

(2014) 01 AHC CK 0201

In the Allahabad High Court

Case No : Civil Misc. Writ Petition (Tax) No. 13 of 2014

M/s. Shikha Steel Co.

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 09-01-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Uttar Pradesh Trade Tax Act, 1948 — Section 2(e), 2(ee), 21, 21(1), 21(2)

Citation : (2014) 2 ADJ 390 : (2014) 68 VST 488

Hon'ble Judges : Dhananjaya Yashwant Chandrachud, C.J.; Dilip Gupta, J

Bench : Division Bench

Advocate : Pradeep Agrawal and Krishna Agrawal, Advocate for the Appellant

Judgement

1. By these proceedings under Article 226 of the Constitution, the petitioner has sought to question the legality of an order dated 24 March, 2011 passed by the Additional Commissioner, Commercial Tax, Grade-I, Ghaziabad Zone-II, Ghaziabad (third respondent) granting approval for reopening of the assessment for the Assessment Year 2004-05 under the proviso to Section 21(2) of U.P. Trade Tax Act, 1948 (hereinafter referred to as the "Trade Tax Act"). The petitioner also questions notices dated 19 October 2013 issued by the Assistant Commissioner-respondent No. 4 in connection with the application filed u/s 30 of the Trade Tax Act for 2004-05 and 2005-06 as well as the notices which have been issued for a regular assessment for Assessment Year 2005-06 and 2006-07. By an order dated 5th January 2007 the regular assessment for 2004-05 was completed on the basis that the petitioner had effected sales in the total sum of Rs. 54,114/- and purchases of Rs. 1,22,512/-. The third respondent, while granting approval under the proviso to Section 21(2), recorded that during the search conducted in the premises of M/s. Parmarth Iron Pvt. Ltd., Bijnor, electronic records maintained by the aforesaid company indicated that the petitioner had engaged in transactions of sales and purchase with the aforesaid company to the extent of Rs. 4.31 crores during the year 2004-05. On 17 March 2011 a notice was issued to the petitioner in response to which the petitioner

submitted that it had no dealing of purchase and sale with M/s. Parmarth Iron Pvt. Ltd. and the latter being a manufacturing entity was solely responsible for payment of tax. The third respondent has noted that there was reason to believe that there had been an escapement of tax, consequent upon which action for reassessment u/s 21 was warranted. In pursuance of the notice, a reassessment took place by which the turnover of sales/purchases was assessed at Rs. 10 crores and a demand of Rs. 40 lacs was levied. This order was admittedly passed ex parte. A fresh notice has now been issued to the petitioner for reassessment for 2004-05 coupled with notices for regular assessment for 2005-06 and 2006-07.

2. Learned counsel appearing on behalf of the petitioner submits that by virtue of an exemption notification which has been issued u/s 3-A of the Trade Tax Act, tax is liable to be computed at the rate of 4% but the liability to bear the tax is that of the manufacturer or as the case may be, of the importer. It has been urged that the expression "importer" is defined in Section 2(e) to mean the dealer who makes the first sale of such goods after their import into the State, while the expression "manufacturer" is defined in Section 2(ee) to mean a dealer who makes the first sale of the goods in the State after their manufacture.

3. In the present case, it has been submitted that the petitioner is neither an "importer" within the meaning of Section 2(e) nor a "manufacturer" within the meaning of Section 2(ee) and hence in any view of the matter no liability of tax can be fastened on the petitioner. Hence, it has been submitted that there could be "no reason to believe", within the meaning of the proviso to Section 21(1) of the Trade Tax Act, that any part of the turnover of the petitioner as a dealer had escaped assessment to tax or that it had been under assessed. Moreover, it has been submitted that though a Division Bench of this Court had dismissed petitions filed by M/s. Parmarth Steel and Alloys Pvt. Ltd. and M/s. Parmarth Iron Pvt. Ltd. (Writ Tax Nos. 874 and 875 of 2010 on 8 May 2013) but that should not come in the way of the petitioner inasmuch as the reopening of the assessment in the case of those two parties was on the basis of the search conducted at their premises, in which on the basis of the material found "a reason to believe" had been formed. Finally, it has been submitted that on a similar issue, other petitions are pending before this Court where an interim stay has been granted.

4. u/s 21 of the Trade Tax Act, the Legislature has provided that if the assessing authority has reason to believe that the whole or any part of the turnover of a dealer, from any assessment year or part thereof, had escaped assessment to tax or has been under assessed or has been assessed to tax at a rate lower than that at which it is assessable under the Act, or any deductions or exemptions have been wrongly allowed in respect thereof, the Assessing Authority may, after issuing notice to the dealer and making such inquiry as it considers necessary, assess or reassess the dealer to tax according to law.

