

(2012) 01 AHC CK 0741
In the Allahabad High Court
Case No : Writ Tax No. 423 of 2004

M/s Shree Bhawani Paper Mills Ltd.

APPELLANT

Vs

State of UP and Others

RESPONDENT

Date of Decision : 13-01-2012

Acts Referred:

Direct Tax Laws (Amendment) Act, 1987 — Section 147

Income Tax Act, 1961 — Section 147

Uttar Pradesh Trade Tax Act, 1948 — Section 147, 21, 21(1), 21(2), 22

Citation : (2012) 49 VST 148

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

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. We have heard Shri Bharat Ji Agarwal, Senior Advocate assisted by Shri Piyush Agrawal for the petitioner-company. Shri S.P. Kesarwani, Additional Chief Standing Counsel appears for the respondents. The petitioner-company is aggrieved by notices dated 10.3.2004 and 17.3.2004 u/s 21 (2) of the U.P. Trade Tax Act, for reassessment of the completed assessments of the years 1997-98, 1998-99, 1999-2000 and 2000-2001. It has also prayed for quashing the order dated 1.2.2004 passed by the Additional Commissioner, Trade Tax, Allahabad, by which he has, in exercise of powers given to him under the proviso to Section 21 (2) of the Act, granted sanction to the Deputy Commissioner (Assessment), Trade Tax, Range-I, Allahabad for reassessment of escaped turnover.

2. The petitioner is a Public Limited Company engaged in manufacture and sale of paper in its factory at Rae Bareli. The company is registered both under the U.P. Trade Tax Act, and Central Sales Tax Act. It is stated that the company does not have electric connection from U.P. State Electricity Board or from any other source, at its factory or residential premises at Rai Bareli. The entire manufacturing process is dependent on the electricity generated from the four diesel generating sets with capacity of more than 1000 KVA each. The generating

sets are installed at the factory site situated at Rae Bareli, where the entire manufacturing activity is undertaken. The factory runs exclusively from the power generated by the diesel generating sets.

3. The company consumes large quantity of diesel for running the generating sets. For the assessment years 1997-98, 1998-99, 1999- 2000 and 2000-2001 the original assessment orders were passed on 16.3.2000, 28.3.2001, 21.3.2002 and 28.2.2003. It is stated that while passing the original assessment orders, complete details of the purchase of the raw material, fuel, packing material etc. was disclosed and was examined by the assessing authority. The assessment orders have become final. It is submitted that the petitioner had duly disclosed the purchase of high speed diesel oil, used in the generating sets for each of the assessment years with the details of other purchases. For the assessment year 1996-97, the petitioner disclosed purchase of high speed diesel valued at Rs. 4,53,63,984.16 in the total purchase of other items of Rs. 16,08,78,644.70, including chemicals, general stores, packing material, wire and felt, & electric stores. Similarly for the assessment year 1998-99 the petitioner disclosed purchase of high speed diesel oil for generating sets valued at Rs. 4,80,86,090.33; for the assessment year 1999-2000 of Rs. 5,54,95,287.00; and for assessment year 2000-01 of Rs. 6,85,55,764.00. These purchases were duly taken into account by the Assessing Officer, at the time of making assessment of turnover of the company.

4. The petitioner was given a notice on 22.1.2004 by the Zonal Additional Commissioner, Trade Tax, Allahabad to show cause as to why permission not granted to the Deputy Commissioner (Assessment), First, Trade Tax, Allahabad for reassessment u/s 21 (2) for the escaped manufacture/sale, on the purchase/ consumption of diesel for the assessment years 1997-98, 1998-99, 1998-2000 and 2000-01 as follows:-

SN

Assessment years

Purchase of Diesel

Purchase of raw material

1.

1997-98

Rs. 4,53,63,984.00

Rs. 7,05,54,337.96

2.

1998-99

Rs. 4,80,86,090.33

Rs. 9,11,23,942.00

3.

1999-2000

Rs. 5,54,95, 287.00

Rs. 8,74,33,266.00

4.

2000-2001

Rs. 7,88,55,764.00

Rs. 8,25,84,718.00

5. The petitioner submitted a reply on 21.2.2004 for each of the assessment years. The reply in respect of the year 1997-98 is quoted as below:-

RO/

21st February, 2004

The Additional Commissioner of Trade Tax Allahabad

Respected Sir:

Sub: Notice No. 2758/Section 21 (2)/Addl. Commissioner Karyalaya, Alld. For the A.Y. 1997-98

The aforesaid notice has been served to us on 29.1.2004, which has been issued u/s 21 (2) of the U.P. Trade Tax Act. Except for mentioning the fact that during the relevant assessment year, we have made purchases of diesel worth Rs. 4, 53, 63, 984/- and raw material worth Rs. 7, 05, 54, 337.96. Nothing has been mentioned as to how the turn over escaped assessment to tax which may come under the jurisdiction to initiate the reassessment proceedings.

Under Section 21 (2) and the proviso, reasons recorded by the Assessing Authority are absolutely essential. It is hereby requested that kindly communicate the reasons which must have been recorded by the Assessing Authority before sending the proposal to you for seeking permission to initiate the proceedings u/s 21 (2) (proviso) to the Act.

