

(2010) 02 AHC CK 0374
In the Allahabad High Court
Case No : Writ Petition No. 9751 of 2009 (MB)

Mirc Electronics Ltd.

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 18-02-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 17(3)
Uttar Pradesh Trade Tax Act, 1948 — Section 10, 18(1), 3C, 4, 4A

Citation : (2011) 37 VST 280

Hon'ble Judges : Rakesh Tiwari, J; Anil Kumar, J

Bench : Division Bench

Advocate : Ashok Kumar, for the Appellant; H.P. Srivastava, Additional Chief Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

Anil Kumar J.

1. By means of the present writ petition, the petitioner has challenged the assessment order dated September 5, 2009 passed by opposite party No. 3 for the assessment year 2005-06 and the order dated October 22, 2009/November 3, 2009 passed by opposite party No. 2.

2. Heard Shri Ashok Kumar, learned counsel for the petitioner and Shri H. P. Srivastava, learned Additional Chief Standing Counsel on behalf of the opposite parties.

3. Factual matrix of the present case as submitted by the learned counsel for the petitioner are to the effect that Onida Savak Ltd. (hereinafter referred to as, "the OSL") was registered under the Companies Act, 1956. OSL could not cope up with stiff competition posed by the multi-national companies in the field in which it was operating as a result of which the company suffered huge losses. Accordingly, the same was declared sick under the provision of the Sick Industrial

Companies (Special Provisions) Act, 1985 (in short, "the SICA") and IDBI was appointed as operating agency u/s 17(3) of the SICA with the direction to arrange for issue of advertisement in respect to change of management and to submit a full tide up scheme for merger. Thereafter, the merger had taken place and in place of OSL the petitioner, M/s. Mirc Electronics Ltd., has come into existence as OSL merged with M/s. Mirc Electronics Ltd. (petitioner-company). Initially, the OSL has been granted an eligibility certificate u/s 4A of the U.P. Trade Tax Act, 1948 (hereinafter referred to as, "the Act") and the said eligibility certificate was valid up till December 25, 2009.

4. The learned counsel for the petitioner further submits that an order dated November 16, 2005 was passed by BIFR after the merger of the OSL with petitioner's company, which was issued to the petitioner's company-unit situated at Noida through registered post on November 21, 2005, received on November 29, 2005.

5. He further submits that section 4A of the Act provides for exemption from payment of trade tax in certain cases. Sub-section (2B) of section 4A of the Act provides the procedure with regard to any succession by another manufacturer by means of sale licence, contract, lease, managing agency or in any other manner such successor-manufacturer may, subject to the provisions of sub-section (3), apply to the officer competent to grant eligibility certificate under clause (d) of sub-section (2), within sixty days of such succession for the grant, under this section of exemption from or reduction in rate of tax for the unexpired portion of the period for which exemption from or reduction in the rate of tax was or could be granted to the former manufacturer.

6. The same is quoted hereinbelow:

Section 4A, sub-section (2B).--If there is discontinuation of business, within the meaning of sub-section (1) of section 18, of the manufacturer who was eligible for exemption from or reduction in rate of tax under sub-section (1), whether such exemption from or reduction in the rate of tax was already granted or not, and (if he is succeeded by another manufacturer, by means of sale, licence, contract, lease, managing agency or in any other manner, such successor-manufacturer may,) subject to the provisions of sub-section (3), apply to the officer competent to grant eligibility certificate under clause (d) of sub-section (2), within sixty days of such succession, for the grant, under this section of exemption from or reduction in the rate of tax for the unexpired portion of the period for which exemption from or reduction in the rate of tax was or could be granted to the former manufacturer:

Provided that the aforesaid officer may, in its discretion and for adequate and sufficient reasons to be recorded in writing, entertain an application moved within six months of the date of the expiration of the period specified in this sub-section:

Provided further that such manufacturer and successor-manufacturer for the

purpose of liability of tax shall be treated as the transferor and the transferee u/s 3C.

Provided also that in computing the unexpired portion of the period, the period during which the production of successor-manufacturer remains closed on account of an order passed by any court or Board for Industrial and Financial Reconstruction or Appellate Authority for Industrial and Financial Reconstruction shall be excluded.

