

(2014) 08 AHC CK 0214

In the Allahabad High Court

Case No : Trade Tax Revision Nos. 27, 28, 29 and 30 of 2007

Lucent Technologies (P) Ltd.

APPELLANT

Vs

Commissioner, Trade Tax

RESPONDENT

Date of Decision : 12-08-2014

Acts Referred:

Central Sales Tax Act, 1956 — Section 10, 9

Constitution of India, 1950 — Article 226

Uttar Pradesh Trade Tax Act, 1948 — Section 10, 29, 29(1), 29(2), 4

Citation : (2014) 7 ADJ 670 : (2014) 3 UPLBEC 2426 : (2015) 82 VST 371

Hon'ble Judges : Dr. Dhananjaya Yeshwant Chandrachud, C.J.; Dilip Gupta, J.; Bharati Sapru, J

Bench : Full Bench

Advocate : Kunwar Saxena, Advocate for the Appellant; U.K. Pandey and S.C, Advocate for the Respondent

Judgement

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Dr. Dhananjaya Yeshwant Chandrachud, C.J.—The present reference to the Full Bench has been occasioned by conflicting views expressed in two decisions, each of a Division Bench of this Court, in *Indodan Milk Products Ltd. v. State of UP*, 1983 UPTC 583 and *Ellora Mechanical Products Pvt. Ltd. Vs. State of U.P. and Others*, . The later judgment in *Ellora Mechanical Products*, which was delivered by a Division Bench of this Court on 13 January 2006 did not notice the earlier decision in *Indodan Milk Products* which was rendered on 9 November 1982. A learned Single Judge of this Court, while noticing this conflict of views, made a reference to the Full Bench by order dated 9th October, 2007 in Trade Tax Revision No. 27 of 2007 in the following terms:

"In case, where the case is remanded back by the appellate authority to the assessing officer either under Section 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 within the specific period."

The issue which arises before the Court, turns upon the interpretation of the provisions of Section 29 of the U.P. Trade Tax Act, 1948.

The revision applicant ("the assessee") entered into a works contract with Escotel Mobile Communications Limited on 18 May 1996 which envisaged carrying out of work in relation to import of equipment and accessories; installation and supervision of equipment installed; and of providing hardware and software for GSM Networking of mobile phones on a turn-key basis in certain parts of India, including western Uttar Pradesh. The Assistant Commissioner (Assessment), Trade Tax, Meerut took up assessment proceedings for Assessment Years 1996-97, 1997-98, 1998-99 and 1999-2000 on the basis of a report by an officer of the Special Investigation Branch. The Assessing Authority imposed a tax liability, overruling the objection of the assessee that it was not liable to tax. The Joint Commissioner (Appeals) dismissed the appeals filed under Section 9. In the second appeals, the Trade Tax Tribunal, by orders dated 27 July 2004, set aside the orders of the Assistant Commissioner (Assessment) and of the Joint Commissioner (Appeals), and remanded the cases for fresh assessment having due regard to its observations. The orders of the Tribunal were served on the Assessing Authority on 17 August 2004.

2. An amount of about Rs. 62 lacs was recovered during the pendency of the appeals in pursuance of the order passed by the Assessing Authority. Upon remand, fresh orders of assessment were made on 12 April 2005 which were served on 14 May 2005. The assessee had a period of thirty days, until 13 June 2005, to deposit the amount. Details of the amount deposited during the pendency of the appeals and of the tax determined by the Assessing Authority upon remand are tabulated below:

3. The table above indicates that though the assessee had deposited an amount of about Rs. 62 lacs during the pendency of the appeals, pursuant to the assessment orders dated 12 April 2005 passed by the Assessing Authority upon remand, it was still required to pay an amount of Rs. 31 lacs.

4. On 28 March 2005, the assessee filed an application for refund of the amount deposited during the pendency of the appeals and interest from 17 August 2004 (the date on which the orders of remand were served on the Assessing Authority) upto 13 June 2005 (the date on which the amount was required to be paid by the assessee in terms of the orders passed by the Assessing Authority upon remand). The assessee claimed interest on the ground that the Tribunal had allowed its second appeals by its order dated 27 July 2004, while remanding the proceedings. The application was rejected by the Deputy Commissioner (Assessment), Trade Tax by an order dated 14 June 2005. By an order dated 14 October 2005, the first appeals of the assessee were dismissed by the Joint Commissioner (Appeals), Trade Tax, Meerut. On 13 October 2006, the second

appeals filed by the assessee were dismissed by the Trade Tax Tribunal, Meerut. Challenging the orders of the Tribunal, the assessee filed revisions in which the learned Single Judge, by an order dated 9 October 2007, made a reference to the Full Bench.