Apart from the requirement of recording the reasons in writing by the Assessing Authority while sending the proposal for initiating the proceedings U/S 21 (2), a circular was also issued on 2nd September, 2000 by the Commissioner of Trade Tax, U.P., Lucknow in which specific directions have been issued that the reasons must be recorded in writing on the order sheet by the Assessing Authority before sending the proposal for initiating the proceedings U/S 21 (2). A photocopy of the circular dated 2.9.2000 is enclosed herewith.

In order to avoid the undue harassment of the assessee by reopening the assessment after the expiry of the period of limitation it was again reiterated by the circular No. 327 dated 3.10.2001 that before sending the proposal for permission for reassessment U/S 21 (2) reasons must be recorded in writing on the order sheet by the Assessing Authority.

We may submit that we have obtained the certified copy of the order sheet along with all the entries therein and no reasons for reopening the assessment have been recorded by the Assessing Officer. In these circumstances, the basis for grant of permission U/S 21 (2) of the U.P. Trade Tax Act, is illegal, arbitrary and malicious, hence the notice deserves to be quashed. In as much as without reasons being recorded and supplied to us, we are unable to give any proper reply. You are hereby requested to drop the notice.

Thanking you,

Yours faithfully, For Shree Bhawani Paper Mills Ltd.

sd/- AUTHORISED SIGNATORY"

6. The reply for the three subsequent assessment years was on the same lines, namely with the basic objection that reasons were not recorded in writing, in the order, or on the order sheet by the assessing authority proposing reassessment. The petitioner has enclosed the order sheet in proof of the objections.

7. The Zonal Additional Commissioner, Commercial Tax, Allahabad by his order dated 1.2.2004, has granted permission for reassessment for each of the years separately. The common grounds given in the orders are that the assessee has shown purchase of diesel as other raw material. At the time of assessment, the manufacture/sale on the basis of the purchase/consumption of diesel has been left out from imposition of the tax, which is leviable. The assessing officer will be able to examine the facts only after he will get a right for examination of account books and other records. The assessing officer has to make the inspection impartially and it is thus just and proper that even if in such assessment or reassessment there is a possibility of change of opinion, it is necessary for reassessment of the tax.

8. The Deputy Commissioner has, by his orders dated 10.3.2004 in respect of each of the four assessment years, issued notices for reassessment. In the notices he has stated that at the time of assessment the justification of the purchase and consumption of diesel, in such large quantities was not made, and thus there is reason to believe on the records that the imposition of tax by the original order of assessment is not proper and that there is escapement of the turnover. He has stated in the notice that at the time of assessment it was not clarified as to how the diesel purchased by the assessee was used. If the diesel was used for production of electricity, it was necessary to disclose as to how much diesel was used for production of electricity and the number of units utilised on per tonne basis of the manufacture of paper.

9. Shri Bharat Ji Agarwal, learned counsel appearing for the petitioner submits that the petitioner had produced the entire records including the purchase of diesel for captive generation of power from the diesel generating sets. The company has manufacturing facility at Rai Bareli, where it does not have electricity connection and thus the electricity produced by the generating sets is used both for the purpose of manufacturing of paper and for the other purposes namely for use in administrative block, residential quarters, street lighting, and all other purposes for which the electricity is consumed in the manufacturing and allied activities. He submits that the details of purchase of diesel in respect of each of the assessment year was truly and correctly disclosed at the time of assessment. The assessing authority completed the assessment without raising any doubt to the sufficiency of the accounts books, the quantity of paper manufactured and the consumption of diesel both for manufacture and other purposes. He submits that the purchase of diesel has no correlation with the manufacture of paper on per tonne basis from the units of electricity consumed, and in the circumstances the respondents have no authority to initiate proceedings for reassessment.

10. Shri Bharat Ji Agarwal has relied upon judgments of Supreme Court in Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, , in which while examining Section 147, which is pari materia with Section 21 of the U.P. Trade Tax Act, the Supreme Court held that the words "reason to believe" u/s 147 of the Income Tax Act do not give powers to the assessing officer to reopen assessment on the basis of mere change of opinion. There is conceptual difference between the power to review and the power to reassess. The assessing officer has no power to review. He has the power to reassess but reassessment has to be based on fulfilment of certain pre-conditions and if the concept of change of opinion is removed, then in the garb of reopening the assessment, review may take place. The Supreme court held in paragraph-6 as follows:-

6.....One must treat the concept of "change of opinion" as an inbuilt test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No. 549 dated 31st October, 1989 (1990) 182 ITR (St.) I,29), which reads as follows:

7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in Section 147.-- A number of representations were received against the omission of the words 'reason to believe' from Section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same.

11. In *M/s Aryaverth Chawal Udyog and others v. State of UP and others* 2008 U.P.T.C. 881 a Division Bench of this Court held in paragraphs 47 and 48 as follows:-

47. Section 21 (1) of the U.P. Trade Tax Act contemplates assessment and reassessment is equivalent to Section 147 of the Income Tax Act, 1961. Both the sections relate to the assessment of the escaped assessment to tax. In both the sections the proceeding can be initiated only if the assessing authority "has a reason to believe" that there is escaped assessment.

