
(2000) 10 AHC CK 0009

In the Allahabad High Court

Case No : Sales Tax Revision No. 1146 of 1991 connected with Sales Tax Revisions No's. 1144 and 1145 of 1991

Meerut Development Authority

APPELLANT

Vs

Commissioner of Sales Tax

RESPONDENT

Date of Decision : 13-10-2000

Acts Referred:

Uttar Pradesh Trade Tax Act, 1948 — Section 11, 8D, 8D(1), 8D(6)

Citation : (2001) 123 STC 5

Hon'ble Judges : R.K. Agrawal, J

Bench : Single Bench

Advocate : B. Dayal, for the Appellant; B.K. Pandey, for the Respondent

Final Decision : Allowed

Judgement

R.K. Agrawal, J.—All these three revisions have been filed by the Meerut Development Authority, against a common order dated May 31, 1991 passed by the Sales Tax Tribunal, Meerut Bench II, Meerut, in Second Appeals No. 338 to 340 of 1990 relating to assessment years 1987-88 to 1989-1990 u/s 8-D(6) of the U.P. Trade Tax Act, 1948 (hereinafter referred to as "the Act").

2. The facts giving rise to present revisions in brief are that the applicant is a Development Authority constituted under the provisions of the U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as "the 1973 Act"). Its main activities are for the development of Meerut City. During the relevant assessment years, the applicant had got executed certain civil contracts and had paid a sum of Rs. 9,73,606.73, Rs. 1,28,03,960 and Rs. 1,72,54,324 respectively to the contractors. It had not deducted any tax at source as provided u/s 8-D(1) of the Act. The Sales Tax Officer, Sector 6, Meerut, had initiated proceedings for imposition of penalty u/s 8-D(6) of the Act and vide separate orders, each dated March 31, 1990 imposed a sum of Rs. 38,944.26, Rs. 5,12,158.26 and Rs. 6,90,172.92, respectively as penalty. Feeling aggrieved by the said order, the applicant had preferred separate appeals u/s 9 of the Act before the Assistant

Commissioner (Judicial), Sales Tax, Meerut, who vide order dated July 5, 1990 had upheld the imposition of the penalty in each of the three years in question. Still feeling aggrieved, the applicant had preferred second appeals u/s 10 of the Act before the Tribunal. The Tribunal vide impugned order has partly allowed the appeals. It has reduced the amount of penalty to 100 per cent of the amount of tax liable to be deducted u/s 8-D(1) of the Act. The said reduction in the quantum of penalty was made by the Tribunal on the supposition that the Sales Tax Officer had imposed penalty to the extent of twice of the amount which ought to have been deducted u/s 8-D(1) of the Act. However, the amount of penalty imposed by the Sales Tax Officer was only to the extent of the amount of tax which ought to have been deducted u/s 8-D(1) of the Act and not twice of the said amount. The applicant had filed applications u/s 22 of the Act before the Tribunal seeking rectification of the impugned order on the ground that the quantum of penalty should have been reduced by half. Shri B. Dayal, learned counsel for the applicant has made a statement at the Bar that the applications filed u/s 22 of the Act have been subsequently rejected by the Tribunal.

3. I have heard Shri B. Dayal, learned counsel for the applicant and Shri B.K. Pandey, learned Standing Counsel for the respondent.

4. The learned counsel for the applicant submitted that the provisions of Section 8-D(1) of the Act, is beyond the purview of the State Legislature and, therefore, the applicant was not liable to deduct any amount towards the tax at source under the said provision. In support of aforesaid plea, learned counsel relied upon the decision of the honourable Supreme Court in the case of Steel Authority of India Ltd. v. State of Orissa reported in [2000] 118 STC 297 and Nathpa Jhakri Jt. Venture v. State of Himachal Pradesh reported in [2000] 118 STC 306 , wherein the honourable Supreme Court had declared Section 13-AA of the Orissa Sales Tax Act, 1947 which provided for similar deduction of tax at source from the payment to works contractors in the case of Steel Authority of India Ltd. Vs. State of Orissa and Others etc. etc., and Section 12-A of the Himachal Pradesh General Sales Tax Act, 1968 in the case of M/s. Nathpa Jhakri Jt. Venture Vs. State of Himachal Pradesh and Others, as beyond the purview of the State Legislature.

5. According to the learned counsel for the applicant, Section 8-D(1) of the Act, is in pari materia with the aforesaid two provisions of the Orissa Sales Tax Act and Himachal Pradesh General Sales Tax Act, and, therefore, no penalty u/s 8-D(6) of the Act can be imposed.