Section 29 of the Act of 1948 provides as follows:

"29. Refunds.

(1) The assessing authority shall, in the manner prescribed, refund to a dealer any amount of tax, fees or other dues paid in excess of the amount due from him under this Act:

Provided that the amount found to be refundable shall first be adjusted towards the tax or any other amount outstanding against the dealer under this Act or under the Central Sales Tax Act, 1956 and only the balance, if any, shall be refunded.

(2) If the amount found to be refundable in accordance with sub-section (1) is not refunded as aforesaid within three months from the date of order of refund passed by the Assessing Authority or, as the case may be, from the date of receipt by him of the order of refund, if such order is passed by any other competent authority or Court, the dealer shall be entitled to simple interest on such amount at the rate of eighteen per cent per annum from the date of such order or, as the case may be, the date of receipt of such order of refund passed by the Assessing Authority to the date of refund.

Explanation I:

The date of refund shall be deemed to be the date on which intimation regarding preparation of the refund voucher is sent to the dealer in the manner prescribed.

Explanation II:

The expression "refund" includes any adjustment under the proviso to sub-section (1).

(3) Notwithstanding any judgment, decree or order of any Court or authority no refund shall be allowed of any tax or fee due under this Act on the turnover of sales or purchases or both, as the case may be, admitted by the dealer in the returns filed by him or at any stage in any proceedings under this Act.

Explanation I:

The date of refund shall be deemed to be the date on which intimation regarding preparation of the refund voucher is sent to the dealer in the manner prescribed.

Explanation II:

The expression "refund" includes any adjustment under the proviso to sub-section (1)."

5. In *Indodan Milk Products (supra)*, during the course of an assessment under the Central Sales Tax Act, for 1967-68, the turnover of the assessee from the sale of condensed milk was subject to sales tax by an assessment order. The case of the assessee was that the turnover from the sale of condensed milk was not taxable, either under the Act of 1948 or the Central Sales Tax Act on the ground that condensed milk is milk. This Court allowed a writ petition of the assessee challenging the order of assessment and came to the conclusion that condensed milk, being milk, its turnover is not liable to sales tax. The judgment of this Court directed the Sales Tax Officer to modify the order of assessment in relation to condensed milk and to amend a notice of demand that had been issued. An appeal which had been filed by the assessee before the departmental authorities was also allowed and the case was remanded to the Assessing Authority to amend the assessment order along lines similar to the directions issued by this Court. Before the Sales Tax Officer could comply with the mandamus of this Court, the Legislature amended the provisions of the Sales Tax Act with retrospective effect so as to exclude condensed milk from the category of milk under Section 4, as a result of which the turnover of condensed milk ceased to be exempt from sales tax. Consequently, the Assessing Authority did not give effect to the mandamus issued by this Court. The assessee once again filed writ proceedings which were allowed with a direction to the Assessing Authority to comply with the mandamus which had been issued in the previous proceedings. Following this, the Assessing Authority passed an order modifying the assessment and directing a refund. The issue before the Division Bench was, whether the assessee was entitled to interest on the amount refunded and, if so, the date from which interest would commence. The contention of the assessee was that the expression "date of order of refund" in Section 29(2) should be interpreted to mean, the date of the order in pursuance of which the dealer became entitled to a refund. The Division Bench, while negating the contention held as follows, noticing the legislative amendment in Section 29 of the Act of 1948:

"It will thus seen that whereas under sub-section (2) as it stood till its substitution with effect from 1st April, 1979, the liability to pay interest on the amount refundable was to accrue if it was not refunded within a period of six months from the date of the order by virtue of which the amount had to be refunded, the substituted Section provided that the interest at a much higher rate, that is, at the rate of 18% was to accrue if the amount found refundable was not actually refunded within three months from the date of order of refund passed by the Assessing Authority or, as the case may be from the date of receipt by him of the order of refund if such order was passed by any other competent authority or Court. The change in the phraseology of the sub-section from, the date of the order by virtue of which the amount is to be refunded" as it existed in Sub-section (2) of Section 29 prior to its amendment in 1979, to "the date of order of refund passed by the Assessing Authority or, as the case may be, from the date of the receipt by him of the order of the refund if such order is

passed by any other competent authority or Court" is quite significant and cannot be said to be meaningless. The legislature obviously intended that the interest on the amount be refunded would accrue only if the same was not refunded within three months of the order of refund made by the Assessing Authority or receipt by the Assessing Authority of such an order by any other competent authority or Court. In view of the amendment made the obligation to pay interest did not arise merely because there was some order by the Assessing Authority or any other competent authority by virtue of which the amount had eventually to be refunded to a dealer. The amendment contemplated a specific order of refund by the Assessing Authority or by any other competent authority or Court."

