(2012) 01 AHC CK 0219

In the Allahabad High Court

Case No : Writ Tax No. 862 of 2006

M/s CEAT Limited — APPELLANT

Vs

State of UP and Others — RESPONDENT

Date of Decision : 13-01-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 29A, 29A(3)
Uttar Pradesh Trade Tax Act, 1948 — Section 2, 21, 21(2)
Uttar Pradesh Trade Tax Rules, 1948 — Rule 44

Citation : (2012) 49 VST 165

Hon'ble Judges : Sunil Ambwani, J;Manoj Misra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. We have heard Shri Bharat Ji Agarwal, Senior Advocate assisted by Shri Piyush Agrawal for the petitioner-company. Shri U.K. Pandey, learned Standing Counsel appears for the respondents. The petitioner-company is aggrieved by the order dated 3/4.3.2006 passed by the Additional Commissioner, Trade Tax, Kanpur and the consequential order dated 31.3.2006 passed by the Deputy Commissioner (Assessment)-IV, Trade Tax, Kanpur with regard to refund of the tax deposited by the petitioner for the assessment year 1999-2000 for reassessment u/s 21 (2) of the UP Trade Tax Act.

2. The petitioner, a Public Limited Company with its registered office at 463, Dr. Annie Besant Road, Mumbai, engaged in manufacturing of tyres, tubes and flaps in its factories at Bhandup- Mumbai and Nasik, from where the goods are transferred to its depots situated within the State of UP as well as outside the State of UP. The petitioner is registered both under the U.P. Trade Tax Act, and Central Sales Tax Act with its principal place of business at 39 Factory Area, Fazalganj, Kanpur.

3. For assessment year 1999-2000 the return filed by the petitioner was examined by the assessing authority. The assessment order was passed on

26.9.2003 determining total taxable turnover at Rs. 65, 40, 36, 213/- on which a sum of Rs. 7, 70, 78, 418/- was imposed as trade tax. The petitioner had issued the sale invoices to its various customers and had charged Net Dealers Billing price from them. Accordingly the tax was paid/deposited. As per the practice prevailing in the industry, various kinds of trade discounts, such as cash discount etc. were passed on by the petitioner to its consumers subsequent to the sales through credit notes issued from time to time. As the exact quantification of various types of discounts relating to quantum of sales was not worked out, the tax liability was not possible to be estimated at the time of sale of goods. The petitioner accordingly made excess payment to the tune of Rs. 30, 33, 983/-. The total amount was refunded by the petitioner to the buyers/customers through credit-notes and the same was verified/checked by the assessing officer at the time of finalisation of the assessment for the year 1999-2000. The assessment order dated 26.9.2003, clearly stated in the order that the petitioner had refunded the amount of Rs. 29, 04, 735/- to its various customers. Since the amount of sale price was also got reduced on account of reduction, which was allowed, the amount of sale price as well as the tax paid was reduced on account of deductions by credit note of Rs. 2, 83, 64, 554.34. The books of accounts were accepted by the assessing authority.

4. It is stated by Shri Bharat Ji Agarwal that the assessing authority specifically recorded a finding that out of total turn over during the assessment year 1999-2000 the petitioner had given discounts, on account of which gross turnover was reduced by Rs. 2, 83, 64, 554.34 for which credit note was issued by the petitioner refunding the said amount.

5. The Additional Commissioner, Trade Tax, Grade-I, Kanpur issued notice on 23.2.2003 to the petitioner for grant of permission for reassessment u/s 21 (2) of the Act. The petitioner submitted a detailed reply on 03.3.2006 in which it was mentioned, that inasmuch the entire turnover of the company has been assessed, and even according to the department neither any turnover had escaped assessment to tax nor has been under-assessed or assessed to tax at a lower rate, or any deductions or exemptions have been wrongly allowed, hence the refund, which was allowed in the original assessment, is not covered by Section 21 of the Act. The assessing authority has no jurisdiction to disallow the refund, which was deposited by the petitioner in excess of tax assessed.

