

(2006) 03 AHC CK 0047

In the Allahabad High Court

Case No : Trade Tax Revision No's. 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017 and 1018 of 2004

Kapoor Fire Works

APPELLANT

Vs

Commissioner of Trade Tax

RESPONDENT

Date of Decision : 10-03-2006

Acts Referred:

Uttar Pradesh Sales Tax (Amendment and Validation) Act, 1978 — Section 19
Uttar Pradesh Trade Tax Act, 1948 — Section 10, 10A, 10B, 10B(1), 18

Citation : (2007) 10 VST 76

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Advocate : R.R. Agrawal and Suyash Agarwal, for the Appellant; K.M. Sahai and S.C., for the Respondent

Final Decision : Allowed

Judgement

Prakash Krishna, J.—These eleven revisions are by different dealers against common orders dated 17.12.2003 and 5.3.2004 passed by the Trade Tax Tribunal Bench-II, Agra under Sections 10 and 22 of the U.P. Trade Tax Act (hereinafter to referred as the Act) respectively. Common questions of law are involved, therefore, they were heard together and are being decided by a common judgment.

2. The State Government in exercise of power conferred u/s 7-D of the Act, floated a scheme popularly known as composition/compounding scheme 1994. The said scheme is dated 24th May, 1994 and is applicable to the assessment year i.e. 1994-95, which is the relevant assessment year involved in all these cases. The said scheme is applicable only to small dealers whose turnover for the immediately preceding assessment year 1993-94 in U.P. and Central was not more than Rs. 5 Lakhs and in the assessment year 1994-95 they fulfill the conditions enumerated therein and are not excluded by Clause-2 of the said scheme. The said Clause-2 lays down three eventualities but for the purposes of

the present case condition No. 2 (ka) and 2 (ga) are relevant, wherein it has been provided that the scheme shall not be applicable in respect of such dealers who do not carry on any sale in the State of U.P. and all their sales are inter-state sales and secondly, the taxable turnover of such dealer exceeds Rs. 7 Lakhs for any reason for the assessment year 1994-95 including the sales in U.P. and inter-state sales. Thus, a dealer whose taxable turnover exceeds Rs. 7 Lakhs inclusive of central sales for the assessment year 1994-95 would not be entitled to avail the benefits under the said scheme.

3. Except M/s. Chandana Traders none of the applicants were registered as a dealer under the Act for the assessment year 1993-94, but they applied for and were granted registration by the Assessing Officer for the relevant assessment year namely 1994-95. M/s. Chandana Traders was already a registered dealer.

4. The applicants, after getting themselves registered for the relevant assessment year, applied for availing the benefit of the aforesaid composition scheme and agreed to pay the lump sum amount in instalments, without recourse to regular assessment proceedings. The Assessing Officer, by separate orders, all dated 1st of July, 1996, accepted the applications filed by the applicants and, thus, it was held that the applicants are entitled to avail the benefits of the said scheme.

5. The Deputy Commissioner (Executive) who also functions as Revising Authority u/s 10-B of the Act revised composition orders passed by the Assessing Authority in exercise of its power u/s 10-B of the Act on the ground that the agreement entered into by the applicant dealers with the department was contrary to law in view of Clause-2 and as such the order passed u/s 7-D is illegal. The agreement has been entered into on wrong premises of facts which automatically invalidates the order passed u/s 7-D of the Act. The registration under the Act was obtained with a oblique motive under a preplanned design to somehow avail the benefits available under the Composition Scheme and to cause wrongful loss to the department. He, by the order dated August, 18, 1999 set aside the orders accepting the composition application as well as the agreement and directed the Assessing Officer to reassess the actual turnover of the dealer applicants after obtaining necessary permission as required u/s 21(2) of the Act from the Additional Commissioner (Grade-I), Trade Tax, Agra. This common order was subject matter of 11 second appeals being 370 of 1999 to 380 of 1999 before the Tribunal, at the instance of the present applicants. These appeals were initially dismissed by a common order dated 31st of March, 2000 by the Tribunal, which led to the filing of the trade tax revision Nos. 470 of 2000 to 480 of 2000 in this Court and all of them were allowed by a common judgment dated 28.8.2000 on a short ground that the Tribunal has failed to deal with the argument about the nature of an order passed u/s 7-D which can or cannot be revised u/s 10-B of the Act. The matter was restored on the file of the Tribunal. Again the Tribunal by its subsequent order dated 17th of December, 2003 dismissed all the appeals without adverting to the question as to whether

