(2010) 04 AHC CK 0290

In the Allahabad High Court

Indian Air Gases Ltd. APPELLANT

Vs

State of U.P. and Others RESPONDENT

Date of Decision : 15-04-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Trade Tax Act, 1948 — Section 21, 21(2), 21(4)

Citation : (2010) 31 VST 542

Hon'ble Judges : Rajes Kumar, J;Pankaj Mithal, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. Heard Sri Aloke Kumar, learned Counsel for the petitioner and Sri S. P. Kesarwani, learned Additional Chief Standing Counsel.

2. By means of the present writ petition, the petitioner is challenging the order dated February 25, 2010, passed by the Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi, granting approval under the proviso to Section 21(2) of the U.P. Trade Tax Act, 1948 (hereinafter referred to as, "the Act") to reopen the proceedings for the assessment years 1997-98 and 1998-99 both under the U.P. Trade Tax Act as well as under the Central Sales Tax Act, 1956 beyond the normal period of limitation.

3. Brief facts giving rise to the present writ petition are that the petitioner is a registered dealer under the U.P. Trade Tax Act as well as under the Central Sales Tax Act and was involved in the business of manufacture and sale of acetone gas, oxygen gas, medical oxygen gas, nitrogen gas, etc. For the assessment years 1997-98 and 1998-99 the assessing authority had passed the assessment orders on February 29, 2000 and February 19, 2001, respectively, both under the U.P. Trade Tax Act as well as under the Central Sales Tax Act. It appears that to reopen the proceedings, proposals have been sent by the assessing authority to the Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi to grant approval under the proviso to Section 21(2) of the Act for the

assessment years 1997-98 and 1998-99. The Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi, after giving opportunity of hearing has passed the orders on August 14, 2003 and August 16, 2003 for the assessment years 1997-98 and 1998-99 under the U.P. Trade Tax Act as well as under the Central Sales Tax Act, respectively and granted approval to initiate proceedings beyond the period of limitation. Being aggrieved, the petitioner challenged the said orders by means of Civil Misc. Writ Petition No. 1154 of 2003. This Court vide order dated July 2, 2009 has allowed the writ petition and set aside the orders dated August 14, 2003 and August 16, 2003 on the ground that no reasons have been assigned for not accepting the case of the petitioner and there appears to be no application of mind by the authority concerned to the reply given by the petitioner. It may be mentioned here that earlier the approval was granted on the ground that the petitioner had sold empty drums on which tax has not been assessed and also certain amount towards delivery charges had not been included in the turnover and, therefore, there was escaped assessment. After the remand of the case, the Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi, has issued the notice on January 12, 2009 on the same grounds on which approval had earlier been granted. The petitioner filed reply on November 19, 2009. One of the submission was that the supply to the oxygen gas and acetone gas was for factor}'' and, therefore, onward freight charged would not be part of the turnover. It was also submitted that the tax has been assessed on the freight charges for the assessment years 2001-02, 2002-03, 2003-04 and 2004-05 but in appeal the levy of tax on such freight has been deleted and against the orders of the first appellate authority, the appeals have been dismissed by the Tribunal. The Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi while exercising suo motu powers asked the assessing authority to give report on certain new issues and on receipt of the report notices dated January 15, 2010 have been issued. The petitioner filed a reply on February 15, 2010, which is annexure 19 to the writ petition and asked for the copy of the report sent by the assessing authority. Thereafter, the Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi, has passed the impugned orders dated February 25, 2010. In the first para of the impugned orders, the reasons given earlier for granting the approval has been mentioned and, thereafter, in the second para it is stated that on receipt of the report dated January 1, 2010 from the assessing authority, fresh notices have been issued and in pursuance thereof, learned Counsel for the assessee appeared and, thereafter, he on perusal of the record and the report sent by the assessing authority, arrived to a conclusion that it is just and expedient to grant the approval. In the impugned orders, neither the contents of the report of the assessing authority have been referred nor any reason has been given for not accepting the reply of the petitioner.

4. The learned Counsel for the petitioner submitted that from a perusal of the impugned orders, it appears that the approval has been granted on the basis of the report of the assessing authority, which was sought on the fresh ground and

not on the basis of the proposal sent by the assessing authority earlier. He submitted that the exercise of suo motu powers and asking the report from the assessing authority on new grounds was beyond the period of limitation, as eight years have expired in the year 2006 whereas fresh report has been sought in the year 2010 and, therefore, the exercise of suo motu powers and asking for the report beyond the period of limitation was barred. He further submitted that again the Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi, has passed the orders mechanically without considering the reply of the petitioner and without giving any reason. Therefore, the orders of the Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi, are liable to be set aside.

