

(2013) 03 AHC CK 0215
In the Allahabad High Court
Case No : Writ Tax No. 642 of 2008

Gaya Deen Kailash Chand

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 06-03-2013

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 15, 15(c), 9(2)

Constitution of India, 1950 — Article 286

Uttar Pradesh Trade Tax Act, 1948 — Section 21, 21(2), 21(4)

Citation : (2013) 4 ADJ 390 : (2013) 59 VST 144

Hon'ble Judges : Ram Surat Ram Maurya, J;Prakash Krishna, J

Bench : Division Bench

Advocate : Kunwar Saksena and Sudeep Dwivedi, for the Appellant; C.B. Tripathi, Special Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Prakash Krishna, J.

Writ Petition (Tax) No. 642 of 2008:

1. By means of this writ petition, the petitioner has challenged the authorization order dated February 22, 2008/February 25, 2008 passed by the Additional Commissioner, Grade-I, Commercial Tax, Allahabad Zone, Allahabad, granting permission u/s 21(2) of the U.P. Trade Tax Act, 1948 for reassessment for the assessment year 2001-02 (Central). The petitioner, a partnership firm is carrying on the business of procuring rice from paddy purchased within the State of U.P. at its rice mill situate at Sirsa, Meja, Allahabad. It is also a recognition certificate holder issued u/s 4B of the U.P. Trade Tax Act for the relevant assessment year, i.e., 2001-02. The petitioner purchased paddy within State of U.P. and paid purchase tax at two per cent. The paddy was converted into rice.

2. The rice thus manufactured out of tax-paid paddy was sold within and outside the State of U.P. The disclosed inter-State sales of rice amounts to Rs.

60,51,075. During the course of the assessment proceeding, the petitioner admitted its liability of tax on aforesaid inter-State sales at four per cent but also claimed adjustment of tax paid in the State of U.P. on the purchases of paddy, u/s 15(c) of the Central Sales Tax Act. The said claim was allowed by the assessing officer by its order dated January 2, 2005. The assessing officer gave an adjustment of Rs. 1,22,245 in respect of tax already paid on purchases of paddy.

3. Subsequently, a notice under proviso to section 21(2) of the U.P. Trade Tax Act was issued to the petitioner on the ground that he was not entitled to adjustment in tax on inter-State sales of rice by an amount already paid on purchases of paddy under the provisions of section 15(c) of the Central Sales Tax Act. The assessing officer sought permission which was granted from the Additional Commissioner (1), Commercial Tax, Allahabad Zone, Allahabad as required u/s 21(2) of the Act to reopen the case and initiate reassessment proceeding as the tax has escaped assessment. The present petition has been filed challenging the said order dated February 22, 2008, granting the permission and the show-cause notice issued u/s 21(2) of the Act by the assessing officer.

4. Heard Shri Kunwar Saksena, learned counsel for the petitioner and Shri C.B. Tripathi, Special Standing Counsel for the State of U.P.

5. The learned counsel for the petitioner submits that the permission granted by respondent No. 2 under proviso to section 21(4) is arbitrary. The submission is that the question with regard to the adjustment of the tax amount paid on the purchases of paddy within the State of U.P. against the Central sales tax was examined and considered by the assessing officer while framing the original assessment order. The assessing officer has now in view of the circular issued by the Commissioner of Trade Tax has changed his opinion, which is not permissible under law. Elaborating the argument, it was submitted that the Commissioner of Trade Tax has exceeded in its jurisdiction in issuing circular dated March 25, 2007 and on that basis, the assessing authority has formed an opinion that the turnover of the petitioner has escaped assessment. It was also submitted that the Commissioner of Trade Tax has exceeded in its jurisdiction in issuing the circular like the present one which interferes with the quasi-judicial power of the assessing authority. Reliance was placed upon a decision of the Division Bench of this court in the case of *Aryaverth Chawal Udyog v. State of U.P.*, (2009) 22 VST 10 (All) .

6. He has also placed reliance upon certain other decisions to buttress his argument that the Commissioner of Trade Tax has no power to issue any such circular which amounts interference in exercise of quasi-judicial function by the authorities below to him.