an order u/s 7-D can be revised u/s 10-B of the Act or not. Subsequently, the applicants filed applications, in all 11 appeals raising the above issue and the Tribunal has now held that the contention of the dealer applicants in this regard is meritless. The department also filed rectification applications in all the appeals. The Tribunal by the impugned order dated 5th of March, 2004 has dismissed all the applications filed u/s 22 of the Act after considering the various submissions made on behalf of the counsel for the parties, on merits, and maintained its earlier order dated 17th of December, 2003. Feeling aggrieved against the aforesaid two orders the present revisions have been filed at the instance of the applicants only. The department has not challenged the order of the Tribunal rejecting its application for rectification filed u/s 22 of the Act and as such the matter is finally closed so far as the department is concerned.

6. Shri Rakesh Ranjan Agrawal, learned Counsel for the applicant, firstly, submitted that on plain language of Section 7-D of the Act, an order accepting the composition application filed by an assessee cannot be revised in exercise of power u/s 10-B of the Act. Section 7-D according to him is prefaced with the words "notwithstanding any thing contained in other provisions of this Act but subject to certain directions as the State Government may from time to time issue in that behalf which according to the applicant dealers show that Section 7-D has been given an overriding effect over other provisions contained in the Act. He laid much emphasis on the word "agree" occurring in Section 7-D of the Act and submitted that proceedings u/s 7-D is in the nature of an agreement between the dealer/applicant and the State Government. Section 7-D does not contemplate passing of an order. "Order" and "agreement", according to him, are not synonyms and conceptually are different. Elaborating the argument, it was submitted that if two interpretations are possible of a taxing statute, one, which leans in favour of assessee, should be preferred and adopted. An "agreement" is not an order and it will not partake the character of an order. u/s 10-B of the Act the power of revising authority is with reference to "any order" passed by subordinate officer and can be interfered with by the revising authority when "such order" is not legal or improper. In contra, Shri K.M. Sahai, the learned standing counsel, submitted that acceptance of a composition application amounts passing of an order although such acceptance may amount in effect be an agreement between a dealer and the State Government to pay ascertained sum by way of trade tax. With the help of composition scheme with particular reference to the Clauses-2,5, 6 and 9 it was submitted that as soon as the net turnover exceeds Rs. 7 Lakhs a dealer who might have applied for composition under the said scheme, ceases to be entitled to avail benefit of the same.

7. I have carefully considered the respective submissions of the learned Counsel for the parties. Both the Counsel submitted that a recent judgment of Full Bench (yet to be reported) in Civil Misc. Writ Petition No. 252 of 1994: Bhaduriya Gram Seva Sansthan v. Assistant Commissioner decided on January, 13, 2006 supports their submissions. The issue before the Full Bench was whether a dealer who has opted for payment of lump sum amount in lieu of tax can subsequently turn

around and say that he is not liable to pay any amount as he has not carried 011 any business either for whole or part of the relevant assessment year. In this backdrop it was held that dealer having once exercised its option, cannot be permitted to turnaround and resile from its liability on the ground that he had no turnover or had not done any manufacturing activity during the relevant assessment year. On the interpretation of Section 7-D it was held that this gives an option to a dealer who is covered by a scheme to opt for payment of lump sum amount in lieu of amount of tax and non-obstanate clause therein excludes the applicability of other provisions of the Act which deals with the assessment and payment of tax. It has been further held that liability to pay the composition money is not relatable to actual sale at all, thus the aforesaid decision does not through much light on the con troversy in hand. It does not advance the case of either parties. The question presently involved was not directly or remotely agitated or decided in the above decision.