6. Shri Bharat Ji Agarwal, learned counsel appearing for the petitioner submits that the seller having refunded to the purchaser by the credit note and the purchaser have already received the amount from seller, the purchaser cannot longer be entrusted for making any refund to the assessment authority of the amount, hence in view of Agra Enterprises Allahabad v. Trade Tax Officer, Allahabad 1997 UPTC 763 the assessing authority correctly refunded the amount of tax to the petitioner, which was deposited with the department. He submits that u/s 21 of the Act, that reassessment can be made, if any turnover had escaped assessment to tax; if the turnover has been under-assessed; or has

been assessed to tax at a rate lower than that at which is assessable; and/or any deductions or exemptions have been wrongly allowed in respect of the turnover. He submits that none of the four contingencies arise in the present case, and thus the notice of re-assessment and the order is bad in law.

7. Shri Bharat Ji Agrawal submits that the writ petition was admitted giving reasons that the order giving sanction u/s 21 (2) dated 4.3.2006 passed by the Additional Commissioner, Trade Tax does not contain any reasons whatsoever. He submits that having admitted the writ petition on a clear question of law, the impugned orders should not be sustained. He relied upon Yadav Traders v. State of UP and others 2009 NTN (Vol. 40) 65, in which this Court approved the view taken in M/s S.K. Traders v. Additional Commissioner, Grade-1, Trade Tax Zone, Ghaziabad 2007 NTN (Vol. 34) 343. The relevant paragraph of the judgement, in Jagdish Rolling Works v. State of UP and others (Writ Petition No. 460 of 2009, decided on 18.2.2009), relied upon in Yadav Traders v. State of UP and others, is quoted as below:-

It appears to this Court that the order impugned dated 19th May, 2007 purportedly communicated to the petitioner on 5th February, 2009, for the assessment year 2002-2003, under U.P. Trade Tax Act, 1948, appears to be hit by the principle laid down by the Division Bench of this Court in a case reported in [2007 NTN (vol. 35) 31] [Ramayan Traders and another v. Assistant Commissioner (Assessment III), Trade Tax, Bareilly]. Paras 17 & 18 of such judgement are important, which are quoted hereunder:

From a perusal of the aforesaid order, it would be seen that he has not dealt with any of the grounds given in the reply submitted by the petitioner. He has only given his conclusion. No finding has been recorded nor any reason has been assigned as to why the approval/sanction should be granted. Except for the aforesaid order dated 12.7.2001, which has been brought on record by the petitioner, the respondents have not brought any other order passed by the respondent no.2, which may show that any other reasons have been assigned. The order dated 12.7.2001 does not contain any reason and, therefore, as held by this Court in the case of M/s Manaktala Chemicals Pvt. Ltd. v. State of U.P. and others, reported in 2006 U.P.T.C., 1128 and M/s S.K.Traders v. Additional Commissioner, Grade - I, Trade Tax, Zone Ghaziabad and another, (Civil Misc. Writ Petition No.483 of 2002), decided today, [since reported in 2007 NTN (34) 343] reasons have to be assigned by the Additional Commissioner while granting sanction/ approval for initiating proceeding u/s 21(2) of the Act. As no reason has been assigned, the authorisation/ sanction dated 12.7.2001 cannot be sustained and is hereby set aside. As the authorisation itself has been set aside, the proceedings taken in pursuance thereof also cannot be allowed to stand and are set aside.

8. Shri Bharat Ji Agrawal submits that in case of executive orders such as the present one the reasons must be given to serve the principle of natural justice. He submits that reasons are the soul of the orders and unless reasons are given

both for the purposes of exercising jurisdiction and informing the party for initiating the action, the order should not be sustained. He submits that in the present case the impugned order u/s 21 (2) dated 4.3.2006 does not contain any reason. The Additional Commissioner has referred the recommendation of the Joint Commissioner (Executive), Trade Tax, Kanpur and also the facts, which were made known to the assessee. He has also referred to the reply given by the petitioner to which no reasons were assigned. The Additional Commissioner has simply stated that it will be just and proper that in this matter, even if the change of opinion is involved at the time of reassessment, the reassessment is necessary. Shri Agrawal submits that the order does not contain any reason much less independent reason in reopening the assessment affecting the vested rights of the petitioner.

