

(1999) 07 AHC CK 0161
In the Allahabad High Court
Case No : Trade Tax Revision No. 202 of 1999

Mala Roller Flour Mills

APPELLANT

Vs

Commissioner of Trade Tax

RESPONDENT

Date of Decision : 14-07-1999

Acts Referred:

Uttar Pradesh Trade Tax Act, 1948 — Section 11, 25, 4A, 4A(3), 4B

Citation : (1999) 07 AHC CK 0161

Hon'ble Judges : M.C. Agarwal, J

Bench : Single Bench

Advocate : Bharat Ji Agrawal, for the Appellant; B.K. Pandey, for the Respondent

Final Decision : Allowed

Judgement

M.C. Agarwal, J.—This revision petition u/s 11 of the U.P. Trade Tax Act, 1948 is directed against an order dated April 26, 1999 passed by a Full Bench of the Trade Tax Tribunal in Appeal No. 55 of 1998 by which it has affirmed an order dated March 27, 1998 passed by the Commissioner of Trade Tax, U.P., Lucknow by which the latter had amended the eligibility certificate granted to the revisionist for the period January 9, 1983 to January 8, 1988 and restricted the period of exemption for the period January 9, 1983 to August 26, 1984.

2. I have heard Sri Bharat Ji Agrawal, Senior Advocate for the revisionist and Sri B.K. Pandey, learned Standing Counsel, for the respondent.

3. The revisionist set up a new industrial unit for the manufacture of atta, maida, and suji. The Government of U.P. had issued a Government Order No. 8244 dated September 30, 1982 u/s 4-A of the U.P. Sales Tax Act, 1948 (now "the U.P. Trade Tax Act") providing exemption from sales tax to new units. It was under the Government order that the petitioner applied for and was granted an eligibility certificate by the Divisional Level Committee granting it exemption from the sales tax for a period of five years with effect from January 9, 1983. The period of exemption expired on the January 8, 1988. u/s 4-A(3) the

Commissioner has the power to cancel or amend the eligibility certificate. The said provision of law stands as under :

"(3) Where the Commissioner of Sales Tax is of the opinion that the facility of exemption from, or reduction in the rate of tax obtained on the basis of an eligibility certificate referred to in Clause (d) of Sub-section (1) or on the basis of any eligibility certificate issued under any executive orders of the Government issued before or after September 13, 1985 has been misused in any manner whatsoever or that the new unit has committed breach of any of the conditions, subject to which the facility of exemption from, or reduction in the rate of tax was granted or that the new unit to which the eligibility certificate has been granted in accordance with the provisions of this Act is not entitled to facility under this section or is entitled to such facility for a lesser period or from a different date he may, by order in writing passed before or after the expiration of the period of exemption or reduction, cancel or amend the eligibility certificate from a date specified in the order and such date may be prior to the date of such order, so however, that in cases of misuse or breach, the cancellation of eligibility certificate shall have effect not before the date of such misuse or breach :

Provided that no order under this Sub-Section shall be passed without giving the dealers a reasonable opportunity of being heard."

4. In exercise of this power, the Commissioner earlier issued a notice for cancellation of the eligibility certificate on the ground that the exemption u/s 4-A was eligible only to units that started production after October 1, 1982. This dealer, according to the Commissioner, had started production prior to that date and was, therefore, not entitled to exemption u/s 4-A. This proceeding terminated in favour of the revisionist and by an order dated July 10, 1989 the Commissioner recalled the notice u/s 4-A. Again after a lapse of almost 8 years, the Commissioner issued a notice to the revisionist proposing to cancel or modifying the eligibility certificate in exercise of powers u/s 4-A(3) on the ground that by virtue of the Government Order dated August 27, 1984 the dealer could not avail the benefit of exemption on the purchase of raw materials u/s 4-B and on the sale of goods manufactured by it u/s 4-A and for availing exemption u/s 4-A, it should have opted not to avail the exemption u/s 4-B and since this was not done, the exemption u/s 4-A was not admissible to the revisionist. The dealer's contention in reply to the notice had, inter alia, been that it was granted exemption under the Government Order No. 8244 dated September 30, 1982 and the Government Order dated August 27, 1984 did not apply to it. It was also contended that the period of exemptions had already expired long back and no action could be taken after such a long time. It was also stated that a subsequent Government order dated January 29, 1985 again dispensed with the condition of opting out of the exemption u/s 4-B and for that reason also, the exemption could not be withdrawn. These contentions were not accepted and the Commissioner in exercise of powers u/s 4-A(3) ordered that the eligibility certificate would be effective only up to August 26, 1984 and the exemption

could not be available for any period thereafter. The revisionist appealed to the Tribunal but without any success.