8. It is desirable to reproduce Section 7-D and 10-B of the Act. Section 7-D reads as follows:

Section 7-D. Composition of tax liability.

Notwithstanding anything contained in this Act, but subject to direction of the State Government, the assessing authority may agree to accept a composition money either in lump sum or at an agreed rate on his turnover in lieu of tax that may be payable by a dealer in respect of such goods or class of goods and for such period as may be agreed upon.:

Provided that any change in the rate of tax which may come into force after the date of such agreement shall have the effect of making a proportionate change in the lump sum or the rate agreed upon in relation to that part of the period of assessment during which the changed rate remains in force.

Explanation: For the purposes of this section the assessing authority includes an officer not below the rank of Trade Tax Officer Grade-II posted at a check-post.

Section 10-B. Revision by Commissioner .

(1) The Commissioner or such other Officer not below the rank of Deputy Commissioner as may be authorised in this behalf by the State Government by notification may call for and examine the record relating to any order (other than an order mentioned in Section 10-A) passed by any officer subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such order and may pass such order with respect thereto as he thinks fit.

(2) No order under Sub-section (1) affecting the interest of a party adversely shall be passed unless he has been given a reasonable opportunity of being heard.

(3) No order under Sub-section (1), shall be passed-

(a) to revise an order, which is or has been the subject matter of an appeal u/s

9, or an order passed by the Appellate Authority under that section:

Explanation - Where the appeal against any order is withdrawn or is dismissed for non-payment of fee payable u/s 32 or for non-compliance of Sub-section (1) of Section 9, the order shall not be deemed to have been the subject-matter of an appeal u/s 9;

(b) before the expiration of sixty days from the date of the order in question;

(c) after the expiration of four-years from the date of the order in question or after the expiration of two years from the date of commencement of Section 19 of the U.P. Sales Tax (Amendment and Validation) Act, 1978, whichever is latter.

9. A Division Bench of this Court in the case of Kothari Contract Interiors v. Trade Tax Officer 2006 U.P.T.C. 74 has examined the scheme of the Trade Tax Act, with particular reference to Section 7-D of the said Act and has come to the conclusion that ample powers have been conferred on the authorities to take appropriate action when the order u/s 7 D is prejudicial to the interest of Revenue. It has observed that "besides power of rectification u/s 22 of the Act the power of revision u/s 10 -B of the Act, is there". The argument of the learned standing counsel that when an order u/s 7-D has been incorrectly passed, in such circumstances the department is entitled to initiate reassessment proceedings u/s 21 of the Act, was rejected in the aforesaid case. There may be some substance in the argument of the applicant that the applicability of Section 10-B was not directly called upon for decision with respect to an order passed u/s 7-D in the aforesaid case. But it is not necessary to deal with this question in detail in view of the fact that there is substance in the another argument of the applicant. Therefore, I leave the issue as it is and treat it as covered by the decision of M/s. Kothari Contract Interiors (Supra).

10. The applicant's second argument is on the merits of the case. Contention is that the authorities below have misinterpreted and misconstrued the composition scheme in question and wrongly held that the applicants are not entitled to avail the said scheme. Elaborating the argument it was submitted that the scheme in question does not stipulate that an applicant/dealer should necessarily be a registered dealer in the assessment year 1993-94 or his turnover should have been subject to assessment by the department for the assessment year 1993-94.

11. The Deputy Commissioner (Executive), Trade Tax proceeded to cancel the order passed u/s 7-D of the Act by exercising its power u/s 10-B of the Act on the following two grounds:

1. The composition scheme is applicable to only such dealers who were registered in the assessment year 1993-94 and whose turnover in U.P. as well as in Central was not more than 5 lakhs.

2. The turnover of the applicant is 6, 98,903.50 (in the case of Kapoor Fire Works) for eight and half months. In view of Section 18 of the Act if the turnover is assessed for the entire year it would be more than 7 Lakhs.

