(2007) 10 AHC CK 0159

In the Allahabad High Court

Lucent Technologies Hindustan Pvt. Ltd. APPELLANT

Vs

Commissioner Trade Tax RESPONDENT

Date of Decision : 09-10-2007

Acts Referred:

Uttar Pradesh Sales Tax Act, 1948 — Section 10, 29, 9
Uttar Pradesh Trade Tax Act, 1948 — Section 11

Citation : (2007) 10 AHC CK 0159

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Judgement

Rajes Kumar, J.—The present revisions u/s 11 of the U.P. Trade Tax Act (hereinafter referred to as the "Act") arise from the order of the Tribunal dated 13.10.2006 for the assessment years 1996-97, 1997-98 (second part), 1998-99 and 1999-2000 by which the Tribunal has confirmed the order of the assessing authority refusing to allow the interest u/s 29(2) of the Act.

2. For the aforesaid assessment years, the Tribunal by order 27.7.2004 allowed the appeals of the applicant and remanded back the cases to the assessing officer for passing afresh assessment orders. It is claimed that the copy of the order dated 27.7.2004 passed by the Tribunal had been served upon the assessing authority on 17.8.2004. In pursuance of the aforesaid order of the Tribunal, fresh assessment orders had been passed on 12.4.2005 which were served upon the applicant on 14.5.2005. As per fresh notices of demand, the tax assessed were liable to be paid by 13.6.2005.

3. The applicant moved applications on 28.3.2005 for the refund of the amount which was paid in pursuance of the assessment orders towards disputed tax, during the pendency of appeals against the said assessment orders which according to the applicant, in all the four years, was about Rs. 62,00,000/- since the amount could not be refunded within the time specified in Section 29(2) the applicant also demanded interest. The assessing authority vide order dated 14.6.2005 rejected the claim of refund and interest. The applicant filed the

appeals before the Joint Commissioner (Appeal), Trade Tax, Meerut which were dismissed vide order dated 14.10.2005.

4. Being aggrieved by the order of the Joint Commissioner (Appeal), applicant filed second appeals before the Tribunal. The Tribunal by the impugned order dismissed all the appeals.

5. Heard Sri Kunwar Saksena, learned Counsel for the applicant and Sri B.K. Pandey, learned Standing Counsel.

Sri Kunwar Saksena, learned Counsel for the applicant submitted that since the fresh liability of tax has been created by the assessing authority by passing the fresh assessment orders dated 12.4.2005, the excess amount claimed to be refundable have been adjusted with the demand. Therefore, the issue of refund does not survive. He however submitted that the issue relating to the interest only survives. The interest was claimed for the period 17.8.2004 to 13.6.2005 which is payable u/s 29(2) of the Act as the amount has not been refunded within three months from the date of the service of the order of the Tribunal which ought to have been refunded in view of the assessment orders being set aside by the Tribunal. In support of the claim, the applicant relied upon the decisions of this Court of learned single Judge in the case of Hind Lamps Limited, Firozabad, v. Commissioner of Sales Tax, Lucknow, reported in 2004 UP TC 80 which has been relied upon by the Division Bench in the case of Ellora Mechnical Products Pvt. Ltd. v. State of U.P. and Ors. reported in 2006 UPTC-368. He also relied upon the decision of its own case in the case of Lucent Technologies Pvt. Ltd., Meerut v. Commissioner of Trade Tax reported in 2006 UPTC-553 in which the aforesaid two cases have been relied upon.

6. Learned Standing Counsel submitted that the Tribunal while remanding back the case had not issued any direction for the refund of the amount and in the absence of any specific direction to refund the amount it was not obligatory on the part of the assessing authority to refund the amount till the date of passing of the fresh assessment order. He submitted that since there was no obligation to refund the amount during the pendency of assessment proceeding in the absence of any direction of the Tribunal to refund the amount, the question of payment of interest did not arise. In support of his contention, he relied upon the decision of Division Bench of this Court in the case of Indodon Milk Products Ltd. v. State of U.P. and Anr. reported in 1983 UPTC 583 and the Division Bench decision of this Court in the case of Oriflame India Pvt. Limited v. Assistant Commissioner (Assessment) reported in 2005 41 STR 155. He also referred the decision of the Apex Court in the case of Commissioner of Income Tax v. Chittoor Electric Supply Corporation and Anr. reported in 212 ITR-404.