9. Shri Bharat Ji Agrawal has also relied upon judgments in M/s Aryaverth Chawal Udyog and others v. State of UP and others 2008 U.P.T.C. 881 and Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, , and M/s Super Chemicals, Seo Ka Bazar, Agra v. Additional Commissioner, Grade-I, T. Tax, Agra Zone, Agra & ors 2010 NTN (Vol. 42) 163 in support of his submission. He submits that in Super Chemicals, Seo Ka Bazar, Agra (supra) this Court, relying upon Johri Lal (HUF) v. Commissioner of Income Tax, UP 1973 (88) ITR 439 (SC); Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, ; Indra Prastha Chemicals Pvt. Ltd. v. Commissioner of Income Tax 2005 UPTC 53; M/s Royal Trading Co. Saharanpur v. Trade Tax Officer, Saharanpur, 2000 NTN (Vol. 16) 290 and Commissioner of Sales Tax v. Bhagwan Industries (P) Ltd. (1973) 31 S.T.C. 293, held 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 assessee from assessment. The 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 for the reassessment.

10. Learned Standing Counsel appearing for Trade Tax Department submits that the petitioner-company is a whole seller. The benefit of trade and discount are given to the whole sellers whereas the tax from the consumer is realised on the sale price in which the discount as given to the whole seller is not deducted. The burden of tax as imposed on the consumer is not refunded relating to trade discount given to the whole seller. He relies upon paragraphs 6, 8, 10, 12, and 17 of the counter affidavit, which are quoted as below:-

6. That in reply to the contents of paragraph no. 9 of the writ petition it is submitted that the petitioner has failed to establish that the deduction of discount in the sale price allowed to the customers of the petitioner (whole sellers) has reached to the consumer as the petitioner has not filed any details of the sale price on which the tyre and tube has been sold to the whole sellers (customers of the petitioner) as well as the sale price of which the whole seller

has sold tyre and tube to the consumer, therefore, it cannot be said that the sale price as fixed for consumer included the deduction of trade discount as proved by the petitioner.

8. That in reply to the contents of paragraph nos. 11 to 13 of the writ petition it is submitted that since tax had been realized from the customers and the alleged refund to the whole sellers and the benefit of the same has not reached to the consumer which according to the decision of the Hon''ble Supreme Court in the case of Mafatlal Industries Ltd. v. Union of India (SC 9-J.B. (1998) 111 STC- 467) and Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of Central Excise and Customs, the refund of the excess tax so realized has to be made in favour of the person (consumer) from whom the same has been realised.

10. That in reply to the contents of paragraph nos. 16 to 20 of the writ petition it is submitted that since in the assessment proceeding benefit on deductions as claimed by the petitioner was wrongly allowed relating to realization of tax, therefore, proceeding u/s 21 (2) was rightly initiated as the realization of taz on such deduction and the refund of the same did not reach to the real consumer which according to the decision of Hon''ble Apex Court was not proper.

12. That in reply to the contents of paragraph no. 22 of the writ petition it is submitted that there is no need to give notice by the Additional Commissioner while granting permission u/s 21 (2). It is further submitted that the notice for initiation of proceeding u/s 21 was given to the petitioner on 8.3.06 for appearance on 24.3.06 which notice was received by the petitioner on 18.3.06 which was mentioned that the said proceeding is being initiated after due permission from the Additional Commissioner, hence any averment contrary are false and hence denied.

17. That in reply to the contents of paragraph nos. 29 and 30 of the writ petition it is submitted that the cases referred in said paras are not applicable in the facts and the circumstances of the present case as in the present case tax was realized from consumer, therefore, any refund which is allowed by the department can only be given directly to the consumer for which the dealer (petitioner) is not entitled. Section 29A specifically provides that the excess tax realized from consumer has to be refunded to the consumer and not to the dealer.