7. In reply, the learned counsel for the respondents submits that validity of the circular has not been challenged in the present writ petition. In any view of the matter, in the case of *Aryaverth Chawal Udyog v. State of U.P.*, (2009) 22 VST 10 (All) , relied upon by the petitioner, the validity of the circular in question has

been upheld specifically. He further submits that there being no discussion on merits with regard to the relevant provision applicable to the facts of the case, it is a case where the assessing officer has not applied his mind to the relevant statutory provision while granting the adjustment in Central sales tax. No opinion with regard to the section 15(c) of the Central Sales Tax Act was formed by him while framing the original assessment order, therefore, it is not correct to say that the reassessment notice is based on change of opinion.

8. Considered the respective submissions of the learned counsel for the parties.

9. At the very outset, it is desirable to have a look to the pleadings of the parties. In the writ petition, after narrating the facts of the case in paragraph Nos. 1 to 11, it has been stated thereafter that u/s 14 of the Central Sales Tax Act (hereinafter referred to as, "the Act"), paddy and rice amongst others are goods of special importance within a State. Section 15 of the Act has placed certain restrictions and conditions in regard to sale or purchase of declared goods. Thereafter, the petitioner has placed its own interpretation of section 15(c) of the Act to justify that the tax paid on the purchases of paddy in the State of U.P. is liable for adjustment u/s 15(c) of the Act, the assessment order in this regard is justified. In para 19, it has been stated that the impugned notice has been issued u/s 21(2) of the U.P. Trade Tax Act and it is based upon circular letter dated March 30, 2007 issued by the Commissioner. The interpretation placed by the aforesaid circular letter is in violation to the article 286 of the Constitution, sections 14 and 15 of the Central Sales Tax Act and therefore, unsustainable. Further, proceedings for reassessment have been issued on the same material which were available at the time of original assessment and there being no fresh material, the reassessment proceedings are vitiated.

10. Having noticed the pleadings of the petitioner, it is but obvious that there is no challenge with regard to the legality and validity of the circular letter dated March 30, 2007 issued by the Commissioner of Trade Tax. Even then, Sri K. Saksena, learned counsel for the petitioner, argued with great vehemence at his command challenging the validity of the circular on the ground that the Commissioner of Trade Tax (hereinafter called as "the CTT") does not possess any such power. The said plea in the absence of any pleading or relief is not open to be canvassed but since the question of legality and validity of the said circular was put at the forefront of the arguments, we now proceed to deal with it.

11. The main plank of the petitioner's argument is that the impugned circular by the CTT amounts interference in the quasi-judicial function of the assessing authority. The law does not authorize CTT to issue any such circular like the present one which may interfere in the judicial functioning of an authority. Strong reliance was placed on Hindustan Aluminium Corporation Ltd. Vs. The State of Uttar Pradesh and Another, , the following portion of paragraph in particular (page 152 in 41 STC):

In the first place, it is not disputed that the Commissioner of Sales Tax has

already issued a circular to all the Sales Tax Officers and the Assistant Appellate Commissioners on the interpretation to be put on the notification dated May 30, 1975, and informing them that all aluminium ingots should be treated as falling in the category of "metals" and all the other items should be treated as unclassified items. The matter does not rest here. The circular further directs that the instructions contained therein should be faithfully obeyed. The Sales Tax Officer and the Assistant Appellate Commissioner while deciding the appeal may be exercising quasi-judicial functions, but the fact cannot be lost sight of that they are also administrative officers under the direct control of the State Government and the Commissioner of Sales Tax. No statutory provision has been pointed to us authorising the Commissioner of Sales Tax to issue directions of such a nature. The State counsel contended that the assessment order does not indicate that the Sales Tax Officer relied on that notification while making the assessment and, as such even if such a circular is there, that should not be sufficient ground for entertaining the petition. We are not impressed by this argument. In a case where the State Government or the immediate officer, who has supervisory control over its subordinate officer, issues directions which are not warranted by law and wants them to comply with it faithfully, we do not feel that the officer concerned would be able to decide the matter dispassionately. . .

