

(2009) 06 UK CK 0072

In the Uttarakhand High Court

Case No : Writ Petition No. 884 of 2008 (MS)

Diamond Cement

APPELLANT

Vs

State of Uttarakhand and Others

RESPONDENT

Date of Decision : 17-06-2009

Acts Referred:

Constitution of India, 1950 — Article 301, 304

Income Tax Act, 1961 — Section 142(2A)

Uttar Pradesh Trade Tax Act, 1948 — Section 21, 21(1), 21(2), 5

Citation : (2009) 06 UK CK 0072

Hon'ble Judges : Sudhanshu Dhulia, J

Bench : Single Bench

Advocate : Bharat Ji Agarwal, a/b., S.K. Posti, for the Appellant; K.P. Upadhyay, Addl. Chief Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

Sudhanshu Dhulia, J.—The Petitioner is a public limited company incorporated under the Indian Companies Act, 1956 having its registered office at Bangalore. The factory of the Petitioner is at Madora, district Jhansi in the State of U.P., where Petitioner manufactures cement. In manufacturing cement, it is also alleged that the Petitioner uses "fly ash" as a material. In the erstwhile State of UP. u/s 5 of the UP. Trade Tax Act, 1948 (hereinafter referred to as the Act), a notification was issued on 18th June, 1997 granting benefits by way of concessional rate of tax on the sale of cement inside the State of UP. (as it was then), which contained fly ash of not less than 10 percent, irrespective of the fact whether such goods were manufactured within the State or outside the State. However, a subsequent notification dated 27-2-1998 was issued by the State of UP. by "which a condition No. 1 was imposed restricting the benefits of the concessional rate of tax by way of rebate only to the goods which are manufactured within the State of UP. This amended notification is dated 27-2-1998, which was challenged before the Allahabad High Court in Writ Petition No. 957 of 1999 Bela Cement Limited v. State of Uttar Pradesh and

others. The Division Bench of the Allahabad High Court vide its order dated 29th January, 2004 has allowed the writ petition and has declared the said condition No. 1 of the notification dated 27th February, 1998 issued u/s 5 of the Act as invalid and void being violative of Article 301 and 304 of the Constitution of India.

2. According to the counsel for the Petitioner Mr. Bharatji Agarwal, Senior Advocate, therefore, the net result would be that irrespective of the place of manufacture, whether in State of UP. or outside, the tax benefit has to be granted.

3. According to the Petitioner even after the creation of the new State of Uttarakhand, the law as it existed in the erstwhile State of UP. and the notifications and the orders passed under the said Statute will remain operative unless suitably modified. Therefore, counsel for the Petitioner has stated that since the UP. Trade Tax Act and the notification issued u/s 5 of the UP. Trade Tax were applicable in the State of Uttarakhand, therefore, the tax benefit was granted to the Petitioner in the State of Uttarakhand for assessment year 2000-01 as well as 2001-02.

4. Learned Counsel for the Petitioner has relied upon the ruling of Supreme Court namely Commercial Tax, Ranchi v. Swam Rekha Cokes JT 2004 (supp) (1) SC 608, where it has been held by the Hon"ble Apex Court while referring to a pari materia provision of the Bihar Reorganisation Act that even after the appointed day such orders and notifications which were passed in the erstwhile State will continue to be in operation in the new State unless suitably modified by the successor State.

5. However, the Learned Single Judge of this Court in Writ Petition No. 1089 (MS) of 2007, which was filed by the present Petitioner itself had distinguished it on facts vide order dated 20-11-2007 and held that in the State of Uttarakhand since there has been an adoption order in 2002, wherein the word "Uttar Pradesh" has been substituted with the word "Uttaranchal", therefore, the benefits which were being given to the Petitioner in the erstwhile State of UP. will not be applicable to the Petitioner in the State of Uttarakhand. All the same, a statement has been made at the Bar that the said judgment has been challenged in a Special Appeal in this High Court, which is presently pending and the recovery has already been stayed with the condition that the Petitioner gives a bank guarantee.

6. Nevertheless, now the counsel for the Petitioner argued that even if there has been an adoption order in the State of Uttarakhand on 23rd March, 2002, the said modification order will only work prospectively and not retrospectively and it would not affect the merit of the present case inasmuch as it pertains to assessment year 2000-01 and 2001-02.

