
(2004) 05 AHC CK 0028
In the Allahabad High Court
Case No : Sales Tax Revision No. 541 of 1992

Commissioner of Sales Tax

APPELLANT

Vs

Spintex Trading Co.

RESPONDENT

Date of Decision : 21-05-2004

Acts Referred:

Central Sales Tax Act, 1956 — Section 10, 10A, 9, 9(2A)

Uttar Pradesh Sales Tax (Amendment) Act, 1995 — Section 15A(1), 8A(2)

Citation : (2006) 144 STC 515

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Prakash Krishna, J.—Challenging the interpretation as put by the Tribunal on Section 15-A(1)(qq), before amendment by U.P. Act No. 31 of 1995, the present revision has been filed and is directed against the order of the Tribunal passed in Second Appeal No. 247 of 1991 for the assessment year 1981-82. The two members of the Tribunal though reached to the same conclusion but they have delivered separate orders and for different reasoning, not agreeing with each other.

2. The facts of the case are not much in dispute. The factual background of the case is that the dealer-opposite party, a registered dealer, both under the U.P. and Central Sales Tax Act and it deals in mill stores, cotton tapes, etc. It purchased the goods from outside the State of U.P. and sold the same to the various persons within the State of U.P. by transfer of documents of title without taking the delivery of the goods. The assessing authority on scrutiny of the account books found that the dealer-opposite party has realised sales tax at the rate of 4 per cent. But the dealer did not admit any tax liability under the Central Sales Tax Act. In the assessment proceedings the dealer claimed and was granted exemption from Central sales tax on the basis of the form C and form EI furnished by it. Consequently the penalty proceedings u/s 15-A(1)(qq) of the U.P.

Sales Tax Act were initiated for levy of the penalty as the dealer has realised 4 per cent as sales tax, according to the department as Central sales tax which was not legally payable by the purchasers. A sum of Rs. 1,70,000 was levied as penalty by the order dated 15th of March, 1990 which was confirmed by the appellate authority. The Tribunal has set aside the penalty order, by the order under revision.

3. Heard the counsel for the parties and perused the record. The learned Standing Counsel submitted that in the facts of the present case Section 15-A(1) (qq) was fully applicable and the reliance placed by one member of the Tribunal upon the judgment of the Supreme Court in the case of Commissioner of Sales Tax, U.P., Lucknow Vs. Mool Chand Shyam Lal, Belanganj, Agra, is misplaced one. The another member has set aside the penalty order on the ground that the penal provisions of the U.P. Sales Tax Act could not be invoked in respect of Central sales and only penal provisions of the Central Sales Tax Act could have been invoked. It was submitted by the learned Standing Counsel that the different reasonings given by the each member of the Tribunal are not sustainable in law. In contra Shri Bharatji Agrawal, the Senior Advocate, submitted that the controversy involved in the present case is fully covered by the aforesaid judgment of the Supreme Court given in the case of Commissioner of Sales Tax, U.P., Lucknow Vs. Mool Chand Shyam Lal, Belanganj, Agra, .

4. The dealer has made Central sales by endorsement of documents and it realised 4 per cent in the bills by mentioning it as surcharge. In reply to the show cause notice the dealer came out with the case that this realisation of the surcharge is only reimbursement from the customers of the amount of sales tax. The assessing authority has dealt with this point in the penalty order. To justify the levy of surcharge at the rate of 4 per cent uniformly from all customers, the dealer submitted that it is inclusive of various miscellaneous expenses, such as insurance; charge, freight, packing charges, forwarding charges, etc.

