

(2008) 05 DEL CK 0086

In the Delhi High Court

Case No : Writ Petition (Civil) No's. 17423 of 2006 and 17391 of 2006

L.G. Electronics (India) Ltd.

APPELLANT

Vs

Commissioner of Trade and Taxes

RESPONDENT

Date of Decision : 23-05-2008

Acts Referred:

Delhi Sales Tax Act, 1975 — Section 21, 24, 25, 30, 30(1)

Delhi Sales Tax Rules, 1975 — Rule 29

Delhi Value Added Tax Act, 2004 — Section 106, 74A

Citation : (2008) 103 DRJ 537 : (2008) 16 VST 361

Hon'ble Judges : Vidya Bhushan Gupta, J; Madan B. Lokur, J

Bench : Division Bench

Advocate : S.C. Ladi and Rajesh Jain, for the Appellant; Rakesh Khanna and Rajesh Mahna, for the Respondent

Judgement

Madan B. Lokur, J.—This judgment is in respect of two writ petitions. The first is Writ Petition (Civil) No. 17423 of 2006 in which the prayer of the Petitioner is for quashing Order No. 449 dated 7th November, 2006 passed by the Joint Commissioner of Sales Tax under the provisions of Section 46 of the Delhi Sales Tax Act, 1975 (for short the DST Act) in respect of the assessment years 1997-98 to 1999-2000 (three years). Section 46 of the DST Act deals with the suo motu revisionary powers of the Commissioner of Sales Tax and according to the Petitioner, neither the Commissioner nor his delegate, the Joint Commissioner, had any jurisdiction to pass the order since the DST Act was repealed by the Delhi Value Added Tax Act, 2004 (the VAT Act) which came into force with effect from 1st April, 2005.

2. The second is Writ Petition (Civil) No. 17391 of 2006 in which the prayer of the Petitioner is for setting aside Order No. 437 dated 20th October, 2006 issued by the Joint Commissioner of Sales Tax under the provisions of Rule 29 of the Delhi Sales Tax Rules, 1975 (for short the Rules) in respect of the assessment years 1997-98 to 1999-2000 (three years). According to the Petitioner, it was entitled to a refund of sales tax erroneously levied and demanded but that was declined

by the impugned order.

3. Broadly speaking, the Petitioner is a limited company engaged in the manufacture, sale and purchase of electronic items. It has a chain of distributors and dealers through whom its goods are sold to ultimate consumers. The Petitioner does not, by itself, sell any goods directly to the consumers - sales are effected only through the distributors/dealers.

4. According to the Petitioner, it had floated schemes by virtue of which it offered trade discounts against the catalogue price of the goods for the benefit of the distributors and dealers. The Petitioner also gave cash discounts on immediate payments. Contracts were entered into by the Petitioner with its distributors and dealers and the discounts were offered through credit notes issued to them. According to the Petitioner, the credit notes included the tax amount.

5. In respect of the assessment year 1997-98, the Assessing Officer under the DST Act framed an assessment on 29th September, 2000 whereby it disallowed the claim of the Petitioner for trade discounts said to have been given to its distributors and dealers.

6. Feeling aggrieved by the assessment order dated 29th September, 2000, the Petitioner preferred an appeal before the concerned Deputy Commissioner who set aside the assessment order and remanded the matter for a fresh consideration by the Assessing Officer under the DST Act. This was on 16th April, 2001.

7. The only issue before the Deputy Commissioner/Appellate Authority was whether the trade discount given by the Petitioner to its distributors and dealers through credit notes has rightly been disallowed and tax imposed thereon.

8. During the course of hearing before the Deputy Commissioner/Appellate Authority, the Petitioner placed reliance on *The Deputy Commissioner of Sales Tax (Law) v. Advani Oerlikon (P) Ltd.* [1980] 45 STC 32. In this decision, the Supreme Court made a distinction between a cash discount and a trade discount. It was held as follows:

Cash discount is allowed when the purchaser makes payment promptly or within the period of credit allowed. It is a discount granted in consideration of expeditious payment. A trade discount is a deduction from the catalogue price of goods allowed by wholesalers to retailers engaged in the trade. The allowance enables the retailer to sell the goods at the catalogue price and yet make a reasonable margin of profit after taking into account his business expense. The outward invoice sent by a wholesale dealer to a retailer shows the catalogue price and against that a deduction of the trade discount is shown. The net amount is the sale price, and it is that net amount which is entered in the books of the respective parties as the amount realisable.

