**(2012) 01 AHC CK 0753**

**In the Allahabad High Court**

**Case No :** Civil Misc. Writ Petition No. 1720 of 2011

Diamond Cement APPELLANT

Vs

State of U.P. and Others RESPONDENT

**Date of Decision :** 13-01-2012

**Acts Referred:**

Income Tax Act, 1961 — Section 147
Uttar Pradesh Trade Tax Act, 1948 — Section 10, 2, 21(1), 21(2), 9

**Citation :** (2012) 49 VST 371

**Hon'ble Judges :** Sunil Ambwani, J;Manoj Misra, J

**Bench :** Division Bench

**Final Decision :** Dismissed

# Judgement

1. We have heard Shri Bharat Ji Agrawal, Sr. Advocate assisted by Shri Piyush Agrawal for the petitioner. Shri S.P. Kesarwani, Addl. Chief Standing Counsel appears for the respondents. The petitioner is a public limited company incorporated under the Indian Companies Act now known as Diamond Cement with its proprietor Heidelberg Cement India Ltd. The petitioner has its manufacturing unit at Mandora, Jhansi, where it is carrying out the business of manufacture and sale of O.P.C. and P.P.C. cement.

2. The writ petition is directed against the order dated 19th September, 2011 passed by the Addl. Commissioner, Commercial Tax, Jhansi Range, Jhansi u/s 21 (2) of the U.P. Trade Tax Act, extending the period of limitation (which expired on 31st March, 2008) for reassessment.

3. For the assessment year 2005-06 the original assessment order was passed by the Deputy Commissioner (Assessment), Jhansi on 31st March, 2009 accepting the books of account and the disclosed turn over of the petitioner as asseessee, in respect of Cement sold and sent both by rail as well as by trucks. The petitioner had spent an amount of Rs.21,39,96,022/-, on account of freight, which was allegedly charged separately from the customers. The assessing authority had accepted the turn over excluding the freight for the purposes of

 

levy of tax on the sale of Cement. While calculating the taxable turn over the assessing authority had added the entire amount of freight of Rs.21,39,96,022/- and while denying the claim of exemption of freight, the tax was levied on it at 12%.

4. Aggrieved by the assessment order dated 31.3.2009 the petitioner had filed an appeal u/s 9 of the U.P. Trade Tax Act. In the proceedings of appeal the petitioner produced original sale invoices. The appellate authority allowed the assessing authority an opportunity to comment on the original sale invoices. The appellate authority noticed that there was no justification for imposing tax on the amount of freight, which was separately charged. The Joint Commissioner (Appeals) as the appellate authority allowed the appeal on 24.8.2009 and remanded the case for fresh assessment. Aggrieved by the order of the Joint Commissioner (Appeals) as an appellate authority the petitioner filed a second appeal u/s 10 of the U.P. Trade Tax Act before the Commercial Tax Tribunal (the Tribunal).

5. The Tribunal by its judgment dated 19th June, 2010, after recording a finding that the amount of freight has been separately charged in the bills/ invoices, which were produced by the petitioner, held that no tax can be legally imposed on the amount of freight. The Tribunal by its order dated 19th June, 2010 found that the assessing authority has committed an error in including freight in the turn over. The Tribunal by its order dated 19.6.2010 passed an order deciding and partly allowing appeals for both the years 2005-06 and 2006-07. In the operative portion of the order it held that the amount of freight realized separately in the bills shall not be treated as part of the turn over. On the remaining questions the Tribunal remanded the matter to the Assessing Officer.

6. The Addl. Commissioner, Grade-1, Jhansi has in the impugned order dated 19.9.2011 u/s 21 (2) of the U.P. Trade Tax Act observed that the petitioner did not produce the Delivery Challan-Invoice Builty etc. before the assessing authority or upto the second appellate stage. The Joint Commissioner (Administration), commercial Tax, Jhansi has requested for permission for reassessment on the ground that the charging of the freight separately from the consumers was not verified. If the freight has been realized separately from the consumers, the amount of freight should have been disclosed in the return of the central excise and service tax and on that amount service tax should have been deposited in accordance with the rules. The trader has disclosed in its return of service tax of the year 2005-06 only an amount of Rs.3,78,09,696/- as freight, in the concerned department in the category of goods transport service, whereas in the commercial tax assessment he has disclosed the freight at Rs.21,39,96,022/-.

