
(2009) 11 AHC CK 0016
In the Allahabad High Court

General De Confiteria India Ltd.

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 10-11-2009

Acts Referred:

Constitution of India, 1950 — Article 141

Citation : (2010) 33 VST 569

Hon'ble Judges : Subhash Chandra Nigam, J;Prakash Krishna, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Prakash Krishna, J.—Raising a short but interesting controversy, the present writ petition has been filed for quashing or setting aside the proceedings initiated against the petitioner u/s 21(2) of U.P. Trade Tax Act (hereinafter referred to as the Act) relating to the assessment years 1997-98 (both U.P. and Central) and 1998-99 (both U.P. and central).

2. Factual matrix, which is almost undisputed, may be noticed in brief. The petitioner, a company, incorporated under the Companies Act, is engaged in the manufacture and sale of candies, bubblegum and chewing gum. It is selling its products- toffees, bubblegum and candies within the State of U.P. On 3-1-2000, the Deputy Commissioner (Assessment)-IX, Trade Tax, Ghaziabad, holding that bubblegum sold by the petitioner in the State of U.P. is liable to be taxed as "confectionery item", at the rate of 5%, passed the assessment orders. Similarly, in the next assessment also, it was held that bubblegum is liable to be taxed at the rate of 5%, The assessing authority took the above view regarding the rate of tax on bubblegum on the basis of a judgment/ order passed by the Tribunal in the case of a different assessee, but relied upon by the petitioner.

3. Thereafter, the assessments for the above two assessment years have been sought to be reopened in exercise of powers conferred on the authority u/s 21 of U.P. Trade Tax Act. A proposal for permission to reopen was submitted on the

ground that in case of Commissioner of Trade Tax v. Associated Distributors, the Tribunal has held that bubblegum and chewing gum are liable to be taxed as "unclassified item" and they are not "confectionery". In other words, these items are liable to be taxed at the rate of 10%, instead of 5%. The judgment of the Tribunal in the case of M/S Associated Distributors has been set aside in TTR No. 656 of 2001 dated 9-11-2001 which is subject matter of appeal before the Apex Court. The Apex Court in SLP on 7-10-2002 having passed the following order "Stay to continue, however, the State shall not proceed against the respondent herein for the recovery of the balance of the amount due to it", there is reason to believe that chewing gum and bubblegum have been wrongly taxed at the rate of 5% while they should be taxed at the rate of 10% and as such, there is escapement of turnover. It has been further reported by the Deputy Commissioner (Assessment) IX, Trade Tax, Ghaziabad in its order dated 3-3-2004 while seeking permission under Sub-section (2) of Section 21 of the Act to reopen the assessment that even if it amounts to "change of opinion" the reassessment proceedings are required to be initiated in view of the aforesaid order dated 7-10-2002 passed by the Apex Court. The Additional Commissioner, Grade-I, Trade Tax, Sahibabad Zone, Ghaziabad in the light of the proposal sought by the assessing authority, referred to above, issued notices to the petitioner asking it to appear and show cause as to why the permission sought may not be granted.

4. In reply, the petitioner submitted that it applied for and has been permitted by the Apex Court to intervene in the matter relating to SLP of CTT v. Associated Distributors. It was further pleaded that in view of the judgment of the Apex Court in the case of Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, , there is a difference in between an "interim order" and a "final order" passed by a Court. A stay order is operative from the date of passing of the order and does not mean that the order under appeal has been wiped out from existence. It was stated that since the matter is subjudice before the Apex Court, at this juncture the permission to reopen the case u/s 21(2) of the Act would be unjust and against the spirit of law.

5. Without awaiting the outcome of the reply, as was submitted by the petitioner, the petitioner rushed to this Court by filing the present petition and sought quashing of the proceedings initiated against it u/s 21(2) of the Act.

6. A counter affidavit on behalf of the respondents has been filed wherein the action taken by them has been sought to be justified on the ground that the stay order passed by the Apex Court consists of two parts. The first part is staying the judgment of the High Court and to continue the same. The second part which reads- "However the State shall not proceed against the respondent herein for the recovery of the balance of amount due to it." means that the respondent therein shall not be asked to pay the balance amount due to the State. Emphasis has been laid on the word "respondent" and it has been stated that the present petitioner is not "respondent" therein. It has been further stated that the

permission vide letter No. 6422 dated 24-3-2004 was granted by the Commissioner concerned for the assessment year 1997-98 (Provincial and Central). The permission for reassessment for the assessment year 1998-99 (Provincial and Central) is still awaited. Further in response to the notices issued by the assessing officer in consequence of the permission granted to it, the petitioner appeared on 31-3-2004 and filed reply. In other words, the petitioner has submitted to the jurisdiction of the assessing authority.