In view of the decision of the Supreme Court, since a trade discount does not enter into the composition of the sale price but exists apart from and outside it

and prior to it, it cannot be included in the taxable turnover. Therefore, according to the Petitioner, the trade discount offered by it to its distributors and dealers could not be included in its taxable turnover. Following the decision of the Supreme Court, the Deputy Commissioner/Appellate Authority decided in favor of the Petitioner and required the Assessing Officer to have a fresh look at the matter.

9. On 7th April, 2003, the Assessing Officer reconsidered the case of the Petitioner and for the assessment year 1997-98, he granted a refund of Rs. 5,15,656/-. The Assessing Officer noted that the assessed had filed a complete set of credit notes showing credit of sales tax to the respective parties. One of the issues canvassed by learned Counsel appearing before the Assessing Officer was that the sales tax had already been returned by issuing credit notes and this was examined by the Deputy Commissioner/Appellate Authority who accepted the contention of the Petitioner. Based on the facts of the case as well as the submissions made by the Petitioner, the Assessing Officer examined the record and allowed the claim made by the assessed.

10. In respect of the assessment year 1998-99, the assessment of the Petitioner went through the same fate and on remand by the Deputy Commissioner, the Assessing Officer passed an order on 8th December, 2003 accepting the claim of the Petitioner and he granted a refund of Rs. 3,68,601/-.

11. In respect of the assessment year 1999-2000, since the earlier appellate order was already available, the Assessing Officer considered the matter on merits and by an order dated 28th December, 2001 he granted a refund of Rs. 86,73,349/- to the Petitioner.

12. The situation, Therefore, was that in respect of all the three assessment years that we are concerned with, the claim of the Petitioner for allowing trade discount in respect of the sales made to its distributors and dealers was allowed by the Assessing Officer.

13. On this basis, the Petitioner filed refund claims on different dates in respect of all the three assessment years with the Assessing Officer u/s 30 of the DST Act.

14. Unfortunately, instead of granting the refund claimed by the Petitioner in terms of the orders passed by the Assessing Officer, the Petitioner was issued a show cause notice on 14th June, 2004 u/s 24 of the DST Act for reopening its assessment for all the three assessment years. The Petitioner contested the notice but in respect of the assessment year 1999-2000 (where the refund amount was quite considerable), an order was passed on 16th July, 2004 denying the benefit of trade discount to the Petitioner and, Therefore, denying the refund claim.

15. Feeling aggrieved, the Petitioner filed two writ petitions in this Court being Writ Petition (Civil) No. 15217 of 2004 and Writ Petition (Civil) No. 15285 of

2004. In these writ petitions, the Petitioner challenged the notices seeking to reopen the completed assessments and also the reassessment order dated 16th July, 2004 passed in respect of the assessment year 1999-2000.

16. When both these writ petitions came up for hearing on 22nd September, 2006, learned Counsel for the Revenue informed this Court that the Commissioner of Sales Tax had taken a decision to withdraw the reassessment order for the year 1999-2000 as well as the show cause notices for the assessment years 1997-98 and 1998-99.

17. Noting this, the following order was passed by this Court on 22nd September, 2006:

Learned Counsel for the Revenue states that an instruction has been sought from Shri Subhash Chander, Sales Tax Officer that the Commissioner of Sales Tax had taken a decision to withdraw the reassessment for the year 1999-2000 and show cause notices for the year 1997-98 and 1989-99.

The only question that now remain pertains to refund. The final decision has to be taken under Rule 29 of the Delhi Sales Tax Rules, 1975. The Assistant Commissioner has observed that since the refund amount is substantial, a verification of the records to examine whether refund is rightly due to the dealer, should be made.

In the circumstances of the case, we direct the Assistant Commissioner to pass a reasoned order on the application for refund within 4 weeks from today.

With these observations, the Writ Petition is disposed of.

Order be given dusty to both the parties.

18. It may be mentioned that in the meanwhile, the VAT Act came to be enacted and was brought into force with effect from 1st April, 2005.

19. Significantly, the VAT Act did not provide for any power of revision such as the one which existed under the repealed DST Act. This is of considerable importance as will be apparent a little later.

20. In any event, after the order dated 22nd September, 2006 passed by this Court, the assessment orders became final since the show cause notices were withdrawn and the chapter of "reassessment" was closed and the reassessment order was also withdrawn. What, Therefore, remained to be considered was the entitlement of the Petitioner for a refund. At this stage, it may be noted that a refund claim can only be rejected under certain conditions mentioned in Section 30 of the DST Act.