7. It is indeed a fact that presently the Petitioner is aggrieved by the proceedings initiated against the Petitioner for reassessment u/s 21 of the Act pertaining to the assessment year, 2000-01 and assessment year 2001-02. It has, therefore,

been argued before this Court that the judgment of the Learned Single Judge in the case referred above will not materially affect the present case as it pertains to the assessment years, which are prior to the date of adoption.

8. The short contention of the Petitioner before this Court in the writ petition regarding the proceedings initiated by the assessing authority and the Additional Commissioner, Commercial Tax u/s 21 of the UP. Trade Tax Act as according to the Learned Senior Advocate Mr. Bharatji Agarwal, these proceedings are bad and the orders passed therein are liable to be set aside inasmuch as it is in violation of the principle of natural justice and fair-play as no opportunity of hearing or show cause was given to the Petitioner by the Additional Commissioner although it is the requirement of law. The relevant provisions of UP. Trade Tax Act, which is Section 21 (1) and (2), which are applicable in the present case, read as under:

21. Assessment of tax on the turnover not assessed during the year.- [(1) if the assessing authority has reason to believe that the whole or any part of the turnover to a dealer, from any assessment year or part thereof, had escaped assessment of tax or has been underassessed or has been assessed to tax at a rate lower than that at which it is assessable under this Act, or any deductions or exemptions has been wrongly allowed in respect thereof, the assessing authority may, after issuing notice to the dealer and making such inquiry as it may consider necessary assess or reassess the dealer to tax according to law]:

Provided that the tax shall be discharged at the rate at which it would have been charged had the turnover not escaped assessment, or full assessment, as the case may be.

Explanation [1].- Nothing in this Sub-section shall be deemed to prevent the assessing authority from making an assessment or full assessment to the best of its judgment.

[Explanation II.- For the purpose of this section and Section 22, "assessing authority" means the officer or authority who passed the earlier assessment order, if any, and includes the officer or authority having jurisdiction for the time being to assess the dealer.

Explanation III.- Notwithstanding the issuance of notice under this Sub-section where an order of assessment or re-assessment is in existence from before the issuance of such notice it shall continue to be effective as such, until varied by an order of assessment or reassessment made under this section in pursuance of such notice].

[(2) Except as otherwise provided in this section, no order of assessment or reassessment under any provision of this Act for any assessment year shall be made after the expiration of [two years from the end of such year or March 31,1998, whichever is later]:

[Provided that if the [Commissioner] [on his own, or on the basis of reasons

recorded by the assessing authority, is satisfied], that it is just and expedient so to do authorities the assessing authority in that behalf, such assessment or re-assessment may be made after the expiration of the period aforesaid but not after the expiration of eight years from the end of such year notwithstanding that such assessment or re-assessment may involve a change of opinion]:

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(3)....

(4)....

(5)....

[(5-A)....

[(6)....

[(6-A)....

[(7)....

9. it is the case of the Petitioner that the benefit of the notification (of the erstwhile State of U.P. dated 18-6-1997) was earlier granted to the Petitioner, however, in view of the decision of this Court, by the Learned Single Judge as referred re-assessment proceedings were initiated by the assessing authority and the assessing officer while referring to the judgment of this Court dated 20th November, 2007 (as has been referred above) has stated that the exemption has wrongly been granted to the Petitioner inasmuch as the notification issued u/s 5 of the Act by the erstwhile State of U.P. would not be applicable in the State of Uttarakhand and consequently thereafter, the Additional Commissioner, Commercial Taxes vide its order dated 3rd April, 2008 agreeing with the proposal of the assessing authority has directed the assessing authority to go ahead with the reassessment within the extended period of eight years. It is this order of the Additional Commissioner dated 3rd April, 2008, which has been presently challenged by the Petitioner.

10. Indeed, a bare perusal of first proviso to Section 21(2) of the Act nowhere states that the Commissioner or Additional Commissioner (as the case may be) should give an opportunity of hearing to the Assessee before passing the order u/s 21(2) of the Act, however, in the opinion of this Court such a provision must be read with the proviso as certain rights have already accrued to the Petitioner and since the order of the Additional Commissioner may affect these rights, an opportunity of hearing becomes necessary, in fact there are two judgments of division bench of the Allahabad High Court on this issue which heavy reliance has been placed by the Petitioner. These rulings are as follows:

(1) Manaktala Chemicals Pvt. Ltd. v. State of U.P. and Ors. reported in [2006 U.P.T.C 1128].

(2) S.K. Traders v. Additional Commissioner of Trade Tax, Ghaziabad & Anoth. Reported in 2007 NTN 34 345.

