(2007) 09 AHC CK 0050

In the Allahabad High Court

Commissioner, Trade Tax APPELLANT

Vs

New Holland Traders India Pvt. Ltd. RESPONDENT

Date of Decision : 26-09-2007

Acts Referred:
Uttar Pradesh Trade Tax Act, 1948 — Section 11(1)

Citation : (2009) 22 VST 444

Hon'ble Judges : Rajesh Kumar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Rajesh Kumar, J.—Present revision u/s 11(1) of the U.P. Trade Tax Act, 1948 (hereinafter referred to as "the Act") is directed against the order of the Tribunal dated August 18, 2003 by which the Tribunal has confirmed the order of the first appellate authority deleting the penalty u/s 8D(6) of the Act.

2. The dealer-opposite party was a foreign company and for the construction of the factory building entered into an agreement with Fiat Engineering, New Delhi. It appears that the opposite party had made some advance payment to the contractor during the year under consideration and deducted one per cent from the payment and deposited the same with the Government Treasury. The assessing authority levied the penalty u/s 8D(6) of the Act on the ground that u/ s 8D(1) the opposite party should have deducted four per cent and not one per cent. Being aggrieved by the order of the assessing officer, the dealer filed an appeal before the Deputy Commissioner (Appeals), Noida which was allowed and the penalty was set aside. The Commissioner, Trade Tax, filed appeal before the Tribunal which has been dismissed by the impugned order. The Tribunal held that the payment was the advance payment, therefore, the provisions of Section 8D(1) of the Act is not applicable in view of the decision in the case of Hindustan Construction Company Limited v. State of Haryana reported in [1998] 109 STC 660. The Tribunal further held that the contractor has obtained an order from the Deputy Commissioner (Executive) dated November 11,1997 u/s 8D of the Act for

the deduction of one per cent only relating to the impugned works contract which was applicable retrospectively and, therefore, the deduction at the rate of one per cent was in accordance with the law. The Tribunal further held that one per cent deduction was made by the opposite party on the instruction of the contractor. The Tribunal further held that both the contractor and contractee were the foreign companies therefore, the ignorance of the provisions of the Act cannot be overruled. On these grounds the Tribunal upheld the order of the first appellate authority deleting the penalty.

3. Heard learned Standing Counsel.

4. Section 8D(1) reads as follows:

Section 8D. Tax deduction from the amount payable to works contractor.--(1) Notwithstanding anything contained in Sub-section (2) of Section 8A, every person responsible for making payment to any dealer (hereinafter in this section referred to as the ''contractor'') for discharge of any liability on account of valuable consideration payable for the transfer of property in goods (whether as goods or in any other form) in pursuance of a works contract, not being a building contract of such class or value as may be notified by the State Government in public interest in this behalf, shall, at the time of making such payment to the contractor, either in cash or in any other manner, deduct an amount equal to four per cent of such sum towards part or, as the case may be, full satisfaction of the tax payable under this Act on account of such works contract:

Provided that the Commissioner of Sales Tax may, if satisfied, that it is expedient in the public interest so to do and for reasons to be recorded in writing order that in any case or class of cases no such deduction shall be made or, as the case may be, such deduction shall be made at a lesser rate:....

5. Section 8D(1) applies to the payment made to a dealer for discharge of any liability on account of valuable consideration payable for the transfer of property in goods in pursuance of a works contract. Therefore, the payment made in advance before the transfer of property in goods cannot be said to be for the discharge of any liability on account of valuable consideration payable for the transfer of property in goods. Moreover, in the present case, the contractor appears to have applied under the compounding scheme u/s 7D of the Act in which liability of tax was at the rate of one per cent in case of civil contract and, therefore, obtained an order from the Deputy Commissioner (Executive) under the provisions of Section 8D(1) of the Act for the deduction of only one per cent in respect of the works contract for which the advance payment was made. A similar question came up for consideration before this Court in the case of Delhi Electric Supply Undertaking, New Delhi v. Commissioner of Sales Tax reported in [2006] 146 STC 72 : [2003] UPTC 1174 in which it has been held that the provisions of Section 8D(1) are not applicable in advance payment. This Court held as follows : (see page 75 of STC)

6. Section 8D(1) contemplates that every person responsible for making payment to any dealer for discharge of any liability on account of valuable consideration payable from the transfer of property in goods in pursuance of a works contract shall at the time of making such payment to the contractor deduct amount equal to four per cent. Section 8D(1) does not apply to all payments but applies to only those payments, which are for the discharge of any liability on account of valuable consideration payable for transfer of property in goods. If there was no transfer of property in goods and the payment is not towards the discharge of any liability towards valuable consideration payable for the transfer of property in goods provisions of Section 8D(1) do not apply. In the present case, admittedly payment was in the nature of advance payment and it was not towards the discharge of any liability on account of valuable consideration for transfer of property in goods, in as much as goods had not been transferred to the applicant during the year under consideration. Since the goods have not been transferred nature of payment was not as a valuable consideration and therefore, provisions of Section 8D(1) do not apply.

6. The order of the Deputy Commissioner (Executive) operates retrospectively. Therefore, the deduction at the rate of one per cent was in consonance with the order passed by the Deputy Commissioner (Executive). In any view of the matter, the finding of the Tribunal that the opposite party was under the bona fide belief and there is no deliberate default is the finding of fact.

7. In view of the above, I do not find any merit in the revision, the revision stands dismissed.