

(2012) 04 AHC CK 0013

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 317 of 2012

M/s. Associated Pigments Ltd.

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 09-04-2012

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 147, 147(a), 147(b), 21
Penal Code, 1860 (IPC) — Section 26
Uttar Pradesh Trade Tax Act, 1948 — Section 21, 21(2)

Citation : (2012) 6 ADJ 192 : (2013) 57 VST 40

Hon'ble Judges : Prakash Krishna, J; Ashok Bhushan, J

Bench : Division Bench

Advocate : S.D. Singh, for the Appellant; S.P. Kesharwani and C.S.C., for the Respondent

Final Decision : Dismissed

Judgement

Hon'ble Prakash Krishna, J.—The main point mooted in the present writ petition is whether the order dated 29th February, 2012 passed by Additional Commissioner-I, Commercial Tax, Kanpur Zone-2, Kanpur authorizing the Assessing Officer to reopen the assessment of the petitioner u/s 21(2) of the U.P. Trade Tax Act, 1948 is valid or not? The back ground facts lie in a narrow compass and may be noticed in brief:

The matter relates to the assessment year 2007-08. The petitioner is a Company registered under the Indian Companies Act, 1956, carries on the business of manufacture and sale of Lead Oxide and Red Lead. It is registered under the provisions of U.P. Trade Tax Act, 1948 (hereinafter referred to as "the Act"). The turnover of the petitioner was accepted under the provisions of the Act by the Assessing Officer vide order dated 4th February, 2010 whereby the accounts book were also accepted.

2. The assessment is being re-opened in exercise of power conferred u/s 21 of

the Act on the basis that Trade Tax Department has received information from the Deputy Accountant General, U.P. informing that during search operation carried by the officers of Central Excise Department, on 27th July, 2007 at the business premises of the petitioner excess stock of finished goods worth Rs. 12.20 lakh was detected. It was not found recorded in the accounts book of the petitioner-Company. It was also not disclosed in the closing stock and as such there is escapement of tax of Rs. 61,000 at the hands of the petitioner.

3. The Assessing Officer of the petitioner under the U.P. Trade Tax Act sought permission from Additional Commissioner-I, Commercial Tax to re-open the assessment of the petitioner u/s 21(2) of the Act. After issuing a show-cause notice, the Additional Commissioner-I, Commercial Tax in exercise of power conferred on it under the proviso to Section 21(2) of the Act by the impugned order dated 29th February, 2012 has granted permission to the Assessing Officer to reopen the assessment of the petitioner by the impugned order.

4. Challenging the said permission which has been granted to the Assessing Officer to reassess the petitioner, learned counsel for the petitioner submits that for initiation of proceedings u/s 21 of the Act, formation of reason to believe by the Assessing Authority is mandatory. Elaborating the argument, he submits that the Assessing Authority in the present case has acted merely on the information furnished by the Deputy Accountant General, U.P. The said information is not germane and it is not possible thereupon to form a belief that turnover of the petitioner has escaped assessment. It was also contended that it is not a case of escapement of turnover as the explanation given by the petitioner has been accepted ultimately by the Central Excise Department. A distinction between reason to believe and reason to suspect was sought to be drawn by him. Reliance was placed on certain precedents which will be considered at appropriate stage.

5. In reply, Shri S.P. Kesharwani, learned Additional Chief Standing Counsel submits that by the impugned order granting permission, the rights of the petitioner is not affected at all. The order granting permission to reassess is in the nature of an administrative order. The information is sufficient to form a belief that the turnover has escaped assessment. The said information is with regard to the turnover of the assessee/petitioner and is germane to form a belief that the turnover has escaped assessment. It was also contended that proviso to Section 21(2) of the Act has been enacted for the benefit of the dealer/assessee. By the said proviso, a check has been provided an arbitrary exercise of power by the Assessing Officer to reopen the assessment after expiry of its normal period but within the extended period of limitation only with the permission of the Commissioner of Trade Tax. The Commissioner of Trade Tax may authorize the Assessing Officer for reassessment if it is just and expedient so to do notwithstanding such assessment or reassessment may involve in change of opinion. In nutshell, the stand of the department is that there is sufficient material in possession of the department to form an opinion that turnover of the petitioner has escaped assessment and in any view of the matter, the order

authorizing the Assessing Officer to initiate assessment or reassessment proceedings is in the nature of administrative order and no interference under Article 226 of the Constitution is called for.

