(2010) 08 AHC CK 0008

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 1468 (Tax) of 2003

Kesar Enterprises Ltd. APPELLANT

Vs

State of U.P. and Others RESPONDENT

Date of Decision : 27-08-2010

Acts Referred:

Uttar Pradesh Trade Tax Act, 1948 — Section 21, 21(2), 3AB, 4

Citation : (2011) 39 VST 184

Hon'ble Judges : V. Rajes Kumar, J;Bharati Sapru, J

Bench : Division Bench

Judgement

V. Rajes Kumar, J.—By means of the present petition the Petitioner seeks the following reliefs:

(i) that a suitable writ, order or direction in the nature of writ of certiorari be issued quashing the reassessment proceedings u/s 21 of the U.P. Trade Tax Act, 1948 for the assessment years 1997-98, 1998-99, 1999-2000 and 2000-01 in pursuance of the notice dated December 3, 2003 (enclosed herewith as annexure 7 to this petition); (i-a) that a suitable writ, order or direction in the nature of certiorari be issued quashing the orders dated November 24, 2003 passed by the Additional Commissioner, Grade I, Trade Tax, Bareilly Zone, Bareilly, Respondent No. 3 (enclosed as annexure 6 to the writ petition) for the assessment years 1997-98 to 2000-01 ;

(ii) that a suitable writ, order or direction in the nature of certiorari be issued quashing the circular dated September 30, 2003, directing for imposition of tax on poly pouches in which the country liquor was packed and sold (enclosed as annexure 4 to this writ petition) ;

(iii) that a suitable writ, order or direction in the nature of mandamus or prohibition be issued restraining/prohibiting the Respondent No. 4 from taking any proceedings for imposition of tax on poly pouches for the assessment years 1997-98, 1998-99, 1999-2000 and 2000-01 ;

(iv) that any other suitable writ, order or direction as this honourable court may deem fit and proper in the circumstances of the case be also issued in favour of the Petitioner.

2. The brief facts of the case are that the Petitioner is a public limited company incorporated under the Indian Companies Act, 1956 and is registered under the U.P. Trade Tax Act (called, "the Act", for short) as well as under the Central Sales Tax Act (called, "the Central Act", for brevity). The Petitioner had its sugar factory as well as distillery in the district of Bareilly. The Petitioner is involved in the sale of Indian-made country liquor (country spirit) and sale of molasses, etc. Manufacturing and sales of country liquor are strictly controlled and governed by the provisions of the U.P. Excise Act and Rules. Indian-made country liquor is exempted from tax under the notification issued in exercise of power u/s 4 of the Act. Therefore, its sales are exempted within the State of U. P. as well as under the Central Act.

3. During the assessment years 1997-98, 1998-99, 1999-2000 and 2000-01, both under the Act and Central Act, the Petitioner has sold country liquor in a packed condition in bottles and poly pouches. The bills of the country liquor were made to the Excise Department and the payments in respect of liquor were received from the Excise Department, while separate bills have been issued in favour of the licensee of the country liquor and the payments of such packing materials have been received from them. The Petitioner claimed exemption on the same packing material, viz., bottles and poly pouches, on the ground that country liquor was sold in packed condition and since the country liquor was exempted from tax, therefore, in view of the provisions of Section 3AB of the Act, the packing material was also not liable to tax for all the assessment years. The assessing authority passed the assessment orders without levying the tax on such packing materials. After passing the assessment orders the assessing authority sent proposal to the Additional Commissioner for the grant of approval to initiate the proceeding u/s 21 of the Act on the ground that since the bills have been separately raised in respect of packing materials to the licensee and the payments have been received from the licensee, the turnover of such packing materials is not liable to be exempted under the provisions of Section 3AB of the Act and are liable to tax at the rate applicable to it. It appears that the proposal has been sent on the basis of letter dated September 26, 2003 issued by the Government, which has been circulated by the Commissioner through its circular dated September 30, 2003. On receipt of the proposals for all the four assessment years, the Additional Commissioner has issued notices to the Petitioner for providing opportunity. The Petitioner filed separate replies for all the assessment years taking common pleas. The Additional Commissioner, vide impugned orders, granted approval on the basis of the reasons given in the proposal and, in pursuance thereof, the impugned notices have been issued by the assessing authority u/s 21 of the Act.

4. Heard Sri Bharat Ji Agrawal, senior advocate, assisted by Sri Piyush Agrawal,

learned Counsel for the Petitioner and learned standing counsel.

5. The learned Counsel for the Petitioner submitted that while granting approval under the proviso to Section 21(2) of the Act, the Additional Commissioner has not given any reason. He further submitted that the initiation of proceeding is only on account of change of opinion and, therefore, the order of the Additional Commissioner as well as the notices issued u/s 21 of the Act for all the assessment years are liable to be quashed.