5. A perusal of the provisions of Sub-section (3) would show that the power conferred on the Commissioner to cancel or amend the eligibility certificate is discretionary. This being a statutory power, that can adversely affect a taxpayer, the discretion has to be exercised judiciously and the facts of this case would show that the Commissioner's action is thoroughly injudicious and arbitrary.

6. As stated above, in this case the dealer was subjected to the same exercise by the Commissioner that ended in favour of the dealer by an order passed on July 10, 1989, i.e., much after the issuance of the Government order dated August 27, 1984 which has been made the basis of the present action. If at all the ground of the revisionist having availed the benefit of Section 4-B was to be pressed into service, the same could have been done earlier also but not having woken up during the earlier round of proceedings and having slept for another 8-9 years, it cannot be a bona fide exercise of discretion to dig old graves and initiate actions on another ground. Perhaps the Commissioner did not recollect that the sales tax is an indirect tax and a dealer is entitled to pass on the burden of tax to the taxpayer. Under the Act, a dealer realises tax from the person to whom he sells the goods and makes it over to the Government. A dealer is, thus, not to pay anything out of his own pocket or profit. Therefore, if an eligibility certificate is revoked after such a long time, the dealer who did not charge sales tax from its customers because of the exemption available, the money would have to be paid by the dealer out of his own pocket which is not the scheme of the Act. Therefore, in matters like this promptness in taking action is required and as is evident from the fact of this case, there is not only an absence of promptness, there is great and unexplained delay on the part of the revenue which only shows that they think that they can dig out a matter any time they like and harass a taxpayer by actions like this. No doubt the provisions of Sub-section (3) permit the cancellation or amendment of an eligibility certificate even after the expiry of the period of exemption but there has to be some cause where such action could be justified even after the period of exemption has expired. Fraud on the part of a dealer and its detection after the expiry of the period of exemption could be one such reason but where the action is proposed on facts where there was no fraud on the part of a dealer and the relevant Government order which is the basis of the action was well-known to the authorities concerned such a gross lapse and delay cannot be justified. The mere absence of a provision of law providing for period of limitation, does not mean that the revenue authorities can be unreasonable to any extent and initiate action any time they like. It is necessary that the provisions of U.P. Trade Tax Act in its omission to prescribe a period of limitation for such action and penalties should be plugged at the earliest because in the absence of any prescribed period of limitation, they have become complacent and inefficient as they have a feeling that they can wake up any time and can harass any and every dealer by looking into past records and finding some cause, good, bad or indifferent, for

initiation of any action like this. The present case is also one of such cases. An earlier proceedings terminated in favour of the revisionist and yet the department after several years chose to find out another ground of action which is nothing but a mala fide exercise of discretion. In *Hindustan Steel Ltd. Vs. State of Orissa*, , the honourable Supreme Court held that whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of the relevant circumstances and the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or a venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. The ratio of the aforesaid case applies to all actions which adversely affect the other side and where the authority concerned has that discretion to initiate or not initiate the action. In the present case the dealer was not at fault at all. If the Revenue was of the view that by virtue of the subsequent Government order dated August 27, 1984, the dealer was not entitled to exemption under Sections 4-A and 4-B simultaneously, the Revenue should have informed the dealer and asked it to opt out of one of the two benefits. The revenue did not do so though in order to be fair, it was its duty to do so if it thought that such opting out was necessary. Then admittedly by a subsequent notification dated January 29, 1985 the restriction of availing one benefit only was again dropped by the Government and, therefore, if at all the Commissioner was justified in modifying the eligibility certificate, he could only order that during the periods of August 27, 1984 to January 28, 1985, i.e., for about 5 months only, the dealer was not entitled to exemption u/s 4-A. The Commissioner was required to take into account whether the exemption for such a small period deserves to be withdrawn after more than 12 years. He has not done this and has mechanically proceeded to cancel the eligibility certificate for the period August 27, 1984 to January 8, 1988 thus withdrawing the exemption for 3 1/2 years. Thus, the discretion conferred on the Commissioner u/s 4-A(3) has been exercised in the present case in a most injudicious and arbitrary manner and the Tribunal has brushed aside this aspect of the matter by merely saying that the Commissioner has the power to cancel or amend an eligibility certificate even after the period of exemption has expired. No doubt he has such power, but not in every case and without compelling reasons. In my view, therefore, the Commissioner's order was liable to be set aside on the ground that it was not a proper exercise of judicial discretion u/s 4-A(3).

