
(2011) 07 UK CK 0086

In the Uttarakhand High Court

Case No : Writ Petition No. 496 (M/S) of 2009

Gitanjali Associates

APPELLANT

Vs

State of Uttarakhand and Others

RESPONDENT

Date of Decision : 06-07-2011

Acts Referred:

Uttar Pradesh Reorganisation Act, 2000 — Section 87
Uttar Pradesh Trade Tax Act, 1948 — Section 4A, 5
Uttarakhand Value Added Tax Act, 2005 — Section 76, 76(6)

Citation : (2011) 2 UD 86

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Tarun Agarwala, J.—M/s Bhushan Steel Ltd. is engaged in the manufacture of steel and iron in Uttar Pradesh and holds an eligibility certificate u/s 4-A of the U.P. Trade Tax Act pursuant to the notification dated 21st February, 1997 granting exemption from payment of tax for a period of 15 years from 31st December, 1998 to 30th December, 2013 or to the extent of 150% of the fixed capital investment which was made within the specified period of 5 years as provided in Clause 3 (a) of the notification dated 21st February, 1997. On 9th November, 2000, the State of Uttaranchal (now Uttarakhand) was created under the U.P. Reorganization Act, 2000 and in view of Section 87 of the U.P. Reorganization Act, 2000, all enactments, namely, the Acts, Rules and Notifications which were in force in the State of Uttar Pradesh were made applicable to the State of Uttarakhand. Consequently, the notification issued u/s 4-A of the U.P. Trade Tax Act also became applicable in the State of Uttarakhand. In this regard, a Notification No. 50 dated 26th December, 2000 was issued by the State of Uttaranchal, u/s 5 of the U.P. Trade Tax Act for granting exemption from payment of tax in respect of the goods which was manufactured in a unit established in the State of Uttar Pradesh and who possessed an eligibility certificate issued u/s 4-A of the U.P. Trade Tax Act whose validity commenced

prior to 9th December, 2000.

2. On 1st October, 2005, Uttaranchal Value Added Tax Act, 2005 (hereinafter referred to as "the Act") was enacted repealing Uttaranchal (U.P. Trade Tax Act, 1948) Adaptation and Modification Order, 2002. Under this Act, whatever tax was payable by a selling dealer holding an eligibility certificate whose unit was located either in Uttar Pradesh or in the State of Uttarakhand was exonerated from payment of tax and was not required to realize the tax from the purchasing dealer. This provision was provided so that the benefit of exemption under the eligibility certificate could reach the ultimate purchaser. The benefit of exemption to the subsequent purchaser is provided u/s 76 of the Act which provides for grant of benefit of Input Tax Credit to the purchaser who was purchasing the goods from an exempted unit. For facility, the provision of Section 76(6) of the Act, which is relevant to the controversy involved, is extracted hereunder:

"76. Moratorium for Payment of Tax-

(1) Notwithstanding anything contained in this Act, where the State Government is of the opinion that it is necessary so to do for increasing production of any goods or for promoting the development of any industry in the State generally or in any district or part of a district in particular, it may on application or otherwise in any particular case or generally, by notification declare that to the dealers running new units whose date of starting production falls on a date prior to the date of commencement of this Act and dealers owning manufacturing units which have undertaken expansion, diversification or modernization or backward integration prior to the date of commencement of this Act and if such dealers hold an eligibility certificate issued under the provisions of Section 4-A of the Uttarakhand (The Uttar Pradesh Trade Tax Act, 1948) Adaptation and Modification Order, 2002, rules made or notifications issued thereunder, moratorium for payment of admitted tax in lieu of exemption from tax on sale of goods whether wholly or partly or at reduced rate, will be allowed subject to the conditions given in this section and such other conditions as may be prescribed or as the State Government may, by notification in the Gazette, specify.

(2)

(3)

(4)

(5)

(6) Subject to other provisions of this section, the dealers holding eligibility certificate either granted under the provisions of the Uttarakhand (The Uttar Pradesh Trade Tax Act, 1948) Adaptation and Modification Order, 2002 before the date of the commencement of this Act or who may be granted eligibility certificate under Sub-section (5), shall be eligible to tax concessions or, as the case may be, for the facility of moratorium for payment of tax in lieu of exemption from tax, as per provisions of Section 4-A of the repealed Act and the

Rules made or relevant Notifications issued thereunder, subject to the following conditions and restrictions, namely:

(a) the dealers who had opted for moratorium for payment of tax in lieu of exemption from tax, shall be eligible for the facility of moratorium to the extent of aggregate amount of hundred percent of the amount of exemption from tax mentioned in the eligibility certificate and fifty percent of the amount of fixed capital investment mentioned in the eligibility certificate less aggregate of such amount in respect of which facility of moratorium for payment of tax has been availed during the period before the commencement of this Act, for the period remaining on that date out of the maximum period mentioned in the order of moratorium.