(Emphasis supplied)

6. The principle which was formulated by the Division Bench was in the following terms:

"...Sections 9 and 10 of the Sales Tax Act give them very wide powers to, depending upon the circumstances of the case, 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. They empower such authorities also to set aside the assessment order and remand the case to the 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 under Sections 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 becomes due in consequence of the order of the High Court after the directions contained therein are complied with the Assessing Authority."

(Emphasis supplied)

7. The Division Bench held that 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, in suitable cases, to make an order directing the refund of the excess amount of tax or other amount paid by a dealer. However, there is no such express provision requiring the assessing authority to

pass a formal order of refund in case it was found that the assessee had paid an amount more than what has actually been assessed. Hence, in the view of the Division Bench, the date of the order of refund by the Assessing Authority is the date on which the interest on the amount to be refunded would run if it is not refunded within three months of the date of the assessment order.

8. In 2004, a learned Single Judge in *Hind Lamps Limited v. Commissioner of Sales Tax*, 2004 UPTC 80, considered the provisions of Section 29 of the Act of 1948. In that case, the assessee had filed appeals against assessment orders for Assessment Years 1968-69 to 1971-72. The appeals were allowed and the proceedings were remanded for reconsideration by the Assessing Authority. In the meantime, the assessee had to deposit various amounts for assessment years 1968-69 to 1971-72. Acting on the basis that this amount had become refundable following the order of remand, the assessee adjusted the amounts deposited against payment of tax for the months of April, May and August 1977. The Assessing Authority declined to grant the adjustment and imposed interest for late payment. Both the first appellate authority and the Tribunal confirmed the order of the Assessing Authority. The learned Single Judge of this Court, while allowing the revision filed by the assessee, held as follows:

"The learned Standing Counsel could not point out any provision either under U.P. Trade Tax Act or under the rules framed therein to justify the observations of the Tribunal that the amount of refund shall be due in the case of remand order only after passing of fresh assessment order. By putting interpretation on word "due" the Tribunal has held that the amount will be refundable only after fresh assessment. According to it the word "due" in tax matter means a sum payable only after quantification of the amount in the assessment proceedings. This interpretation of the Tribunal, in my view, is out of context. When an assessment order is set aside, varied or annulled in appeal, any excess amount paid by person over and above admitted liability is due to him...."

Consequently, the view of the learned Single Judge was that an assessee is entitled to a refund of an amount which is paid or deposited during the pendency of an appeal, which is not referable to an admitted tax liability.

9. The judgment of the learned Single Judge in *Hind Lamps* was approved by a Division Bench in *Ellora Mechanical Products (supra)*. In that case, the first appeals of the assessee against orders of assessment under the Act of 1948 were dismissed. In the second appeals, the assessee applied for a waiver of pre-deposit and eventually filed writ proceedings in which it was required to deposit a part of the disputed amount of tax and to furnish a bank guarantee for the balance. The Tribunal subsequently allowed the appeals of the assessee and remanded the proceedings to the Assessing Authority for passing fresh orders of assessment. Thereupon, the assessee made an application seeking a refund of the amount which had been deposited pursuant to the order of this Court. The Division Bench agreed with the view of the Single Judge in *Hind Lamps* and held that under Section 29(1), a duty is cast on the Assessing Authority to refund to a

dealer, tax paid in excess of the amount due. In the view of the Division Bench, until such time that an assessment is not made, any amount due under the Act would be referable only to the admitted tax liability and any amount which is deposited in excess of the admitted tax liability upon interim orders passed by the appellate authority or by this Court, would not be an amount due in the absence of a determination of liability either by an assessment or otherwise.