12. In *Mercury Laboratories Pvt. Ltd. Vs. State of U.P. and Others*, , the decision of this court in *Hindustan Aluminium Corporation Ltd. Vs. The State of Uttar Pradesh and Another*, , has been referred. Para 42 in *Mercury Laboratories Pvt. Ltd. Vs. State of U.P. and Others*, , which has been relied upon is reproduced below (pages 285 and 286 in 119 STC):

43. On the strength of the authorities cited from both sides we proceed to decide the controversy in the following manner:

After giving anxious consideration to the arguments raised by the learned counsel for the parties we find that the Commissioner, Sales Tax, had no authority to either issue a directions, instructions, guidelines or message or even suggestion to the assessing authority or the subordinate authority who has to deal with the matter of assessment, impressing upon them in any manner that the "life savings drugs" which have been notified if are being sold in the brand name of the respective companies would not be entitled for exemption.

13. The validity of the circular in question issued by the CTT was directly challenged in a bunch of writ petitions on the ground that the interpretation put by the CTT on section 15(c) of the Act is incorrect. It was also urged that the observations in the circular that the judgment given by the Andhra Pradesh High Court in the Case of *Aitha Narasaiah and Co. and Another Vs. The State of Andhra Pradesh and Another*, , is distinguishable due to peculiar statutory setting, is incorrect.

14. In the case of *Aryaverth Chawal Udyog v. State of U.P.*, (2009) 22 VST 10 (All) , the court has examined the validity of the circular on the merits and

reached to the conclusion that the impugned circular dated March 29/30, 2007 issued by the CTT is in conformity with the plain language of section 15(c) of the Act, vide paragraph Nos. 41 and 42 of the said judgment. The said paragraphs are reproduced below (page 34 in 22 VST):

41. In this view of the matter, we are of the view that there is no illegality in the impugned circular dated March 29/30, 2007 issued by the Commissioner of Trade Tax, which is in conformity with the plain language of section 15(c) of the Central Act.

42. We have also examined the circular dated March 18, 1998. The said circular was issued in the case of new unit. We have perused the circular. There is nothing in the circular which provides the benefit of the reduction of tax leviable under the Central Act on the inter-State sale of rice by the tax levied on paddy. This circular does not help the petitioners.

15. The ratio of the decision is that u/s 15(c) of the Act, adjustment of State tax paid on purchases of paddy cannot be adjusted against the sales tax liability which may arise out of inter-State sales of rice.

16. Taking a note of the aforesaid Division Bench's decision in the case of *Aryaverth Chawal Udyog v. State of U.P.*, (2009) 22 VST 10 (All) and the fact that there is no pleading in the writ petition and there being no such relief challenging the legality and validity of the circular, we are of the opinion that the petitioner cannot be permitted to take a plea not raised in the writ petition, for the first time in the arguments. Even otherwise also, in view of the judgment of this court in the case of *Aryaverth Chawal Udyog v. State of U.P.*, (2009) 22 VST 10 (All) holding that the circular is valid, we are of the view that the challenge made by the petitioner is unsustainable.

17. A bare perusal of the circular would show that it has only invited the attention of the assessing authorities to the fact that the decision given by the Andhra Pradesh High Court in the case of *Aitha Narasaiah and Co. and Another Vs. The State of Andhra Pradesh and Another*, is not applicable due to different statutory set up in U.P. Trade Tax Act. The said view has been found legally correct by the Division Bench of this court in the case of *Aryaverth Chawal Udyog v. State of U.P.*, (2009) 22 VST 10 (All) . Thus, it cannot be said by any stretch of imagination that it amounts to interference in the quasi-judicial function of the authorities of trade tax. Drawing the attention of the authorities discharging quasi-judicial function, to a correct exposition of law, does not amount interference in quasi-judicial function of the authority. All statutory authorities are bound by law and we see nothing objectionable if the attention of such authorities is drawn to the correct proposition of law. It is bounden duty of every trade tax authorities to assess, levy and realize correct trade tax. The circular only facilitates such authorities to discharge quasi-judicial function in conformity with law, smoothly and harmoniously. As a matter of fact, the said circular can be taken as if it is providing assistance to quasi-judicial authority in discharge of

its duties. It is interesting to note that the judgment of *Aryaverth Chawal Udyog v. State of U.P.*, (2009) 22 VST 10 (All) , holding the circular as valid is based on the decision given by the apex court in the case of *Satnam Overseas (Export) through its Partner Vs. State of Haryana and Another etc. etc.*, , wherein the apex court had an occasion to interpret section 15(c) of the Central Sales Tax Act. Although, in the circular, the CTT has independently took the view but is being in conformity with the ratio of *Satnam Overseas (Export) through its Partner Vs. State of Haryana and Another etc. etc.*, is in a sense reminds the trade tax authorities the correct exposition of law.