7. A notice dated 14.9.2011 was issued to the petitioner, in reply to which a written explanation and affidavit was filed, in support thereof the General Manager (Taxation), Senior Accounts Officer and the Advocate of the firm appeared and claimed the exemption of commercial tax on the entire amount of

 

freight. They pleaded that at the time of assessment they had produced the account books and verified the entire sale of cement and the expenses of freight both by transport through road and rail. During the course of hearing the trader accepted that the cement dispatched by the company to its various depots by rail, the freight thereafter was borne by either the depot or by the company and thereafter it was realized from the consumers. They, however, did not produce the account books with regard to the loading, unloading, the details of the freight charges and the manner such charges were recovered from the consumers.

8. The Addl. Commissioner thereafter observed after considering the affidavit and the explanation furnished by the petitioner that the trader did not from the stage of assessment to the stage of hearing u/s 21 (2) produce either the account books or any evidence regarding freight and the manner in which the amount of freight has been adjusted. The records produced by the petitioner would show that he had shown in his returns, and in the previous hearing that the goods were delivered ex-factory and that freight was realized from the consumers separately, where trader has not delivered the goods ex factory but to its various depots/ agents/ branches. The ownership of the goods from the factory to the depot by rail was until goods reach upto the depot with the trader. The Railway Receipts show that both the consignor and consignee were Diamond Cement and that agents of the company had taken delivery on the destination after which various purchasers were issued delivery challans from depot/ station. The petitioner company had disclosed the charge of freight from the consumers for evasion of the tax and that is why they did not produce the account books, and also did not verify as to who had paid the freight. In this manner in view of M/s India Motors Ltd. v. Tamil Nadu State, 2010 NTN 44, the entire amount of freight was the part of turn over of the petitioner. The information received from the Central Excise Department also verified that infact the company has paid an amount, which is much less as service tax, than the amount shows towards freight. The company was, therefore, not entitled to exemption on the freight and that it is necessary to grant permission u/s 21 (2) for reassessment.

9. Shri Bharat Ji Agrawal, learned counsel for the petitioner submits that Section 21 (1) of the U.P. Trade Tax Act contemplates assessment and reassessment equivalent to Section 147 of the Income Tax Act. Both the Sections relate to the assessment of the escaped assessment to tax. In both the Sections the proceedings can be initiated only if the assessing authority has reason to believe that there is escaped assessment. In Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, it has been laid down that under the garb of assessment a review of the original proceedings cannot be made.

10. Shri Agrawal submits that u/s 21 (1) the words are ''has reason to believe'' and not ''reason to suspect''. The belief entertained by the assessing authority must not be arbitrary or irrational. It must be reasonable and based on reasons, which are relevant. It should be in good faith and not a mere pretence. It should have rational connection and relevant bearing on the formation of belief, which

 

should not be extraneous or irrelevant. It is not any and every material, howsoever vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief. He has relied upon Aryaverth Chawal Udyog v. State of U.P., 2008 UPTC 881, in submitting that there is no justification, in the case for initiating the reassessment proceedings. He has also relied upon Apolo Tyres v. State of U.P. & Ors., 2010 (42) NTN 169 in which it was held that on the same material, which was in existence at the time of original assessment, reassessment proceedings cannot be initiated. There has to be fresh material on the basis of which belief may be formed. He submits that entire records were produced before the assessing authority. In item No. 10 of the details of turn over, given in the assessment order the petitioner had claimed exemption on the entire amount of freight, which was disclosed as part of turn over and on which exemption was sought. The assessing officer did not accept the exemption on freight on the grounds that inspite of asking the petitioner did not produce the challen/ delivery challan/ invoices. The first appellate authority accepted the claim for exemption subject to verification of the bills, which were produced in original and of which the copies were kept on record, and observed that the company does not have its own transport. It does not own any trucks and uses the services of various transport companies on the rates fixed according to the distance and whatever amount is settled towards freight is paid to the transporter. The Tribunal as second appellate authority accepted the submission that the assessing authority had accepted the account books in which the freight was shown separately. The first appellate authority had in the presence of the State representative examined the account books and found that the freight was separately charged in the bills. The Tribunal, thereafter, recorded satisfaction that in view of M/s Vinod Sindicate v. Commissioner, Trade Tax, 1988 UPTC 218 and JP Cement, 1989 UPTC 750 the freight charge separately should not be treated as part of turn over and that in the case of the petitioner appellant himself the High Court had accepted in its judgment dated 27.1.2010 that the freight charge separately will not be part of turn over.