13. The Tribunal has affirmed the above order of the Deputy Commissioner (Executive).

To judge the legality and validity of the impugned order, it is expedient in the interest of justice to reproduce the relevant extract of the composition scheme, dated 26 May, 1994 (Annexure-1), which reads as follows:

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2& mDr lek/kku ;kstuk fuEufyf[kr n"kkvksa esa ykxw ugha gksxh%&

d& ftu O;kikfj;ksa dh izns"kh; O;kikj dj ds varxZr dksbZ fcdzh ugha gS dsoy dsaUnzh; fcdzh dj ds varxZr fcdzh gS A

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14. It is axiomatic that the composition scheme on its fair reading does not stipulate that an applicant who wants to claim the benefits of the aforesaid scheme must necessarily be a registered dealer for the assessment year 1993-94. The mandate under the scheme is loud and clear. There is no stipulation that the said scheme would apply only to such dealers who were registered dealers in the year 1993-94. To this, the reply of the learned standing counsel is that this Court should on a fair reading of the scheme draw an inference that the applicant should necessarily be a registered dealer in the year 1993-94. It is difficult to agree with the aforesaid submission. The opening part of the scheme (which has been reproduced above) at least does not show any such thing even if one is permitted to read in between the lines. On the contrary, the scheme is meant for the benefit of small traders (Chhotey Vyapari). This word "Chhotey Vyapari" is sufficient indication of exclusion of big dealers. U.P. Trade Tax Act, like other Sales Tax Act, also provide basic exemption limit vide Section - 3 of the Act. It was Rs. 1 Lakh in the case of manufacturer and Rs. 1.50 in the case of other dealers in the assessment year 1993-94. A dealer whose turnover is less than the minimum taxable limit or In other words within the basic exemption limit is not required to obtain registration under the Act. The

argument that only such applicants who were registered dealers in the year 1993-94, if accepted, it would lead to an anomalous position. The dealers whose turnover was even below the basic exemption limit in the year 1993-94 would not be entitled to avail the benefit of the said scheme and such dealers whose turnover was over and above the basic exemption limit but below 5 lakhs inclusive of inter-state sales would be entitled to avail the benefit of the scheme, which does not appear to be the intention of the above scheme. The loud object of the scheme is to extend the benefits of hassle free assessment to small dealers irrespective of facts whether they were registered as dealer in the year 1993-94 or not.

15. There is another way to look into the problem. Clause-2 of the scheme excludes certain category of dealers mentioned therein. It does not say so that a dealer who was not a registered dealer in the year 1993-94 would stand excluded. On the plain language and on harmonious constructions of the scheme, it is difficult to construe the scheme in the manner it has been construed by the authorities below and to hold that only registered dealer for the year 1993-94 is entitled to invoke the scheme. Registration as a dealer for year 1993-94 is not precondition, under the scheme. The Deputy Commissioner (Executive) as well as the Tribunal both have swayed away and tried to read condition of registration in the year 1993-94 as a precondition to qualify for entitlement to apply under the aforesaid scheme. There being no such stipulation in the scheme in question, the view taken by the authorities below on this point cannot find approval by this Court.

16. The second objection taken by the Deputy Commissioner (Executive) as also by the Tribunal, to disentitle the applicants from the benefit of the scheme in question, is, that the turnover of the applicant exceeds Rs. 7 Lakhs for the assessment year 1994-95 by invoking Section 18 of the Act. This point needs a little elaboration and it is necessary to recapitulate the facts. The scheme in question came into effect by means of the notification/circular issued by the Commissioner of Trade Tax through the letter dated May, 26, 1994 (Annexure-1). None of the applicants except M/s. Chandana and Company were registered firms in the assessment year 1993-94. M/s. Chandana and Company was registered with effect from 2nd of April 1990 in U.P. for doing business of stationery and books. It got registration certificate amended adding the business of tire works in the registration certificate on 1st of April, 1990 but no turnover of fire works was assessed till 11.7.1994, as mentioned in the Tribunal's order. It has been further found that after the commencement of the aforesaid scheme the applicants applied for registration on or about 16th July, 1994 which was granted on or about 22nd July, 1994. The disclosed turnover of all the applicants for the period they carried on business as registered Firm is less than Rs. 7 Lakhs. On this premise, the Trade Tax Officer Sector-I found that the applicants are entitled to invoke the benefit of the scheme in question. However, this has been reversed by the Deputy Commissioner (Executive) with the help of Section 18 of the Act. The Deputy Commissioner (Executive) has proportionately

enhanced the turnover for the entire assessment year (12 months). The question of applicability of Section 18 is, thus, immediately arises. Section 18(2) of the Act is reproduced below:

18. Assessment of reconstituted or new firms and change of partnership. -

(1) ...

(2) Every dealer commencing business during the course of an assessment year whose average estimated monthly turnover for the remainder of the year is not less than one-twelfth of [one lakh] rupees in the case of manufacturers or [one lakh fifty thousand] rupees in the case of other dealers] or of such large amount as may be notified under Sub-section (2) of Section 3, or whose turnover during such period is liable to tax under Sub-section (3), shall within 30 days from the expiry of the month in which business was commenced, give notice of the fact to the Assessing Authority, and shall submit a statement of his turnover at such intervals, within such period, in such form and verified in such manner as may be prescribed.

(3) ...

(4) ...

17. This Court is concerned with the interpretation of Section 18(2) of the Act Let us look at the language employed :

The title "assessment of reconstituted or new Firms, and change of partnership", is itself suggestive of the situation embraced in Section 18 of the Act. This Section, as its heading discloses, has only a limited application. The section has been enacted for the purpose of assessment of reconstituted or new firms and change of partnership, during the course of an assessment year. It nowhere provides enhancement of turnover proportionally for the entire assessment year in question. This section should be read in the light of Section 3 of the Act for the purposes of determining the basic exemption limit of reconstituted or new firm for remainder period of the assessment year. Section 3 of the Act provides basic exemption limit for the entire assessment year. This section provides that by change in constitution in the partnership or opening of a new firm or reconstitution of a new firm would not in any way give an advantage to already existing dealers qua the basic exemption limit. If a new firm comes into existence in the course of an assessment year, for the purposes of determination of basic exemption limit, the basic exemption limit shall be proportionately reduced for the period the new firm carried on the business for the part of that assessment year. Section 18 does not provide that the turnover of a new firm which came into existence during the course of assessment year shall be proportionately enhanced and spread over for the entire assessment year. The Deputy Commissioner (Executive) by wrongly interpreting Section 18(2) of the Act has assumed that the turnover of the applicant exceeds Rs. 7 lakhs as its disclosed turnover for the part of the assessment year if enhanced

proportionately would be more than Rs. 7 lakhs. Further u/s 18(2) of the Act an obligation has been cast on every dealer commencing business during the course of an assessment year to file return within 30 days of the month in which business commenced, if the turnover exceeds the specified limit therein. This section, by no stretch of imagination, can be interpreted to enhance the turnover of a new dealer by taking out the average monthly turnover and multiplying it by 12, as done by the Deputy Commissioner (Executive) in the present case. Reliance on Section 18(2) placed by the Dy. Commissioner (Executive) to hold that the turnover of the applicant exceeds beyond Rs. 7 lakhs is misplaced one. The Trade Tax Officer, in each case, has found as a fact that the turnover of each applicant is less than Rs. 7 lakhs. The Deputy Commissioner (Executive) has tried to overcome this finding with the help of Section 18(2) of the Act. As demonstrated above, Section 18(2), in my considered view is not at all applicable and cannot be pressed into service.

18. The Apex Court in the case of Commissioner of Income Tax Bombay City -I, Bombay v. Maharashtra Sugar Mills Limited AIR 1971 S.C. 2434 has quoted an extract from its earlier judgment in Commissioner of Income Tax, Madras Vs. Indian Bank Ltd., which is reproduced below:

In our opinion, in construing the Act, we must adhere closely to the language of the Act. If there is ambiguity in the terms of a provision, recourse must naturally be had to well-established principles of construction but it is not permissible first to create an artificial ambiguity and then try to resolve the ambiguity by resort to some general principle.

