

(2013) 05 AHC CK 0125

In the Allahabad High Court

Case No : Writ Petition No"s. 4287 and 4300 (MB) of 2013

M/s. Kay Pan Products Limited

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 31-05-2013

Acts Referred:

Citation : (2013) 6 ADJ 646 : (2013) 66 VST 289

Hon'ble Judges : Satish Chandra, J;Rajiv Sharma, J

Bench : Division Bench

Advocate : Piyush Agrawal and Vaibhav Pandey, for the Appellant;

Judgement

Satish Chandra, J.—In both the petitions, the petitioner has assailed the orders dated 25.3.2013 passed by the Additional Commissioner, Grade-I Commercial Tax, Lucknow whereby he has granted the permission u/s 21(2) of the U.P. Trade Tax Act, for the assessment year 2006-07, to make the reassessment under the Trade Tax Act as well as under the Entry Tax Act. The brief facts of the case are that the petitioner is a Private Limited Company, who has established its units for manufacturing and sale of Gutkha Pan Masala having Tobacco. The Brand name of the petitioner"s product is "Rajshree".

2. On 11.3.2008, for the assessment year 2006-07, the original assessment order was passed under Rule 41(8) of the U.P. Trade Tax Rules. Assessment order under Entry Tax Act was also passed. On 30.6.2009, the Central Excise Department has conducted a survey at the business premises of the assessee namely M/s. Vinay Wires and Poly Products Limited, Kanpur; and M/s. Kaveri Graphics Limited (earlier known as M/s. Diamond Graphics Limited) Kanpur. During the survey, after examining the books of accounts, bank accounts and other materials, it was found that the assessee has sold more than 98 crores Gutkha Pouch without showing it in the books of accounts. To this effect, necessary information was sent to the department. The matter was more than four years old. So, the Deputy Commissioner, Commercial Tax has sought permission from the competent authority for the extension of time for making

reassessment. The authority concerned has passed the impugned orders u/s 21(2) of the Trade Tax Act and granted the permission for making the reassessment under the Trade Tax Act as well as Entry Tax Act by observing that the Gutkha is exempted from the commercial tax but its raw material is subject to tax. Being aggrieved, the petitioner has filed the present petitions.

3. Mr. H.P. Srivastava, learned Additional Chief Standing Counsel appearing for the State raises a preliminary objection that the petitioner has an alternative remedy of filing an Appeal to which Sri Bharat Ji Agarwal, learned Senior Counsel assisted by Sri Piyush Agarwal, submits that the impugned orders are not appealable, so the present writ petitions have been filed. He submits that the Gutkha, which is manufactured by the petitioner is exempted from the clutches of Trade Tax and accordingly, while computing the total taxable turnover, the sale of self manufactured Gutkha, which was sold within the State of U.P. is also exempted from the payment of Entry Tax. The tax is levied only on the sale of Pan Masala. The petitioner has maintained books of accounts, namely-Cash Book, Ledger, stock register of the raw materials, stock register of the manufactured goods, and all the sales and purchase vouchers in the regular course of business. For the assessment year under consideration, the scrutiny was made by the A.O. and the assessment order was passed. He also submits that similarly, under the Central Sales Tax Act, the assessment order was also passed on 11.3.2008, where the tax was imposed only on the inter-State Sale of Pan Masala, as the sales of Gutkha was exempted from payment of Tax.

4. Learned counsel further informed that Central Excise Department has made a survey at the business premises of the assessee and on the basis of survey, some information was received by the Commercial Tax Department. So, the notice for the proceedings u/s 21(2) of the U.P. Trade Tax Act was issued on 8.3.2013 for the assessment year 2006-07. He again repeated that sale of Gutkha is exempted from the payment of tax.