7. By way of supplementary affidavit, the petitioner has filed the permission dated 24-3-2004, granted by the Additional Commissioner, Grade-I, Trade Tax, Zone Ghaziabad and also the notices issued by the assessing authority initiating the reassessment proceedings in consequence thereof.

8. Heard the learned Counsel for the parties and perused the record.

9. It is not out of place to mention here that the Apex Court has finally allowed the SLP filed by the department and reversed the judgment of this Court which is reported in 2002 UPTC 173 . The judgment of the Apex Court is reported in Commissioner of Trade Tax, U.P. Vs. Associated Distributors Ltd., . The Apex Court in no uncertain terms has held that bubblegum and chewing gum are liable to be taxed as "unclassified" items in the relevant assessment year and not as "confectionery". In other words, these items were liable to be taxed at the rate of 10% and not at the rate of 5%. This position was not disputed by the learned Senior Counsel for the petitioner even.

10. Sri Dhruv Agrawal, learned Senior Counsel for the petitioner appearing along with Sri Nikhil Agrawal, Advocate, submits that at the relevant point of time when the notices were issued for permission to reopen the assessments, the judgment of the High Court holding that these items are liable to be taxed at the rate of 5% being "confectionery items" was holding the field, the passing of the stay order by the Apex Court will not take away or wipe out the judgment of the High Court and as such, there was no material before the authority concerned to form the belief that the turnover of the dealer petitioner has escaped assessment. With regard to the subsequent development i.e. the judgment of the Apex Court reversing the judgment of the High Court is concerned, he submits that the reason cannot be supplemented and while judging the validity of the initiation of the proceedings, the facts as they stood at the relevant point of time, should only be taken note thereof. In other words, the submission is that the judgment of the Apex Court is not relevant for the present moment while considering the question of legality and validity of the initiation of reassessment proceedings is concerned. In contra, the learned Standing Counsel, on the other hand, submits that in view of the authoritative pronouncement of the Apex Court in the case of M/S Associated Distributors (supra), there is no room for argument that chewing gum and bubble gum are not "confectionery items". These items, according to the judgment of the Apex Court, were "unclassified items" at the relevant point of time and as such, it is a clear case of escapement of turnover as tax has been levied at lower rate on the commodity in question.

11. Considered the respective submissions of the learned Counsel for the parties.

12. The facts are not much in dispute. Chewing gum and bubblegum were taxed at the rate of 5% in the original assessment proceedings treating them to be items of confectionery. Ultimately, the controversy with regard to rate of tax on these items travelled to the Apex Court and the Apex Court by its judgment, referred to above, has held that these items are liable to be taxed at the rate of 10% under relevant notification in the State of U.P. and they are not items of confectionery but are unclassified items.

13. The sole contention of the petitioner is that at the relevant point of time, the judgment of the High Court was in operation holding that these items are taxable at the lesser rate and by staying the operation of the judgment of the High Court, the effect of the judgment of the High Court was not washed of and, therefore, the very initiation of reassessment proceedings is without jurisdiction. The said argument may be attractive, but does not hold good.

14. The Judges interpret the law and declaration of law operates not from the date of judgment but from the date of legislation. To put it in different words, so far as interpretation of law is concerned, a judgment operates retrospectively generally. However, as was done by the Apex Court in the case of *I.C. Golak Nath and Others Vs. State of Punjab and Another*, a judgment may operate prospectively, provided the judgment says so. In this case it has been noticed that the Judges do not make law but only discover or find true law. The law has always been the same. If a subsequent decision changes the earlier one, the latter decision does not make the law but only discovers the correct principle of law. The result of this view is that it is necessarily retrospective in operation. But as suggested by some Jurists, the doctrine of "prospective overruling" is an "useful judicial tool". We find that in the present case, the Apex Court in the case of *M/S Associated Distributors (supra)* has not said so that the judgment would not be applicable retrospectively.

15. *Salmond on Jurisprudence*, Tenth Edition, by Glanville L. Williams at page 189 states as follows:

...the theory of case law is that a Judge does not make law; he merely declares it; and the overruling of a previous decision is a declaration that the supposed rule never was law. Hence, any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision. The overruling is retrospective, except as regards matters that are *res judicata*, or accounts that have been settled in the meantime.