18. In view of the above discussions, we repel the arguments of the petitioner's counsel relating to the validity of circular of CTT.

19. Then, it was contended that the authorities below was not justified in initiating the proceedings u/s 21 of the Act, even if there is an escapement of turnover. The authorities should have invoked jurisdiction u/s 10B of the U.P. Trade Tax Act, 1948, i.e., revisional jurisdiction of the Act. The above argument was advanced on the strength of a Division Bench decision of this court in *United Tractors, Gorakhpur v. State of Uttar Pradesh* [1997] 105 STC 48 (All) : [1996] UPTC 1185. Firstly, no such plea has been set out either in the body of the writ petition or in the grounds. Secondly, a close reading of the judgment of *United Tractors* [1997] 105 STC 48 (All) : [1996] UPTC 1185 would show that the notice issued u/s 10B of the Act was impugned therein, which is not so here. Even in that case, in para 4 of the report, the court observed that "There may be overlapping of jurisdiction between sections 10B and 21". The court then proceeded on the facts of that case, that the revisional jurisdiction u/s 10B should not have exercised and the case could be reopened u/s 21 of the Act. The court noticed that on earlier three occasions, the proceedings were taken u/s 21 of the Act and the petitioners therein were again reassessed. In view of the pendency of proceedings u/s 21 of the Act, it opined that initiation of proceedings u/s 10B was not called for and unsustainable. The said case was decided on its own peculiar facts where the validity of proceedings u/s 10B of the U.P. Trade Tax Act was in issue, which is not so here. It does not lay down as a rule of universal application that the proceedings u/s 21 of the Act cannot be initiated. The relied upon decision is distinguishable on the facts and has hardly any application here.

20. As next limb of arguments, the learned counsel for the petitioner submits that this court should follow the same course of action as was done in the case of *Aryaverth Chawal Udyog v. State of U.P.*, (2009) 22 VST 10 (All) wherein this court after holding that the circular is valid, has set aside the notice u/s 21 of the Act as it opined that it was issued on account of change of opinion on the basis of material available on record. Reference was made to para 59 of the judgment, which is reproduced below:

It is settled principle of law that the notice u/s 21 of the Act cannot be issued on account of change of opinion on the basis of material available on record.

21. The argument is attractive but on deeper scrutiny, we find that it does not hold the water. The reason is that the notice u/s 21 of the Act in the case of *Aryaverth Chawal Udyog v. State of U.P.*, (2009) 22 VST 10 (All) , is differently worded. The court held that the notice was issued on account of change of opinion. Whether reassessment notice has been issued on account of change of opinion, will depend on the facts of individual cases and may differ from case to case. In para 45 of the judgment, the notice u/s 21 of the Act has been reproduced therein. There the notice proceeds on the footing that besides the other thing, the Additional Commissioner (Grade-I), Commercial Tax, Lucknow, has granted permission u/s 21(2) of the Act, therefore, the case is being reopened. For the sake of convenience, the said notice is extracted below:

22. Copy of impugned notice dated March 11, 2008 u/s 21(2) issued by the Deputy Commissioner (Grade-IV), Commercial Tax, Allahabad has been filed as annexure 6 in the present case, is reproduced below:

emphasis1 supplied

23. A reading of the aforesaid two notices would show that the impugned 24 notice in the present case is based on the basis of Circular No. 2313 dated 29th March, 2007, issued by the CTT informing that where Central sales of rice has been made, the tax paid in the State law on paddy cannot be adjusted against the tax liability on inter-State sale of rice. Such adjustment is impermissible and if such adjustment has been made in the order, proceeding u/s 21(2) is desired. Meaning thereby, the notice u/s 21 is based on such circular of CTT and the circular as discussed hereinabove contains the correct exposition of law. The question is whether in this fact-situation, the initiation of reassessment proceeding can be said to be valid or not. Together with it, it was argued by the petitioner's counsel that while framing the assessment order, the point in issue was discussed and therefore, taking a different view amounts to change of opinion, requires consideration.