11. In both the above referred judgments, Division Benches of Allahabad High Court have considered this provision of law i.e. Section 21(2) of the U.P. Trade Tax Act and have held that an opportunity of hearing has to be given to the Assessee before the Additional Commissioner grants permission for re-assessment and an opportunity of hearing must be read with the proviso, although it has not been specifically stated in the provision. The principle of nature justice and fair-play demands that such an opportunity of hearing is deemed to be inbuilt in the provision, reference may be made here to paragraph 9 to 15 of *Mis Manaktala Chemicals Pvt. Ltd. (supra)*, which are being reproduced as under:

9. Section 21(2) though specifically does not say that opportunity is to be afforded to the dealer granting the sanction by the Commissioner but the principle is well recognized, that even if there is no specific provision in the Statute, such opportunity need be given, to make the action takers or order passed in consonance with the principles of natural justice, unless, of course, the Statute specifically excludes the applicability of principle of natural justice, such an opportunity is deemed to be inbuilt in the provision, in case any action taken or order passed would effect the right of any person adversely. In the case of *Indian Oil Corporation, Agra v. Commissioner, Trade Tax*, reported in 1999 U.P.T.C. 365, a Division Bench of this Court after holding the Circular issued on 7th July, 1992 binding on the Assessing Authority held that the dealer should have been given a hearing in the matter before any reassessment order could have been passed, and since such an opportunity was not given, the order of approval granted by the higher authority was quashed.

10. There is one more reason for holding that the opportunity has to be given to the Assessee or the dealer by the Commissioner before the grants / approval for initiating proceedings u/s 21 of the extended period of limitation which stands speit out from the language used in the first proyiso attached to Sub-section (2).

11. The proviso confers and given jurisdiction / authority to the Commissioner if he "satisfied" either on his own or on the basis of the reasons recorded by the Assessing Authority that it is just and expedient to either Assessee or re-asssess the dealer, only then he would authorize the Assessing Authority to make such assessment or reassessment within the extended period of limitation. The plain and simple meaning of the aforesaid proviso Is that the permission / approval for such re-assessment of alleged escaped turnover is to be granted by the Commissioner only on being satisfied either on his own or on the basis of the reasons recorded by the Assessing Authority that it is just and expedient to re-open the assessment,

12. Once the proviso postulates recording of reasons by the Assessing Authority, it necessarily obligates the Commissioner or the Additional Commissioner to consider such reasons and make them known to the Assessee, before he finally forms his satisfaction and even if the Commissioner or the higher authority on his own reasons feels satisfied that it is just and expedient to re-open the assessment, it would still require that such reason must be made known to the dealer also so that before the assessment is re-opened he may have an opportunity to satisfy the higher authority that the reasons assigned by the Assessing Authority are not relevant or they are incorrect or they do not make out a legal ground for reopening of the assessment and likewise if the Commissioner of the higher authority proposes to authorize the Assessing Authority for reopening the assessment on his own, then also reasons for such satisfaction have to be supplied to the dealer, so that he may have a say to convince the higher authority for not authorizing the Assessing Officer for reopening the assessment.

13. Whether the Commissioner or the higher authority permits the Assessing Officer to proceed under the extended period of limitation either on his own or on the reason recorded by the Assessing Authority, in both cases, the dealer would have a right to put forward his defence for not reopening the assessment. This opportunity, if is excluded or shredded out from the aforesaid proviso, it would leave the dealer with no opportunity / remedy to challenge the very authority of the Assessing Officer to reopen the assessment nor there would be any opportunity to challenge the approval granted by the Commissioner under any of the remedies under the Act.

14. When an order is passed on the basis of the reasons recorded, it naturally means that the reasons must be rationale, genuine or relevant. Any reason which cannot be termed as rationale, genuine or relevant would not make out a case for reopening of the assessment and for that matter also, the dealer has to be associated in the proceedings initiated seeking approval from the Commissioner or the Additional Commissioner, as case may be.

15. Admittedly, the Commissioner before granting sanction / approval did not give any opportunity to the Petitioner and obviously he has not recorded any reasons for being satisfied that it is just and expedient to reopen the assessment while granting sanction on 29th March, 1993. The order passed by the Commission simply reproduces the language used in the aforesaid proviso but it does not disclose any reason for reaching the said conclusion. The order, thus granting approval itself is liable to be quashed on the aforesaid ground alone.

