(2006) 04 AHC CK 0248

In the Allahabad High Court

Case No : Trade Tax Revision No. 191 of 2006

Divisional Superintendent Engineering (C) Northern Central Railway — APPELLANT

Vs

Commissioner, Trade Tax — RESPONDENT

Date of Decision : 26-04-2006

Acts Referred:
Uttar Pradesh Trade Tax Act, 1948 — Section 11, 2, 8(1)

Citation : (2006) 04 AHC CK 0248

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Advocate : K.N. Kumar, for the Appellant; B.K. Pandey and S.C., for the Respondent

Final Decision : Dismissed

Judgement

Rajes Kumar, J.—Present revision u/s 11 of the U.P. Trade Tax Act (hereinafter referred to as the "Act") is directed against the order of the Tribunal dated 8th December, 2005 relating to the assessment year, 2002-2003,

2. The applicant is a Division of the Northern Central Railway. During the year under consideration, it sold scrap for Rs. 10,47,98,988/-. Assessing authority levied the tax on the turnover of scrap at the rate of 4 percent at Rs. 41,91,959.52 paise and after giving the credit of tax of Rs. 32,95,856/- a demand of Rs. 8,96,103,52 paise was created along with the interest. First appeal filed by the applicant was dismissed by the Joint Commissioner (Appeals) vide order dated 23rd February, 2003. Second appeal before the Tribunal too has been dismissed by the impugned order. Tribunal has confirmed the levy of tax on the scrap and the dealer has been held liable for interest u/s 8(1) of the Act on the short deposit of the tax on the turnover of iron scrap.

3. Thus, short question involved in the present revision is whether levy of tax on the iron scrap and demand of interest u/s 8(1) of the Act on the short deposit of

tax on the turnover of iron scrap are justified. Tribunal held that after the amendment in the definition of "business" in Section 2(aa) of the Act by U.P. Act No. 31 of 1995, the applicant activity of selling the scrap falls under the definition of "business" and thus, the applicant is liable to tax on the scrap. Tribunal further held that in view of the provisions of the Act, the applicant was clearly liable to tax on sale of scrap and thus, the tax due for non-deposit of such tax u/s 8(1) of the Act was chargeable.

4. Heard learned Counsel for the parties.

5. Learned Counsel for the applicant submitted that the applicant is a railway and as per the Railways Act, its activity was for a public carriage of passenger or goods and, thus, its activity was not in the nature of trade or commerce. He submitted that since his main activity was not in the nature of trade or commerce, the sale of the scrap, which was incidental, does not come within the purview of the definition of "business" u/s 2(aa) of the Act. He submitted that for the application of Clause (iii), which included the sale of scrap within the ambit of the business, provides that such sale is covered only when it is ancillary to or is connected with or is incidental to, or results from such trade, commerce, manufacture, adventure or concern. He submitted that to cover the case under Clause (iii), it is necessaiy that the main activity should be of trade, commerce, manufacture, adventure or concern, while the main activity of die railway is only of a carnage of the goods or passenger and not of trade or commerce. In support of his contention, he relied upon the decisions in the case of Commissioner of Sales Tax v. Northern Railway Catering and Boarding Unit reported in 1982 U.P.T.C. 148, Andhra Pradesh Transport State Road Transport Corporation v. The Commercial Tax Officer reported in 27 STC 43, State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another, , Commissioner of Sales Tax v. Sai Publication Fund reported in (2002) 35 STR 250, Cementation Patel (Durgapur) v. Commissioner of Commercial Taxes reported in 47 STC 385 and Jai Hind Printing Press Vs. The State of Gujarat, .

