
(1999) 08 AHC CK 0182
In the Allahabad High Court
Case No : Trade Tax Revision No. 334 of 1999

D.C.M. Limited

APPELLANT

Vs

Commissioner of Trade Tax

RESPONDENT

Date of Decision : 23-08-1999

Acts Referred:

Uttar Pradesh Sales Tax Act, 1948 — Section 29A

Citation : (1999) 08 AHC CK 0182

Hon'ble Judges : M.C. Agarwal, J

Bench : Single Bench

Advocate : Bharat Ji Agrawal, for the Appellant; Surya Prakash, for the Respondent

Final Decision : Allowed

Judgement

M.C. Agarwal, J.—This revision petition u/s 11 of the U.P. Trade Tax Act, 1948 (hereinafter referred to as "the Act") is directed against an order dated February 26, 1998 passed by the Trade Tax Tribunal, Meerut whereby it partly allowed the dealer's appeal.

2. I have heard Sri Bharat Ji Agrawal, Senior Advocate for the revisionist and Sri Surya Prakash, learned Standing Counsel for the respondent.

3. The dispute in this revision petition relates to the revisionist's claim of a refund of Rs. 13,23,069.54 in respect of sales tax on alcohol (Rs. 4,65,652.26) and on export pass fee (Rs. 8,57,417.28). The admitted facts are that the aforesaid amounts were realised as sales tax by the dealer though no tax was leviable. The dealer after realising the aforesaid amounts deposited the same as tax under the U.P. Sales Tax Act, 1948 (now U.P. Trade Tax Act). Later on realising that no tax was leviable on the aforesaid commodities it issued credit notes in favour of the buyers and in that manner refunded the amounts to the persons from whom it was charged. It, therefore, claimed a refund of the aforesaid amounts from the assessing officer who rejected the dealer's claim by

virtue of the provisions of Section 29-A of the Act. The assessing officer observed that the dealer had no right to itself allow an adjustment of the aforesaid amounts and, therefore, the amounts cannot be refunded to the dealer. The revisionist preferred an appeal to the Deputy Commissioner (Appeals) but the same was dismissed and a second appeal before the Tribunal has also failed. Section 29-A of the Act reads as under :

"29-A. Procedure for disbursement of amount wrongly realised by dealer as tax.--

(1) Where any amount is realised from any person by any dealer, purporting to do so by way of realisation of tax on the sale or purchase of any goods, in contravention of the provisions of Sub-section (2) of Section 8-A, such dealer shall deposit the entire amount so realised in such manner and within such period as may be prescribed.

(2) Any amount deposited by any dealer under Sub-section (1), shall, to the extent it is not due as tax, be held by the State Government in trust for the person from whom it was realised by the dealer, or for his legal representatives, and the deposit shall discharge such dealer of the liability in respect thereof to the extent of the deposit.

(3) Where any amount is deposited by any dealer under Sub-section (1), such amount or any part thereof shall, on a claim being made in that behalf in such form as may be prescribed, be refunded, in the manner prescribed, to the person from whom such dealer, had actually realised such amount or part, or to his legal representatives, and to no other person :

Provided that no such claim shall be entertained after the expiry of three years from the date of the order of assessment or one year from any date of the final order on appeal, revision or reference, if any, in respect thereof, whichever is later.

Explanation.--The expression "final order on appeal, revision or reference" includes an order passed by the Supreme Court under Article 42 Article 132 Article 133 Article 136 or Article 137 or by the High Court under Article 226 or Article 227 of the Constitution."

4. Thus, the revenue has relied on Sub-Sections (2) and (3) and the contention of the learned Standing Counsel was that the amounts could be refunded only to the persons from whom the revisionist had charged tax that was deposited to the Government.