(b) the dealers who were enjoying exemption from tax for any period before the commencement of the Ordinance, may, either-

(i) continue to do so for the period remaining on that date out of the maximum period mentioned in eligibility certificate, and to the extent of remaining balance amount (amount of exemption from tax mentioned in the eligibility certificate less the aggregate of amount of exemption from tax as has been availed before the date of commencement of this Ordinance); or

(ii) opt, in the prescribed manner, for benefit of moratorium for payment of tax in lieu of exemption from tax and such units shall be eligible for facility of moratorium to the extent of aggregate amount of hundred percent of the amount of exemption from tax mentioned in the eligibility certificate and fifty percent of the amount of fixed capital investment mentioned in the eligibility certificate less the aggregate of amount of exemption from of tax as has been availed before the date of commencement of the Ordinance, for the period remaining on that date out of the maximum period mentioned in the eligibility certificate:

Provided that if the dealer does not choose either of the two options, within 30 days of the commencement of this Act, it shall be presumed that the dealer desires to continue as per provision (i) above.

(c) any taxable dealer purchasing goods from such dealer holding eligibility certificate and who is exempted from tax, whether wholly or partially, shall be entitled to Input Tax Credit of the amount of tax charged in the sale invoice of the selling dealer and for this purpose the selling dealer shall append the following certificate in the sale invoice regarding -

Certificate "Certified that the dealer is entitled to exemption from tax @-----as per Eligibility Certificate No-----dated-----according to which the exemption amount in this Invoice comes to Rs. -----."

3. A perusal of Section 76(6)(b) indicates that dealers who were enjoying exemption of tax for any period prior to 1.10.2005 when the Act came into force would also be entitled for exemption for the remaining period of exemption.

4. Section 2(17) defines "Input Tax". For facility, the said provision is extracted hereunder:

2 (17) "Input Tax" in relation to any registered dealer means a tax paid or payable under this Act by the dealer to another registered dealer on the purchase of any taxable goods other than Special Category Goods in the course of business for re-sale or for use in manufacturing or processing of such taxable goods for sale or for use as containers or packing materials for packing of such manufactured goods.

5. Section 76(6)(c) refers to the grant of Input Tax Credit by a registered purchasing dealer from a dealer who is holding an eligibility certificate and exempted from payment of tax whether wholly or partially to the extent of the tax charged in the sale invoice of the selling dealer and, for this purpose, the selling dealer is required to give a certificate in the sale invoice itself. The aforesaid provision indicates that even though a selling registered dealer who is holding an eligibility certificate and who is exempted from payment of tax and consequently, cannot charge the tax in the sale invoice, nonetheless, for the purpose of giving Input Tax Credit the purchaser has to provide a certificate indicating that he is entitled to exemption from tax to the extent of the amount of tax in respect of that particular invoice.

6. In the light of the aforesaid provisions, the Petitioner was purchasing iron and steel from M/s Bhushan Steel, who was also a registered dealer in the State of Uttarakhand and who held an eligibility certificate u/s 4-A of the Act. The sale invoice issued by the selling dealer, namely, M/s Bhushan Steel, was also providing a certificate in the sale invoice indicating that the dealer is holding an eligibility certificate which is valid and also indicated the amount of tax payable. On the basis of this sale invoice, the Petitioner was getting the necessary set off of the tax.

7. It transpires that the Commissioner, Commercial Tax, Dehradun, issued a circular dated 11.4.2008 indicating that in view of the amended provision of Section 76(6)(c) of the Act, Input Tax Credit can only be availed of by the purchasing dealer in the eventuality of the purchasing dealer actually paying the tax to the seller. Since the actual tax had not been paid by the Petitioner to the selling dealer, the Deputy Commissioner (Assessment) Commercial Tax issued a notice dated 3rd March, 2009 for the Assessment Year 2008-09 indicating therein that the Petitioner was not entitled for Input Tax Credit since the Petitioner had not actually paid the tax to the selling dealer and was consequently not liable for any set off on the said amount of tax. The Petitioner, being aggrieved by the issuance of such notice, has filed the present writ petition praying that the Respondents be restrained from imposing any tax pursuant to the notice dated 3rd March, 2009 and further prayed that the circular dated 17th April, 2008 insofar as it relates to the denial of Input Tax Credit on the goods purchased from the selling registered dealer holding an eligibility certificate, be quashed.