19. It is also well established that equity is out of place in tax law. If a particular turnover is not taxable, the same cannot be taxed by invoking the principle of estoppels or any other equitable doctrine, as observed by the Supreme Court in the case of Commissioner of Income Tax, Madras Vs. V. Mr. P. Firm, Muar, . The relevant paragraph is reproduced below:

If a particular income is not taxable under the Income Tax Act, it cannot be taxed on the basis of estoppel or any other equitable doctrine. Equity is out of place in tax law; a particular income is either exigible to tax under the taxing statute or it is not. If it is not, the Income Tax Officer has no power to impose tax on the said income.

20. The Tribunal also committed illegality in mechanically upholding the order of the Deputy Commissioner (Executive) on this point without making any analysis of Section 18. This approach of the Tribunal is far from satisfactory. The Section 18 has been enacted with different purpose.

21. Before the Tribunal in respect of Chandana & Company an argument was raised that it has done the business of fire works in the year 1993-94 and since the said Firm was admittedly registered in the year 1993-94, was entitled to get the benefit of the scheme in question. This argument was negated on the ground that fire work is a licence business and there is no iota of evidence to

show that any such business was transacted by the said firm in the assessment year 1993-94. The Tribunal took the view as no fire work business was done in the year 1993-94, the said firm was also disentitled to invoke the benefits of the said scheme. This approach of the Tribunal is erroneous, for the simple reason that under the scheme the maximum turnover that is Rs. 5 Lakhs, the outer limit provided for. It will include nil turnover also.

22. Before parting with the case it may be noted here that the Deputy Commissioner (Executive) was very much influenced by irrelevant consideration that the Trade Tax Officer by accepting application of the applicants under the aforesaid composition scheme has caused financial loss to the department. It also appears that the Deputy Commissioner (Executive) had issued notice to the Trade Tax Officer, Sector-I who appeared before him on 12th March, 1999 and supported the order passed by him. Faced with this situation the, Deputy Commissioner (Executive) has sought clarification from the Head Quarter through letter No. 3789 dt. 31 March, 1999 and the reminder No. 230 dt. 23.4.99 but proceeded to decide the matter without awaiting further from the Head Quarter. These facts are borne out from the order of Deputy Commissioner (Executive) itself. On a close scrutiny of facts, it is clear, so far as the applicant dealers are concerned, that they did not suppress any facts nor they stated any wrong or false facts. The Deputy Commissioner (Executive) has also not found any misstatement or wrong statement of fact, by the applicants. There was no suppression of facts. Suppression of facts can have only one meaning that the correct information was not disclosed deliberately to evade payment of tax. When facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. The Supreme Court in the case of Anand NishiKawa Co. Ltd. v. Commissioner of Central Excise, Meerut AIR 2005 SCW 4923 has held that to constitute suppression of facts there must be some positive act from the side of the assessee to find willful suppression and if the facts are known both to the department and the assessee, no inference of suppression of facts can be drawn. Although the above observations were made by the Apex Court in the context of Central Excise Act, but are applicable to the facts of the present case and the observation made by the Deputy Commissioner (Executive) in his order is totally uncalled for so far as applicant-dealers are concerned.

23. In nutshell this Court is of the view that registration for the assessment year 1993-94 was not a precondition to invoke the benefit of the scheme in question and for the purposes of determining the maximum limit of Rs. 7 lakhs, provisions of Section 18 of the Act cannot be pressed into service. The Deputy Commissioner (Executive) as well as the Tribunal both have committed legal error in holding otherwise and their orders being indefensible are hereby set aside.

24. In the result all the revisions are allowed with costs of rupees one thousand each. The orders of the Deputy Commissioner (Executive) dated 18.8.1999

(Annexure-5), and of the Tribunal 17.12.2003 (Annexure-10) and 5.3.2004 (Annexure-12) are hereby set aside. The department shall pay Rs. 1,000/- as costs to each applicants, as directed above.