5. The contention of the learned counsel for the revisionist was that at the tune when the tax was realised, deposited with the Government and subsequently refunded to the customers by issue of credit notes, the procedure for the refund of the tax had not been prescribed and, therefore, the dealer bona fide adopted the aforesaid course. He pointed out that rules 106 to 110 contained in Chapter XVI of the U.P. Trade Tax Rules were enacted by U.P. Sales Tax (Amendment) Rules, 1993 while the revisionist had refunded the amounts to its customers

earlier and in the absence of a procedure the customers could not have applied for the refund of the tax and, therefore, the dealer bona fide refunded the amounts and is entitled to claim the refund from the State. Reliance is placed on a judgment of a Division Bench of this Court in *Kores (India) Ltd. v. State of Uttar Pradesh* [1995] 97 STC 36 SC : 1995 UPTC 605 in which such a view was taken. In that case for the assessment year 1980-81 the dealer had deposited tax at the rate of 8 per cent while tax was realisable at the rate of 6 per cent only. The tax so realised was duly deposited with the authorities and after the assessment had been made charging the tax at the rate of 6 per cent, the dealer claimed the refund which was denied and the matter ultimately came to this Court in a writ petition and this Court held as under :

"5. The petitioner's case is that for the assessment year 1980-81 he realised 8 per cent as tax bona fide believing it to be sales tax leviable on sale of carbon and stencil papers as unclassified item. From the averments in the writ petition it is revealed that there seems to be some dispute whether this goods is liable to tax as unclassified item and tax leviable at 8 per cent or 6 per cent. The Commissioner, Sales Tax, u/s 35 held that carbon and stencil papers are taxable at the rate of 6 per cent under the entry "paper of all kinds". This decision came on July 6, 1982. The contention of the petitioner is that till this decision the petitioner bona fide believing it to fall under unclassified item realised the amount and also deposited with the department. So far as the procedure prescribed u/s 29-A, it is true that when a procedure is prescribed under any provision of statute, the things should be done in the manner as prescribed therein. However, in the present case the procedure under Sub-section (3) of Section 29-A was to be prescribed for refund of the amount deposited with the respondents to the customers. On behalf of the respondents it is conceded till rules are framed in 1993 there is no procedure prescribed for the refund of the said excess amount deposited. Hence there was no procedure under which the said amount was to be refunded. So far the petitioner, after coming to know that he has realised excess tax on 2 per cent and knowing his customers, has refunded all such excess amount to such dealers, and submitted with the assessing authority the details of the same. It is not in dispute between the parties that any excess amount realised by a dealer is to be refunded to the customers from whom it is realised. It is only the procedure under Sub-section (3) and the manner in which it has to be returned. We find, in the absence of any procedure and the manner for refund, if in fact the amount deposited had been refunded, which of course has to be subject to the satisfaction and verification of the respondent-authority, it cannot be said that the petitioner, if on its own, refunds the amount which is deposited with the respondent, which he was not entitled to realise, then he committed an illegality in doing so on which the amounts stand forfeited with the respondents. On behalf of the learned Standing Counsel reliance was placed on the case of *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, If the provisions as contained in Gujarat Act was also in U.P. as in the Gujarat Act, there was Section 37 where

the respondent, namely, the State has right to forfeit this amount, then the position would have been different. If any amount deposited with the State was liable to be forfeited, then the argument raised by the petitioner was not available but we do not find any such forfeiture clause under the U.P. Sales Tax Act. Thus the question of the said amount stands forfeited with the State does not arise. Even the State has to return this amount to the person from whom it was realised. It is significant to refer to proviso to Section 29-A. According to this no such claim is entertained after the expiry of three years from the date of order of assessment or one year from the date of final order in appeal, revision or reference. In the present case the appeal itself was decided on July 11, 1988 and even after years there was no procedure prescribed by the State. If the argument of the respondent is to be accepted, then merely by not providing the procedure the amount stands forfeited and will be with the State. Such a conception cannot be accepted. It is always to be kept in mind that procedure prescribed under law is towards giving substantial justice to a party. The procedure is not an obstacle for providing justice. In case where two possible interpretations are there, one which contributes towards justice and the other towards injustice, the latter should be rejected.