11. We have considered the respective submissions and examined the records. For the assessment year 1999-2000 the petitioner was assessed to turnover of sale of tyre, tube and flap including tyres and tubes of the hand driven carts to Rs. 78, 13, 71, 259.75 in accordance with the documents and Rs. 65, 40, 37, 214.00 in accordance with the books. In the assessment order dated 26.9.2003 the assessing officer observed that the petitioner has given various discounts to its purchasers of Rs. 2, 83, 84, 554.34 vide credit notes and at the time of assessment he has accepted the tax liability after deducting amounts of discounts from the total turnover. He has disclosed a sum of Rs. 2, 73, 35, 045.13 as discounts by credit note on the taxable goods and Rs. 10, 29, 509.00

as credit notes for tyres and tubes which are exempt from tax. The assessing officer also observed that the trader has produced the documents relating to credit note. The company has in accordance with the policy in the assessment year issued price variation additional discounts, special discounts, turnover discounts, cash on delivery discount and promptness discount to its purchaser and accordingly issued credit note for which the trader has kept the detailed accounts and which were verified. The discounts by credit note are given in the normal course of business, which is not part of turnover u/s 2 (i) of the Act and Rule 44 of the Rules. The assessing authority thereafter relied upon Deputy Commissioner of Sales Tax (Law) v. M/s Motor Industries Co. 1983 (53)S.T.C. 48; M/s Baidnath Ayurved Bhawan Pvt. Ltd. v. Commissioner, Sales Tax, UP 1970 (26) S.T.C. 171; Commissioner of Trade Tax v. M/s Indian Farmers Fertilisers Co. Ltd. 1993 (90) S.T.C. 23 and M/s Aicher Good Earth Ltd v. Commissioner, Trade Tax, UP 1995 (99) S.T.C. 130 in which the High Court has not treated the discounts as part of turnover. In the operative portion of the assessment order, the assessing officer found that a sum of Rs. 30, 33, 983.00 was deposited as tax in excess. Although this amount of tax was shown by the trader as recovered from the consumers in the bills, this amount was returned by credit notes by way of various discounts to the consumers. Out of this excess amount Rs. 1,29, 248.00 was not returned to the consumers and thus this amount was not liable to be returned to the trader. The assessing authority thus found that the trader is entitled to refund of Rs. 29, 04, 735.00 and thus the remaining amount in view of Section 29-A (3) realised from the consumers and deposited in Government treasury can be returned only to the consumers on their application and not to the traders. In D.C.M. Sriram Consultants Ltd v. State of UP and others S.T.I. 2001 457 the Allahabad High Court has not treated such amount, which has been returned by credit notes to the consumers as the amount, which has been realised from the consumers. A similar view has been taken in M/s Agrawal Enterprises v. Trade Tax Officer 1977 U.P.T.C. 763, and thus the trader was entitled to refund of Rs. 29, 84, 735.00.

12. We find that the assessing authority in his order dated 26.9.2003 had considered the disclosure of the trade discounts and examined the documents relating to different trade discounts given by credit notes to the consumers. He had also discussed whether the trade discounts were actually given and whether the amount of trade discounts returned to the consumers could be made part of the turnover. The assessing authority had also discussed the question of law as to whether such amount can be refunded in view of Section 29A (3) of the Act. The assessing authority had complete material before it and had applied its mind to the trade discounts and the entitlement of the refund with the help of the accounts books as well as legal position obtained in various decisions of this Court.

13. In the notice dated 23.2.2006 issued by the Additional Commissioner, Grade-I, u/s 21 (2) on the request of the Deputy Commissioner (Assessment)-IV, Trade Tax, Kanpur served upon the petitioner after referring to the deposit of excess

amount of tax of Rs. 29, 84, 735.00 and refund given to the petitioner of Rs.2, 83, 64, 554.00 on the basis of the credit, a reference is made to the judgment of Supreme Court in M/s Sahkari Khand Udyog Mandal Ltd v. C.C.E. 3 J.B. Dated 9.3.2005 in which it is provided that at the time of refund, it is necessary to examine whether the burden of excess amount of tax has been born by the assessee or has been transferred to the consumers or the burden of the excess amount has been directly born by any other person.

14. The petitioner gave its reply to the notice on 03.3.2006 after quoting Section 21 and the legal position that the reason to believe must be based on certain material, which should be examined by the assessing authority. It was stated that in M/s Sahkari Khand Udyog Mandal Ltd. v. CCE (supra) the refund of excess duty was denied to the assessee because of specific provisions existing u/s 11-B of the Central Excise Act, 1944 on the basis of the concept of unjust enrichment. The Valuation Laws of Central Excise and Sales Tax are altogether different and therefore, the decision of the Supreme Court under the Central Excise Act could not be made applicable to the case, which is based upon a provisions of U.P. Trade Tax Act. The purchase of price has been defined under U.P. Trade Tax Act, 1948 as follows:-

(gg) "Purchase price means the amount of valuable consideration paid or payable by a person for the purchase of any goods, less any sum allowed by the seller as cash discount according to trade practice and shall include any sum charged for anything done by the seller in respect of the goods at the time of or before delivery thereof, other than the cost of freight or delivery or the cost of installation when such cost is separately charged.