21. Be that as it may, since the order passed by this Court on 22nd September, 2006 gave the Assistant Commissioner four weeks time to pass a reasoned order on the application for refund moved by the Petitioner in respect of all the three assessment years that we are concerned with, he issued a notice on 18th

October, 2006 asking the Petitioner to show cause why the refund applications be not rejected. This was virtually on the last day of the expiry of the period of four weeks.

22. Almost immediately thereafter on 20th October, 2006 the concerned Joint Commissioner rejected all the three refund applications filed by the Petitioner in respect of the three assessment years. On the same day, the Joint Commissioner issued notices to the Petitioner to show cause why the assessment orders passed in its favor (on the basis of which the claims for refund were made) be not revised suo motu. The notices for suo motu revision of the assessment orders for the assessment years 1997-98 to 1999-2000 were issued by the Joint Commissioner of Sales Tax u/s 46 of the repealed DST Act.

23. Pursuant to the show cause notice dated 20th October, 2006, the Joint Commissioner passed an order on 7th November, 2006 suo motu revising the assessment orders passed in favor of the Petitioner for the three assessment years that we are concerned with and then remanded the matter to the Assessing Officer for a fresh assessment. It is against this order dated 7th November, 2006 that the Petitioner has filed Writ Petition (Civil) No. 17423 of 2006.

24. As we have already mentioned above, the DST Act was repealed and the VAT Act was brought into force with effect from 1st April, 2005. The VAT Act had no provision for suo motu exercise of revisionary power by the Commissioner. The power to revise an assessment order was conferred upon the Commissioner for the first time by an amendment to the VAT Act which incorporated Section 74A therein with effect from 16th November, 2005.

25. One of the questions canvassed before us was whether the Commissioner or his delegate (the Joint Commissioner) could exercise powers u/s 46 of the DST Act which had been repealed by the VAT Act. In continuation of this, another question canvassed before us was that in the absence of an appropriate savings clause, coupled with the fact that the revisionary power was deliberately not conferred upon the Commissioner under the VAT Act, could the Commissioner exercise powers conferred by Section 46 of the repealed DST Act.

26. This very issue had arisen before us in Writ Petition (Civil) No. 5828 of 2007 (International Metro Civil Contractors v. Commissioner of Sales Tax/VAT, Delhi and Anr.) decided on 14th March, 2008 and we had expressed the opinion that after 1st April, 2005, the Commissioner of Sales Tax had no power to revise an order passed u/s 46 of the repealed DST Act, since such a power was deliberately not conferred upon him. The repeal and savings section (Section 106) of the VAT Act did not save the power u/s 46 of the DST Act.

27. We were told by learned Counsel for the Revenue that the decision rendered by us in M/s International Metro Civil Contractors was the subject matter of a Petition for Special Leave to Appeal (Civil) No. 7470 of 2008 (Commissioner, Value Added Tax, New Delhi and Anr. v. International Metro Civil Contractor) and

by an order dated 31st March, 2008 passed by the Supreme Court, it was made clear that the larger issue regarding the applicability of the VAT Act as also the question of repeal of the DST Act and related issues discussed in our judgment were kept open. This is what the Supreme Court said:

Having regard to the facts of the present case we are of the view that the Commissioner ought not to have interfered with the Assessment Order u/s 46 of the Delhi Sales Tax Act particularly when the requirements of that Section do not stand complied with. We make it clear that the larger issue regarding the applicability of Delhi Value Added Tax Act 2004 as also question of repeal of Delhi Sales Tax Act and related issues discussed in the impugned judgment of the High Court are kept open.

As far as the cost is concerned we are of the view that in the facts and circumstances of the case it would not be proper to impose the cost of rupees twenty six lakhs on the Department. Ultimately it is the tax payer who has to bear the burden. The order passed by the High Court as far as cost is concerned stands cancelled.

The SLP is disposed of accordingly.

28. Consequently, the view expressed by us in M/s International Metro Civil Contractors has not been upset by the Supreme Court and, Therefore, following the decision rendered by us, for which neither learned Counsel has given us reason to depart from, we conclude that the Commissioner (and, Therefore, his delegate the Joint Commissioner) had no power u/s 46 of the repealed DST Act to revise an assessment order. Section 106 of the VAT Act dealing with repeal and savings does not come to the rescue of the Revenue as we have held in that decision.

