(2019) 12 UK CK 0014

In the Uttarakhand High Court

Case No : Writ Petition (M/S) No. 3735 Of 2018

M/s ebm-Papst India Pvt. Ltd APPELLANT

Vs

State Of Uttarakhand & Others RESPONDENT

Date of Decision : 04-12-2019

Acts Referred:

Uttarakhand Value Added Tax Act, 2005 — Section 4(2)(b)(i), 4(2)(b)(i)(d), 21(1), 25, 26, 28, 29, 29(1), 29(2), 29(4), 30, 263
Income Tax Act, 1961 — Section 147, 147(1), 148
Uttar Pradesh Trade Tax Act, 1948 — Section 21
Income Tax Act, 1922 — Section 34

Citation : (2019) 12 UK CK 0014

Hon'ble Judges : Sudhanshu Dhulia, J

Bench : Single Bench

Advocate : S.K. Posti, Ashutosh Posti, S.R. Joshi

Final Decision : Allowed

Judgement

Sudhanshu Dhulia, J

1. The petitioner is a manufacturer of various electrical goods, including one which is called "Instrument Cooling Fan". All these electrical goods are manufactured in the plant of the petitioner, which is at Chennai. It has a sale depot though at Rudrapur, District Udham Singh Nagar and for our purposes what is relevant is that the first sale of the product is shown in Uttarakhand.

2. The present matter relates to reassessment done by the State Revenue Authorities under the provisions of Uttarakhand Value Added Tax, 2005, (from hereinafter referred to as the "VAT Act") which is presently challenged by the petitioner. The assessment year in question is 2010-2011. The documents submitted by the petitioner before the Revenue Authorities in Uttarakhand showed the product as "Instrument Cooling Fan" and sub heading was that it was a "part of communication equipment". The excise code which was given by the petitioner for the said purposes is 84145990. Admittedly under the Excise Law

and the Rules and Regulations framed therein, the said code is given for the goods which are classified as "electrical goods". There are two entries which are necessary to be mentioned here.

3. Entry No. 3 of Schedule II (B) of the Act reads as under:-

"SCHEDULE II (B)

[See sub-clause (i) of Clause (b) of sub-section (2) of Section 4 of the Uttarakhand Value Added Tax Act, 2005]

Tax shall be payable on the goods specified in this Schedule at every point of sale at the rate of five percent.

Sl.No.

Item

Rate of Tax

Entry

1.

....

2.

....

3.

All equipments for communications such as, Private Branch Exchange (P.B.X.) and Electronic Private Automatic Branch Exchange (E.P.A.B.X.) teleprinters wireless equipments and parts thereof

4.5 %

ScheduleII(B)-3

4. Sub-section 2 (b) (i) (d) of Section 4 of the VAT Act provides that in respect of all the goods which have not been mentioned in the Schedules, the rate of tax would be 13.5%.

5. There are two questions before this Court. One as to under which category the petitioner's goods in question, which is an "Instrument Cooling Fan", is to be taxed, more particularly whether it has to be taxed under the heading Schedule-II(B)-3 taking it to be a part of larger equipment for communication, or under the residuary clause, taking it to be an electrical equipment. The second and the much larger question before this Court is as to the justification of the reassessment proceedings by the Revenue Authorities and the orders passed therein. We shall deal with the second question first.

6. The reassessment proceedings under the Act are given under Section 29 of

the Act, which reads as under:-

"Section 29: Assessment of Escaped Turnover-

(1) Where after a dealer is assessed under Section 25 or Section 26 for any year or part thereof, the Assessing Authority has reasons to believe that the whole or any part of turnover of the dealer in respect of any tax period has -

(a) escaped assessment; or

(b) been under assessed; or

(c) been assessed at a rate lower than the rate at which it is assessable; or

(d) been wrongly allowed any exemption or deduction therefrom; or

(e) been wrongly allowed any tax credit therein, the Assessing Authority shall, after recording the reasons in writing, serve a notice on the dealer and after giving the dealer a reasonable opportunity of being heard and making such enquiries as he considers necessary, he shall assess or reassess the turnover of the dealer and tax according to law and the provisions of this act shall as far as may be, apply accordingly:

Provided that the tax shall be charged at the rate at which it would have been charged had the turnover not escaped assessment or full assessment as the case may be.