10. After the judgment of the Division Bench in Ellora Mechanical Products, which was rendered on 13 June 2006, a matter pertaining to the revision applicant in these proceedings came up before a learned Single Judge in Lucent Technologies Pvt. Ltd. Vs. Commissioner, Trade Tax . In that case, an order of assessment was made under the Act of 1948. The assessee disputed the tax liability on the ground that it was not engaged in the business of buying and selling within the State. The first appellate authority allowed the appeal and remanded the proceedings to the Assessing Authority. In the meantime, the entire amount of tax was realized from the assessee. Thereupon, the assessee called upon the Assessing Authority to refund the amount of tax following the order of remand relying upon the decision of the learned Single Judge in Hind Lamps. Before the learned Single Judge, both the learned counsel appearing for the assessee and for the revenue agreed that the revision was covered by the judgment of the Division Bench in Ellora Mechanical Products which, in turn, had approved the decision of a learned Single Judge in Hind Lamps. Consequently, the learned Single Judge directed the Assessing Authority to refund the amount which had been recovered in pursuance of the order of assessment during the pendency of the appeal, other than the admitted tax liability together with interest under Section 29.

11. The correctness of the view of a learned Single Judge in Hind Lamps was called into question before the Supreme Court in an appeal filed by the revenue. By a judgment dated 31 July 2008 in Commissioner of Sales Tax, U.P. v. Hind Lamps Ltd., 2008 UPTC 978, the Supreme Court reversed the view of the learned Single Judge of this Court. The issue before the Supreme Court was whether it was open to a dealer to make an adjustment while depositing tax on the basis of tax out, admitted to be payable, of certain amounts which according to him had been deposited in excess for some other assessment periods. To recapitulate, the dealer had claimed that certain amounts which had been paid towards tax had become refundable following an order of remand to the Assessing Authority, issued by the first appellate authority. That amount was sought to be adjusted against the amount payable as tax for a subsequent period. The plea had been allowed, as noted earlier, by a learned Single Judge of this Court. The Supreme Court reversed the judgment of this Court holding that under the proviso to Section 29(1), the amount must have been found to be refundable and due to be refunded. The Supreme Court held as follows:

"The approach of the High Court is clearly erroneous. A bare reading of the proviso referred to shows that the amount must have been found to be

refundable and due to be refunded No authority has found any amount to be refundable...."

(Emphasis supplied)

12. Again, in the view of the Supreme Court:

"The expression used is "found to be refundable"", in other words, it must be as a result of adjudication. The amount has to be found to be refundable. In the instant case, there is no such adjudication. Even otherwise, the power of adjustment lies with the authority under the Statute. While granting refund, he has to first find out whether there is any amount which has to be adjusted against tax or other amounts outstanding against the dealer under the Act or the Central Act and the balance has to be refunded. This power of adjustment lies only with the authority under the Statute. The dealer cannot (sic) any adjustment on his own, and not certainly under the proviso to sub-section (1) of Section 29 of the Act as has been held by the High Court. The Explanation-I makes the position further clear that the date of refund shall be deemed to be the date on which first intimation regarding preparation of the refund voucher is sent to the dealer in the prescribed manner. Obviously, therefore, date of refund is relatable to the intimation regarding the preparation of the refund voucher. Explanation-II shows that the expression "refund" includes the adjustment which is permissible under the proviso to sub-section (1). It is to be noted that the manner in which the refund has to be granted is provided in Rules 89 and 90 appearing in Chapter XV."

(Emphasis supplied)

13. The learned counsel appearing on behalf of the assessee submitted that the judgment of the Supreme Court in Commissioner of Sales Tax, U.P. v. Hind Lamps Ltd. (supra) is distinguishable on the ground that in that case, the issue was whether an adjustment of the tax deposited during the pendency of an appeal was permissible where the appellate authority had remanded the proceedings to the Assessing Authority for a fresh assessment.

14. We are unable to accept that such a distinction can be made. It must be emphasised that the proviso to sub-section (1) of Section 29 as well as sub-section (2) use the same expression, namely "the amount found to be refundable." Subsection (1) of Section 29 requires the Assessing Authority to refund to a dealer any amount of tax paid in excess of the amount due from him under the Act. Under the proviso, any amount found to be refundable had to be first adjusted towards tax or any other amount outstanding against the dealer under the Act. Sub-section (2) imposes a liability for the payment of interest upon the amount found to be refundable. The liability to pay interest arises if:

"(i) the amount is found to be refundable in accordance with sub-section (1); and