5. He further submits that in the notice, it is wrongly alleged that in December 2006 to March 2007 certain quantity of Gutkha was manufactured and sold. But the fact remains that there is no liability for payment of tax on its sale. This aspect was already considered in the original assessment order. The proceedings u/s 21(2) have been initiated only on the ground that the petitioner might have purchased raw materials from unregistered dealers. Hence, the liability for payment of tax on such purchases from unregistered dealer is not upon the petitioner. For this purpose, he invited our attention towards Section 21(2) of the Trade Tax Act, which reads as under:

Section 21. Assessment of tax on the turnover not assessed during the year:

(1)

(2) Except as otherwise, provided in the section, no order of assessment or re-assessment under any provision of this act for any assessment year shall be made after the expiration of two years from the end of such year or March 31,

1998, whichever is later.

6. Learned counsel also submits that the limitation for re-assessment for the assessment year 2006-07 had already expired on 31.3.2008. However, in view of the proviso to Section 21(2), limitation may be extended by the Commissioner on the basis of the reasons recorded and the reassessment can be made within the period of six years at the end of the assessment year in question. Another submission of the learned counsel for the petitioner is that there is no material whatsoever was available with the survey team regarding the purchase of raw material from the unregistered dealer, which attracts Section 3AAAA, hence the initiation of the proceedings u/s 21 for imposition of tax u/s 3AAAA is based on the assumption and presumption, Learned counsel further submits that the petitioner has specifically demanded the information and sought an opportunity to cross-examine but without affording any opportunity, the respondent No. 2 has granted the permission by means of the impugned orders dated 25.3.2013. The notice issued by the Central Excise Department cannot be relied upon since it is based upon an information that the various parties whose names and details were found in the survey report. An inference has wrongly been drawn that the petitioner has sold Gutkha outside the books of accounts. For this purpose, learned counsel has relied on the ratio laid down in the cases of *M/s. M.L. Shukla and Co. v. Sales Tax Officer*, 1981 UPTC 396 (All); and *Mohd. Yakub and Sons v. Trade Tax Officer*, (30) STC 406 (All), where it was observed that information received from the Income Tax Department cannot be used for reassessment proceedings. The survey was made by the Central Excise Department at the place of third parties. On the basis of the survey dated 30.6.2009, information was received by the Trade Tax Department and the reassessment proceeding has been initiated, which is illegal and unjustified. On the strength of the ratio laid down in the cases of *Natraj Rubbers and another v. Sales Tax Officer*, (1999) 113 SCC 575; *State of Kerala v. K.T. Shaduli*; (1977) UPTC 363 (All). Learned Counsel for the petitioner contended that the impugned orders are per se bad in law and are liable to be set-aside.

7. Regarding Entry Tax, learned counsel submits that Section 4(1) of the Entry Tax provides for levy of entry tax on the entry of goods mentioned in the Schedule into a local area from any other place outside that local area for consumption, use or sale therein and the entry tax was payable by a dealer who is bringing the goods within the local area and not by the manufacturer. He also submits that the petitioner being the manufacturer of Gutkha and not a dealer is not liable for payment of Entry Tax on the manufactured products. For the assessment year 2006-07, an assessment order was passed on 11.3.2008, wherein it was clearly mentioned that the petitioner has received the entry tax in respect of the sales within the State of U.P. and the petitioner is not liable to receive the Entry Tax in the interstate trade or commerce. He also made a request that the notice impugned pertaining to the Entry Tax Act may also be quashed.

On the other hand, Sri H.P. Srivastava, learned Counsel for the department has justified the impugned orders passed by the Commercial Tax Department. He submits that no proceedings can be initiated u/s 10-B, of the Act for the reason that the period of four years has already expired. So, the authorities concerned have rightly initiated proceedings u/s 21 of the Trade Tax Act, which is valid as per the ratio laid down in the cases of Kala Kendra Kanpur v. Sales Tax Officer, Kanpur, (1989) UPTC 597 (All); and Super Chemicals Agra and Apollo Tyres Ltd. v. Commissioner, Trade Tax, (2010) NTN (42), All. He also submits that proper notice was issued to the petitioner but petitioner failed to co-operate. For this, purpose, he has drawn the attention towards the report submitted by the Central Excise Department on 17.1.2012 addressed to the Commercial Tax Department, wherein it is mentioned that:

Shri Sameer Mittal and Shri Sunil Aggarwal, cousin brothers of Sri Manish Aggarwal, Director of KPPPPL, who were present in the factory of KPPPPL, on 30.6.2009 stated that all documents/records were being maintained by Sri Manish Aggarwal, However, Sri Manish Aggarwal did not turn up on 30.6.2009, since none explained the stock in the records regarding packaging material, the entire packing material was detained on 30.6.2009 for further inquiry u/s 110 of the Customs Act, 1962, as made applicable to Central Excise Matters u/s 12 of Central Excise Act, 1944 vide notification No. 68/63-CE dated 4.5.1963. Sri Maish Aggarwal, Director of M/s. K.P. Pan Products Pvt. Ltd. was repeatedly summoned to appear with records and verify the stocks, but he has not appeared. During investigations against M/s. K.P. Pan Products Pvt. Ltd. evidences of clandestine purchase of packaging material from M/s. Vinay Wires and Poly Products Pvt. Ltd., Rania Kanpur Dehat have been found. Thus, on the reasonable belief that he said stock of detained goods was on account of clandestine purchase on which no duty had been paid and the same are liable for confiscation under Rule 25 of Central Excise Rules, 2002 was seized u/s 110 of the Customs Act, 1962 as made applicable to like matters of Central Excise vide Section 12 of the Central Excise Act, 1944 read with Notfn. No. 68/63-CE 4.5.1963 vide Seizure Memo dated 21.8.2009 (RUD-2). A show-cause notice of seizure part has already been issued on 22.11.2009 (RUD-2(i)).

During the course of search conducted in various places, on 30.6.2009, other incriminating documents/pen drives etc. were also resumed from different premises. The incriminating documents so seized indicate that the unaccounted finished goods were sold by VWPPPL Unit-I and II to various manufactures including manufacturers of "Rajshree" brand Gutkha and the same were used by those manufacturers in the manufacture of excisable goods on which duty was not paid by such manufacturers.

Although no one from KPPPPL has not joined the investigation, but it was admitted by Sri C.N. Malviya, Director-cum-Manager of VWPPPL in his statement dated 16.7.2009 (RUD-3) that VWPPPL have cleared finished goods without payment of duty to manufactures of "Rajshree" brand gutkha or M/s. Kaveri

Graphics (earlier M/s. Diamond Graphics) under invoices issued in the name of M/s. BKG Enterprises, Kanpur and placed in file No. 63, 65, 67 and 68 resumed from Unit-I of VWPL on 30.6.2009 under Panchnama dated 30.6.2009 (RUD-4(i) to (iv) which are not accounted for in their statutory records. He further clarified that from their Unit-II they have sent printed flexible laminated rolls and pouches without payment of duty to manufactures of "Rajshree brand gutkha (which was working in the name and style of M/s. K.P. Pan Products Pvt. Ltd. Lucknow as on 30.6.2009, i.e. the date of search), whereas the invoices (which were not reflected in their statutory records) were made in the name of M/s. BKG Enterprises. It, therefore, appears that manufactures of "Rajshree" brand are engaged in clandestine purchase of raw material in their unit in a well planned and organized manner.

8. Lastly, he justified the impugned order, where permission for re-assessment has been granted by the competent authority as the raw material used for the suppressed sale item is taxable.

9. We have heard both the parties at length and gone through the material available on record.

10. In the instant case, it is evident that the original assessments were completed. Normal period for re-assessment has already expired. So, the assessing officer has sought permission for re-assessment from the competent authority after recording the reasons, which was granted by the impugned orders under the Trade Tax Act as well as the Entry Tax Act.

