
(2003) 09 AHC CK 0029

In the Allahabad High Court

Case No : Sales Tax Revision No's. 443 and 444 of 1992

Hari Ram Seth Khandsari

APPELLANT

Vs

Commissioner of Sales Tax

RESPONDENT

Date of Decision : 11-09-2003

Acts Referred:

Contract Act, 1872 — Section 72, 74

Uttar Pradesh Trade Tax Act, 1948 — Section 10A, 29, 8(1), 9

Citation : (2005) 139 STC 358

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Advocate : Bharat Ji Agrawal, for the Appellant; The Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

Prakash Krishna, J.—These two revisions are founded on the common order of the Tribunal dated December 20, 1991 passed in two connected Second Appeals Nos. 329 of 1990 (1979-80) and 330 of 1990 (1980-81).

2. The applicant is a registered partnership firm and these two revisions relate to the assessment years 1979-80 (U.P.) and 1980-81 (U.P.). The question involved in these revisions is about the imposition of interest u/s 8(1) of the U.P. Trade Tax Act, 1948.

3. The applicant for the assessment year 1978-79 deposited the tax on the turnover of khandsari. The said commodity was taxable at the rate of two per cent. Due to the mistake in the fourth quarter of the assessment year 1978-79 the applicant deposited the tax at the rate of four per cent amounting to Rs. 20,396.45. The rate of tax being two per cent, it deposited Rs. 10,198.22 in excess of the amount due under the Sales Tax Act. The mistake was detected by the applicant subsequently and it adjusted the part of the excess amount itself deposited in the third quarter of 1979-80 and the remaining excess amount in the assessment year 1980-81. Applications for adjustment were filed on April 29,

1980 for adjustment of the excess amount against the assessment year 1979-80 and on July 31, 1980 for the adjustment of the remaining excess amount in the assessment year 1980-81. These applications could not be disposed of and the matter was referred to Assistant Commissioner (E) for approval being the amount of refund was in excess to the limit of Rs. 10,000.

4. Further it appears that in the meantime the assessment proceedings by the order dated November 20, 1982 for the assessment year 1978-79 were completed. The assessing officer after taking into account the additional deposit of Rs. 10,198.22 created the additional demand of Rs. 2,983. This order was modified by the first appellate authority by the order dated July 19, 1983. The first appellate authority by this order reduced the turnover of seera and also reduced the tax of Rs. 9,800. The first appellate authority (Assistant Commissioner, Judicial) ordered the refund of the excess amount to the applicant. This order has great relevancy according to the department which will be adverted to by me later on in the judgment at appropriate place. The aforesaid order dated July 19, 1983 was further modified in favour of the dealer-applicant by the Tribunal by the order dated February 23, 1985. The Tribunal further reduced the tax by Rs. 3,179.25. The cumulative effect of the aforesaid two orders of the appellate authorities is that the account books of the dealer stand accepted by the department and the dealer became entitled to receive the refund of Rs. 9,800 in pursuance of the order of the first appellate authority and Rs. 3,179.25 in pursuance of the order passed by the Tribunal. The Tribunal accepted the disclosed turnover of seera as well as the account books of the applicant.

5. The assessments were also completed for the assessment years 1979-80 and 1980-81 wherein the dealer had claimed the adjustment of the excess amount mistakenly deposited by it for the assessment year 1978-79 in the assessment years 1979-80 and 1980-81. The department demanded interest from the dealer-applicant u/s 8(1) of the Act on the following amounts and the period:

(i) On Rs. 7,266, the demand for the assessment year 1979-80 for the period February 1, 1980 to July 19, 1983, the date on which the first appeal filed by the applicant was partly allowed for the assessment year 1978-79 and the refund was ordered.

(ii) On amount of Rs. 2,698 from November 1, 1980 to July 19, 1983, the date on which the refund was ordered by the first appellate authority for the assessment year 1978-79.

6. The starting point of period appears to be the date when the dealer was required to deposit the aforesaid amounts along with return as part of admitted tax for the assessment years 1979-80 and 1980-81, as required u/s 7 of the Act. This order is the subject-matter of the controversy in the present case. All the three authorities below have negated the plea of the dealer-applicant that it is not liable to pay any interest inasmuch as the amount was deposited by it as

excess amount along with the return for the assessment year 1978-79. The Tribunal was also of the view that against such demand no appeal lies before it.

7. Heard the counsel for the parties and perused the record. The question of maintainability of appeal against the order demanding interest can be disposed of immediately. The reliance was placed by the Tribunal upon a single Judge's judgment of this Court in the case of Banwari Lal Buddha Sen v. Commissioner of Sales Tax, U.P. [1988] 69 STC 83 : 1987 UPTC 880. This judgment is not a good law as observed by a division Bench of this Court in the case of Ram Lal & Sons v. Deputy Commissioner (Appeals), Sales Tax 1992 UPTC 107. The division Bench has placed reliance upon the earlier division Bench of this Court in the case of Hind Lamps Ltd. v. State of U.P. 1986 UPTC 54. In the face of these two division Bench judgments the learned Standing Counsel was unable to support the order of the Tribunal on this point. Therefore, the Tribunal has committed illegality in holding that the order demanding interest is not appealable. To put it differently it is held that the order imposing interest is appealable. To make it further clear, when the dealer is disputing its liability to pay interest such an order demanding interest is appealable u/s 9 of the Act. u/s 9 of the Act, every order passed by the assessing authority is appealable except an order passed u/s 10-A of the Act.