6. Considered the respective submissions of the learned counsel for the parties.

7. On 23rd July, 2007, a team of Central Preventive Officers of Central Excise Commissionerate, Lucknow, visited the factory premises of the petitioner and a discrepancy was noticed that the petitioner has got much more finished goods as well as raw-materials vis-a-vis the stock position as recorded in the accounts book. A show-cause notice was issued by the Central Excise Authorities requiring the petitioner to show as to why 9.825 M.T. of Lead Oxide Grey (finished goods) may not be confiscated. Also raw-materials 2.490 M.T. of Lead Ingot was sought to be confiscated. The confiscation order was passed and redemption fine was imposed. The matter was carried in appeal and was remanded back for fresh consideration by the statutory authority. On remand, Deputy Commissioner, Central Excise Division, Raebareli vide order dated 21st April, 2009 held that "Thus, both the quantities i.e. 9.825 MT of finished goods and 2.490 MT of raw material i.e. lead ingots were out of the accounted for raw material." vide para-11 of the writ petition. The matter was carried further in appeal before Custom, Excise & Service Tax Appellate Tribunal (hereinafter referred to as "the Tribunal") by the Central Excise Department and the cross objection was filed by the petitioner. The Tribunal dismissed the appeal of the Central Excise Department but reduced the penalty from Rs. 1,12,246/- to Rs. 25,000/- vide order dated 27th January, 2011, Annexure-4 to the writ petition.

8. At the very outset, it may be stated that the present writ petition as mentioned herein above is directed against the order passed under the proviso to Section 21(2) of the Act authorizing the Assessing Officer to initiate reassessment proceedings. The Assessing Officer armed with the authorization, has issued reassessment notice dated 1st March, 2012. At that stage, the present writ petition has been filed.

9. The main thrust of the petitioner's argument is that there is no material to form reason to believe that the whole or any part of the turnover of the petitioner has escaped assessment to tax. In this regard, strong reliance was place on para-11 of the judgment of the Apex Court in the case of The Commissioner of Sales Tax, U.P. Vs. Bhagwan Industries (P) Ltd., Lucknow, , wherein the import of phrase "reason to believe" has been explained. For the sake of convenience, the said paragraph is reproduced below:

The controversy between the parties has centered on the point as to whether the assessing authority in the present case had reason to believe that any part of the turnover of the respondent had escaped assessment to tax for the assessment year 1957-58. Question in the circumstances arises as to what is, the import of the words "reason to believe", as used in the section. In our opinion, these words convey that there, must be some rational basis for the assessing authority to

form the belief that the whole or any part of the turnover of a dealer has, for any reason, escaped assessment to tax for some year. If such a basis exists, the assessing authority can proceed in the manner laid down in the section. To put it differently, if there are, in fact, some reasonable grounds for the assessing authority to believe that the whole or any part of the turnover of a dealer has escaped assessment, it can take action under the section. Reasonable grounds necessarily postulate that they must be germane to the formation of the belief regarding escaped assessment. If the grounds are of an extraneous character, the same would not warrant initiation of proceedings under the above section. If, however, the grounds are relevant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under the section. Whether the grounds are adequate or not is not a matter which would be gone into by the High Court or this Court, for the sufficiency of the grounds which induced the assessing authority to act is not a justiciable issue. What can be challenged is the existence of the belief but not the sufficiency of reasons for the belief. At the same time, it is necessary to observe that the belief must be held in good faith and should not be a mere pretence.