8. The Respondents in the counter affidavit have admitted that the Petitioners are purchasing iron and steel from M/s Bhushan Steel, who holds an eligibility certificate and is exempted u/s 4-A of the U.P. Trade Tax Act. The Respondents contend that u/s 76(6)(c), the Petitioner would be entitled to Input Tax Credit only when he has paid the tax on the purchase of his goods and if the Petitioner has not paid any tax on his purchase, he would not be entitled to any Input Tax Credit.

9. In the light of the conflicting stand taken by the parties, the Court has heard Sri Bharat Ji Agarwal, the learned Senior Counsel assisted by Sri S.K. Posti and Sri Shubham Agarwal, the learned Counsel for the Petitioner and Sri Sudhir Kumar, the learned Brief Holder for the State.

10. The question for determination is, whether the Petitioner is entitled for Input Tax Credit u/s 76(6)(c) of the Act on the purchase value of the raw material which the Assessee had purchased from a dealer who is exempted from payment of tax u/s 4-A of the Act.

11. The crucial words to be interpreted u/s 76(6)(c) are "shall be entitled to Input Tax Credit of the amount of tax charged in the sale invoice of the selling dealer". What does the words "tax charged" mean?

12. Under the Value Added Tax Act, the tax is payable at every point of sale on value addition. The Act also provides for the set off of the tax if it has been paid or payable by the selling dealer. The said amount of tax can be adjusted or set off by way of Input Tax Credit from the tax which is payable by the purchasing dealer on its subsequent sale. Section 2(17) of the Act defines "Input Tax Credit", which means a tax paid or payable by a dealer to another registered dealer on the purchase of any taxable goods. Section 76(6)(c) provides for the grant of benefit of Input Tax Credit to the purchaser who was purchasing the goods from the exempted units. Section 76(6)(c) is in two folds, namely,

(a) the purchasing dealer is entitled to Input Tax Credit who has purchased the goods from the selling dealer holding an eligibility certificate of the tax charged on the invoices.

(b) The Input Tax Credit of the amount of exemption from the tax as per the eligibility certificate.

13. Section 76(6)(c) stipulates that the purchasing dealer would be entitled to Input Tax Credit of the amount of tax charged in the sale invoice of the selling dealer.

14. The manner in which the said tax is payable has not been described. It only uses the words "tax charged". The payment of tax can be done by tendering the amount in cash or by cheque or by a Bank draft. It can also be done by way of adjustment/set off. There is no prohibition in the Act by which the payment of tax could not be done by way of an adjustment.

15. Let us also consider from the side of the selling dealer. The amount of tax determined and payable by the selling dealer is given due adjustment in the eligibility certificate. Such adjustment amounts to payment of tax or receipt of tax by the taxing Department and consequently, the set off or the Input Tax Credit is required to be given u/s 76(6)(c) to the purchasing dealer.

16. The word "charge" as defined in Concise Oxford English Dictionary (10th Edition), means "a demand (an amount) as a price for a service rendered or goods supplied". Words & Phrases Permanent Edition defines "charge" as "to lay on or impose as a load, tax, or burden; to tax or demand a price for a thing or service". Websters 3rd New International Dictionary (Unabridged) defines charge as "to impose a pecuniary burden".

17. From the aforesaid, it is clear that the words "tax charged" does not mean the tax actually paid by the purchasing dealer. It only refers to a liability which has been ascertained or quantified. It is only a demand which is reflected in the sale invoice and which is liable to be adjusted. The expression "tax charged" has to be understood in the context as explained aforesaid.

18. In Commissioner, Trade Tax, U.P. Lucknow v. Shri Mahaveer Rolling Mills (P) Ltd., Fazal Ganj, Kanpur 2010 U.P.T.C. 977, the Court held that it was not necessary that for adjustment the tax had to be physically paid and that the same could be adjusted. The Court held:

11. The Scheme of the Act envisages issuance of eligibility certificate to dealer granting exemption u/s 4-A of the Act. The said eligibility certificate discloses the amount to the extent of which exemption is permissible to the dealer and the time limit during which said exemption can be availed. The sale and purchase of the goods of the dealer are accounted for and the tax liability on the same on being determined is periodically adjusted from the limit of the exemption provided in the eligibility certificate. In this way there is assessment of tax on the sale and purchase of the dealer and corresponding adjustment of the tax payable by him from the eligibility certificate. Accordingly, there is payment of tax in the books by way of adjustment without actual payment of tax.