8. Now the main question regarding the imposition of interest in the facts of the present case requires consideration. This question cannot be answered simply by invoking the provisions of the U.P. Trade Tax Act. There is no dispute between the parties regarding the rate of tax of seera was at two per cent for the assessment year 1978-79, wherein the dealer by mistake in the fourth quarter deposited the tax on the turnover of seera at the rate of four per cent. The Tribunal has justified the levy of the interest simply on the ground that the applicant became entitled to get the refund of the excess amount deposited by it only on or after July 19, 1983, the date the order of the refund was passed by the first appellate authority for the assessment year 1978-79. Although the Tribunal has not referred Section 29 of the Act but presumingly the aforesaid conclusion was reached by the Tribunal on the basis of Section 29 of the Act which reads as follows :

"(3) Notwithstanding any judgment, decree or order of any court or authority, no refund shall be allowed of any tax or fee due under this Act on the turnover of sales or purchases or both, as the case may be, admitted by the dealer in the returns filed by him or at any stage in any proceedings under this Act.

Explanation I.-The date of refund shall be deemed to be the date on which intimation regarding preparation of the refund voucher is sent to the dealer in the manner prescribed.

Explanation II.-The expression "refund" includes any adjustment under the proviso to sub-section (1)."

9. At this stage it is interesting to note that the U.P. Sales Tax Act as it was enacted originally did not contain any procedure for the refund of the excess

amount to a dealer. In the year 1949 the legislator intervened and enacted Section 29. It obliged the assessing authority to in the manner prescribed refund to a dealer applying on this behalf any amount of tax, fees or other dues paid in excess of the amount due from him under the Act; provided he made an application for the purpose within 24 months from the date on which the order of assessment was passed or within 12 months of the final order passed in appeal, revision or reference in respect of the order of assessment whichever period was later. This section enabled the dealer to claim refund even of an amount which he had paid prior to the assessment made by the assessing authority in case it was found to be in excess of the amount eventually assessed against him. But then such amount or any amount directed to be refunded by the appellate or the revisional authority could be refunded only if an application for the purpose was made by him. (See *Indodan Milk Products v. State of U.P.* 1983 UPTC 583.

10. The learned Standing Counsel has placed strong reliance upon the aforesaid judgment of this Court in the case of *Indodan Milk Products v. State of U.P.* 1983 UPTC 583 and submitted that objection to pay interest could not arise merely because there was some order by the assessing authority or any other competent authority by virtue of which the amount had eventually to be refunded to a dealer. The aforesaid case and facts is quite distinguishable and has no application to the facts of the present case. In that case the assessee was claiming interest on the amount of refund due to it from the date of order in consonance to which the refund became due. The controversy in that case was as to for what period the department is liable to pay interest on the amount. According to the dealer of that case the interest should have been granted from the date when the assessment order was modified and the court passed the orders for refund of excess amount to the petitioner. It was held in that case that the words "the date of order of refund" contemplate a specific order of refund by the assessing authority or by any other competent authority or court and interest would not accrue merely because eventually some refund becomes due in consequence of the order of the High Court after the directions contained therein are complied with by the assessing authority. In the case where an order has been passed by an assessing authority, the date of order of refund would be a date of assessment order whereunder the refund becomes due to the dealer and the interest on the amount to be refunded would run if the same is not refunded within three months of the date of the assessment order.

11. Further reliance was placed by the learned standing counsel in the case of *Madras Rubber Factory Ltd. v. Commissioner of Sales Tax* 1981 STJ 300. In the said case it was held that a dealer is liable to pay interest for not depositing the admitted tax and entitlement to have refund in earlier years could not be treated as deposits made by the assessee. The amounts of refund which were granted subsequent to the submission of returns could not have been adjusted or set-off against the admitted tax payable. In my view the aforesaid case is also distinguishable and has no application to the facts of the case in hand. In the case in hand the excess amount was deposited by the dealer due to mistake of

fact. The question would be whether a dealer can get the refund of the excess amount deposited by it by mistake along with return only after conclusion of the assessment proceedings in terms of Section 29 of the Act or earlier to it as soon as the mistake is detected.

12. Chapter V of the Contract Act, 1872 deals with the certain contracts known as quasi-contracts. These contracts are presumed to be contract in the eyes of law although as a matter of fact there is no such contract. Section 68 to Section 72 under the aforesaid Chapter deals with such type of contracts. Section 72 which in my opinion has some application to the controversy involved in the present case reads as follows :

"Liability of person to whom money is paid, or delivered, by mistake or under coercion : A person to whom money has been paid, or in any state, by mistake or under coercion, must repay or return it."