6. He also relied upon the division Bench decision of this Court in the case of the Commissioner of Income Tax Vs. U.P. Hotel-Restaurant Ltd., and emphasised upon the observations made in paragraph 5 of the said decision which is reproduced below :

"5. For the sake of convenience, we will consider the third question, as we propose to consider the 2nd, 4th, 5th and 6th questions together. The Tribunal

has allowed the addition of the borrowed capital by resort to Rule 19A(3)(b). However, on the view that we propose to take, it is not necessary to consider as to whether the borrowed capital was repayable after a period of more than seven years. Rule 19A(3) provides for exclusion of borrowed capital while computing the capital employed for purposes of Section 80J. In the case of Kota Box Mfg. Co. Vs. Income Tax Officer and Others, a division Bench of this Court held that Rule 19A(3), so far it seeks to exclude borrowed capital for purposes of computation of the capital employed is ultra vires of rule-making power. This being so, the borrowed capital could not be excluded for computing the relevant amount of capital employed. Sri Ashok Gupta appearing for the department urged that as we are deciding this matter on a reference, it would not be proper for us to proceed to answer the question on the basis that Rule 19A(3) is ultra vires the rule-making power. It is settled that in a reference one cannot declare any provisions of the Act or the Rules ultra vires. But, we are doing nothing of the sort here. All that we propose to do is to take notice of the decision of this Court in Kota Box Mfg. Co. Vs. Income Tax Officer and Others, , which declares Rule 19A(3) to be ultra vires. The effect of the decision is that Rule 19A(3) is wiped out of the statute book, with the result that we have to decide the question as if Rule 19A(3) is non-existent. We may also refer to the decision of the Andhra Pradesh High Court in the case of Commissioner of Income Tax Vs. Warner Hindustan Ltd., . In that case, one of the questions that arose for decision was as to whether Rule 19A(3) can take away the benefit conferred by Section 80J. On an interpretation of Rule 19A(3) it was held that the rule did not come in conflict with Section 80J inasmuch as Section 80J did not provide for the method by which the capital employed had to be computed. This, according to the Andhra Pradesh High Court, was left solely to the rule-making power. On this view, they held the rule to be intra vires. Apart from this consideration the other ground on which they did not allow the validity of the rule to be canvassed was that no such plea had been taken by the assessee earlier. As at present advised we think it advisable to follow the decision of our court in preference to that of Andhra Pradesh. The result is that we hold that the Tribunal was right in holding that the loan amounting to Rs. 23,74,000 was not liable to be deducted while computing the capital employed for working out the relief allowable u/s 80J of the Act."

7. The learned counsel for the applicant further submitted that the applicant is an authority constituted under the 1973 Act, and has been created for the development of Meerut City. It is not engaged in the business of buying and selling any goods as provided under the provisions of the Act and, therefore, it is not a dealer. He further submitted that even though u/s 8-D(1) of the Act, the applicant was liable to deduct tax at 4 per cent at the time of making payment to the contractors in discharge of any liability on account of valuable consideration payable for the transfer of property in goods in pursuance of the works contract yet no penalty under Subsection (6) of Section 8-D, could have been imposed on the applicant's failing to deduct the tax as provided u/s 8-D(1) of the Act

inasmuch as there was no deliberate intention on the part of the applicant to flout or contravene the provisions of Section 8-D(1) of the Act. In the alternative, he submitted that the amount of penalty, which has been imposed is equivalent to the amount of tax which ought to have been deducted u/s 8-D(1) of the Act, is excessive and no reasons whatsoever has been given by the authorities for imposing the said amount as penalty.

8. On the other hand, Shri B.K. Pandey, has submitted that the applicant was under statutory obligation to deduct tax at source at 4 per cent at the time of making payment to the contractors towards the discharge of any liability on account of valuable consideration for transfer of property in goods in pursuance of the works contract entered into between the parties and failure to deduct the tax automatically attracted the penal provisions as provided u/s 8-D(6) of the Act. He further submitted that the penalty to the extent of 100 per cent of the amount of tax which ought to have been deducted at source u/s 8-D(1) of the Act is just, fair and reasonable and calls for no interference.

9. The submission at the first instance appears to have some force but it cannot be gone into in the present proceedings. No doubt, the honourable Supreme Court in the case of Steel Authority of India Ltd. v. State of Orissa [2000] 118 STC 297 had declared Section 13-AA of the Orissa Sales Tax Act, 1947 as being beyond the purview of the State Legislature and also Section 12-A of the Himachal Pradesh General Sales Tax Act, 1968 in the case of Nathpa Jhakri Jt. Venture v. State of Himachal Pradesh [2000] 118 STC 306, yet a division Bench of this Court in the case of V.K. Singhal v. State of U.P. reported in [1995] 97 STC 355 ALL; 1995 UPTC 337 had upheld the validity of Section 8-D(1) of the Act. Further as held by the honourable Supreme Court in the case of K.S. Venkataraman and Co. Vs. State of Madras, that an authority created by a statute cannot question the vires of that statute or any of the provisions thereof whereunder it functions. It must act under the Act and not outside it. If it acts on the basis of a provision of the statute, which is ultra vires, to that extent it would be acting outside the Act. This Court, while exercising the jurisdiction u/s 11 of the Act also cannot examine the vires of any provision of the Act in the revisional proceeding as has been held by the honourable Supreme Court in the case of Alpha Chem and Another Vs. State of U.P. and Others, . The honourable Supreme Court in the case of Alpha Chem and Another Vs. State of U.P. and Others, has held as under :