6. The learned standing counsel submitted that the approval has been granted on the basis of the proposal sent by the assessing authority. He submitted that no separate and detailed reasons are required to be given for granting approval under the proviso to Section 21(2) of the Act, inasmuch as the Additional Commissioner is not an adjudicating authority and his satisfaction only is sufficient for granting approval. He further submitted that the Division Bench of this Court in Writ Petition No. 317 of 2004 (Majhola Distillery & Chemical Works Majhola, District Pilibhit v. State of U.P.), decided on October 4, 2007 See (2010) 34 VST 292 (All) (App), on a consideration of the various decisions of the apex court and the aims and objects of introducing Section 3AB of the Act has held that Section 3AB of the Act applies only in a case where a composite price for the goods and packing materials have been charged and it does not apply to a case where the price of the goods and packing materials have been separately charged. He submitted that SLP filed against the said order has been dismissed by the apex court. He further submitted that the provision itself is a source and constitutes material to initiate the proceeding and, therefore, it cannot be said that there was no material to form the belief about the escaped assessment. He has, however, admitted that for two assessment years, viz., 1997-98 and 1998-99 the assessing authority, in the assessment order, has adjudicated the issue but for the assessment years 1999-2000 and 2000-01 there is no discussion in the assessment order relating to the issue.

7. We have considered the rival submissions and have gone through the records. A perusal of the proviso to Section 21(2) of the Act reveals that the authority concerned has to satisfy on the basis of the reasons recorded by the assessing authority in the proposal seeking approval. The Additional Commissioner exercising powers under the proviso to Section 21(2) of the Act is not the adjudicating authority. Therefore, we are of the view that no separate reasons are required to be given, but, at the same time, the powers should not be exercised mechanically and there should be application of mind. It is true that the order of the Additional Commissioner is not happily worded, but, on the facts and circumstances of the present case, it would be futile to set aside the order and relegate the matter to the Additional Commissioner to pass fresh order in view of the decision of this Court in Writ Petition No. 317 of 2004 (Majhola Distillery & Chemical Works Majhola, District Pilibhit v. State of U.P. (2010) 34 VST 292 (App)) which has been followed in several other cases wherein it has been held that Section 3AB of the Act applies only in a case where a composite

price for the goods and the packing materials have been charged and it does not apply to a case where the prices of the goods and the packing materials have been separately charged.

8. The question of merit, namely, where the prices for the country liquor and packing materials are separately charged whether the provision of Section 3AB applies or not is squarely covered by the Division Bench decision of this Court in the case of Majhola Distillery & Chemical Works Majhola, District Pilibhit v. State of U.P. (Writ Petition No. 317 of 2004 delivered on dated October 4, 20071) wherein it has been held that where the price of the goods and the packing materials are separately charged, Section 3AB does not apply and accordingly it has been held that if the prices for the country liquor and the packing materials are separately charged, the value of the packing materials would not be exempted u/s 3AB of the Act. The Division Bench of this Court has considered in details the decisions of the apex court in the case of Premier Breweries Vs. State of Kerala, The Associated Cement Companies Ltd. Vs. Government of Andhra Pradesh and Another, Raj Steel and Others Vs. State of A.P. and Another, and Co-operative Company Ltd. Vs. Commissioner of Trade Tax, U.P., and aims and objects of introducing Section 3AB of the Act. The Division Bench decision of this Court is well considered decision. The SLP against the said order has also been dismissed by the apex court. In this view of the matter, we do not see any reason to reconsider the issue and we respectfully agree with the view taken by the Division Bench. Accordingly, we are of the view that the view expressed in circular dated September 30, 2003 is legally correct and in accordance to the provisions of the Act.

9. So far as the submissions of learned Counsel for the Petitioner that the proceedings have been initiated on account of change of opinion, we are of the view that for the assessment years 1997-98 and 1998-99, the submissions of the Petitioner''s counsel has substance but for the assessment years 1999-2000 and 2000-01, the submissions of the Petitioner''s counsel cannot be accepted. In the assessment orders, for the assessment years 1997-98 and 1998-99, the claim of the Petitioner that the value of the bottles or poly pouches was not liable to tax, has been considered in details; the facts that the prices of the liquor and the bottles and the poly pouches have been charged separately, have been noticed and on the consideration of the aforesaid facts, the assessing authority had held that the value of the bottles and poly pouches were not liable to tax in view of Section 3AB of the Act as the country liquor is exempted from tax. Therefore, the reopening of the proceedings for the assessment years 1997-98 and 1998-99 are only on account of change of opinion and cannot be sustained. So far as the assessment years 1999-2000 and 2000-01 are concerned, learned Counsel for the Petitioner fairly admitted that the issue has not been considered in the original assessment orders, therefore, reopening of the proceedings u/s 21 of the Act cannot be said to be on account of change of opinion inasmuch as no opinion has been expressed in the order. It is settled principle of law that each year is a separate assessment year for the purposes of assessment. (See Bharat Sanchar

Nigam Ltd. and Another Vs. Union of India (UOI) and Others,

10. We are of the view that the issue involved in the present case is squarely covered by the Division Bench decision of this Court in the case of Sir Shadilal Enterprises Ltd., Shamli, District Muzaffar Nagar v. State of U.P. reported in (2010) 35 VST 86 : (2010) 43 NTN 1 wherein similar issue has been considered in detail. No other point has been argued.

11. In the result, the writ petition is allowed in part and the notices u/s 21 of the Act for the assessment years 1997-98 and 1998-99 are hereby quashed. The notices issued u/s 21 of the Act for the assessment years 1999-2000 and 2000-01 are held valid.