5. Section 21(2), however, provides that except as otherwise provided in Section 21, no order of any assessment or reassessment under the Act for any

assessment year shall be made after the expiration of two years from the end of such year. The proviso to sub-section (2) empowers the Commissioner on his own or on the basis of the reasons recorded by the assessing authority to reopen an assessment notwithstanding that such assessment or reassessment may involve a change of opinion.

6. The expression "reason to believe" has been construed by the Supreme Court while interpreting the provisions of Section 21 of the U.P. Sales Tax Act, 1948 in *The Commissioner of Sales Tax, U.P. Vs. Bhagwan Industries (P) Ltd., Lucknow*, . The observations of the Supreme Court are:

..... 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.....

The expression "reason to believe" postulates that there must be an objective basis for the authority to believe that the turnover of a dealer has escaped assessment or that it has been under assessed or has been assessed to tax at a rate lower than that at which it is assessable. The existence of "reason to believe" means that the ground must be relevant and have a nexus with the formation of belief and should not be extraneous.

7. In the judgment of the Division Bench in *M/s. Parmarth Steel and Alloys Pvt. Ltd.* (supra) the following principles have been laid down after considering the earlier decisions of this Court on the subject:

- (1) Section 21(2) provides that permission can be granted even if there is change of opinion.
- (2) The change of opinion may arise even if some material is brought on record after the assessment or there was lack of care or inadvertence of mistake.
- (3) Order granting sanction need not contain reasons in details but it should show application of mind.

8. In the present case the third respondent while authorising a reopening of the reassessment for the year 2004-05 has furnished a tangible basis upon which the formation of belief has been founded. The search which was conducted upon M/s.

Parmarth Iron Pvt. Ltd., Bijnor resulting in recovery of data maintained in the electronic form indicated transactions of a value of Rs. 4.31 crores with the petitioner for the year 2004-05. The petitioner has undoubtedly disputed having had any transaction with the aforesaid party but this is not the matter which falls for consideration at this stage. The point to be noted, as is reflected in the original order of the assessment dated 5 January 2007, is that for the year in question the petitioner reflected total purchases of only Rs. 1.22 lacs and sales of Rs. 54,114/-. On this material, it cannot be held that the formation of belief was extraneous or that the grounds which weighed with the third respondent have no nexus with the formation of belief.

9. But it has been urged on behalf of the petitioner that the liability to tax would only fall upon the importer or a manufacturer and since it is M/s. Parmarth Iron Pvt. Ltd. which is the manufacturer, the liability to pay tax must only fastened upon the aforesaid entity and not upon the petitioner.

This assertion on the part of the petitioner, it must be noted, is not a pure jurisdictional issue which can be decided by the Court in a petition challenging a notice of reassessment. Section 12-A of the Trade Tax Act provides that in any assessment proceedings, when any fact is specially within the knowledge of the assessee, the burden of proving that fact shall lie upon him, and in particular, the burden of proving the existence of circumstances bringing the case within inter alia any of the exceptions, exemptions or reliefs mentioned in Section 3-A, shall lie upon the assessee and the assessing authority shall presume the absence of such circumstances.

10. We are inclined to clarify that by this observation we are not concluding the merits of the defence which the assessee has on the substantive issues that will appear in assessment before the assessing officer in the course of reassessment for the year 2004-05 or the assessment for the years 2005-06 and 2006-07. All that needs to be determined at this stage is as to whether there was "reason to believe" within the meaning of Section 21 and for the reasons which we have arrived at, we hold that the requirement of Section 21 was satisfied. Accordingly, the notice issued for 2005-06 and 2006-07 and the notice for a regular assessment are also in accordance with law. The mere fact that on 12 May 2011, a Division Bench of this Court in another petition (M/s. Shiv Shakti Stores v. State of U.P. and others, Writ Tax No. 674 of 2011) had, while granting time to file a counter, directed that until the next date of listing, the assessment proceedings u/s 21(2) would be stayed, is no justification for this Court to entertain the petition. Once the Court has come to the conclusion that the jurisdictional requirement of reopening and reassessment has been duly met, there is no reason to interfere with the impugned action of the authorities.

This is not one of the cases where the authority has a mere "reason to suspect" and not "reason to believe".

In the circumstances and for the reasons stated above, no case for interference

under Article 226 is made out.

The writ petition is, accordingly, dismissed.

There shall be no order as to costs.