"The High Court was not right in its contemplation that the vires of the impugned provisions could be examined in the revision proceedings. The jurisdiction of the High Court in revision is under the same limitation in so far as the contention as to constitutionality is concerned as was indicated by this Court in K.S. Venkataraman and Co. Vs. State of Madras, , in the context of the reference jurisdiction of the High Court under the Income Tax Act. It was held :

"Up to this stage all the three authorities are the creatures of the Act and they function thereunder. They cannot ignore any sources of income on the ground

that the relevant provisions offend the fundamental rights or are bad for want of legislative competence. The Act does not confer any such right on them.....Whether the provisions are good or bad is not their concern.....Can it be said that a question Whether a provision of the Act is ultra vires of the Legislature arises out of the Tribunal's order ? As the Tribunal is a creature of the statute, it can only decide the dispute between the assessee and the Commissioner in terms of the provisions of the Act. The question of ultra vires is foreign to the scope of its jurisdiction. If an assessee raises such a question, the Tribunal can only reject it on the ground that it has no jurisdiction to entertain the said objection or decide on it. As no such question can be raised or can arise on the Tribunal's order, the High Court cannot possibly give any decision on the question of the ultra vires of a provision....."

Even as the authorities under the Act cannot go into the vires of the very statutes under which they are constituted and draw their power and jurisdiction from so is the High Court in the matters arising before it from proceedings under the Act and examine the constitutionality of the statute and its provisions. The High Court can, of course, deal with the question of constitutionality in judicial review of legislation under Article 226. That is what the appellants sought to do before the court in the writ petition. The High Court was not justified in requiring the appellants to have recourse to proceedings of revision taken under the "Act" to have the contention as to constitutionality resolved."

10. So far as the decision of this Court in the case of Commissioner of Income Tax Vs. U.P. Hotel-Restaurant Ltd., is concerned it would not be applicable in the present case inasmuch as, this Court had already upheld the validity of Section 8-D(1) of the Act in the case of V.K. Singhal [1995] 97 STC 355 , and there is no contrary decision of any court in so far as Section 8-D(1) of the Act is concerned, As held by the honourable Supreme Court that in the case of revisional proceedings u/s 11 of the Act, the vires of any provision of the Act cannot be gone into. Thus, the court is not required to decide the validity of Section 8-D(1) of the Act on the basis of two honourable Supreme Court decisions rendered in Steel Authority of India Ltd. v. State of Orissa [2000] 118 STC 297 Ori and Nathpa Jhakri Jt. Venture v. State of Himachal Pradesh [2000] 118 STC 306 HP.

11. Coming to the merits of the case, I find that in each of the three years in question, the Sales Tax Officer had repeatedly directed the applicant to deduct the tax at source at 4 per cent as provided u/s 8-D(1) of the Act but no heed was paid by the applicant. When notice for imposition of penalty u/s 8-D(6) of the Act was issued, the Law Officer on behalf of the applicant informed the Sales Tax Officer that the necessary instructions had been issued to deduct tax at source at 4 per cent u/s 8-D(1) of the Act. No explanation whatsoever, was given by the applicant as to the circumstances under which it had not deducted any tax at source as provided u/s 8-D(1) of the Act. In fact no explanation justifying its action in not deducting any tax at source was given. Thus, the authorities were fully justified in invoking the provisions of Section 8-D(6) of the Act and imposing

the penalty. However, from the perusal of penalty order, I find that the authorities have not given any reason as to why they are imposing the amount equal to the amount of tax, which ought to have been deducted u/s 8-D(1) of the Act as penalty.

12. It may be mentioned here that u/s 8-D(6) of the Act a sum not exceeding twice the amount deductible u/s 8-D but not so deducted can be imposed as penalty. Thus, the maximum amount of penalty, which can be imposed, has been fixed. However for imposing any amount of penalty even if it is equal to the amount of tax deductible u/s 8-D but not so deducted some reasons are to be given justifying the amount of penalty. However, in the present case, the authorities have not given any reason whatsoever as to why the penalty should be equal to the amount deductible but not deducted u/s 8-D of the Act. Thus, the impugned order of the Tribunal cannot be sustained and is hereby set aside. The Tribunal is directed to decide all the appeals afresh in accordance with law in the light of the observations made above.

13. In the result, all the revisions succeed and are allowed in part.