24. Sub-section (1) of section 21 of the Act confers power on the assessing authority to reopen the assessment order if the assessing authority has reason to believe that--

(i) whole or part of any turnover of a dealer in any assessment order or part thereof ;

(ii) has escaped assessment to tax or

(iii) has been under-assessed or

(iv) has been assessed to tax at a rate lower than at which it is assessable under this Act or

(v) any deductions or exemptions have been wrongly allowed in respect thereof.

(vi) the assessing authority may issue notice . . .

25. On a plain and simple reading of section 21, it is crystal clear that any deduction or exemption which has been wrongly allowed in the case of an assessee is a case of escaped assessment. Rider is that such assessing authority should have reason to believe that whole or part of turnover has escaped assessment. The condition precedent, namely, the formation of opinion on the part of assessing authority that there is reason to believe that the case in which the action is contemplated falls within the ambit of at least one of the several contingencies mentioned u/s 21. The reason to believe must have rational connection or link between the material coming in possession of assessing authority and the escapement of turnover of the assessee from assessment in a particular year. To put it differently, the assessing authority must form opinion objectionably on reasonable ground that the turnover has escaped assessment. (See: Kalpana Kala Kendra v. Sales Tax Officer [1989] 75 STC 198 (All)).

26. In The Commissioner of Sales Tax, U.P. Vs. Bhagwan Industries (P) Ltd., Lucknow, , it has been held as follows (page 299 in 31 STC):

The words "reason to believe" in section 21 of the U.P. Sales Tax Act convey that there must be some rational basis for the assessing authority to form the belief that the whole or any part of the turnover of a dealer has, for any reason, escaped assessment to tax for some year... if there are, in fact, some reasonable grounds for the assessing authority to believe that the whole or any part of the turnover of a dealer has escaped assessment, it can take action under the section. Reasonable grounds necessarily postulate that they must be germane to the formation of the belief regarding escaped assessment. If the grounds are of an extraneous character, the same would not warrant initiation of proceedings under the above section. If, however, the grounds are relevant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under the section. Whether the grounds are adequate or not is not a matter which would be gone into by the High Court or the Supreme Court, for the sufficiency of the grounds which induced the assessing authority to act is not a justiciable issue. What can be challenged is the existence of the belief but not the sufficiency of reasons for the belief. At the same time, the belief must be held in good faith and should not be a mere pretence.

(emphasis supplied)

27. In Sales Tax Officer, Ganjam Vs. Uttareswari Rice Mills, : [1973] 89 ITR 6 (SC), the apex court has held while considering the question with regard to validity of reassessment proceedings, the approach has to be practical and not pedantic. Any view which would make opening words of section 12(2) (Orissa Sales Tax Act dealing with reassessment), unworkable has to be avoided.

28. Keeping the principle of law as delineated above, it would be clear that it is a case of grant of adjustment in the tax in the assessment order which is not permissible. Therefore, it amounts escapement of tax. At this juncture, it is

necessary to have a look of the assessment order. Copy of the assessment order u/s 9(2) of the Central Sales Tax Act has been filed as annexure 1 to the writ petition. Assessing Officer has granted adjustment of tax paid on the purchase of paddy u/s 15(c) of the Central Sales Tax Act. The said order is bereft of any discussion with regard to the ambit and scope of section 15(c) of the Central Sales Tax Act.

29. In *Rawalpindi Flour Mills (P) Ltd. v. State of U.P.* [1998] UPTC 172, a Division Bench of this court has held as follows:

The validity of the notice u/s 21 depends on the question whether the petitioner had been allowed the exemption in the original assessment proceedings on a wrong premise to which it was not entitled under law. This question and the other related matters on which the petitioner may like to assail reassessment proceedings can legitimately be raised and canvassed before the assessing authority itself. If for some reason the decision goes against the petitioner, there is adequate forum provided under the Act where the aggrieved person can seek redressal of his grievances.