10. Then, reliance was placed on para-11 of the judgment of the Apex Court in the case of Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, . The said paragraph is reproduced below:

As stated earlier, the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the income tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the Court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the income tax Officer on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The fact that the words "definite information" which were there in section 34 of the Act of 1922 at one time before its amendment in 1948 are not there in section 147 of the Act of 1961 would not lead to the conclusion that action cannot be taken for reopening assessment even if the information is wholly vague, indefinite, far-fetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretence

11. Further reliance was placed on para-7 of the judgment of this Court in the case of M/s Royal Trading Co., Saharanpur v. Trade Tax Officer, Saharanpur, 2000 UPTC 742. The said paragraph is reproduced below:

Therefore, action u/s 21 of the Act cannot be taken on the whims of the assessing officer by resorting to conjecture of imagination. He has to have before him the facts which are germane to the issue and on the basis of which a rational man can have reason to believe that the whole or any part of the turnover has escaped assessment or has been under- assessed. In *Income Tax Officer and Others Vs. Madhani Engineering Works Ltd., Calcutta*, the Hon''ble Supreme Court while dealing with some what similar provision u/s 147 of the Income Tax Act, 1961 held that the existence of reason to believe on the part of the ITO was a justifiable issue and it was for the Court to be satisfied whether in fact the ITO had reason to believe that income had escaped assessment. In *Joti Parshad v. State of Haryana*, JT 1992 (6) SC 94, the Hon''ble Supreme Court while dealing with the meaning of expression "reason to believe" in section 26 of the Indian Penal Code held that the reason to believe is not the same as suspicion and a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning conclude or infer regarding the nature of the thing concerned. In *Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das*, the Hon''ble Supreme Court held that the reasons for the formation of the belief contemplated by section 147 (a) of the Income Tax Act, 1961, for the reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of this belief. The Hon''ble Supreme Court further observed that though it is true that the Court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income Tax Officer on the point as to whether action should be initiated for reopening the assessment yet at the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the asses-see from assessment. This view was reiterated by the Hon''ble Supreme Court while dealing with the provisions of Section 21 of the U.P. Trade Tax Act in *Commissioner of Sales Tax v. Bhagwan Industries (P) Ltd.*, (1973) 31 STC 293, in which it was held that reasonable grounds necessarily postulate that they must be germane to the formation of the belief regarding escaped assessment. If the grounds are of an extraneous character, the same would not warrant initiation of proceedings under this section. If however, the grounds are relevant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under this Section.

12. It may be placed on record that the department also placed reliance upon the aforesaid para-11 of *M/s Bhagwan Industries (P) Ltd.* (supra) as also paras 12 and 13 thereof.

13. The proposition of law as culled out from the above decisions is that the words "reason to believe" show that there must be some rational basis for the Assessing Authority to form the belief that the whole or any part of the turnover

of a dealer has escaped assessment. This appears to be the basis of judicial pronouncements in this regard. The question is with regard to its applicability to the facts and circumstances of each case. It has also been laid down that the insufficiency of material is no ground for interference by the Court but the relevancy of the material can be examined by the Court. The Court has to find out as to whether the grounds are of extraneous character. The belief entertained by the Assessing Officer must not be arbitrary or irrational. It should have rational nexus with the reasons.

14. Coming to the facts of the case on hand, it is matter of record that in a search operation carried on by the Officers of Central Excise Department, a discrepancy was found with regard to raw-materials and finished goods on physical verification vis-?-vis as found in the accounts book. Whatever may be proceedings under the Central Excise Act, the fact remains that the petitioner has not been totally exonerated nor there is any such case in the writ petition. In a search operation, excess stocks of raw-materials and finished goods were physically found. The excess stocks either have been sold or where it has been gone has to be explained by the petitioner as it has not been accounted in the closing stock, a fact which cannot be possibly be disputed, at this stage at least. Where and in what manner, the excess stock has been dealt with by the petitioner and where it has gone, remains unexplained. The petitioner will have an opportunity during reassessment proceedings to explain his stand but at this stage of the proceedings granting permission, it cannot be said that the information of excess stock in respect of finished and unfinished goods is not germane to form the belief that the turnover of the assessee has escaped assessment.

