
(2009) 10 AHC CK 0200
In the Allahabad High Court

Jubilant Organosys Ltd.

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 15-10-2009

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) 10 AHC CK 0200

Hon'ble Judges : Sunil Ambwani, J; Ran Vijai Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. Heard Shri Bharatji Agrawal, Sr. Advocate assisted by Shri Nikhil Agrawal for the petitioners. Shri K.M. Sahai, Standing Counsel appears for the respondents.

2. The writ petition No. 1801 of 2009 is directed against the orders dated 24.3.2009 and 31.3.2009 passed by the Asstt. Commissioner, Commercial Taxes, Sector-2, Hasanpur for the assessment year 2002-03 (Central). The petitioner has also prayed for writ of prohibition restraining the respondents to proceed in any manner in pursuance to the order dated 31.3.2009 and also to proceed in any manner pursuant to the demand created by reassessment order dated 31.3.2009.

3. The writ petition No. 1802 of 2009 is directed against the orders dated 24.3.2009 and 31.3.2009 passed by the Asstt. Commissioner, Commercial Taxes, Sector-2, Hasanpur for the assessment year 2002-03 (U.P.). The petitioner has also prayed for writ of prohibition restraining the respondents to proceed in any manner in pursuance to the order dated 31.3.2009 and also to proceed in any manner pursuant to the demand created by reassessment order dated 31.3.2009.

4. The petitioner is a public limited company with its registered office and factory at Bhartiagram, Gajraula, Distt. Jyotiba Phule Nagar and its head office at Plot No. 1-A, Sector 16-A, Institutional Area, Noida. The company is registered under the U.P. Value Added Tax Act, 2008 as well as Central Sales Tax Act, 1956 with

Commercial Tax Office, Hasanpur. It is engaged in manufacture and sale of Single Super Phosphate (Granulated & Powder) commonly known as SSP under the brand name "Ram Ban" manufactured in accordance with the standards prescribed by the Fertiliser Control Order, 1985.

5. For the year 2002-03 (Central) the petitioner was assessed u/s 9 (2) of the U.P. Trade Tax Act on 5.7.2004. In the assessment the assessing authority did not assess tax on the exempted "potash" and "phosphatic" components of SSP. It was later found that "sulphur" present in SSP was not taxed, on which a notice for reassessment u/s 21 (2) was given after approval of the Addl. Commissioner, Grade-I, Commercial Tax, Moradabad Zone, Moradabad vide order dated 24.3.2009. In the reassessment order dated 31.3.2009 under challenge in this writ petition the assessing authority after giving notice to the petitioner and after rejecting the adjournment application filed on the adjourned date on 31.3.2009 on the ground that the assessment was going to be barred by time, proceeded to make reassessment order on the grounds that by notification dated 12.5.2003 issued amending the Fertiliser Control Order "sulphur" was included as taxable component. Prior to this amendment only Phosphoric Acid 4%; Water soluble phosphates 16% and moisture 20% was determined to be present in SSP. The assessee had disclosed that phosphate is manufactured out of grounded rock phosphate and "sulphuric acid" and in the year 2002-03 "sulphur" was not determined and taxed. By notification No. 440 dated 12.2.2002 only "potash" and "phosphatic components" of SSP were exempt from tax. The assessing authority found that since "sulphuric acid" is used in manufacture of SSP, the element of "sulphur" is bound to be present in the fertiliser and thus treating the presence of "sulphur" at 68% on the basis of best judgment assessment, he has imposed tax on 50% of this component on the disclosed turn over.

6. Shri K.M. Sahai, learned Standing Counsel has raised preliminary objections to the maintainability of the writ petition without availing the remedies of appeal and revision provided under the Act. He submits that the order of reassessment is also subject to appeal. The Asstt. Commissioner did not commit any error in refusing to adjourn the proceedings on 31.3.2009 on the ground that reassessment was going to be barred by limitation. In any case the petitioner can challenge the order in appeal before the Addl. Commissioner.

7. Shri Bharat Ji Agrawal, learned Counsel for the petitioner submits that the reassessment order has been passed, after the Addl. Commissioner, Grade-I, Commercial Tax, Moradabad Zone, Moradabad authorised the assessing authority for reassessment u/s 21 (2) of the Act, after recording his satisfaction that since "sulphuric acid" is used in the process of manufacture of SSP, the possibility of the presence of sulphur as taxable chemical in the compound cannot be ruled out. Shri Bharat Ji Agrawal submits that the Addl. Commissioner has recorded findings, in giving permission for reassessment and thus an appeal to the Addl. Commissioner would be an exercise in futility. He has relied upon Ganga Saran and Sons P. Ltd. Vs. Income Tax Officer and Others, in submitting that the

questions whether assessing authority had "reason to believe" is not a question of limitation but is also a question of jurisdiction, which could be considered by the High Court under Article 226 of the Constitution of India. The words "has reason to believe" are stronger than the words "is satisfied". The belief of the Assessing Officer must not be arbitrary or irrational. He has relied upon S.K. Traders, Modi Nagar, Ghaziabad v. Addl. Commissioner, Grade-I, Trade Tax, Zone Ghaziabad and Anr. 2008 UPTC 392, in submitting that where the Addl. Commissioner has not given reasons for granting permission/ sanction, to reopen the assessment for the assessment year in question, to make reassessment under the extended period of limitation, his order cannot be sustained and consequently all proceedings taken would also be illegal and without jurisdiction. A notice u/s 21 (2) of the Act is a jurisdictional notice and can be challenged in the writ petition. In para 18 and 19 of this judgment the Court observed that since the petitioner has also challenged the order passed by the Addl. Commissioner, against which there is no provision to prefer any appeal, before any statutory authority, an appeal u/s 9 would not be maintainable against his order. An appeal also cannot be preferred u/s 10 against the order of Addl. Commissioner directly before the Trade Tax Tribunal. The Court found that apart from the order of the Addl. Commissioner the validity of the notice issued u/s 21 was also challenged on the ground that the assessing authority did not have any reason to believe for initiating proposal for reassessment.

