(1977) 01 AHC CK 0027

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petitions No''s. 147 and 325 of 1976

M/S. RAM PRAKASH and SONS and Another — APPELLANT

Vs

SALES TAX OFFICER. — RESPONDENT

Date of Decision : 28-01-1977

Acts Referred:
Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 297

Citation : (1977) 6 CTR 141

Hon'ble Judges : R. M. Sahai, J

Bench : Division Bench

Final Decision : Allowed

Judgement

R. M. Sahai, J. :- In these petitions under Article 226 of the Constitution, the common question that arises for determination, is the rate at which aluminium wares are subject to sales tax under the U.P. Sales Tax Act, 1948 (hereinafter called the Act).

2. The petitioners are dealers in aluminium wares. Their case is that the rate at which sales tax is leviable on aluminium wares is only 31/2 per cent, whereas the sales tax authorities have been demanding from them sales tax at 7 per cent on aluminium wares.

On behalf of the Sales Tax authorities the learned Standing Counsel contended that sales tax is leviable on aluminium wares at 7 per cent.

3. In order to appreciate the rival contention of the parties, it is necessary to set out the relevant provisions of the Act, the course of amendments thereof and the relevant notifications under the Act.

The relevant portions of S. 3 of the Act, as it stood on 5-4-1961, read as follows :-

"3. Liability of tax under the Act : (1) Subject to the provisions of this Act, every dealer shall, for each assessment year, pay a tax at the rate of two naya paise per rupee on his turnover of such year, which shall be determined in such manner as may be prescribed.

Provided ....

Provided also that the State Government may, by notification in the Official Gazette, enhance the rate of tax on the turnover in respect of any goods or class of goods, so, however, that the rate does not exceed three naya paise per rupee, and may, likewise, reduce it and the tax shall thereupon be payable on the relative turnover at the enhanced or reduced rate as may be applicable.

Provided ....

Explanation ...."

Under the second proviso to sub-S. (1) of S. 3 of the Act, the Government issued Notification No. ST-1367/X-1045 (19)-1960 date 5-4-1961. That Notification stated, inter alia, that the rate of tax on aluminium wares would be 3 per cent instead of the general rate of tax at 2 per cent.

4. The provisions of the Act were modified substantially by the Amending Act, U.P. Act No. 24 of 1971, which came into force on 22-8-1971. This Act substituted two new sections for S. 3 and S. 33-A of the Act. The relevant portions of these two new sections read as follows :-

"3 Liability to tax under the Act. (1) Subject to the provisions of this Act every dealer shall, for each assessment year, pay a tax at the rates provided by or under S. 3-A, S. 3-AB or, S. 3-AA on his turnover of sales which shall be determined in such manner as may be prescribed.

(2) ....

3-A Rate of Tax (1) (a) The turnover in respect of the goods specified in the second column of the First Schedule shall be liable to tax at the point specified in the third column thereof at such rate, not exceeding ten per cent, as the State Government may, by notification in the Gazette, declare :

Provided that the rate prevailing by virtue of S. 3-AB immediately before the commencement of the Uttar Pradesh Sales Tax (Amendment and Validation) Act, 1971, shall continue in force until altered by any such notification.

(b) The State Government may, by notification in the Gazette, omit the entry relating to any goods from the First Schedule, and may in the like manner restore any entry so omitted, and upon the issue of any such notification omitting or restoring any entry, the said Schedule shall subject to the provisions of sub-S. (3) be deemed to be amended accordingly.

(2) The turnover in respect of all goods, which are not for the time being specified in the First Schedule or in S. 3-AA or in a notification under S. 3-D shall be liable to tax at the rate of three per cent.

Provided that the State Government may, by notification in the Gazette reduce the rate of tax on the turnover in respect of any goods :

Provided further that in respect of any goods, the rate of tax on the turnover whereof is at any time less than three per cent, the State Government may, by notification in the Gazette, enhance it upto three per cent.

(3) ...."

5. S. 3-A was again amended by U.P. Taxation Laws (Amendment) Ordinance which came into force on 15-11-1971. This Ordinance was later replaced by the U.P. Taxation Law (Amendment) Act, 1972. The only change brought about by this amendment was that the words "three per cent" occurring in sub-S. (2) of S. 3-A were substituted by the words "three and a half per cent".

6. Pursuant to the aforesaid amendment, the State Government issued Notification No. St. 334/X-10-2-1971 under the second proviso to sub-S. (2) of S. 3-A of the Act, by which aluminium wares were made taxable at the rate of 3 1/2 per cent.

7. Sub-S. (2) of S. 3-A was further amendment by U.P. Act No. 1 of 1975 which came into force on 1-12-1973. After such amendment, sub-S. (2) of S. 3-A read as follows :

"(2) The turnover in respect of all goods which are for the time being specified in a notification issued in that behalf, shall be liable to tax at the rate of four per cent :

Provided that the State Government may, by notification in the Gazette, reduce the rate of tax on the turnover in respect of any goods :

Provided further that in respect of any goods, the rate of tax on the turnover whereof is at any time less than four per cent, the State Government may, by notification in the Gazette, enhance it upto four per cent."

8. U.P. Act No. of 1973 inserted a new sub-S. namely sub-S. (2-A) in S. 3-A of the Act. The sub-section, as originally added read as follows :

"(2-A). The turnover in respect of goods other than those referred to in sub-S. (1) and (2) shall be liable to tax at the point of sale by the manufacturer or importer at the rate of seven per cent :

Provided that the State Government may, by notification in the Gazette reduce the rate of tax on the turnover in respect of any goods :

Provided that in respect of any such goods, the rate of tax on the turnover whereof is at any time less than seven per cent, the State Government may, by notification in the Gazette, enhance it upto seven per cent."