29. On this short ground itself, Writ Petition (Civil) No. 17423 of 2006 is allowed and the impugned Order No. 449 dated 7th November, 2006 is quashed.

30. To complete the record, we may note that learned Counsel for the Petitioner contended that the exercise of power to suo motu revise the assessment orders was mala fide and a clear attempt to overturn the earlier decision of the Commissioner to withdraw reassessment proceedings. It was also said to be a blatant attempt to overreach this Court which was already seized of the issue regarding the correctness of the procedure adopted by the Revenue and which made it clear in its order of 22nd September, 2006 that the only question that remained was of granting a refund to the Petitioner. We are not going into these issues because it is not necessary to do so particularly since we have held that the exercise of power by the Commissioner was without jurisdiction.

31. The next question that arises for consideration is whether the claim for refund was rightly rejected. This is the subject matter of Writ Petition (Civil) No. 17391 of 2006. Our answer to this question is in the negative and there are two reasons for it.

32. Firstly, since the suo motu revision of the assessment orders has been held to be bad in law, the natural consequence is that the assessment orders sought to be revised must be held to have been validly passed. That being so, there is no impediment in accepting, in principle, the claim for refund subject to any legal obstacle. Is there any legal obstacle?

33. The claim for refund was made by the Petitioner u/s 30 of the DST Act. Ordinarily, the claim must be allowed in view of the provisions of Section 30 of the DST Act, but it may be rejected only on the grounds mentioned in Section 30(3) and Section 30(6) of the DST Act. These provisions read as follows:

30. Refund. - (1) If any person satisfies the Commissioner that the amount of tax paid by him or on his behalf for any year exceeds the amount payable by him under this Act for that year, he shall, on making a claim in the prescribed form and verified in the prescribed manner, be entitled to refund of the excess either by cash payment or at his option by deduction of such excess from the amount of tax and penalty (if any) due in respect of any other period:

Provided that the Commissioner shall first apply such excess towards the recovery of any amount in respect of which a notice u/s 25 has been issued and shall then refund the balance, if any.

Explanation. - When no assessment is made, the due tax paid u/s 21 by the dealer shall be deemed to be the tax payable under this Act.

(2) xxx xxx xxx

(3) No claim for refund under Sub-section (1) shall be allowed unless it is made within a period of twelve months from the date of the order giving rise to a claim for such refund and the Commissioner shall, except as otherwise provided in this Act, refund any amount which becomes due to a dealer in the prescribed manner:

Provided that the Commissioner may allow a claim for refund to be made after the expiry of the said period but not later than twelve months from such expiry, if he is satisfied that there was sufficient cause for not making such claim within that period.

(4) & (5) xxx xxx xxx

(6) Where an order giving rise to a refund is the subject-matter of an appeal or further proceeding or where any other proceeding under this Act is pending and the Commissioner is of opinion that the grant of the refund is likely to adversely affect the revenue, the Commissioner may withhold the refund till such time as the Commissioner may determine.

34. It is nobody's case that any of the conditions specified in Section 30(3) or Section 30(6) of the DST Act exist so as to deny the claim for refund. As far as Section 30(3) of the DST Act is concerned, there is no doubt that the claim for refund was made within a period of twelve months from the date of the order giving rise to the claim. As far as Section 30(6) of the DST Act is concerned, the

revisionary proceedings suo motu initiated by the Commissioner having been quashed by us today, no proceeding in respect of the subject matter of the claim for refund is pending. The assessment order on the basis of which the refund claim was made is not the subject matter of any appeal or any other proceeding. Consequently, the refund claim must be allowed in favor of the Petitioner since no legal bar exists.

35. We may also note that what the Revenue is effectively attempting to do is to reopen a closed assessment while considering the application for refund. Clearly, this is not permissible. On the facts of the present case, this is all the more so because the Revenue had earlier tried to reopen the completed assessment but when that was challenged by the Petitioner by filing a writ petition in this Court, the Revenue decided to withdraw the show cause notices issued to the Petitioner for reassessment. To make matters worse for the Revenue, even the reassessment order that had been passed for the assessment year 1999-2000 was withdrawn by the Revenue. It is, Therefore, quite clear that the Revenue is trying to do collaterally and in a roundabout manner is what it could not succeed in doing on an earlier occasion. In the garb of examining the claim for refund, which can be rejected only under the conditions specified in Section 30 of the DST Act, the Revenue is wanting to reopen and reassess all the completed assessments which, in our opinion, is certainly not permissible.