(emphasis supplied)

30. Viewed as above, it is a case where the assessing authority has wrongly allowed deduction of tax paid on purchase of paddy while computing the payment of sales tax liability of Central sales tax. The assessment order would show that the assessing officer did not satisfactorily deal with the point whether such deductions are permissible or not within the meaning of section 15(c) of the Central Sales Tax Act. A Division Bench decision of this court in the case of *Sonpal Sanjay Kumar v. Sales Tax Officer* [1997] UPTC 73, has held that where the assessing authority has not applied his mind on a particular issue at the time of original assessment as a consequence of which turnover has escaped assessment, the proceedings u/s 21 of the Act is valid.

31. Section 21(2) under which the permission has been granted for opening of the assessment, provides that permission can be granted even in the case where there is change of opinion. In *S.K. Traders Vs. Additional Commissioner, Grade-I, Trade Tax and Assistant Commissioner (Assessment), Trade Tax*, it has been held that the change of opinion may arise even if some material has been brought on record after assessment has been completed or it may be because of result of lack of care or inadvertence on the part of the assessing officer. The relevant paragraphs is reproduced below (page 636 in 26 VST):

50. First proviso to sub-section (2) of section 21 of the Act empowers the authority to initiate proceedings for reassessment even in the case where there is a change of opinion. The change of opinion may arise even if some material has been brought on record after assessment has been completed or it may be because of result of lack of care or inadvertence on the part of the assessing officer.

51. In the case of Shyam Babu Vaishya and Co. and Another Vs. Assistant Commissioner, Trade Tax and Others, , a Division Bench of this court has held that section 21 of the Act is wider than that of section 147(a) of the Act and the escapement envisaged by section 21 of the Act need not necessarily spring from a source extraneous to the original record and action u/s 21 can be taken on the basis of material already on record at the time of the original assessment, if the escapement of assessment to tax was a result of lack of care or inadvertence on the part of the assessing officer. In the present case the escapement has resulted on account of lack of care or inadvertence on the part of the assessing officer. In the facts and circumstances of the case as there is binding decision of the this court in the case of Kabar Khana, Turkmanpur [1985] ATJ 73 wherein it has been held that goods purchased from Kabar is not exempt from tax but is liable to tax as unserviceable goods the proceedings can therefore be taken on mere change of opinion.

32. Having regard to what has been said above, we are of the opinion that the Additional Commissioner Grade-I/respondent No. 2 has committed no error in exercise of power u/s 21(2) of the Act in granting the impugned permission permitting the assessing officer to initiate the proceeding for reassessment by the order dated February 22, 2008 as contained in annexure 4 of the writ petition. The consequent notice for reassessment u/s 21(2) given by the assessing authority dated March 11, 2008, annexure 6, to the writ petition is also valid.

33. There is one more aspect of the case yet. The purchase tax paid in the State of U.P. by the petitioner, as held in the case of Satnam Overseas (Export) through its Partner Vs. State of Haryana and Another etc. etc., and Aryaverth Chawal Udyog v. State of U.P., (2009) 22 VST 10 (All) cannot be adjusted against the Central sales tax. The assessing officer has, thus, wrongly given adjustment of Rs. 1,22,245. Realizing the mistake, the assessing officer wants to correct it. Whether a writ court can prevent the assessing officer to correct the mistake when law envisages such correction u/s 21 of the Act. The answer is obviously "No". No writ can be issued to prohibit a person to correct a legal mistake. A writ jurisdiction is meant for doing justice and not to perpetuate injustice or technicalities.

34. We, therefore, find no merit in the writ petition. The writ petition is dismissed but no order as to costs.

Writ Petition (Tax) No. 1394 of 2009:

35. The learned counsel for the petitioner adopted the arguments of the petitioner's counsel in the connected matter and submitted that there is nothing further to add. The writ petition is dismissed for the reasons given in writ petition (Tax) No. 642 of 2008 and the said judgment shall form part of this order.

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