5. While entertaining the writ petition on April 9, 2010, we have asked the Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi to appear in person. Shri Kamta Prasad, Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi is present in court. We have asked him that whether the approval has been granted on the basis of the earlier proposal sent by the assessing authority or on the basis of the fresh report given by the assessing authority, which has been sought by the Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi in exercise of suo motu powers. He categorically stated that the approval has been granted on the basis of the earlier grounds taken in the earlier proposal and not on the basis of the report given by the assessing authority on the new grounds.

6. The Additional Chief Standing Counsel endorses the aforesaid statement given by the Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi in the court. On the submission made by learned Counsel for the petitioner that no reason has been assigned for granting the approval, it is submitted that inadvertently a mistake has been committed and such mistake will not be repeated in future.

7. Having heard learned Counsel for the parties, we have perused the impugned orders.

8. We are of the view that despite the order passed by this Court setting aside the earlier orders passed by the Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi on the ground that the orders were passed mechanically without giving any reason, the impugned orders have again been passed mechanically. From the perusal of the impugned orders, it is not clear that whether the approval has been granted on the basis of the grounds taken in the earlier proposal or on the basis of the report given by the assessing authority on new grounds. However, in view of the statement given by the Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi, in this Court, we proceed to examine that the proposal has been granted on the basis of the grounds mentioned in the earlier proposal and not on the basis of the new grounds. The impugned orders reveal that the reply of the petitioner has not been considered. In view of the aforesaid facts and circumstances, we are of the

view that the Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi, has committed a manifest error of law in passing the impugned orders mechanically without proper application of mind and, therefore, the impugned orders are liable to be set aside.

9. It may be mentioned here that under the proviso to Section 21(2) of the Act the power to grant the approval has been given to the Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi to keep a check on the assessing authority that the proceedings u/s 21 of the Act may not be reopened by the assessing authority on flimsy grounds beyond the normal period of limitation. Therefore, while passing the orders in exercise of powers u/s 21(2) of the Act, the Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi, should be more careful and should apply his mind that whether the reasons given in the proposal constitute a material to form the belief of escaped assessment and, it is just and expedient to grant the authorization.

10. We are of the view that under the proviso the Commissioner does not exercise the judicial power in strict sense. He is not supposed to adjudicate the issue. He has to satisfy on the basis of the reasons recorded by the assessing authority that it is just and expedient to authorize the assessing authority to make the assessment or reassessment beyond the period of limitation prescribed u/s 21(2) of the Act. Therefore, we are of the view that a detailed reasoning is not required to be given while granting the authorization. What is required under the proviso is that there should be an application of mind to arrive at the satisfaction on the consideration of the reasons recorded and the submissions of the assessee.

11. In the present case, we find that the Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi has not acted in accordance with law and despite the order passed by this Court the power has not been exercised carefully and judiciously and the order of this Court has not been complied with.

12. For the reasons stated above, the writ petition is allowed. The impugned orders dated February 25, 2010 for the assessment years 1997-98 and 1998-99 both under the U.P. Trade Tax Act as well as under the Central Sales Tax Act are set aside with cost of Rs. 25,000, which will be payable by the Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi, to the petitioner by account payee cheque within a period of one month.

13. So far as limitation in passing the order is concerned, we may follow the principle laid down by the Division Bench of this Court in the case of S.K. Traders v. Additional Commissioner, Grade I, Trade Tax, Zone, Ghaziabad (2009) 26 VST 601 which held as follows (at page 638):

Recently a Division Bench of this Court in Civil Misc. Writ Petition No. 563 of 2007 (King Agency v. State of U.P.) decided on May 11, 2007 had followed the aforesaid decision and had held that where proceeding has been set aside by this Court in exercise of powers under Article 226 of the Constitution the period of limitation shall not apply while initiating proceeding thereafter. We are therefore of the considered opinion that the period of limitation provided under the first proviso to Sub-section (2) of Section 21 or Sub-section (4) of Section 21 would not be attracted in the present case both for passing a fresh order of sanction and reassessment. However, it would not mean that they could be passed at any time at the sweet will of the authorities. They are to be passed within a reasonable period and what would be the reasonable period would depend upon the facts of each case.

14. The petitioner is directed to file a certified copy of the order before the Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi within a period of two weeks and the Additional Commissioner, Grade I, Commercial Tax, Varanasi Zone I, Varanasi, is directed to pass a fresh order within another period of four weeks in accordance with law.