19. In Associated Cement Companies Ltd. v. State of Bihar and Ors. 2004 U.P.T.C. 1226, the question was whether the Assessee was liable to adjust the entry tax paid under the Entry Tax Act while computing the tax payable under the Act. The Supreme Court, after analyzing the provisions, held that the liability to pay the tax under the Bihar Finance Act would be reduced to the extent of entry tax paid u/s 3 of the Bihar Tax on Entry of Goods Act and that the benefit of adjustment was available under the Bihar Finance Act even though no tax was payable because of the exemption under the Bihar Finance Act. The Supreme Court in the aforesaid judgment held that "exemption" is freedom from liability, tax or duty and that a liberal and a strict construction of an exemption provision is to be invoked at different stages. When the question is whether a subject falls in the notification or in the exemption clause, then it being in the nature of an

exception is to be construed strictly and against the subject but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction. This view of the Supreme Court was reiterated in the light of the earlier judgments of the Supreme Court in *Union of India and others Vs. M/s. Wood Papers Ltd. and another*, *Mangalore Chemicals and Fertilisers Ltd. Vs. Deputy Commissioner of Commercial Taxes and others*, .

20. In the light of the aforesaid, the question of exemption arises only when there is a liability. Exigibility to tax is not the same as liability to pay tax. The former depends on a charge created by the Statute and latter on computation in accordance with the provisions of the Statute and Rules framed thereunder, if any.

21. In the present case, the liability to pay tax chargeable u/s 3 of the Act is different from quantification of the tax payable on assessment. The liability to pay tax and actual payment of tax are conceptually different and if there was an exemption, the dealer would be required to pay the tax in terms of Section 3 of the Act. In the light of the aforesaid, the Petitioner was liable to pay tax under the Act but for the exemption. Section 76(6)(c) clearly provides that a purchasing dealer would be entitled to Input Tax Credit of the amount tax charged and this provision relating to exemption has to be liberally construed as held by the Supreme Court in *Associated Cement Companies Limited's* case (*supra*).

22. In *State of Punjab and Others Vs. Perfect Synthetics etc. etc.*, , the Assessee claimed that after purchasing raw material from an exempted unit, it had used the same in the manufacture of yarn. The raw material purchased by the Assessee was exempted from payment of tax under the Punjab General Sales Tax Rules, 1991. The grievance of the Petitioner was that in calculating its taxable turnover, the deduction was not being allowed by the Taxing Department on the ground that the goods purchased by the Assessee was liable to tax at the first stage of sale and since no tax on purchase of raw material from exempted units had been done, the Assessee was, consequently, not entitled for deduction from its turnover. The Supreme Court after analyzing the Scheme of the Act held that the words "subjected to tax" in Rule 29 (xii) of the Rules cannot be equated to the words "having suffered tax". The Supreme Court held that the eligible unit had to be assessed to tax and under that assessment the Department had to compute the tax liability. The Department was also to compute the amount of tax payable by the eligible unit and such tax was to be appropriated towards the exemption entitlement. The Supreme Court held that the provision "subjected to tax" does not mean that the tax should have been paid and consequently, held that the Assessee was entitled to deduction.

23. In the light of the aforesaid, the Court is of the opinion that it is not necessary that a purchasing dealer would be entitled to Input Tax Credit only if he has paid the tax charged in the sale invoice. The purchasing dealer would be entitled for Input Tax Credit if the said amount is adjusted or set off, as the case

may be. The circular of the Commissioner, Commercial Tax, dated 17th April, 2008 insofar as it interprets Section 76(6)(c) to the effect that benefit would only be given to those purchasing dealers who have actually paid the tax to the seller, is patently erroneous and against the provision of Section 76(6)(c) of the Act.

24. Consequently, the circular dated 17th April, 2008 of the Commissioner, Commercial Tax, insofar as it interprets Section 76(6)(c), is patently erroneous and to that extent is quashed. Since the notice dated 3rd March, 2009 was issued on the basis of the said circular, the same is wholly illegal and without any basis and is also quashed.

25. In the connected petitions, provisional assessment orders was made on the basis of the circular denying Input Tax Credit to the purchasing dealer on the ground that the actual tax was not paid to the selling dealer. The said provisional assessment is patently erroneous and is also quashed.

26. In view of the aforesaid, the writ petitions are allowed. In the circumstances of the case, there shall be no order as to cost.