Explanation (1). Nothing in this sub-section shall be deemed to prevent the Assessing Authority from making an assessment to the best of its judgment.

Explanation (2). For the purposes of this section and of section 30, "Assessing Authority" means the officer who passed the earlier assessment order, if any, and includes the officer having jurisdiction for the time being to assess the dealer.

Explanation (3). Notwithstanding the issuance of notice under this sub-section, where an order of assessment or reassessment is in existence from before the issuance of such notice it shall continue to be effective as such, until varied by an order of assessment or reassessment made under this section in pursuance of such notice.

(2) Except as otherwise provided in Section 28 or under this section, no order of assessment or reassessment shall be made under sub-section (1) after the expiry of three years from the end of the year in respect of which or part of which the tax is assessable.

(3) Assessment or reassessment in respect of turnover escaped from assessment may be passed at any time within three years and nine months ending on 31st December after the expiry of assessment year for which assessment is to be made, provided that notice under this section has been served within a period of three years and six months ending on 30th September after the expiry of the assessment year for which assessment is to be made.

(4) If the commissioner on his own or on the basis of reasons recorded by the Assessing Authority is satisfied that it is just and expedient so to do, he may authorise the Assessing Authority in that behalf, and then such assessment or reassessment may be made after the expiration of six years from the end of such assessment year, notwithstanding that such assessment or reassessment may involve a change of opinion."

7. The bare perusal of the aforesaid provision shows that Assessing Officer can initiate reassessment proceedings if he has "reason to believe" that the whole or any part of turnover of the dealer in respect of any tax period has - (a) escaped assessment or (b) been under assessed or (c) been assessed at a rate lower than the rate at which it is assessable or (d) been wrongly allowed any exemption or deduction therefrom or (e) been wrongly allowed any tax credit.

8. Under the contingencies given above, the Assessing Authority after recording reasons in writing, serves a notice to the dealer and after giving the dealer a reasonable opportunity of being heard and making such enquiries as he considers necessary, he shall reassess the turnover of the dealer and tax accordingly.

9. Sub-section (2) of Section 29 shows that the jurisdiction of the Assessing Officer for initiating a reassessment proceedings is for a period of three years which shall be calculated from the end of the year in respect of which tax is assessable. Therefore, the reassessment proceedings could have been initiated in the present case by the Assessing Officer by 31.03.2014. Admittedly these proceedings have been initiated after 31.03.2014, in the year 2018. But the law provides the Assessing Officer to, initiate reassessment proceedings beyond three years, provided he has taken an approval of the Commissioner, as powers have been given to the Commissioner to initiate reassessment proceedings beyond a period of three years either by his own or for the reasons recorded by the Assessing Authority. In the present case, the recovery proceedings admittedly have the approval of the Commissioner.

10. This is the second round of litigation. Initially when the petitioner had received a notice by the Assessing Authority (who had taken an approval of the Commissioner under sub-section (4) of Section 29 of the Act), the petitioner had approached this Court by means of a writ petition. There was apparently no application of mind by the Assessing Authority nor any reasons assigned for opening reassessment except a statement that the reassessment was being initiated on the ground that the Assessing Officer found that on the document which was submitted by the petitioner, the Excise Code was 84145990, which is given for electrical goods and not for telecommunication equipment and therefore there was in fact an admission on the part of the petitioner that the goods being manufactured by the petitioner were electrical goods and not telecommunication goods and therefore he was liable to be charged under the residuary clause at the rate of 13.5%. Since these reasons were not sufficient, this Court vide its order dated 25.07.2018 directed the authority concerned to

decide the representation of the petitioner by passing a speaking order.