15. The Additional Commissioner, Grade-I, Trade Tax in the impugned order dated 4.3.2006 has referred to the proposal of the Joint Commissioner and the reply given by the petitioner. He has, however, not given any reason whatsoever for directing reassessment. He has not even referred to the contents of the reply given by the petitioner on 03.3.2006. The order is mechanical, and stereotyped in which it is only stated after examining the reply given by the petitioner that it is just and proper that in this matter even if the change of opinion is involved, the reassessment is necessary.

16. As discussed above the question of various discounts offered by the petitioner company and the passing off of such discounts to the consumers was disclosed by the petitioner to the assessing officer along with the accounts as well as the credit note. The assessing officer has mentioned that the petitioner has kept the complete accounts and details of such credit notes. The assessing officer also discussed whether in a case where the tax is deposited in excess the amount could be refunded to the petitioner after reducing the turnover by the discounts given to the consumers. The assessing officer had arrived at a considered and conscious decision to refund the excess tax deposited with the finding that the amount realised from the consumers has been refunded to them by credit notes.

17. In the request made by the Deputy Commissioner (Assessment)-IV, Trade Tax, Kanpur, the notice of the Additional Commissioner dated 23.2.2006 and in the order giving sanction of reassessment dated 4.3.2006, it is nowhere doubted nor any discussion has been made whether the amount of discounts have not been refunded to the consumer. A new case has been sought to be taken in the counter affidavit that the petitioner as a whole seller had realised sale price in which the discount was given and which was not deducted. We do not find any good reason to accept the new defence, which was neither the basis of initiating the proceedings nor the order of sanction given by the Additional Commissioner.

18. In this case the assessing officer proceeded with the reassessment in pursuance to the order of sanction dated 4.3.2006 and has made the assessment on 31.3.2006 in which the petitioner or his representative did not participate. The writ petition was filed on 8.5.2006 much after the order of reassessment was made on 03.3.2006 and in which the Deputy Commissioner in proceeding for reassessment held that the petitioner has not produced any evidence of returning the discounts to the consumers. The tax can be returned in view of M/s Sahkari Khand Udyog Mandal Ltd. vs. CCE (supra), only if the amount has been actually returned to the consumers. The Deputy Commissioner held, in ex-parte proceedings that since the amount has not been returned to the consumers and that the trader and the purchaser have only exchanged credit note, the amount of excess deposit of tax could be refunded. The Deputy Commissioner directed recovery of the entire refunded amount from the petitioner, which was actually adjusted in the demand of the year 2003-04.

19. We have already observed that in the present case on the findings recorded by the assessing officer in the original assessment proceedings, it was clearly found that the amount of discounts were actually offered and were passed on to the consumers. A specific finding was recorded that by credit notes the amount was refunded to the consumers. There was no fresh material nor any tangible evidence was brought in any survey or in subsequent years which may have indicated that the discounts were actually not received by the consumers and that it was only a paper transaction by credit notes. The entire exercise of the powers of reassessment was vitiated by non-application of mind and non-recording of the reasons in the order dated 04.3.2006 passed by the Additional Commissioner, Grade-I, Trade Tax, Kanpur Zone,Kanpur u/s 21 (2) of the Act. The order of re-assessment based on the exercise of powers u/s 21 (2), is thus vitiated by non-application of mind and non-recording of reasons. The writ petition is allowed. The impugned order dated 3/4.3.2006 passed by the Additional Commissioner, Trade Tax, Kanpur Zone, Kanpur u/s 21 (2) of the Act; the consequential order dated 31.3.2006 passed by the Deputy Commissioner (Assessment)-IV, Trade Tax, Kanpur by way of reassessment for the assessment year 1999-2000 and the demand of Rs. 29, 04, 735.00 in pursuance to the assessment order are set aside.