12. On this reasoning, the Division Bench of Allahabad High Court has quashed the order of the Additional Commissioner, which was passed in violation of the principle of nature justice and fair-play as no such opportunity of hearing was granted to the Assessee before passing such an order. Similar situation is before this Court as well. This Court is clearly in agreement with the logic and reasons given by the Division Bench of the Allahabad High Court and also holds that the

order dated 3-4-2008 passed by the Additional Commissioner is bad to this extent.

13. Similarly in M/s S.K. Traders (supra), the Division Bench of the Allahabad High Court while relying upon various judgments of the Hon''ble Apex Court has similarly held that the principle of natural justice and fair-play have to be read with the Proviso to Section 21(2) of the Act.

14. The Division Bench in the said judgment has particularly relied upon the Supreme Court's judgment in Rajesh Kumar and Others Vs. D.Commissioner of Income Tax and Others, , wherein the Hon''ble Apex Court while considering the provision of Section 142(2-A) of the Income Tax Act. which gives power to the Assessing Officer after obtaining approval of the Commissioner to direct for special audit of the book of accounts of the Assessee, has observed that the provisions of Section 142(2-A) of the Income Tax Act also did not provide for any opportunity of hearing by the Commissioner to the Assessee. The Hon''ble Apex Court has held as follows:

53. The factors enumerated in Section 142(2A) of the Act, thus, are not exhaustive. Once it is held that the Assessee suffers civil consequences and any order passed by it would be prejudicial to him, principles of natural justice must be held to be implicit. These principles of natural justice are required to be applied inter alia to minimize arbitrariness.

54. It is trite, even if there is a possibility that the Tribunal would correctly follow the statutory provisions, still compliance with principles of natural justice would be required [See R. v. Kensington and Chelsea Rent Tribunal, exp. Macfarlane (1974) 1 WLR 1486].

15. It is necessary to mention though that the Parliament incorporated a specific provision of requirement of hearing in Section 142(2A) subsequently by way of an Amendment vide Finance Act, 2007. However, what is important is that at the relevant time when the Apex Court was considering the provision such a provision was not there, yet the Apex Court held that such a requirement must be read into the provision.

16. Before this Court as well, there is a limited question as to whether the Additional Commissioner was right in granting approval for reassessment without giving an opportunity of hearing to the Petitioner. On the basis of the law already discussed above, this Court is of the considered view that the Additional Commissioner's order being in violation of the principle of natural justice is bad and is liable to be set aside.

17. The Learned Additional Chief Standing Counsel for the State of Uttarakhand Mr. K.P. Upadhyay has, however, argued that the provisions of law more particularly the provisions of law relating to the tax must be strictly construed and since the proviso to Section 21 of the U.P. Trade Tax Act does not provide for an opportunity of hearing, the same is not liable to be given to the Assessee. The

order of the Additional Commissioner cannot be said to be an order without reason as apparently reasons have been assigned, by the Additional Commissioner in its order and as far as opportunity of hearing is concerned, the same has in fact been given to the Petitioner by the assessing officer, therefore, the State counsel would argue that not only the principle of natural justice and fair-play have been met but also reasons have been given in the order. This Court is, however, in not agreement with the submission of the Learned Addl. Chief Standing Counsel inasmuch the opportunity of hearing has to be given by the Additional Commissioner and not by the Assessing Officer and merely because such an opportunity of hearing has been given by the assessing officer, this would not satisfy the requirement of natural justice and fair-play nor by this compliance alone the order impugned would become "reasoned order".

18. Since in the present case as well the Additional Commissioner has not given any opportunity of hearing or any reason in his order for granting approval, the order dated 3-4-2008 passed by the Additional Commissioner, Commercial Taxes, Rudrapur for the assessment years, 2000-01 and 2001-02 (contained as Annexure No. 11 to the writ petition) cannot be sustained and is hereby set aside. The Additional Commissioner/Respondent No. 2 is directed to pass a fresh order in accordance with law after giving an opportunity of hearing to the Petitioner and after recording reasons.

19. It is made clear that this Court is not giving any opinion on the merit of the case, which will be decided by the Revenue Authorities in accordance with law. On a limited ground of non application of principle of natural justice and fair-play, the present writ petition is being allowed. The matter is again being sent to the Additional Commissioner, Commercial Taxes, for reappraisal of the issue after giving an opportunity of hearing to the Assessee. It is further directed that appropriate orders will be passed by the Additional Commissioner, Commercial Taxes in accordance with law as expeditiously as possible and it is also expected that the Assessee will cooperate in the proceeding.

20. In view of the aforesaid discussions the writ petition succeeds and is allowed. No order as to costs.