7. Accordingly, in view of the provisions of sub-section (2B) of section 4A of the Act, the petitioner's company after receiving the order dated November 16, 2005 issued by the BIFR moved an application on January 16, 2006 before the competent authority for amendment in the eligibility certificate already granted in favour of OSL and valid up till December 25, 2009, which was well within 60 days of succession before opposite-party No. 2, however, the same kept pending at the end of opposite-party No. 2 and no heed whatsoever had been paid in spite of the repeated requests and reminders made in this regard. In the meantime, the assessing authority (opposite party No. 3) had passed an assessment order for the assessment year 2005-06 and by the said order, the benefit of exemption of section 4A of the Act was not granted to the petitioner's company on the ground that the requisite amendments have not been made in the eligibility certificate issued u/s 4, in favour of OSL as required under sub-section (2B) of section 4A,; therefore being the successor of the erstwhile company, the petitioner's company (OSL), cannot avail of the said benefit.

8. In view of the said developments, the petitioner's company has filed the present writ petition before this court praying therein the main relief to the effect for quashing of the order dated September 5, 2009 passed by the assessing authority (opposite party No. 3) for the assessment year 2005-06 both under the U.P. Trade Tax Act, 1948 as well as the Central Sales Tax Act, 1956 and also for a direction to respondent No. 2 to take action on the petitioner's application moved on January 16, 2006 under sub-section (2B) of section 4A of the Act.

9. In the meantime during the pendency of the writ petition before this court opposite-party No. 2 had passed an order dated October 22, 2009/ November 3, 2009 thereby rejecting the petitioner's application moved under sub-section (2B) of section 4A of the Act. Accordingly, an application for amendment was moved by the petitioner for challenging the said order passed by opposite-party No. 2. It was allowed and necessary amendments have been incorporated in the writ petition, by the petitioner in order to challenge the order dated October 22, 2009/ November 3, 2009 passed by opposite party No. 2.

10. Shri Ashok Kumar, learned counsel for the petitioner, while challenging the orders impugned in the writ petition, i.e., order dated September 5, 2009 passed by opposite-party No. 3 and the order dated October 22, 2009/ November 3, 2009 passed by opposite-party No. 2, has submitted that so far as the assessment order dated September 5, 2009 passed by opposite party No. 3 for

the assessment year 2005-06 is concerned the said action on the part of opposite-party No. 3 was totally illegal, arbitrary and without jurisdiction as the same was passed during the pendency of the petitioner's application under sub-section (2B) of section 4A of the Act for requisite amendments in the eligibility certificate issued u/s 4A being the successor of the erstwhile company (OSL), so the same is liable to be set aside.

11. While challenging the order dated October 22, 2009/November 3, 2009 passed by opposite-party No. 2, the learned counsel for the petitioner submits that the order dated November 16, 2005 issued by BIFR, was dispatched through registered post on November 21, 2005, received by the petitioner on November 29, 2005. Accordingly, the petitioner had moved an application dated January 16, 2006 praying therein that in view of the provisions as provided in sub-section (2B) of section 4A, the necessary amendments may be made in the eligibility certificate issued by the Joint Commissioner, Upper Chief Executive Officer/Upper Director of Industries, Noida, Sector 20, Noida, Gautambudh Nagar, the said application was well within the statutory period of 60 days as provided therein. However, opposite-party No. 2 without any reasonable or justifiable reasons and contrary to the provisions of law had dismissed the same by the order dated October 22, 2009/November 3, 2009 on the ground that the same had been filed after the expiry of the statutory period of limitation, i.e., 60 days, as given in sub section (2B) of section 4A of the Act. The said impugned action was taken by the authority concerned treating the date November 16, 2005 passed by the BIFR as the starting point of limitation for moving an application by the petitioner for the purpose in question.