11. The case of the petitioner was that it was merely a change of opinion which is not sufficient for reassessment and therefore reasons have to be assigned as to why reassessment is being done. In view thereof, this Court had directed that in case the petitioner moves a representation within a period of three weeks, the authority concerned was directed to decide the representation of the petitioner by passing a speaking order

12. The Assessing Authority had therefore to give reasons as to why reassessment proceedings are being initiated. All the same, vide order dated 25.07.2018 reassessment has been justified by assigning the same reasons as given earlier which is that "instrument cooling fan", was considered as a part of telecommunication equipment, as that is how it was presented by the assessee, but after further examination it has been found that the excise code given to the petitioner was 84145990, which is relating to electrical goods and therefore tax has to be charged under the residuary clause. Apart from this, no reasons have been assigned. These are the same reasons as were there earlier, nothing has been elaborated.

13. Learned Senior Counsel for the petitioner Mr. S.K. Posti has emphasized on the phrase used in Section 29 of the Act, which is "reason to believe", which is in sub-section (1) of Section 29 of the Act. The exact phrase has been used in Section 147 of the Income Tax Act as well as in Section 21 of the U.P. Trade Tax Act, which are also fiscal provisions dealing with reassessment.

14. Learned Senior Counsel of the petitioner would argue that the reassessment has to be done by way of an "exception" and not as a "matter of routine". This is evident from the note of sub-section (1) of Section 147 of the Income Tax Act that where the Assessing Officer can only initiate the reassessment proceedings, if he has "reason to believe", that reassessment is liable to be done under certain contingencies which are given in each fiscal laws with which it concerns. In the present case, it is given under sub-section (1) of Section 29 of the Act, as already referred above.

15. The learned Senior Counsel for the petitioner would also argue that these provisions of reassessment are by and large the same in all fiscal matters and therefore the case laws on reassessment which he relies upon, which may be relating to Income Tax Act or the U.P. Trade Tax Act would be equally applicable here.

16. The first case, the learned Senior Counsel for the petitioner, relies upon is the Division Bench judgment of Allahabad High Court in the case of M/s S.K. Traders, Modi Nagar, Ghaziabad v. Additional Commissioner, Grade-I, Trade Tax, Zone Ghaziabad and another, where relying upon the catena of judgments of Hon'ble Ape Court, the Division Bench of Allahabad High Court gave a categorical finding that before a notice for reassessment can be issued by the Assessing Authority, it must fulfill the requirement of having "reason to believe". The Division Bench of

Allahabad High Court said as under:-

"15. The expression "reason to believe" in Section 147 does not mean purely subjective satisfaction on the part of the Assessing Officer. The belief must be held in good faith; it cannot be merely a pretence. It is open to the Court to examine whether the reasons for the belief have a rational connection or a relevant hearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section. To this limited extent, the action of the Assessing Officer in starting proceedings under Section 147 is open to challenge in a Court of law as held in S. Narayanappa v. Commissioner of Income Tax, (1967) 63 I.T.R. 219 (SC); Kantamani Venkata Narayana and Sons v. Additional Income Tax Officer, (1967) 63 I.T.R. 638 (SC); Madhya Pradesh Industries Ltd. v. Income Tax Officer, (1970) 77 I.T.R. 268 (SC); Sowdagar Ahmed Khan v. Income Tax Officer, (1968) 70 I.T.R. 79 (SC), Income Tax Officer v. Lakhmani Mewal Das, (1976) 103 I.T.R. 437 (SC); Income Tax Officer v. Nawab Mir Barkat Ali Khan Bahadur, (1974) 97 I.T.R. 239 (SC); Commissioner of Sales Tax v.Bhagwan Industries (P) Ltd., (1973) 31 S.T.C. 293 (SC) and State of Punjab v. Balvir Singh, (1994) S.C.C. 2999."

17. In other words, it is only when the Assessing Officer forms a definite opinion that condition exists for reassessment that it will have a jurisdiction to proceed under Section 147/148 of the Income Tax Act for reassessment and the failure to fulfill this condition would vitiate the entire proceeding, as held by the Hon'ble Apex Court in the case of Johri Lal (H.U.F.), Agra v. the Commissioner of Income Tax reported in (1973) 88 I.T.R. 439 (SC).