16. Having said as above, we are of the view that in the case on hand, the law that chewing gum and bubblegum are taxable as unclassified items and, therefore, liable to be taxed at the rate of 10% has been the law throughout with effect from the date of enforcement of the relevant notification. It shall be deemed to be from the date of notification and as such, it is but a clear case of escapement of turnover as these items have been taxed at a lower rate. Learned

Senior Counsel could not dispute that even today a notice for reassessment subject to period of limitation may be issued to tax these items accordingly. But, he maintains that the impugned notices are bad, specially in view of the pronouncement of the Apex Court in the case of Shree Chamundi Mopes Ltd., referred to above. Reference was made to paragraph-10 of the judgment wherein the difference in between an "interim order" staying operation of the order under challenge and a "final order" has been noticed by the Apex Court. There is no quarrel to the said proposition but its applicability to the facts of the present case is altogether a different aspect. In the case on hand, the appeal has been allowed by the Apex Court and the interim order by fiction of law stood merged with the final order. Article 141 of the Constitution of India provides that the law declared by the Supreme Court shall be binding on all the courts within the territory of India. It is the duty of every court, High Court or subordinate courts and the authorities to follow the decision of the Apex Court. It would amount to judicial impropriety for the courts and the authorities below to the Apex Court, to ignore a well settled position of law as a result of judicial pronouncement of the Supreme Court and pass a judicial order contrary to it. See- Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another,

17. Keeping the above principle of law in the background of mind, it can be safely said that the department possess relevant material to form a belief that the turnover of the petitioner escaped assessment. The law declared by the Apex Court shall be deemed to be in existence from the date of notification. The interim order which was passed in SLP and was operative at the time of initiation of proceedings stood merged in the final order of the Apex Court and as such, there was material before the authority concerned to form a belief that the turnover of the dealer has escaped assessment.

18. There is yet another aspect of the case. u/s 21(2) of the Act, permission to reopen a concluded assessment proceedings can be granted notwithstanding the fact that such assessment or reassessment may involve change of opinion. The proviso to Sub-section (2) of Section 21 of the Act expressly says that notwithstanding a change of opinion the Commissioner, Trade Tax on being satisfied on the basis of the reasons recorded by the assessing authority that it is just and expedient so to do, authorise the assessing authority to reopen the assessment. The expression used "just and expedient" in the said provision also supports the above view.

19. Strong reliance was placed on a Division Bench decision of this Court in K.N. Agrawal v. Commissioner of Income Tax (1991) 189 ITR 769. It was a case under Income Tax Act and the Court was considering scope of Section 263 of the Income Tax Act. The said provision empowers the concerned authority to revise the assessment order, after giving notice to the assessee. The said section has nothing to do with the scope of reopening of a concluded assessment order on the ground of escapement of income or turnover, as the case may be. It was held that the orders of the Tribunal and High Court are binding upon the assessing

authority and the assessing authority cannot ignore them merely on the ground that the Tribunal's order is subject matter of revision in the High Court or that the High Court's decision is under appeal before the Supreme Court and in this connection it was held that permitting the assessing authority to take such a view would introduce a judicial indiscipline. The said decision has no application at all. Neither there is any similarity with regard to the facts or the principle involved herein. The said decision rests on a different factual and legal set up and has no application even remotely. Here, there is no question of any judicial indiscipline in as much as the Act authorises to seek permission for reopening a concluded assessment after the expiry of normal period of limitation by sending a proposal to the concerned Commissioner and the concerned Commissioner, after examination of the proposal and attending facts of the case, may or may not grant permission/sanction within the parameters of Section 21(2) of the Act. Noticeably, the question of jurisdiction to initiate reassessment proceedings was not a subject matter in issue in the case of K.N. Agrawal (supra).

20. Lastly, reliance was placed on the proposition in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, that the reasons cannot be supplemented by way of affidavits and the validity of an order should be judged on the basis of the reasons contained therein. The said argument is wholly misconceived and has no application to the issue involved herein.

21. There is yet another reason not to interfere in the present writ petition. In Prestige Lights Ltd. Vs. State Bank of India, the Apex Court has held that a prerogative remedy is not a matter of course. It is a constitutional remedy not as a matter of right. Discretion has been conferred on a court to refuse a writ even if the impugned order is illegal. The High Court has power to refuse the writ if it is satisfied that there was no failure of justice. Unless the Court is satisfied that justice of the case requires it, a writ court may refuse to interfere in a matter. See- A.M. Allison Vs. B.L. Sen,

22. Applying the above principle to the facts of the present case together with the judgment of the Apex Court in the case of M/S Associated Distributors Ltd. (supra), it will be travesty of justice if by way of judicial engineering, the relief is granted to the petitioner by permitting it to pay the tax at a lower rate, contrary to the judgment of the Apex Court.

23. There is one more ground on which the present petition must be dismissed. The petition, as framed, is directed against a show cause notice issued by the Additional Commissioner as to why the permission/sanction should not be granted. The petitioner rushed to this Court, without waiting for the outcome of its reply to show cause. That is, before an order granting the permission could be passed. For the assessment year 1998-99, no order yet has been passed and the matter is pending due to the stay order granted in the present writ petition.

23. In view of the above discussions, we do not find any merit in the writ petition.

24. The writ petition is dismissed, but no order as to costs.