12. He further submits that the same is contrary to law as in the present case the starting point of limitation for moving an application for amendment in the eligibility certificate already issued in favour of OSL will commence from November 29, 2005 when the petitioner-company had received the order dated November 16, 2005 issued by the BIFR. So the order dated October 22, 2009/November 3, 2009 passed by opposite-party No. 2 beside being in violation of principles of natural justice and void ab initio is also passed on technical ground without providing any opportunity whatsoever to the petitioner as such, the said action on the part of opposite-party No. 2 being contrary to law and liable to be set aside.

13. In support of his arguments, he relied on the judgment passed by this court in the case of Commissioner of Sales Tax U.P., Lucknow v. Navyug Brishak Suppliers, Chandausi (1983) UPTC 1224 and in the case Krishna Paper Rouse, Allahabad v. Commissioner of Sales Tax, U.P. (1989) UPTC 1336.

14. Shri H. P. Srivastava, learned counsel for the respondents, in rebuttal has raised preliminary objection to the effect that again the assessment order dated September 5, 2009 passed by the assessing authority (opposite-party No. 3) for the assessment year 2005-06 and against the order dated October 22, 2009/November 3, 2009 passed by opposite-party No. 2, the petitioner has statutory

alternate remedy available u/s 9 and u/s 10 of the U.P. Trade Tax Act, 1948, respectively, as such the present writ petition is liable to be dismissed on the said ground.

15. We have heard learned counsel for the parties and perused the record.

16. On the basis of the submissions made by the counsel for the parties in the present case, the disputes which are involved in the present writ petition can be summarized and crystallized as under:

(a) Grievance of the petitioner against the assessment order dated September 5, 2009 passed by opposite-party No. 3 for the assessment year 2005-06.

(b) Grievance of the petitioner in respect to the order dated October 22, 2009/ November 3, 2009 passed by opposite-party No. 3.

17. So far as the first grievance of the petitioner against the assessment order dated September 5, 2009 passed by the assessing authority (opposite-party No. 3) for the assessment year 2005-06 is concerned, the petitioner has got alternate statutory remedy by way of appeal before the appellate authority u/s 9 of the U.P. Trade Tax Act, 1948. The facts have also not been disputed by the learned counsel for the petitioner. So in view of the law as laid down by the apex court in the case of *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, wherein it is held that where a right or liability is created by statute which gives special remedy for enforcing it, that must be availed of as the said statute provides a complete machinery in order to challenge the impugned action taken therein in the statute itself and not under article 226 of the Constitution of India.

18. In the case of *Karnataka Chemical Industries and Others Vs. Union of India and Others*, , the Supreme Court has held that when there is no challenge to the validity of any statutory provision, we see no reason as to why a writ petition should have been filed by-passing the alternative remedy which is provided under the statute. On the short ground we dismiss this appeal, vacate the interim orders, direct the payment of the balance amount of duty along with interest at 15 per cent, per annum with yearly rests. It will be open to the appellant to avail of such statutory remedy as may be available to it. If an appeal is filed within four weeks from today, the Department will take a lenient view in condoning the delay.

19. In the case of *Central Coalfields Ltd. Vs. State of Jharkhand and Others*, , the Supreme Court held that if there is a statutory alternative remedy available to a person, writ petition should not be entertained under article 226 of the Constitution of India and the petitioner is directed to avail of the alternative statutory remedy.

20. In the light of the above said facts, the present writ petition filed by the petitioner, so far it relates to the challenge of the assessment order dated September 5, 2009 passed by the assessing authority (opposite-party No. 3) in

the assessment year 2005-06, is dismissed on the ground of alternate remedy available to the petitioner u/s 9 of the Act. However if the petitioner seeks the said alternate remedy before the appellate authority then in that circumstances, the appeal of the petitioner shall not be dismissed on the ground of limitation by the appellate authority but the same may be adjudicated and decided on the merits after hearing the parties concerned in accordance with law.