8. The judgment in Ganga Saran & Sons P. Ltd. (Supra) is an authority on the expression used in Section 147(A) of the Income Tax Act "has reason to believe" and the words "is satisfied". The belief entertained by ITO must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons, which are relevant and material. The Court would not investigate into the adequacy or sufficiency of the reasons, but the Court can certainly examine whether the reasons are relevant in regard to which the assessing authority is required to entertain the belief before he can issue notice u/s 147 (A). If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on fact and law could reasonably entertain the belief, the conclusion would be inescapable that the ITO could not have reason to believe that any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts, and the notice issued by him would be liable to be struck down as illegal.

9. In M/s S.K. Traders, Modi Nagar, Ghaziabad (Supra) the dealer was engaged in the business of "broken glass". The complete details relating to the sales of broken glass in its commission agency business purchased in U.P. from unregistered dealers was disclosed in the course of assessment proceedings. The assessing authority after examining the transactions exempted the turn over of "broken glass" on the ground that liability of tax was at the point of manufacture or import and not at the point of purchase by the petitioner. Thereafter permission was sought from Addl. Commissioner under Sub-section (2) of

Section 21 of the Act for reassessment. A notice was issued calling upon the petitioner to show cause as to why the permission be not granted. The permission was given on the basis of a decision of the Court in Commissioner of Sales Tax. U.P. v. Kabarkhana 1985 ATJ 73 in which it has been held that goods purchases from Kabari, are not exempted and are liable to be taxed. The petitioner had not collected the goods from Kabaris, but had sold them in its commission agency business purchased from within the State of U.P. from unregistered dealers. There was no fresh material on the basis of which a reasonable belief could be formed. On the question of limitation the Court held that once an order was made within a period of 90 days, the subsequent order made in pursuance of an order or direction by the Court could be made at any time. The period of limitation provided under first proviso to Sub-section (2) or Section 21, of Sub-section (4) of Section 21 of the Act can be exercised within a reasonable period and what would be the reasonable period, would depend upon the facts of each case. The Court, thereafter, held in para 57 as follows:

As we have already found that the Additional Commissioner has not given any reason in his order for granting approval, the order dated 1st June, 2001 cannot be sustained and is hereby set aside and consequently the notice issued on 4th March, 2002 also cannot be sustained and is hereby set aside. The Additional Commissioner respondent No. 1 is directed to pass a fresh order in accordance with law after giving an opportunity of hearing to the petitioner and after recording reasons.

10. In the present case the order u/s 9 (2) of the Act for the assessment year 2002-03 was made on 5.7.2004. The assessing authority in support of his request for reassessment u/s 21 (2) of the Act submitted that under notification No. 440 dated 12.2.2001 the taxability of SSP was not accepted, but that in the notification only "potash" and "phosphates" elements of the compound were exempted. In the notification issued under the Fertiliser Control Order, the SSP is also declared to contain 11% "sulphur" on which tax is payable. This element of 11% of "sulfur" has escaped, assessment and thus it is necessary to impose tax.

11. The Addl. Commissioner issued notice and heard the submissions made by the petitioner. It was stated that prior to May 2003 the Fertiliser Control Order, 1985 was also in force. According to the Fertiliser Control Order, the SSP, contains 12% moisture, 4% free phosphoric acid and 16% water soluble phosphates. The amendment by which 11% sulfur was included in the notification to be present in SSP was added on 12.5.2003, and thus prior to this period no element was present in the compound. The SSP is manufactured out of "grinded rock phosphate" and "sulfuric acid" in which process, gypsum is produced. The "sulphur" was not determined as an element in SSP in the year 2002-03 and thus there is no question of reassessment.

12. The Addl. Commissioner found that trader has explained the elements in SSP only to the extent of 32%. He has not explained about the 68% element of the fertilizer. The Fertiliser Control Order only provided for minimum percentage and

did not certify that "sulphur" was not used or is produced in the manufacture. It was admitted that "sulphuric acid" is used in the manufacture and thus it is possible that element of "sulphur" is also present in the compound.

13. The Addl. Commissioner has, in his order dated 24.3.3009 after issuing notice and hearing the petitioner, applied his mind and has given sufficient reasons to believe that "sulphur" present in SSP has escaped assessment. The order, therefore, cannot be treated to be an order passed without hearing and without giving any "reason to believe" that the tax has escaped assessment. The order is not arbitrary or irrational to interfere in writ jurisdiction.

14. The question whether "sulphur" was present in SSP and whether the chemical composition of which has not undergone any change and whether "sulphur" is liable to tax, and has escaped assessment, is a question, which has been considered in the assessment order, against which an appeal clearly lies.

15. The petitioner has not shown any good reason to interfere with the assessment order without availing the statutory remedies of appeal under the Act.

16. The writ petition No. 1802 of 2009 is based on the same facts relating to the sales of SSP, within the State of U.P. for the same assessment year.

17. Both the writ petitions are consequently dismissed relegating the petitioner to the statutory alternative remedies of filing appeal, against the orders of reassessment passed by the assessing authority.