11. Needless to mention here that initiation of proceedings for granting permission by the Commissioner after expiry of four years from the end of assessment order in question creates valuable right in favour of the petitioner. There is obligation on the Commissioner to give opportunity of hearing or show-cause notice to the petitioner before granting permission for reassessment proceedings. Where no such opportunity has been given or show-cause notice has been issued, the permission accorded by the Commissioner is not justifiable as per the ratio laid down in the case of Mohan Steel Limited Vs. Commissioner, Trade Tax and Another, . The Hon"ble Supreme Court in the case of Addl. Commissioner (Legal) and Another Vs. Jyoti Traders and Another, , observed that the proviso is operative from February 9, 1991 and a bare reading of the proviso shows that the operation of this provision relates and encompasses to the previous assessment years. Action may be taken u/s 21(1) after obtaining permission from the Commissioner, when the original period of limitation prescribed u/s 21(2) had already expired. No doubt, the proviso confers power and gives jurisdiction/authority to the Commissioner, if he is satisfied either on his own or on the basis of the reasons recorded by the A.O. that it is just and expedient to either assess or reassess the dealer, only then he would authorize the assessing officer to make such reassessment within the extended period of limitation. However, as per the ratio laid down in the case of Chopra Desels v. State of U.P.; 1994 NTN (4) 17 All, an opportunity of hearing has to be provided

to the petitioner before initiating the proceedings for reassessment, though Section 21(2) specifically does not say so but where any order entails civil consequences, the observance of principle of natural justice is imperative. The plain and simple meaning of the aforesaid proviso is that the permission/approval for such re-assessment of alleged escaped turnover is to be granted by the Commissioner only after being satisfied either on his own or on the basis of the reasons recorded by the A.O. and it is just an expedient to reopen the case.

12. Once the proviso postulates recording of reasons by the Assessing Authority, it necessarily obligates the Commissioner or the Additional Commissioner to consider such reasons and make them known to the assessee before he finally forms his satisfaction and even if the Commissioner or the higher authority on his own reasons feels satisfied that it is just and expedient to re-open the assessment, it would still require that such reasons must be made known to the assessee also, so that before the assessment is reopened, he may have an opportunity to satisfy the higher authority that the reasons assigned by the Assessing Authority are not relevant or they are incorrect or they do not make out a legal ground for reopening of the assessment and likewise if the Commissioner or the higher Authority proposes to authorize the Assessing Authority for re-opening the assessment on his own, then also reasons for satisfaction have to be supplied to the dealer, so that he may have a say to convince the higher authority for not authorising the Assessing Officer for not reopening the assessment.

13. Whether the Commissioner or the higher authority permits the Assessing Officer to proceed under the extended period of limitation either on his own or on the basis of the reasons recorded by the Assessing Authority, in both cases, the assessee would have a right to put forward his defence for not re-opening the assessment. This opportunity, if excluded, or shredded out from the aforesaid proviso, it would leave the assessee with no opportunity/remedy to challenge the very authority of the assessing officer to reopen the assessment nor there would be any opportunity to challenge the approval granted by the Commissioner under any of the remedies under the Act.

14. When an order is passed on the basis of the reasons recorded, it naturally means that the reasons must be rationale, genuine and relevant. Any reason which cannot be termed as rationale genuine or relevant would not make out a case for reopening of the assessment and for that matter also, the assessee has to be associated in the proceedings initiated seeking approval from the Commissioner or the Additional Commissioner, as the case may be. Similar views were also expressed in the case of *Manaktala Chemicals Pvt. Limited Vs. State of U.P. and Others*, .

15. In the present case, the assessee has not co-operated as mentioned in the report submitted by the Central Excise Department. At the time of survey, and thereafter, opportunity was given to the petitioner to submit his reply. Prima facie, there is suppressed sale of raw material for manufacture of Gutkha though

which is not taxable but its raw material is taxable, which was purchased by the petitioner from unregistered dealers. When it is so, then we are of the view that matter needs further inquiry by the A.O. The petitioner is at liberty to put its defence before the A.O. We hope that petitioner will cooperate with the A.O. at least this time.