21. The next grievance which is agitated by the petitioner in the present writ petition, against the order dated October 22, 2009/November 3, 2009 passed by opposite-party No. 2 is concerned, it is not disputed as per facts of the case that order dated November 16, 2005 was issued by the BIFR., dispatched on November 21, 2005, received by the petitioner on November 29, 2005 and thereafter the petitioner had submitted the application on November 16, 2006. Hence the said application was well within the statutory period of limitation of 60 days as provided under sub-section (2B) of section 4A as the starting point of the period of limitation for the purposes of filing of the application under the said section on the part of the petitioner will be the date when he received the order dated November 16, 2005 issued by the BIFR and not from the date of issuance by the authority concerned (BIFR). In the case of Commissioner of Sales Tax, U.P. Lucknow v. Navyug Brishak Suppliers, Chandausi (1983) UPTC 1224, this court has held that the limitation for filing of an appeal would run from the date of communication of order. The assessee may or may not have appealed but the starting point of the limitation would be the date of communication of the order in the manner contemplated by sub-rule (10) of rule 25A.

22. Further in the case Krishna Paper House, Allahabad v. Commissioner of Sales Tax, U.P. (1989) UPTC 1336 this court has held that learned counsel for the assessee contended that the period of 30 days should be counted from the date of service of the stay order on the assessee and not from the date of the passing of the order. If the Legislature could have intended that the period of 30 days should be counted from the date of the passing of the order, for instance, if the stay order is passed on a particular date but the stay order is not communicated to the assessee for a period of 30 days, it is not expected by the assessee to furnish security within a period of 30 days. In the present case, this fact is not disputed that the assessee deposited the security within a period of 30 days from the date of the service of the said order. In my opinion, the argument advanced on behalf of the assessee has considerable force and while interpreting the limitation of 30 days provided in section 9(3A)(iii), the period of 30 days shall start from the date of the service of the order on the assessee and not from the date of the passing of the order by the appellate court. In view of the said fact, I am of the opinion that the order passed by the Tribunal cannot be sustained.

23. In view of the above said settled proposition of law, the impugned order dated October 22, 2009/November 3, 2009 passed by opposite-party No. 2 thereby rejecting the petitioner's application dated January 16, 2006 on the ground that the same was filed beyond the statutory period of limitation, i.e., 60

days as provided in said section is an action beside being contrary to law is also in violation of principles of natural justice and fair-play.

24. Needless to mention herein if technical justice and substantial justice are pitted together then the way should be taken to the substantial justice because it is a well-settled proposition of law that if an order which involved civil consequences the same should not be passed without giving an adequate and reasonable opportunity of hearing to a person against whom the same is passed as the justice should not only be done but appears to be done and if any action by an authority which prevents justice from being seen to be done is nothing but amounts to the action which is contravention of the principles of natural justice and without jurisdiction. As such the order dated October 22, 2009/November 3, 2009 passed by opposite-party No. 2 cannot sustain under law.

25. So far as the preliminary objection by learned counsel for the respondent, Shri H. P. Srivastava, that the petitioner has got statutory alternate remedy against the order dated October 22, 2009/November 3, 2009 passed by opposite-party No. 2 u/s 10 of the Act, is concerned the said argument is misconceived as in the present case, the order dated October 22, 2009/November 3, 2009 has been passed in violation of the principles of natural justice and merely on the technical ground, in view of the law as laid down by the apex court in the case of Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1988) 8 SCC 1 where it has been held that if any order is passed in violation of principles of natural justice, alternate remedy shall not be an absolute bar.

26. Further in the case of Canara Bank and Others Vs. Shri Debasis Das and Others, , the honourable Supreme Court has held that whenever an order is struck down as invalid being in violation of the principles of natural justice there is no final decision of the case and proceedings are left open for fresh adjudication to be decided by the authority concerned as per the procedure provided for the said purpose in the statute.

27. For the foregoing reasons, the order dated October 22, 2009/November 3, 2009 passed by opposite-party No. 2 (Joint Commissioner Upper Chief Executive Officer/Upper Director of Industries, Noida, Sector-20, Noida, Gautambudh Nagar) is hereby set aside and the matter is remanded back to the said authority to consider and decide the application of the petitioner under sub-section (2B) of section 4A of the U.P. Trade Tax Act, 1948 for amendment of eligibility certificate already granted in favour of OSL which merged with the petitioner's company after providing due opportunity of hearing, in accordance with law.

28. With the above observations, the present writ petition is allowed in part.

29. No order as to costs.