9. The effect of the amendment of S. 3 and 3-A by U.P. Act No. 1 of 1973, was that it altered the pattern of Sales Tax in vogue till then. The emphasis shifted

from taxation at multiple point to taxation at a single point. The general rate of tax on all goods became 7 per cent at the point of manufacture or import. The maximum rate of tax for goods notified by the State Government under S. 3-A was fixed at 3 1/2 per cent with the power to reduce the rate of tax for any goods and to enhance the rate of tax for any goods where it was lower than the maximum.

10. Shri S. P. Gupta, learned counsel for the petitioner in Writ No. 147 of 1976, urged that aluminium wares being among the goods which were specified in notification issued by the State Government, they came within the ambit of sub-S. (2) of S. 3-A and hence were liable to sales tax at 3 1/2 per cent only. He maintained that the notice dated 11-12-1976 issued by the Sales Tax Officer, Moradabad, directing the petitioner to deposit sales tax at the rate of 7 per cent with his quarterly return since 1-12-1973, was clearly unsustainable.

11. Shri S. N. Kacker, learned counsel for the petitioner in Civil Misc. Writ No. 325 of 1976, supported the contention of Shri Gupta the circular issued by the Commissioner of Sales Tax in U.P. (Annexure 6) and that issued by the State Government (Annexure 7) declaring that aluminium wares are taxable at 7 per cent. were without the authority of law.

12. On the other hand, the learned Standing Counsel (Shri V. D. Singh) appearing for the Sales Tax Authorities, contended that the general rate of sales tax having been provided by sub-S. (2) of S. 3-A at 3 1/2 per cent by Notification No. 1367/X-1045(19) - 1960 dated 5-4-1961 issued by the State Government became a dead letter. He maintained that Notification No. ST-334 dated 15-11-1971 was not a notification prescribing the rates of tax on the goods mentioned therein, but was only by way of clarification and was issued to dispel any doubt regarding taxability of the goods mentioned therein and that even if this Notification had not been issued, aluminium wares would have been liable to sales tax at the rate of 3 1/2 per cent only upto 1-12-1973. He laid emphasis on the words "in that behalf" occurring in sub-S. (2) of S. 3-A and argued that unless a notification was issued after 1-12-1973 under that sub-section, all goods shall be liable to sales tax at 7 per cent under sub-S. (2-A) of S. 3-A. In other words, his argument was that for goods to be taxable at 3 1/2 per cent the notification should be issued in exercise of powers conferred under sub-S. (2) of S. 3-A and that any notification issued earlier was not effective.

13. Sub-S. (2) of S. 3-A is in the nature of an exception to the general provision contained in sub-S. (2-A) of S. 3-A. The only requirement for any goods to qualify for a lesser rate than 7 per cent is that they should be specified in a notification under sub-S. (1) or (2) of S. 3-A. That Notification No. ST-334 dated 15-11-1971, is such a notification cannot be disputed. Nor can it be disputed that aluminium wares are among the goods mentioned in the list appended to notification. It makes no difference whether in the words issued in that behalf occurring in sub-S. (2) of S. 3-A the emphasis is of the rate of tax or on the specification of the goods therein. We do not find either in that sub-section or in

the Act itself anything to indicate that it (that sub-section) shall apply only when a notification has been issued in exercise of the powers thereunder after it was amended by U.P. Act No. 1 of 1973.

14. A perusal of the last part of Notification No. ST-334 dated 15-11-1971 indicates that it is not merely a clarificatory one as suggested by the learned Standing Counsel, it clearly declares that all previous notifications in regard to goods mentioned in the list therein have been rescinded so that the turnover of goods mentioned in the list therein have been rescinded so that the turnover of goods mentioned in the list therein shall be taxable at 3 1/2 per cent by virtue of provisions of sub-S. (2) of S. 3-A.

15. The legislature has carved out an exception in favour of the goods which are specified in notifications in that behalf. If the argument of the learned Standing Counsel is accepted, it would be adding a further requirement is sub-S. (2) of S. 3-A that a notification referred to therein should be legal and effective.

16. In S. B. Jain vs. Income Tax Officer a question arose as to whether proceedings initiated beyond the period of limitation by an invalid notice was a proceeding pending within the meaning of S. 297 of the Act. The Supreme Court said :

"That S. 297(2)(a)(ii) requires is the factual pendency of a proceedings under S. 34 of the repealed Act. The question whether that proceeding was barred by limitation or not is irrelevant. It is not denied that those proceedings were initiated by a competent authority. Those proceedings were quashed for the reason that notice under S. 34 of the 1922 Act was issued beyond time prescribed by law. Hence, it cannot be said that no proceeding under S. 34 of the 1922 Act either factually or legally was pending at the time when the new Act came into force.

Our above conclusion receives support from the decision of this Court in Therein the question that arose for decision was whether an appeal under S. 24 of the Industrial Disputes Act, 1950, can be said to have been pending if that appeal was incompetent or invalid for some reason. This Court ruled that what was necessary was the factual pendency of the appeal and not that it should have been a valid or competent one under the provisions of the limitation Act or such other adjectival law."

17. The above observations are equally applicable to the present cases. We, therefore, hold that aluminium wares have been specified in the notification issued in that behalf and are liable to tax at 3 1/2 per cent only.

18. The result is that both the petitions succeed. We issue a writ in each of these petitions restraining the respondents from demanding from the petitioners sales tax on aluminium wares at 7 per cent.

19. In the circumstances of the case we direct the parties to bear their own costs.