6. Learned Standing Counsel submitted that the activity of the railway, namely, carriage of passengers and goods are in the nature of trade or commerce. He submitted that the Apex Court in the case of The District Controller of Stores, Northern Railway, Jodhpur v. Assistant Commercial Taxation Officer reported in 1976 UPTC 247 held that the activity of the railway to transport the passengers and goods is the activity of trade or commerce. He further submitted that the railway is regularly involved in selling the scrap and obsolete and discarded material and thus, the railway is involved in the activity of trade or commerce by selling scrap, condemned wagons, obsolete and discarded material and, thus the case of the applicant is even covered under Clause (i) of the definition of business u/s 2(aa) of the Act. He submitted that the cases cited by the learned Counsel for the applicant are not related to the railway and are not applicable while the decision of the Apex Court in the case of The District Controller of Stores, Northern Railway, Jodhpur v. Assistant Commercial Taxation Officer

(supra) is in case of Railways. He further submitted that this Court in the case of Executive Engineer Stores, Sonbhadra v. Commissioner of Sales Tax reported in 1992 UPTC 561 held that sale of iron scrap, copper, other old goods by U.P. State Electricity Board are liable to tax and the Board has been held dealer within the definition of the Act. He also relied upon the decisions in the case of Government of India Press, Aligarh v. Commissioner of Sales Tax reported in 1989 UPTC 50, Commissioner of Sales Tax v. S/S Northern Railway Catering and Wending reported in 2000 UPTC 765 and 1998 (102) ELT 513 (SC) .

7. I have given my anxious thought on the submissions of the learned Counsel for the parties and perused the order of the Tribunal and the authorities below.

8. Dealer is defined in Section 2(c) of the Act and business is defined in Section 2(aa) of the Act. The definition of the business has been amended w.e.f. 1.6.1975 by U. P. Act No. 12 of 1979. A further amendment has been made by U.P. Act No. 25 of 1985 w.e.f. 13.9.1985 by which Clause (vii) has been added. The definition of the dealer u/s 2(c) of the Act after the amendment, which is relevant for the year under consideration reads as follows

(c) ''dealer'' means any person who carries on in Uttar Pradesh (whether regularly or otherwise) the business of buying, selling, supplying or distributing goods directly or indirectly, for cash or deferred payment or for commission, remuneration or other valuable consideration and includes-

(i) a local authority, body corporate, company, any cooperative society or other society, club, firm, Hindu undivided family or other association of persons which carries on such business;

(ii) a factor, broker, arhti, commission agent, del credere agent, or any other mercantile agent, by whatever name called, and whether of the same description as hereinbefore mentioned or not, who carries on the business of buying, selling, supplying or distributing goods belonging to any principal, whether disclosed or not;

(iii) an auctioneer who carries on the business of selling or auctioning goods belonging to any principal, whether disclosed or not, and whether the offer of the intending purchaser is accepted by him or by the principal or nominee of the principal;

(iv) a Government which, whether in the course of business or otherwise buys, sells, supplies or distributes goods, directly or otherwise for cash or for deferred payment or for commission, remuneration or other valuable consideration;

(v) every person who acts within the State as an agent of a dealer residing outside the State, and buys, sells, supplies or distributes goods in the State or acts on behalf of such dealer as-

(A) a mercantile agent as defined in the Sale of Goods Act, 1930, or

(B) an agent for handling of goods or documents of title relating to goods; or

(C) an agent for the collection or payment of the sale price of goods or as a guarantor for such collection or such payment;

(vi) a firm or a company or other body corporate, the principal office or head quarter whereof is outside the State, having a branch or office in the State, in respect of purchases or sales, supplies or distribution of goods through such branch or office:

Provided that a person who sells agricultural or horticultural produce grown by himself or grown on any land in which he has an interest, whether as owner, usufructuary mortgagee, tenant, or otherwise, or who sells poulty or dairy products from fowls or animals kept by him shall not, in respect of such goods, be treated as a dealer.

9. The definition of business as it was existed prior to 1973 has been substituted by another definition by U.P. Sales Tax (Amendment and Validation) Act, 1985 w.e.f. 1.4.1973 and further it was amendment by U.P. Act No. 25 of 1985 w.e.f. 13.9.1985 and by Act No. 31 of 1995 w.e.f. 13.09.2005. After the aforesaid amendment, the definition of business in Section 2(aa) of the Act which is relevant reads as follows:

(aa) "business", in relation to business of buying or selling goods, includes:-

(i) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern;

(ii) the execution of any works contract or the transfer of the right to use any goods for any purpose whether or not for a specified period; and

(iii) any transaction of buying, selling or supplying plant, machinery, raw materials, processing materials, packing materials, empties, consumable stores, waste or by products, or any other goods of a similar nature or any unserviceable or obsolete or discarded machinery, or any parts or accessories thereof or any waste or scrap or any of them or any other transaction whatsoever which is ancillary to or is connected with or is incidental to, or results from such trade, commerce, manufacture, adventure or concern or works contract or lease.

but does not include any activity in the nature of mere service or profession which does not involve the purchase or sale of goods.