18. As to the reasons to be recorded for opening reassessment proceedings, the Division Bench of Allahabad High in the case of S.K. Traders (supra) in paragraph 14 has emphasized on what kind of reasons and value attached to this reason should be. Paragraph 14 of the judgment in the case of S.K. Traders (supra) reads as under:-

"The words "has reason to believe" are stronger than the words "is satisfied". The belief entertained by the Assessing Officer must not be arbitrary or irrational. It must be reasonable or, in other words, it must be based on reasons which are relevant and material as held by the Apex Court in Ganga Saran & Sons P. Ltd. v. Income Tax Officer, (1981) 130 I.T.R. 1 (SC)."

19. The same facts were also cited by Full Bench of Delhi High Court in the case of Commissioner of Income-Tax v. Kelvinator of India Ltd. reported in (2002) 256 I.T.R. 65, where while dealing with Section 147 and 148 of the Income Tax Act, it was stated by the Full Bench of Delhi High Court as under:-

"It is well settled principle of law that what cannot be done directly cannot be done indirectly. If the Income-tax officer does not possess the power of review, he cannot be permitted to achieve the said object by taking recourse to initiating a proceeding of reassessment or by way of rectification of mistake. In the case of this nature the Revenue is not without remedy. Section 263 of the Act empowers the Commissioner to review an order which is prejudicial to the Revenue."

20. Learned Senior Counsel for the petitioner further relies upon the judgment of Hon'ble Apex Court in the case of State of Uttar Pradesh and others v. Aryaverth Chawl Udyoug and others reported in (2016) 91, VAT and Service Tax Cases 1, where the Hon'ble Apex Court has once again emphasized the parameters within which the Revenue can operate in a reassessment proceedings. The Hon'ble Apex Court in paragraph 25 had this to say:

"25. Te import of the words "reason to believe" has also been examined by this court in cases arising out of proceedings under Section 34 of the Indian Income-tax Act, 1922 which also has the same phraseology. It deals with income escaping assessment and confers jurisdiction on the income-tax officer to make assessment or reassessment if he had reason to believe that income, profits or gains chargeable to income-tax had been under-assessed and that such under-assessment had occurred by reasons of either omission or failure on the part of the assessee to make a return of his income or to disclose fully and truly all material facts necessary for his assessment."

21. In paragraph no. 28 of the judgment, the Hon'ble Apex Court has said as under:

"28. This Court has consistently held that such material on which the assessing authority bases its opinion must not be arbitrary, irrational, vague, distant or irrelevant. It must bring home the appropriate rationale of action taken by the assessing authority in pursuance of such belief. In case of absence of such material, this Court in clear terms has held the action taken by assessing authority on such "reason to believe" as arbitrary and bad in law. In case of the same material being present before the assessing authority during both, the assessment proceedings and the issuance of notice for reassessment proceedings, it cannot be said by the assessing authority that "reason to believe" for initiating reassessment is an error discovered in the earlier view taken by it during original assessment proceedings. (See DCM v. State of Rajasthan [1980] 4 SCC 71."

22. Learned counsel for the State Mr. S.R Joshi while rebutting the arguments of the petitioner would submit that first and foremost the provisions in the Income Tax Act or even the U.P. Trade Tax Act are not exactly the same as that of Uttarakhand VAT Act. He would lay emphasis on sub-section (4) of Section 29 of the Act where the Commissioner on his own or on the basis of reasons recorded by the Assessing Authority, while granting an approval beyond a period of three years, can do so "notwithstanding that such assessment or reassessment may involve a change of opinion". In other words even if the reassessment proceedings are being done on admitted position that the Assessing Authority has a different opinion in doing so, it is perfectly permissible under the law i.e. under the Uttarakhand VAT Act.

23. It is, however, elementary that in interpretation of a statute the entire

statute must be read as a whole and then the focus should be on Chapter and Section and the words of the Statute. For our purposes when we see Section 29 of the Act as a whole, the position becomes clear.