6. In the present case the petitioner has given the details to whom the said amount has been refunded which is said to be the persons from whom the excess tax was realised. The argument on behalf of the respondent is that the petitioner has only stated the names which may not be sufficient for verification. On the other hand it has been averred and urged by the petitioner that every detail, including names, addresses and credit note number by which the amount has been paid, has been given to the assessing authority. It is for the assessing authority to ascertain the veracity of such statement.

7. Accordingly we allow the writ petition with costs and direct the respondents not to withdraw the refund/adjustment voucher No. 44, dated November 8, 1988 and will verify within a period of three months the veracity of which has been filed before the said authority after giving opportunity to the person concerned regarding the said payment having been made and only in case any amount is not verified, that amount will be adjusted towards the amount already deposited by the petitioner which is to the tune of Rs. 92,837.56 and then pass consequential order of refunding the amount if any amount found remaining with the respondents to the petitioner accordingly."

6. This view was followed by another Division Bench of this Court in *O.D. Industries v. State of U.P.* 1996 UPTC 307 and in *Agarwal Enterprises v. Trade Tax Officer* 1997 UPTC 763 also a similar view was taken. That was, however, a case in which the buyer from whom the tax had been illegally realised, on receiving the amounts from the seller, had authorised a seller to claim a refund from the Sales Tax department.

7. Learned counsel for the respondent placed reliance on *Mahavir Machinery Corporation v. State of Uttar Pradesh* [1991] 82 STC 345 (All) : 1990 UPTC 547

in which it was held that a writ of mandamus cannot be issued to a dealer for refund of the excess tax. This was a case in which a buyer, namely, Mahavir Machinery Corporation had prayed for a writ of mandamus against the General Manager, Ordnance Factory, Muradnagar for refund of the alleged excess amount of sales tax charged by the latter, The situation being entirely different, this authority has no application in the present case. Reliance was also placed on *Kasturi Lal Harilal Vs. State of U.P. and Others*, in which the honourable Supreme Court had upheld the validity of the provisions of Section 29-A. This authority too also does not conclude the matter because this too is on a different point.

8. Lastly, reliance is placed on *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, in which dealing with the doctrine unjust enrichment the honourable Supreme Court held that refund of excess duty was permissible only on proof that the burden thereof had not been passed on to another and that application for refund could be made only under statutory provision.

9. As is evident, from the facts of the present case the dealer has already refunded the amounts to the buyers from whom it had realised the tax. This has been done by issuing credit notes which is a valid method of refund and the factum of which has not been doubted by the authorities below. Therefore, so far as the revisionist is concerned, there is no question of its being unduly enriched if refund is allowed to it. On the other hand, it is the State which would stand unduly enriched if it retains the amounts which it was not legally entitled to retain as tax.

10. The validity of the provisions of Section 29-A has been upheld by the Honourable Supreme Court in *Kasturi Lal Harilal Vs. State of U.P. and Others*, and the tax had to be refunded to the persons from whom it was wrongly realised in the manner prescribed. The manner had not been prescribed till 1993. while the proceedings relate to assessment year 1986-87 and the tax had already been refunded to the buyers in the manner aforesaid. As already stated, this Court has taken a view that in the absence of the prescribed procedure the dealer who had refunded the amounts to its customers could claim a refund. Though this view may be open to challenge because the absence of procedure did not mean that the person who was not legally liable to pay any amounts could do it and claim a refund from the Government, or that though the right was created the absence of procedure barred the enforcement thereof. However, since this Court has already taken aforesaid view and the revenue did not challenge this Court's decisions before the Supreme Court and the judgment in *Kores (India) Ltd. [1995] 97 STC 36 (All.) : 1995 UPTC 605* having held the field for the last several years I find no justification why the same should not be followed. In my view, therefore, the orders of the authorities below are not in accordance with law as declared by this Court in *Kores (India) Ltd. [1995] 97 STC 36 (All.) : 1995 UPTC 605*.

11. This revision petition is, therefore, allowed and setting aside the Tribunal's order dated February 26, 1998 on this point, it is directed that the assessing

officer will refund the aforesaid amounts to the revisionist.