These items have been included in the turnover of the dealer and thus realisation of 4 per cent surcharge from the purchasers, according to the dealer was not towards the sales tax. The assessing authority has not accepted the said explanation of the dealer and recorded a finding after taking into consideration the copies of the bills produced by the dealer. In the bills the dealer has specifically mentioned 4 per cent surcharge on the sale price against form C. The assessing authority rejected the case of the dealer regarding the reimbursement as claimed by it on the face of the averments made in the bills. It has come to the conclusion that the said explanation is imaginary. The transaction took place by endorsement of document against form EI. In the assessment proceedings the Central sales tax was not levied on the dealer therefore the realisation of 4 per cent surcharge is nothing but realisation of an amount towards the Central sales tax. On this issue both the members of the Tribunal have recorded contradictory findings in their respective orders. I have considered both the orders of the learned members of the Tribunal. I find that this issue was not examined by one

member in depth and he has readily accepted the case of the assessee that the "amount realised by the assessee was only reimbursement of the expenses incurred plus extra profit, over and above the price, which was paid by the appellant (assessee) as surcharge and the entire amount has been included by the assessee in the total turnover of the sales effected under the Central Sales Tax Act and the same has been subjected to the Central Sales Tax Act". This is only discussion on the finding of this vital issue by one of the members of the Tribunal. The another member examined the matter in some detail and also has taken into consideration the documentary evidence, namely, the copies of the bills. He agreed that the conclusion of the assessing authority that the mention of the form C and realisation of amount at the rate of 4 per cent indicates that the amount was realised towards the Central sales tax which was not attracted due to form EI and form C. Due to forms EI and C no Central sales tax could be levied on the dealer. Further the delivery of goods was not taken by the dealer-opposite party and as such the question of alleged freight, insurance charges, forwarding charges and their reimbursement do not really arise. The realisation of alleged additional profit at the rate of 4 per cent is totally unjustified and was not required to be shown separately in the bills. Having given the careful consideration of the entire facts and circumstances of the case the finding recorded by the assessing authority on this issue as confirmed by the another member, is perfectly justified. The finding recorded by the first member cannot be justified. Except making sweeping remark the first member has not considered the material on record and the perversity in the finding that the amount was not realised as sales tax cannot be justified. I could not get any discussion on these vital issues in the order of the first member. The first member was recording a finding of reversal and it was expected from him to consider the copies of the bills which were taken into account to arrive at that finding by the assessing authority.

5. In view of the above it is held that the assessee realised 4 per cent surcharge as Central sales tax and no Central sales tax was levied on it nor it could have been levied in view of the forms C and EI issued to it by the purchasing dealers.

6. The Section 15-A(I)(qq) as it stood at the relevant time reads as follows :

15-A. Penalties in certain cases.-(1) If the assessing authority is satisfied that any dealer or other person-

...

(qq) realises any amount as sales tax, or purchase tax, where no sales tax or purchase tax is legally payable or in excess of the amount of tax legally payable under this Act;

7. It is apparent from the above that for levy of penalty three things are required to be established. Firstly, realisation must be as sales tax or purchase tax. Secondly, it should be in excess and thirdly the amount of tax should not be legally payable under the Act. The Supreme Court has interpreted the aforesaid

provision in the case of Moot Chand Shyam Lal [1988] 71 STC 226 : 1988 UPTC 1144. The facts of that case are to be noticed briefly to understand the controversy involved therein. In that case the assessee was entitled to realise the price and purchase tax from customers under Notification No. 4602 of the Essential Commodities Act. The excess amount realised was by way of price. It was observed by the Supreme Court that there would be breach of Control orders for which no penalty could be levied under the U.P. Sales Tax Act. What the assessee has realised from customers was price and not tax. In this factual background the Supreme Court has held that it is necessary that the realisation must be as the sales tax or the purchase tax. If the purchaser realised more money than by itself will not attract the penal provision. In that case there was no finding that the assessee realised excess of tax leviable or legally payable under the Act.

8. In the case in hand, as noticed above the finding has been recorded by the trial court that no Central sales tax was payable by the dealer-opposite party. The dealer-opposite party has realised the sales tax by way of surcharge at the rate of 4 per cent which is clear from the bills. In the bills issued by the dealer it has been mentioned that 4 per cent is being realised against form C. This is a vital fact which distinguishes the present case from the facts of the case of Commissioner of Sales Tax, U.P., Lucknow Vs. Mool Chand Shyam Lal, Belanganj, Agra, . Indisputably in the case in hand no sales tax under the Central Sales Tax Act was levied by the assessing authority. Therefore, no sales tax or purchase tax was legally payable by the dealer-opposite party. u/s 8A(2)(b) of the U.P. Sales Tax Act a registered dealer may recover an amount equivalent to the amount of sales tax payable from the person to whom the goods are sold by him. To put it differently, if no tax was payable by such registered dealer he is not entitled to recover any amount from the person to whom the goods are sold by him.