12. Shri S.P. Kesarwani appearing for the State respondents submits that the petitioner did not produced the account books relating to charging of freight at any stage from the assessing authority to the proceedings for reassessment u/s 21 (1) of the Act. The authorities, after examining the returns filed by the petitioner in the Central Excise and Service Tax found that he had disclosed only Rs.3,78,09,696 /- towards freight in the category of goods transport service. He had not shown charging of freight of Rs.17,61,86,326/- separately. The records indicated that in the returns the petitioner had disclosed the delivery ex-factory, and charging of freight separately from the consumers, whereas infact the petitioner had transported the goods from factory on its own to depot. The railway receipts clearly established that Diamond Cement was both the consignor and consignee, and that the agents of appellant had accepted the delivery of goods at the destination and thereafter sent the goods by delivery challan, from the depot/ station to the consumers. The Addl. Commissioner has not committed

 

any error in finding that there was fresh material on which reasonable belief could be formed that the turn over of freight had escaped assessment.

12. Shri Kesarwani submits that the petitioner-company has not come with clean hands. It made false disclosures and has made false statement in the High Court that the entire account books were produced. The account books relating to freight and the manner in which the freight was charged and realised from the consumers was never produced before any authority. The petitioner relied upon certain judgments and suppressed the account books. Shri Kesarwani submits that the petitioner had cleverly withheld the relevant facts of the manner and method of charging freight. The facts came to the light only after examining the service tax returns.

13. We have considered the arguments and the reasons recorded by the Addl. Commissioner in the order of giving the permission for reassessment u/s 21 (2). The petitioner has apart from making arguments, has not relied on any such material to show that the petitioner had disclosed the manner and method of charging freight, before any of the authorities from the stage of assessment to the order authorising reassessment. Infact the assessing authority had rejected the request for exempting the freight on the ground that the petitioner had not disclosed the challan/ delivery challan/ invoices. u/s 2 (i) of the Act the cost of freight or delivery cost is not to be included as part of turn over, if it has been separately charged. The petitioner had disclosed the entire amount of freight in his turn over and had thereafter claimed exemption. He did not produce the details as to how the goods were transported and the freight was charged. The proof of charging freight separately was not produced nor could be verified from the audit report, profit and loss account, balance sheet or trial balance.

14. The appellate authority referred to some of the bills in original and observed that since firstly the goods are dispatched by delivery challan and then bills are prepared, and further that the rates are negotiated with transport companies, and are paid according to the actual freight, the matter required reconsideration. The first appellate authority remanded the matter to the assessing authority for examining the material produced in appellate proceedings. The appellate authority also observed that the concerned bill books of both the assessment years (2005-06 and 2006-07) were not produced. At the appellate stage also only some photocopies were produced to demonstrate that the freight has been charged separately. The appellate authority was thus in doubt about the manner and method in which freight was charged and had remanded the matter.

15. The Tribunal in our opinion without appreciating the fact that the amount of freight, which was charged separately from the consumer, is not part of the turn over, adopted a casual approach and erred in observing that the assessing authority had accepted the declared turn over, and the account books, and that the account books and bill books produced before the assessing authority shows that the freight was charged separately. The Tribunal also observed that before the first appellate authority the State representative had examined the material

 

produced by the petitioner and stated that the freight has been separately charged in the bills. In our opinion these observations, are not only casual but are also against the record. The assessing authority had clearly observed and recorded finding that the petitioner did not produce the material relating to freight and did not produce, inspite of demand, the challan, delivery challan, invoices and thus rejected the plea of exemption. The first appellate authority was in doubt. It relied upon the statement given by the State representative on examining some of the bill books and remanded the matter. On 9 these findings the Tribunal could not had returned the findings that the entire account books and bill books were produced and that State representative had also examined the records and found that the freight was charged separately. In the circumstances, the findings recorded by the Tribunal cannot be sustained or believed for advancing the argument that the entire material was placed and examined by the assessing and the appellate authorities.

16. The material discovered by the department from the returns filed by the petitioner in Central Excise Department for levy of service tax, the railway receipts, and the non-production of the document, bill books and challans, before the assessing authority, clearly establishes that the petitioner company did not produce the relevant material to claim that the entire freight was charged separately. The Addl. Commissioner did not commit any error on fact or in law in recording the turn over on account of freight has escaped from assessment. The writ petition is dismissed.