10. A similar issue relating to taxability of sale of scrap and unserviceable material by the railway came up for consideration before the Apex Court in the case of The District Controller of Stores, Northern Railway, Jodhpur v. Assistant Commercial Taxation Officer (supra) arising under the Rajasthan Sales Tax Act. On the consideration of the definition of ''dealer'' and the ''business'' under the said Act which were almost similar rather narrower than the definition under the

U.P. Trade Tax Act, the Apex Court held that the activity of the Railway in selling unserviceable material and the iron scrap etc., would be business within Clause (i) of the definition of the word "business". The Apex Court further held that the activity of the transportation is the activity of commerce within the Clause (i) of the definition of ''business'' and transactions of sale of unserviceable material and scrap are transactions connecting with or ancillary to such commerce within the Clause (ii) of that definition. It is useful to refer the relevant parts of the judgment.

In view of the definition of the word ''business'' in Section 2 of the Rajasthan Sales Tax Act (Act No. 29 of 1954) as introduced with retrospective effect by the Rajasthan Taxation Law (Amendment) Act, 1965 (Act No. 9 of 1965), the High Court held that the sales of unserviceable materials were exigible to tax. The definition of the term ''dealer'' in Section 2(f) of the above Act so far as it is material runs:

dealer'' means any person who carries on the busisness of buying, selling supplying or distributing goods directly or otherwise, whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration and includes-

(i) the Central or a State Government or any of their departments, a local authority, a company, an undivided Hindu Family or any society (including a c-operative society), club, firm or association which carries on such business....

As already indicated by Section 2 of the Rajasthan Taxation Law (Amendment) Act, 1964 (Act No. 9 of 1965), Section 2 of the Rajasthan Sales Tax Act, 1954 (Rajasthan Act No. 29 of 1954) was amended. Clause (cc) of Section 2 provides: "business'' includes-

(i) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce, or manufacture whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any profit accrues from such trade, commerce, manufacture adventure or concern, and

(ii) any transaction in connection with or incidental or ancillary to such trade commerce, manufacture, adventure or concern;

but does not include activities of sale, supply or distribution of goods carried on without any profit motive by-

(i) any charitable or religious institution in the performance of its functions for achieving its avowed objects; and

(ii) an educational institution, where such sale, supply or distribution is made to its students." The contention of the appellant was that it was not carrying on the business of buying and selling and, therefore, the sales of unserviceable material and scrap iron etc. would not be transaction in connection with or incidental or ancillary to "such" trade, commerce, manufacture, adventure or concern.

We think that the activity of the appellant in the selling of unserviceable material and scrap iron etc. would be "business" within Clause (i) of the definition of the word ''business'' introduced by the Amending Act. The word ''business'' according to Clause (i) of that definition would include any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not it is carried on with a motive to make gain or profit. So even if it be assumed that the activity involved in selling unserviceable material and scrap iron etc. would not amount to carrying on business in the normal connotation of that term, it would be ''business'' within Sub-clause (i) of that clause as introduced y the Amending Act. We also think that there is no fallacy in thinking that Railway since it is concern in the activity of transportation is engaged in commerce within the meaning of Clause (i) of the definition and that the sale of ancillary to such commerce within the Clause (ii) of that definition.

11. Thus, the case of the applicant is squarely covered by the aforesaid decision of the Apex Court in the case of The District Controller of Stores, Northern Railway, Jodhpur v. Assistant Commercial Taxation Officer (supra), which is in the case of the applicant itself. After the decision of the Apex Court in the case of the applicant itself, there is no scope of any further argument.