9. The realisation of any amount as set off tax or purchase tax, where no sales tax or purchase tax is legally payable or in excess of the amount of tax legally payable attracts the penal provision of Section 15-A(I)(qq) of the Act. The observation of the Supreme Court in para 6 of the above case Mool Chand Shyam Lal [1988] 71 STC 226 : 1988 UPTC 1144 is as follows :

Realisation of excess amount is not impermissible but what is not permissible is realisation of excess amount as tax.

10. Present one is the case of realisation of excess amount of tax. Therefore, I am unable to agree with the order of the first learned member of the Tribunal on this issue.

11. This Court in the case of Neelofar Tabak Co. v. Commissioner of Trade Tax 1998 UPTC 715 has taken the similar view of the matter. It was held that when the assessee was not liable to any assessment under the Central Sales Tax Act the levy of penalty u/s 15-A(I)(qq) of the Act is justified.

12. Another member of the Tribunal held that the penal provisions of the U.P.

Sales Tax Act are not applicable in the action or omission under the Central Sales Tax Act. The remedy, if any, with the department is to levy penalty under Sections 10 and 10A of the Central Sales Tax Act. The learned counsel for the dealer-opposite party has placed reliance upon a judgment of this Court given in the case of Jagan Nath & Sons v. Commissioner of Sales Tax 1995 UPTC 575. It appears that the attention of the court was not invited towards the binding precedent of the Supreme Court given in the case of Shiv Butt Rai Fateh Chand v. Union of India [1983] 53 STC 289 : 1983 UPTC 920. At least there is no discussion or mention of the above ruling in the aforesaid judgment. The attention of the court was drawn towards the Section 9(2-A) of the Central Sales Tax Act by the learned Standing Counsel. The learned Judge held that the penalty in question u/s 15-A(l)(qq) imposed otherwise than by way of assessment and in fact even before the assessment proceedings had been initiated; he was of the opinion that the penalties contained in the State sales tax laws shall apply only in relation to the assessment, reassessment, collection and reinforcement of payment of any tax. This is crux of the said judgment. However, the Supreme Court in the aforesaid case of Shiv Dutt Rai Fateh Chand [1983] 53 STC 289 : 1983 UPTC 920 has dealt with this matter in great detail and has come to the conclusion that the Parliament adopts provisions relating to the penalties of the general sales tax laws of the States for enforcing the charge under the Act. The aforesaid judgment of the honourable Supreme Court is binding on me and I have no option but to follow the same. The reasoning given by the another learned member of the Tribunal for striking off the penalty can also not be sustained.

13. I could lay my hands on one judgment of the Bombay High Court and one judgment of the Punjab and Haryana High Court on this point. In the case of Commissioner of Sales Tax Vs. Bombay Commercial Traders, it has been held that after insertion of Sub-section (2A) in Section 9 of the Central Sales Tax Act penalty for failure to pay the tax within time under the State Act can be levied in respect of Central sales. The penal provisions of provincial Sales Tax Act can be imported in the Central Sales Tax Act. The same view has been taken in the case of Fairdeal Agencies Vs. The State of Haryana and Others, It has been held that in view of Section 9(2A) of the Central Sales Tax Act, the imposition of penalty for excess collection of tax under the Central Sales Tax Act can be levied by invoking the provisions of the provincial Sales Tax Act.

14. Therefore, the order of the Tribunal on both counts is liable to be set aside. Since the question of levy of penalty was not considered by the Tribunal and was also not argued before me, it is desirable that the matter should be remitted to the Tribunal for this limited purpose only. The matter is remanded to the Tribunal for consideration of the levy of quantum of penalty. No other point shall be open to the parties or the Tribunal.

15. In the result the revision is allowed. The order of the Tribunal is set aside and the matter is remanded to the Tribunal as indicated above.