36. However, it is necessary to recall that when this Court disposed of the earlier two writ petitions filed by the Petitioner on 22nd September, 2006, a submission was made by the Revenue that since the refund amount is substantial it is necessary to verify the records of the Petitioner to decide whether a refund should be made or not. Liberty as prayed for was implicitly granted by this Court because a direction was given to the Revenue to pass a reasoned order on the application for refund within four weeks. Therefore, it would be correct on the part of the Revenue to contend that they were entitled to take a fresh look at the applications for refund in view of the earlier order passed by this Court. This has in fact been done but we find that notwithstanding this there was no occasion, in law, for the Revenue to have rejected the refund claims since the conditions mentioned in Section 30 of the DST Act were not applicable.

37. Having said this, we may note that it is mentioned in the order rejecting the claim for refund that the claim is rejected by applying the principles of unjust enrichment. In this regard, reliance is placed upon the decision of the Supreme Court in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, . It appears to us that the decision rendered by the Supreme Court is not quite applicable. It is mentioned in the majority judgment written by Justice B.P. Jeevan Reddy (with whom Chief Justice Ahmadi agreed) in the opening paragraph that a significant question concerning the refund of excise and customs duties collected contrary to law arises for consideration. The question arose as a result of certain amendments made to the Central Excise and Salt Act, 1944 and the Customs Act, 1962. The decision of the Supreme Court, Therefore,

did not concern itself with the question of unjust enrichment in respect of other statutes. Therefore, Mafatlal Industries would not help the Revenue in this case.

38. Learned Counsel for the Revenue, however, relied upon an unreported decision of this Court in *Mafat Lal Dyes and Chemicals Ltd. v. Sales Tax Officer Writ Petition (C) No. 3716/1992* decided on 29th September, 2005. In that case, a Division Bench of this Court relied upon a judgment of the Supreme Court being *Entry Tax Officer, Bangalore v. Chandanmal Champalal & Co.* [1994] 95 STC 5 in which the Supreme Court applied the principle of unjust enrichment and denied a claim for refund. While referring to that decision as well as *Mafatlal Industries*, the Division Bench declined to grant refund of sales tax on the ground that the tax was in fact collected by the assessed therein which was then passed on to the customers. It was held that a direction for refund of the sales tax passed on would amount to unjustly enriching the assessed therein.

39. In our opinion, the decision rendered by a Division Bench of this Court would be applicable to the facts of this case. In view of the Division Bench decision, the principle of unjust enrichment would apply to a case such as the present which pertains to a refund of sales tax.

40. However, what needs to be determined is whether the Petitioner had passed on the benefit of the trade discount to its dealers and distributors. We feel handicapped in making such a determination on the existing paperbook because the facts of the case in this regard are not at all clear.

41. In the impugned order rejecting the claim for refund, the Joint Commissioner has been critical of the credit notes and the manner in which they have been prepared and kept by the Petitioner but unfortunately he does not deal with the question whether the benefit of the trade discount was passed on by the Petitioner to its dealers and distributors. On the basis of his conclusion that the credit notes were not kept in a proper manner, the Joint Commissioner has presumed that the burden of sales tax was passed on by the Petitioner to its dealers and distributors who in turn have passed it on to the ultimate consumers. We are of the opinion that this is a rather unsatisfactory way of dealing with the factual position but we do agree that in case the Petitioner has passed on the sales tax burden despite giving a trade discount, it would not be entitled to a refund to that extent on the principles of unjust enrichment.

42. Consequently, we are of the opinion that since the facts in this regard are not at all clear, it will be appropriate if the matter is dispassionately re-examined by the Joint Commissioner limited only to the question whether the Petitioner has passed on the tax burden to its dealers and distributors or not. If it is found that the Petitioner has passed on the tax burden, then on the principles of unjust enrichment the Petitioner will not be entitled to a refund for that amount. But if it has not passed on the tax burden then, of course, the Petitioner will be entitled to a refund. To this extent, while we quash the Order No. 437 dated 20th October, 2006 we direct the Joint Commissioner to take a decision within six

weeks from today limited to the question whether, despite the trade discounts given by the Petitioner, it has passed on the tax burden to its dealers and distributors or not. Of course, the Petitioner will be entitled to produce all its documents to show that the tax burden has not been passed on to the dealers and distributors.

43. Writ Petition (C) No. 17391/2006 is disposed of in the above terms.

44. There will be no costs in either of the writ petitions.