7. As regards the merits of the case also the dealer has a strong case. As already stated the eligibility certificate has been granted to the revisionist in terms of a Government order dated September 30, 1982. The Government by orders dated January 15, 1983 framed the rules sanctioning the grant of exemption u/s 4-A under the Government order No. 8244 dated September 30, 1982. The rules provided that the industrial unit that are manufacturing goods mentioned in annexure 3 of the Government order dated December 31, 1976 will have to opt

whether they would avail the exemption on the purchase of raw materials, etc., or on the sale of manufactured goods. It is admitted that atta, maida and suji which the dealer-revisionist was manufacturing, was not an item mentioned in annexure 3 and, therefore, the revisionist could avail the benefit u/s 4-B as well as u/s 4-A and the eligibility certificate was accordingly granted to the revisionist knowing fully well that it had a recognition certificate as well u/s 4-B. The requirement of opting out of the exemption u/s 4-B came vide Government Order No. 6468 dated August 27, 1984. A copy of this Government order has been placed before me and there is nothing therein that this Government order affected the exemption already granted to industrial units in terms of the Government Order No. 8244 dated September 30, 1982. In fact the Government order dated August 27, 1984 does not refer to the Government order dated September 30, 1982. Therefore at the most what the Government order dated August 27, 1984 provided was that in respect of the pending applications for exemption u/s 4-A a new unit may be required to opt out of the exemption u/s 4-B. The Government order dated August 27, 1984 cannot be read to mean that even the holders of the eligibility certificates for the period prior to August 27, 1984 would be required to opt out of exemption u/s 4-B. In fact for a certain period, it became impossible to opt out of the scheme. Like the present assessee, some dealers might have already availed the benefit of exemption u/s 4-B as well. As stated above, the present revisionist was granted eligibility certificate from January 9, 1983. Therefore, for the period January 9, 1983 to August 27, 1994 it became impossible for it to opt out of the scheme. Then by a subsequent Government order No. 604 dated January 29, 1985, the Government superseded the notification dated August 27, 1984 and made a fresh order u/s 4-A laying down new conditions for the grant of exemption and in such conditions there was no condition that a dealer cannot avail both the exemptions simultaneously and should opt out of the exemption u/s 4-B to be able to avail the exemption u/s 4-A. u/s 25 of the U.P. Sales Tax Act, 1948 the Government has power to issue notifications with retrospective effect to make them effective from a date not earlier than six months from the date of issuance of such notification. The notification dated January 29, 1985 was issued within six months from the earlier notification dated August 27, 1984 and, therefore, the notification dated August 27, 1984 stood effectively repealed and superseded and could have no effect in so far as at least the revisionist was concerned. The reasoning as adopted by the Commissioner and reiterated by the Tribunal that on the issue of the notification No. 6468 dated August 27, 1984, the earlier notification became ineffective is erroneous. Firstly the said notification dated August 27, 1984 does not say that any earlier notification stands superseded. Where the Government wants to supersede an earlier notification, it specifically says so as has been said in the notification dated January 29, 1985. In fact and in law, it is the notification dated August 27, 1984 that stood repealed and superseded by the subsequent notification dated January 29, 1985. Further the notifications issued by the Government u/s 4-A being statutory in character, the provisions of Section 6 of the General Clauses Act, 1897 apply, Clause (b)

whereof provides that there was any U.P. Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder. Therefore, even if it be assumed that the notification dated August 27, 1984 repealed the earlier notification dated September 30, 1982 (which could not be done by virtue of Section 25 aforesaid), the exemption already granted under the Notification dated September 30, 1982 to unit already established would remain unaffected.

8. In view of the above discussions, I find that the action of the Commissioner in initialing proceedings u/s 4-A(3) against the assessee was without jurisdiction and suffered from legal mala fides. The Tribunal's order sustaining such action is, therefore, not legally sustainable. The revision petition, therefore, deserves to be allowed and the dealer-revisionist should be compensated by adequate costs.

9. The revision petition is allowed. The Tribunal's order dated April 26, 1999 is set aside and it is ordered that the revisionist's appeal No. 55 of 1998 u/s 4-A(3) will stand allowed and the Commissioner's order dated March 27, 1998 will stand quashed. The revisionist will get his costs of this revision petition from the respondent which I assess at Rs. 5,000.