24. In our case, the powers which have been given to the Commissioner for opening a reassessment even beyond a period of "three years" under sub-section 4 of Section 29 of the Act, where the Commissioner can initiate reassessment proceedings on his own or when he is satisfied with the reasons recorded by the Assessing Authority. In the present case the reassessment proceeding has been initiated on the basis of the reasons recorded by the Assessing Authority. The Assessing Authority had to assign reasons under sub-section (1) of Section 29 of the Act, which is grounded on the basic foundation of "reasons to believe". In other words, the net result would be that even if the reassessment proceedings under the VAT Act can be initiated on the basis of a "change of opinion" of the Revenue Authorities, this must first satisfy the jurisprudence foundation contained in sub-section (1) of Section 29 of the Act, which is that the Authority must have "reasons to believe", that such an reassessment should be done. This can only be done when he gives a clear cut finding and reasons as to why reassessment is being done. If he has "reason to believe" then he can change his opinion. But reasons must come first.

25. We would revert once again to the judgment of Hon'ble Apex Court in the case of Aryaverth Chawl Udyoug (supra), where in a case of change of opinion, the Hon'ble Apex Court had this to say in para 30:-

"30. In case of there being a change of opinion, there must necessarily be a nexus that requires to be established between the "change of opinion" and the material present before the assessing authority. Discovery of an inadvertent mistake or non-application of mind during assessment would not be a justified ground to reinitiate proceedings under section 21(1) of the Act on the basis of change in subjective opinion (Commissioner of Income-tax v. Dinesh Chandra H. Shah (1972) 3 SCC 231 and Income-tax Officer v. Nawab Mir Barkat Ali Khan Bahadur (1975) 4 SCC 360."

26. The Statute here provides the rate of tax for the petitioner which at the relevant time was 4.5% as the goods in question according to the petitioner were part of the telecommunication system and he was charged for that for the assessment year 2010-2011. Now the reassessment proceedings have been opened up beyond a period of three years without assigning any reasons on the part of the Revenue Authorities, which may justify the reassessment proceedings. They are now taxing the goods on the basis of residuary clause, which is chargeable at the rate of 13.5%, for which no justifiable reason whatsoever has been shown.

27. In Jindal Photo Films Ltd. (1998) 234 ITR 170 (Delhi), it was held as under:-

"The power to reopen an assessment was conferred by the Legislature not with the intention to enable the Income-tax Officer to reopen the final decision made against the Revenue in respect of questions that directly arose for decision in earlier proceedings. If that were not the legal position it would result in placing an unrestricted power of review in the hands of the assessing authorities depending on their changing moods."

28. This position was reiterated by the Full Bench of Delhi High Court in the case of Commissioner of Income Tax v. Kelvinator of India Ltd. (2002) 256 ITR 1.

29. Under these circumstances, this Court finds no basis for the Revenue to open reassessment proceedings.

30. Having given this finding, although this Court is not even required to examine the validity of the provisions under which the rate of tax is to be given, but since it goes to the root of the matter, that may also unnecessarily been done.

31. The case of the petitioner is that any goods in question were liable to be taxed at the rate of was liable to be taxed at the rate given in item no. 3 of Schedule II(B). According to him, the good in question is being manufactured and marketed as an "Instrument Cooling Fan" which is a part of the telecommunication system and is used in telecommunication tower for cooling of telecommunication instruments. In other words, it is a very specialized kind of cooling fan which cannot be used for any other purposes but for cooling a telecommunication system. This he has not only stated in the invoice that the goods which is the "Instrument Cooling Fan" is a part of telecommunication system, but the only customer of the petitioner's goods is one Acme Tele Power Limited. Acme Tele Power Limited has given a certificate to the petitioner stating the requirement and end use of the product purchased by it. The certificate given by the Acme Tele Power Limited dated 25.03.2017 reads as under:

"We have been Procuring Instrument cooling fans (Telecommunication equipments) from your depot at Udham Singh Nagar, Rudrapur since 2008-2009.

The said equipment are used by us exclusively in the Telecommunication Towers and accordingly forms part and parcel of the Telecommunication equipment."