12. The aforesaid decision of the Apex Court has been followed by this Court in the case of Government of India Press, Aligarh v. Commissioner of Sales Tax (supra), this Court held that on the sale of waste paper Government of India Press, Aligarh was liable to tax being dealer under the Act. In the case of Executive Engineer Stores, Sonbhadra v. Commissioner of Sales Tax reported in 1992 UPTC 561, relying upon the decision of the Apex Court in the case of The District Controller of Stores, Northern Railway, Jodhpur v. Assistant Commercial Taxation Officer (supra) and also in the case of Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur, . This Court held U.P. State Electricity Board as dealer in respect of the sale of iron scrap, copper and other goods, while Board was involved in the activity of generation and supply of electricity. In the case of Commissioner of Sales Tax, Madhya Pradesh, Indore v. Madhya Pradesh Electricity Board (supra) the Madhya Pradesh Electricity Board was involved in the activity of generation, distribution and supply of electric energy and for such activity, it was held involved in the activity of trade and commerce and is a dealer by Apex Court.

13. In the case of Commissioner of Sales Tax v. S/S Northern Railway Catering and Wending (supra), the claim of exemption of the railway on the sale of supply of cooked food, drink, ice-cream etc by its catering unit under Article 285 of the Constitution of India has been rejected following the decision of the Apex Court in the case of Collector of Customs and Anr. v. State of West Bengal and Anr. (supra).

14. Let us examine the decisions cited by the learned Counsel for the applicant.

15. The case of Commissioner of Sales Tax v. S/S Northern Railway Catering and Boarding Unit (supra) cited by the learned Counsel for the applicant relates to the assessment year 1972-73 prior to the amendment in the definition of ''business and dealer'' has no relevance.

16. In the case of Andhra Pradesh State Road Transport Corporation, Hyderabad v. The Commercial lax Officer, Hyderabad (supra), the Andhra Pradesh High Court found that the activity of the U.P. State Road Transport was not in the nature of trade or commerce and, thus, in respect of sale of discarded vehicle and other scrap, Andhra Pradesh State Road Transport Corporation, Hyderabad has been held not a dealer.

17. In the case of Commissioner of Sales lax v. Sai Publication Fund (Supra), the Apex Court held that if the main activity is not business then any transaction incidental or ancillary would not normally amount to business unless an independent intention to many on business in the incidental or ancillary activity is established. In the said case, the Sai Publication Fund was found involved in spreading message of Saibaba of Shirdi by the publication and sale of books, booklets, pamphlets, photos, stickers and other publications and the trust was not found involved in the activity of trade or commerce. Similar view has been taken by the Calcutta High Court in the case of Cementation Patel (Durgapur) v. Commissioner of Commercial Taxes (supra).

18. The above decisions are not helpful to the applicant inasmuch as in the case of the applicant itself, the Apex Court held that the activity of the railway is of the nature of trade or commerce.

19. In the case of State of Tamil Nadu v. Burmah Shell Oil Storage and Distributing Co. (supra), the sale of scrap and canteen sale has been held liable to tax after the amendment in the definition being ancillary to the business of the applicant inasmuch as the company was admittedly involved in the activity of trade or commerce.

20. After the decision of the Apex court in the case of The District Controller of Stores, Northern Railway, Jodhpur v. Assistant Commercial Taxation Officer (Supra), the law relating to the liability of tax on the sale of iron scrap by the railway had been settled and there was no manner of doubt about the taxability of iron scrap. The applicant ought to have deposited the tax on the sale of iron scrap along with return and if the tax has not been deposited, it was the fault of the applicant. The tax on the iron scrap was the tax due under the Act, thus liable to be deposited within the time specified, along with the return. Since the part of the amount has not been deposited along with the return, the applicant is liable for interest u/s 8(1) of the Act on the non-deposited amount as held by the Apex Court in the case of Commissioner of Sales Tax v. Qureshi Crucible Centre reported in 1993 UPTC 901. The order of the Tribunal is upheld.

21. In the result, revision fails and is accordingly dismissed.