(ii) that amount is not refunded within three months from the date of the order of refund of the Assessing Authority or, as the case may be, from the date of

receipt of the order of refund, if such order is passed by any other competent authority or Court. The dealer is thereupon entitled to simple interest at the prescribed rate from the date of "such order" or, as the case may be, the date of the receipt of "such order of refund passed by the Assessing Authority to the date of refund". In other words, an amount, in order to carry interest, must be found to be refundable in accordance with sub-section (1). The liability to pay interest would arise if it is not refunded within three months from the date of the order of refund passed by the Assessing Authority or from the date of the receipt by him of the order of refund, where it is passed by any other Court or competent authority. The Supreme Court in Commissioner of Sales Tax, U.P. v. Hind Lamps Ltd. (supra) has clearly held that the expression an amount to be "found to be refundable" must be as a result of an adjudication Under the Explanation I to sub-section (2), the date of refund is relatable to the intimation regarding the preparation of the refund voucher."

15. The matter, insofar as the present assessee is concerned, stands concluded by a decision of the Supreme Court which arose from the judgment of the learned Single Judge in Lucent Technologies. In the case of the present assessee, the learned Single Judge had, following the view of a Single Judge in Hind Lamps and of the Division Bench in Ellora Mechanical Products directed a refund with interest of an amount which had been recovered in pursuance of an order of assessment during the pendency of an appeal, other than the admitted tax, following an order of remand of the appellate authority. The judgment of the learned Single Judge was carried in appeal by the revenue to the Supreme Court. By a judgment dated 4 March 2014 in Commissioner, Trade Tax, U.P. v. Lucent Technologies Private Limited, [Civil Appeal No. 5230 of 2006 with connected Civil Appeal Nos. 5104-5106 of 2007 (Commissioner, Trade Tax, U.P. v. R.K. Associates)] the Supreme Court allowed the appeal filed by the revenue holding that the issue raised was squarely covered by the judgment of the Supreme Court in Commnr. of Sales Tax, U.P. Vs. Hind Lamps Ltd., . The order of the Supreme Court reads as follows:

"These appeals are directed against the judgment and order passed by the High Court of judicature at Allahabad in Trade Tax Revision No. 61 of 2006, dated 28.2.2006 and in Civil Miscellaneous Recall Application No. 73819 of 2006 in Trade Tax Revision No. 61 of 2006, dated 24.4.2006 and judgment and order passed by the High Court of judicature at Allahabad in Trade Tax Revision Nos. 1020, 1026 and 1027 of 2000, dated 25.1.2007 respectively.

2. Though the respondents are served, they are unrepresented before us.

3. The issues raised in these appeals is squarely covered by the decision of this Court in the case of Commnr. of Sales Tax, U.P. Vs. Hind Lamps Ltd., .

4. Following the aforesaid observations made in the aforesaid decision, these appeals are also allowed and the judgment(s) and order(s) passed by the High Court are set aside. No order as to costs."

16. The judgments of the Supreme Court in Commissioner of Sales Tax v. Hind Lamps Ltd. (supra) and in Commissioner of Trade Tax, U.P. v. Lucent Technologies Put Ltd. (decided on 4 March 2014) would squarely govern the present cases. The former decision of the Supreme Court which was rendered on 31 July 2008 reverses the view of a learned Single Judge of this Court in Hind Lamps. The decision in Hind Lamps of a Single Judge of this Court was approved by a Division Bench in Ellora Mechanical Products. Both the learned Single Judge in Hind Lamps as well as the Division Bench in Ellora Mechanical Products had not noticed the earlier decision of the Division Bench in Indodan Milk Products. The interpretation of the provisions of Section 29 of the Act of 1948 is now settled by the decision of the Supreme Court in Commissioner of Sales Tax, U.P. v. Hind Lamps Ltd. (supra). The decision in Commissioner of Sales Tax, U.P. v. Hind Lamps Ltd. has been followed in the case of the assessee itself by the Supreme Court on 4 March 2014 while reversing the judgment of the learned Single Judge of this Court in Lucent Technologies. In view of this clear legal position, the conflict between the views taken by the two Division Benches of this Court in Indodan Milk Products and in Ellora Mechanical Products would stand resolved in terms of the law laid down by the Supreme Court, as noticed above. We, accordingly, answer the question of law, in terms of the decisions of the Supreme Court in Commissioner of Sales Tax, U.P. v. Hind Lamps Ltd. and the decision rendered in the case of the assessee itself on 4 March 2014 in Commissioner of Trade Tax, U.P. and another v. Lucent Technologies Put Ltd.

The reference is answered accordingly. The revisions shall now be placed before the appropriate Bench according to the roster, for disposal in the light of the present decision.