32. In its order dated 26.10.2018, which is impugned before this Court, the Revenue has not dealt with this aspect as to why it is charging the petitioner at the rate of 13.5%, which is for the goods in the residuary clause, when there is a specific case of the petitioner that the goods in question manufactured and designed are to be sold only as a part of the telecommunication equipment. The only reasons assigned by the Revenue for charging this good under the residuary clause is that since in its invoice the excise number which is given pertains to electrical goods, it will be charged as an electrical good.

33. This is, however, not a sufficient reason as already held. In the present writ petition, the petitioner in paragraph no. 14 of the writ petition has stated that there is no other use of the goods supplied by the petitioner except as part of telecommunication equipment. Paragraph 14 of the writ petition reads as under:-

"14. That the petitioner immediately filed its reply on 27/02/2017 to Addl. Commissioner Commercial Tax, where he requested to give personal hearing to explain about the fact. The petitioner also submitted that, the petitioner has closed its business at Rudrapur and intimation regarding closer already given to department. The petitioner submits that, the goods supplied by the petitioner to its buyer is used by him as part of Telecommunication equipments, there is no other use of the goods supplied by the petitioner except part of Telecommunication equipments. So it was rightly taxed as a part of telecommunication equipments."

34. In this case, two counter affidavits have been filed, one by the Additional Secretary, Finance, Government of Uttarakhand and another by the Deputy Commissioner (Assessment) Second, Commercial Tax, Rudrapur, District Udham Singh Nagar.

35. The reply to the averments made by the petitioner in para 14 of the writ petition, has been given by the Additional Secretary, Finance as under:

"12. That the contents of Para No. 11 to Para No. 20 are matters of record, therefore alls for no comments."

36. The reply to the averments made by the petitioner in para 14 of the writ petition, given by the Deputy Commissioner (Assessment) Second, Commercial Tax, Rudrapur, reads as under:

"That in reply to the contents of paragraph no. 11 to 20 of the writ petition it is submitted that the said issue has already been dealt with by this Hon'ble Court at earlier round of litigation while deciding Writ Petition No. 636 (M/S) 2017 and an opportunity was given to the petitioner to submit his reply/explanation to the notice issued under Section 29(4) of the VAT Act, 2005 and to consider the same by the respondent no. 2, which has already been done and impugned orders have been passed."

37. In other words, there is no rebuttal of the petitioner's claim at any level that the product which he is selling is only a part of telecommunication system and although it is a cooling fan, it cannot be used in any other way but for cooling a telecommunication system. It is hence a part of telecommunication system, though independently it may still be classified for other purposes as an "electric good".

38. The provision which the petitioner relies upon is Sl. No. 3 of Schedule II (B) of the Uttarakhand Value Added Tax Act, 2005, which relates to a telecommunication system and then it gives a break up of the same and finally adds "and parts thereof". Being a part of a telecommunication system an "instrument cooling fan" has to be taxed under this clause at 4.5%.

39. It is a settled principle of law that if an item or entry clearly comes under one of the Schedules given in the fiscal law, where the rate of tax is to be determined, then it should not be relegated to the residuary clause. In this case

the goods in question is categorically a part of telecommunication equipment and therefore it could have been charged only under entry no. 3 of Schedule II and not under the residuary clause.

40. An "instrument cooling fan", strictly speaking may not be a telecommunication equipment in itself but it is definitely a part of it ("parts thereof"). Therefore, the "instrument cooling fan", has a claim to be classified under an enumerated item in the taxing statute and not to be relegated to the residuary clause.

41. In Dunlop India Ltd. v. Union of India & others reported in (1976) 2 SCC 241, the Hon'ble Apex Court has said as under:-

"When an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause. The question of competition between two rival classifications will, however, stand on a different footing."

42. This decision has subsequently been followed by the Hon'ble Apex Court in the case of Bharat Forge and Press Industries (P) Ltd. v. CCE, reported in (1990) 1 SCC 532 and Commissioner of Central Excise, Bhubaneshwar-I v. Champdany Industries Limited, reported in (2009) 9 SCC 466.

43. In view of the above, writ petition succeeds and is hereby allowed. The order dated 26.10.2018 passed by the Additional Commissioner, Commercial Tax, Rudrapur is set aside.