7. In the case of Hind Lamps Limited, Firozabad v. Commissioner of Sales Tax (Supra) learned single Judge of this Court has held that once the assessment order is set aside and the matter is remanded back to the assessing authority for fresh assessment, the tax deposited become excess tax and the said amount is

refundable u/s 29(1) of the Act. A similar view has been taken by the Division Bench in the case of Ellora Mechnical Products Pvt. Ltd. v. State of U.P. and Ors. (Supra). Following the aforesaid decisions in the case of the applicant itself, in Lucent Technologies Pvt. Ltd., Meerut v. Commissioner of Trade Tax (supra) similar view was taken and direction for the payment of interest has also been issued.

8. In all the aforesaid cases the decision of Division Bench of this Court in the case of Indodon Milk Products Ltd. v. State of U.P. and Anr. (Supra) has not been considered. The Division Bench of this Court on consideration of the provisions of Section 9, 10 and 29 of U.P. Sales Tax Act held as follows.

11. So far as the appellate or the revisional authority (revisional authority now substituted as Sales Tax Tribunal) are concerned, Sections 9 and 10 of the Sales Tax Act give them very vide powers to, depending upon the circumstances of the cases, confirm, cancel or vary any assessment order and to pass specific orders directing the Assessing Authority to refund to the dealer such amount of tax, fees or penalty or other money as may have been realised in excess of due amount. The empower such authorities also to set aside the assessment order and remand the case to be Assessing Authority to pass a fresh assessment order making such further inquiry as may be specified by him. In such cases where the matter is sent back by the authorities u/s 9 and 10 to the Assessing Authority for passing fresh assessment orders without issuing directions for refund of any amount, it may be that the dealer might become entitled to some refund by virtue of what is contained in the order of remand, but then obligation to refund and to pay interest would not arise till such time as fresh assessment order is not made in pursuance of the remand order. Likewise, apart from the authorities mentioned in Sections 9 and 10 of the Sales Tax Act in suitable cases order of refund or a direction to the Assessing Authority to pass a fresh assessment order may also be made by the High Court in exercise of its jurisdiction under Article 226 of the Constitution. In such cases the obligation to refund the amount to the dealer and to pay interest thereon would accrue only if the High Court makes a specific direction for the refund of the said amount. It would not accrue merely because eventually some refund become due in consequence of the order of the High Court after the directions contained therein are complied with by the Assessing Authority.

(Emphasis provided)

12. Some difficulty, however, still remains while construing the expression "date of the order of refund made by the Assessing Authority." As already pointed out, so far as the authorities constituted under Sections 9 and 10 of the Sales Tax Act are concerned, there are specific provisions in the Act requiring them to in suitable cases, make an order directing refund of the excess amount of tax or other amounts paid by a dealer. But there is no such express provisions requiring the Assessing Authority to pass a formal order of refund in cases where it finds that the assessee has paid an amount more than what has actually been

assessed by it. Clear implication of the section is that if while making ''the assessment order the Assessing Authority finds that the assessee has paid any amount of Sales-tax which is in excess of the amount of tax found to be due from him, it becomes statutory obligation to refund such amount itself. The requirement of making an order refund flows from and can be said to be implied in the assessment order passed by Assessing Authority itself. Accordingly, in the case of an Assessing Authority, the date of the order of refund would be the date of assessment order where under the refund becomes due to the dealer and the interest on the amount to be refunded would run if the same is not refunded within three months of the date of the assessment order.

9. In paragraph-11 it has been categorically held that in case of setting aside the assessment order and remanding back the case "for fresh assessment by the appellate authority, in the absence of any specific order of refund, during the pendency of the assessment it is not obligatory on the assessing authority to refund the amount and allow the interest till the fresh assessment order is passed. This view of the Division Bench is in direct conflict to the decision of the Division Bench in the case of Ellora Mechnical Products Pvt. Ltd. v. State of U.P. and Ors. (Supra).

10. It may De mentioned here that, in my view, prima facie it appears that the decision of the Apex Court in the case of Commissioner of Income Tax v. Chittoor Electric Supply Corporation and Anr. (Supra) has no application to the present dispute. The decision of the Supreme Court is based on the provisions under the Income Tax Act wherein there was a specific provision Sections 237 and 240 in this regard. Section 240 of the Income Tax Act specifically bars the refund of the amount in case if the matter is remanded back till the fresh assessment order is passed.

11. In view of the above, in my view, since there is conflict of opinion between the two Division Benches of this Court it would be appropriate to refer the matter to larger Bench to resolve the issue.

The issue which requires decision by the Full Bench is as follows:

In case, where the case is remanded back by the appellate authority to the assessing officer either u/s 9 or Section 10 of the U.P. Trade Tax Act after setting aside the assessment order without any specific direction to refund the amount, whether it is obligatory on the part of the assessing officer to refund the amount and to pay the interest in case, if the amount is not refunded with the specific period.

12. Let the record of this case be placed before Hon''ble the Chief Justice for the formation of Full Bench.