The aforesaid section contains two illustrations (a) and (b). Illustration (a) is relevant for our purposes which reads as follows :

"(a) A and B jointly owe Rs. 100 to C. A alone pays the amount to C and B, not knowing this fact, pays Rs. 100 over again to C. C is bound to repay the amount to B."

13. The aforesaid section deals with situation with regard to the overpayment of Income Tax, sales tax or excess dues also. Payment "by mistake" in Section 72 refers to payment which was not legally due and which could not have been enforced. The mistake is in thinking that the money paid was due when, in fact, it was not due. In AIR 1949 297 (Privy Council) it has been held that "mistake" in Section 72 must not be given a limited meaning. It has been further held that once it is established that the payment in question was not due it is irrelevant to consider whether or not there was a contract between the parties under which some other sum was due. The judgment of Calcutta High Court given in the case of Jagadish Prosad Pannalal v. Produce Exchange Corporation Ltd. AIR 1946 Cal 245 was approved in the case before the Privy Council. The money was paid to lessor which was not due. The money was paid under the belief that it was legally due. This belief was mistaken. In their Lordships' view that is sufficient to bring the case within Section 72 of the Contract Act.

14. The term "mistake" used in Section 72 of the contract Act has been used without any qualification or limitation and comprises within its scope a "mistake of law" as well as the "mistake" of fact.

15. Chapter V of the Contract Act deals with the law of unjust enrichment and restitution. The law of unjust enrichment and restitution in England is judge-made law. Restitution performs a corrective function where the transactions fail, or made by mistake, and money or wealth exchanges hands. This doctrine has statutory basis in India since the enactment of Contract Act, 1872.

16. The Supreme Court in the case of Nagar Mahapalika, Kanpur v. Shri Ram

Maha Dev Prasad applied Section 72 of the Contract Act for the refund of terminal tax paid to the Municipality under mistake of law.

17. To recapitulate facts of the case in hand Rs. 10,198.22 was deposited by the dealer in excess of the amount due under the U.P. Sales Tax Act. The said amount was not deposited as gratis. The dealer was entitled for the refund or adjustment of the aforesaid amount immediately after the detection of the mistake.

18. The only objection of the department is that the amount shall be refundable to the dealer after the order of refund passed u/s 29 of the Act. In my view Section 29 of the Act has application only to such refunds which are consequential upon assessment, appellate or the revisional orders passed by the authority or by a court. Independent of Section 29 if a case is covered under the Chapter V of the Contract Act, the dealer would be entitled to seek the refund/ adjustment of the said amount under the doctrine of quasi-contract and on the principles of restitution as enshrined in Section 72 of the Contract Act.

19. Now question arises as to whether excess payment of tax is covered u/s 72 of the Contract Act. The Supreme Court in the case of Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, has considered this question. The said case arose out of proceedings under the U.P. Sales Tax Act. The amount was paid by the assessee in respect of forward transactions in silver. It was held that State of U.P. was not entitled to receive the sales tax on these transactions, the provisions in that behalf being ultra vires. The Supreme Court negated the plea of the department that the payments having been made in discharge of liability under the U.P. Sales Tax Act, the terms of Section 72 of the Indian Contract Act, 1872 are not applicable. The relevant portion is quoted below :

"It was, however, contended that the payments having been made in discharge of the liability under the U.P. Sales Tax Act, they were payments of tax and even though the terms of Section 72 of the Indian Contract Act applied to the facts of the present case no moneys paid by way of tax could be recovered. We do not see any warrant for this proposition within the terms of Section 72 itself.

....."

20. The Privy Council decision in AIR 1949 297 (Privy Council) has set the whole controversy at rest and if it is once established that the payment, even though it be of a tax, has been made by the party labouring under a mistake of law the party is entitled to recover the same and the party receiving the same is bound to repay or return it. No distinction can, therefore, be made in respect of a tax liability and any other liability on a plain reading of the terms of Section 72 of the Indian Contract Act, even though such a distinction has been made in America, vide the passage from Willoughby on the Constitution of the United States, Vol. 1, page 12 op. cit. To hold that tax paid by mistake of law cannot be recovered u/s 72 will be not to interpret the law but to make a law by adding some such words as "otherwise than by way of taxes" after the word "paid".

21. The aforesaid judgment has been followed by the Supreme Court in the case of State of Madhya Pradesh Vs. Bhailal Bhai and Others, . This was also a case relating to sales tax under the Madhya Bharath Sales Tax Act. In para 14 it was held that payment of sales tax under mistake is covered within Section 74 of the Indian Contract Act let so the Government to whom the payment has been made by mistake must in law repay it.

22. In equity also the plea of the department and the order of the Tribunal cannot be sustained. The department cannot charge any interest as it was already in possession of the amount refundable to the dealer on the date of filing of returns for the assessment years 1979-80 and 1980-81.

23. In view of the above both the revisions are allowed and it is held that the applicant-dealer is not liable to pay any interest for the assessment years 1979-80 and 1980-81 u/s 8(1) of the Act.