of the date of institution of application.

 

6. In case no such affidavit is filed and the assessee is not served by Commissioner of Trade Tax, meaning thereby there is no notice or opportunity to the assessee and revision has not been filed in the manner prescribed in the Rules.

7. It is true that revision filed by the Revenue, may not be dismissed for technical reasons, but where service has not been effected upon the assessee for several years altogether and the Commissioner of Trade Tax apparently has failed to comply with the statutory requirement of filing affidavit of service, this court finds no justification, still to continue with said revision to remain pending and give further opportunity to Revenue, after such a long time.

8. This revision was filed in 2007 and till date affidavit of service has not been filed. In my view it is fit case where this court must reject revision having not been filed in accordance with rules and for non-compliance of requirement of Chapter 27, rule 5(2) of the High Court Rules.

9. Even otherwise, having heard learned standing counsel, I find that Tribunal by recording findings of fact has allowed appeal preferred by dealer. Learned standing counsel could not place anything before this court that view taken by the Tribunal suffers from any error either of facts or of law in any manner. For this reason also the question formulated in this revision has to be answered against the Revenue.

10. Accordingly, this revision has to fail either way. Dismissed accordingly.