16. In these circumstances, we find no reason to interfere with the impugned order passed by the competent authority to grant the permission u/s 21(2) of the Trade Tax Act for re-opening the assessment for the assessment year 2006-07. In its defence, the assessee will get another chance at the time of reassessment proceedings. So, the writ petition No. 4287(MB) of 2013 is hereby dismissed.

17. Regarding writ petition 4300(MB) of 2013, pertaining to the Entry Tax Act, it may be mentioned that the petitioner is a manufacturer of Gutkha. He is neither a dealer within the meaning of Section 2(b) of the Entry Tax Act, nor there is any liability for payment of Entry Tax.

18. Section 4(1) of the Entry Tax Act provides the levy of Entry Tax on the entry of goods mentioned in Schedule-II into local area from any other place outside the local area for consumption, use or sale therein and the entry tax was payable by a dealer, who is bringing the goods within the local area. The manufacturer of "Gutkha" is not liable for payment of entry tax. His liability is just to collect the Entry Tax from the dealers and deposit with the exchequer.

19. During survey, it was found that the petitioner has manufactured "Gutkha" from the raw material purchased from the unregistered dealers and as raw material was taxable under the provisions of Trade Tax Act now known as Value Added Tax and under the provisions of Entry Tax Act, the liability to pay Tax is on the dealer but in the instant case in the absence of entries in the books of account, no case is made out as to where the goods were sold and how Entry Tax was evaded. Hence, no prima-facie case is made out for the evade of Entry Tax.

20. Section 4(1) of the Entry Tax provides levy of Entry Tax on the entry of goods mentioned in the schedule into a local area from any other place outside that local area for consumption, use or sale therein and the Entry Tax was payable by dealer who is bringing the goods within the local area and not by the manufacturer. Section 4-A of the Old Entry Tax Act is equivalent to Section 12 of the New Entry Tax, 2007 and it only requires the manufacturer to collect entry tax from the purchasing dealer at the time of delivering Gutkha from the manufacturer. Only change in Sections 4-A and 12(1) is that u/s 12(1), it has been provided that the manufacturer shall not give such goods to the purchaser unless the amount of such tax has been paid by the purchaser, but such purchaser is the person who intends to bring into the local area after purchasing from the manufacturer. In other words, the liability of the manufacturer is only to the extent to collect entry tax from the dealer and deposit the same to the exchequer.

21. In the instant case, a survey was conducted upon unregistered dealers by

the Central Excise Department from whom, it is said that petitioner used to purchase raw material for manufacturing Gutka and on the basis of the report so submitted by the Central Excise Department, proceedings for reopening and reassessment u/s 21(2) of the Trade Tax Act have been initiated on the ground that certain turn over has escaped from the assessment. It may be noted that there is no dispute in the fact that the petitioner is manufacturer of Gutka. The final product in the form of Gutka has been manufactured for the first time and the same was sold within the local area. Therefore, in view of provisions of Section 2(C), there is no liability for payment of Entry Tax by the manufacturer, who by no stretch of imagination can be said to be a dealer in terms of Section 2(b) of the Entry Tax Act, 2007. In the instant case, the assessment order for Entry Tax was already passed. Further, the order was also passed by the first appellate authority. Thus, the assessment order has already merged in the first appellate order, as agreed by both the parties. When it is so, then no re-assessment can be made pertaining to Entry Tax and no proceedings under Section- 21 can be legally initiated. Hence, we set aside the impugned order dated 25.3.2013 (Annexure 5 to the writ petition), pertaining to the Entry Tax Act only. The petitioner will get the relief accordingly.

For the reasons aforesaid, writ petition No. 4287 (MB) of 2013 is dismissed whereas writ petition No. 4300 (MB) of 2013 stands allowed in above terms.