15. The other limb of the argument of the petitioner's learned counsel is that the information may be there but it is for the Assessing Authority to form a belief which according to him is lacking in the present case that the turnover has escaped assessment. A distinction between reason to suspect and reason to believe was put forward. In this regard, reliance was placed upon the Apex Court judgment in the case of *Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi*, , para-13 in particular, a case u/s 147(b) of the Income Tax Act. We see hardly its any application to the present case. There the Apex Court was called upon to interpret the word "information" as had occurred in Section 147(b) of the Income Tax Act (as it then stood). In that connection, the Apex Court held that that part alone of the note of an audit party which mentions the law which escaped the notice of the Income Tax Officer constitutes "information" within the meaning of Section 147(b); the part which embodies the opinion of the audit party in regard to the application or interpretation of the law cannot be taken into account by the Income Tax Officer. Suffice it to say that in Section 21 of the Act, the word "information" has not been used. The only phrase mentioned therein is that "reason to believe". This being so, the aforesaid decision is not of any help to the petitioner as it was rendered in different factual and legal matrix. In any view of the matter, it is too

much to say that on the information with regard to excess stock of raw-material and finished goods a belief that the turnover has escaped assessment cannot be found.

16. At the stage of issue of notice as pointed out by the Apex Court in the case of M/s Bhagwan Industries (P) Ltd. (supra), the relevant consideration is whether there is some relevant material giving rise to prima facie inference that some turnover has escaped assessment. Whether that material is sufficient for making assessment or re-assessment u/s 21 of the Act would be gone into after notice is issued to the dealer and he has been heard in the matter or given an opportunity for that purpose. It has been laid down therein that the Assessing Authority would then decide the matter in the light of material already in its possession as well as fresh material procured as a result of the enquiry which may be considered necessary. Para-12 of the aforesaid case indicates that at this stage only this much is to be examined as to whether there is some relevant material or not giving rise to prima facie inference, which is present in the present case.

17. Reference was also made to certain decisions such as M.L. Shukla & Co, v. The Sales Tax Officer, Sector 17, Kanpur, 1981 UPTC 396 and The General Electric Company of India Ltd. v. The Sales Tax Officer, Sector IV, Kanpur, (1974) 33 STC 108.

These decisions were rendered after passing of the reassessment order and it was found that on the facts of those cases that the information on the basis of which notice was issued to the dealer was not sufficient to form the belief that the turnover has escaped assessment. These cases were decided on their own facts and the ratio laid down therein does not in any manner is otherwise which we are taking in the present case. The test in such matters is whether a person properly instructed on the facts and law could reasonably entertain the belief that the turnover has escaped assessment or not.

18. A feeble attempt was made by the petitioner to show that the notice for reassessment by the Assessing Officer was issued even prior to passing of the order granting permission by pointing out that in the said show-cause notice the dispatch number is given as 623/28th February, 2012 meaning thereby it was dispatched on 28th February, 2012. The said argument is not at all attractive as notice was signed by the concerned officer on 1st March, 2012. So it cannot be said that notice is of any date anterior to 1st March, 2012. Permission was granted on 29th February, 2012. Even otherwise also, in the notice month "March" has been typed out while the dispatch number, if it is so as mentioned, is added by hand.

19. It was also argued that after repeal of U.P. Trade Tax Act, it has been replaced by U.P. VAT Act, is not saved as such proceeding is not saved by repealing and saving clause. Learned counsel for the petitioner in all fairness did not pursue the said argument when it was pointed out by Sri Kesharwani, learned Addl. Chief Standing Counsel that the issue stands settled against the

petitioner by a Division Bench decision of this Court based on Supreme Court's decision.

20. Upshot of the above discussion is that there is relevant material on record to form a honest belief that the turnover of the petitioner has escaped taxation so as to justify the initiation of proceedings u/s 21 of the Act. We find no illegality or infirmity in the impugned order granting permission to the Assessing Authority on his proposal to initiate reassessment proceedings within the extended period of limitation. The writ petition is dismissed summarily.