48. u/s 21 (1) of the Act the words are "has reason to believe" and not "reason to suspect". The belief entertained by the Assessing Officer must not be arbitrary or irrational. It must be reasonable and based on reasons, which are relevant. It must be in good faith and not in mere pretence, should have a rational connection and relevant bearing on the formation of the belief, and should not be extraneous or irrelevant. The material should be relating to the particular year for which the assessment is sought to be reopened. 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 income.

12. In *M/s Super Chemicals, Seo Ka Bazar, Agra v. Additional Commissioner, Grade-I, T. Tax, Agra Zone, Agra & ors* 2010 NTN (42) 163 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 (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.

13. Shri S.P. Kesarwani, Additional Chief Standing Counsel appearing for the State respondents, submits that the Additional Commissioner of Trade Tax, Allahabad has given reasons for granting permission to reopen the case u/s 21 (2) after providing an opportunity of hearing to the petitioner. The reasons have been recorded in the order sheet but before sending the proposal for granting permission to reopen the case the reasons have been recorded in the proposal sent by the Assessing Officer. The Circulars dated 2.9.2000 and 3.10.2011 are not applicable to proviso u/s 21 (2), rather they relate to the regular assessment proceedings. He relies upon para-3A of the counter affidavit of Shri Prakash Narain, Deputy Commissioner (Assessment), Trade Tax 1st, Allahabad, which reads as follows:-

3A That the petitioner company is registered under U.P and Central Sales Tax Act and its Head Office is situated at Allahabad. It manufactures all kinds of paper at Rai Bareli. For the assessment years 1997-98 to 2000- 2001, the assessment proceedings have been completed in due course. On examination of the assessment orders and files of the aforesaid years, it was found that the petitioner had purchased diesel oil in bulk quantity, disproportionate to production and sale. The account books were not examined in this light and no findings have been recorded by the assessing authority with regard to the consumption of diesel and the production of paper.

In view of the facts narrated above, the assessment orders for the abovenoted years were scrutinized again and it was found that the purchase of diesel oil as disclosed by the petitioner, is unjustified and disproportionate to the production and prima facie, the case of escaped turnover of manufactured paper was made out. On this ground the proposal for reopening the case u/s 21 (2) was sent to the Additional Commissioner Grade 1st, Trade Tax, Allahabad who, after detailed examination of the records and after hearing the parties, allowed the assessing authority to reopen the case of the petitioner for the aforesaid years.

In pursuance to the permission granted by the Additional Commissioner, the impugned notices were sent to the petitioner who challenged these notices through the present writ petition before this Hon''ble Court and this Hon''ble Court has been pleased to stay further proceeding in pursuance of these notices, hence no further action has been taken.

14. Shri S.P. Kesarwani submits that it is unusual for any manufacturer to use the electricity supplied by the diesel generator sets alone for the manufacturing facility. The assessee had consumed diesel in bulk quantity, which is disproportionate to production and sale. The assessing authority did not examine the accounts books with reference to the consumption of diesel, and has not recorded any findings on such consumption of diesel and the production of paper, and thus there were sufficient material, which is tangible and live having close link with the formation of belief of escapement of assessment of the turnover.

15. We have considered the arguments and examined the documents annexed to

the record. The assessment orders of any of the four years do not refer to the fact, that the petitioner does not have electricity connection, and that the entire production and all other ancillary activities including supply to administrative block and residential quarters is dependent upon the electricity generation of the diesel generating sets. There is no discussion with regard to the number of the units of the electricity produced and the proportion in which the electricity was used in manufacture of paper and other ancillary activities. Though the assessment order states that the accounts have been examined in detailed, there is no discussion whatsoever regarding the consumption of electricity produced from diesel generating sets and its utilisation in production of paper.

16. We do not find the reference of any material on record, by the petitioner, which would justify the grounds taken before the Additional Commissioner in proceeding for sanction for reassessment and in the writ petition. The assessment orders referred to purchase of raw material such as waste paper, cotton linter, bagasse, straw, hemp (new & old), wood pulp as well as other purchase of goods namely chemicals, general stores, packing material, wire & felt, electrical stores and high speed diesel, but does not refer to or co-relate the manufacture with the utilisation of the purchased/consumed raw material including diesel oil. We further find that there is nothing in the assessment orders, which may show as to how much high speed diesel oil purchased was actually consumed and the number of units utilised in manufacture of paper.

Section 21 (1) of the Act provides:-

Section 21. Assessment of tax on the turnover not assessed during the year. (1) If the assessing authority has reason to believe that the whole or any part of the turnover of the dealer, for any assessment year or part thereof, has 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 this 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 may consider necessary, assess or reassess the dealer or tax according to law:

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 I: Nothing in this sub-section shall be deemed to prevent the assessing authority from making an assessment to the best of its judgment.

Explanation II : For the purposes of this section and of section 22, "assessing authority" means the officer or authority who passed the earlier assessment order, if any, and includes the officer or authority having jurisdiction for the time being to assess the dealer.

Explanation III : Notwithstanding the issuance of notice under this sub-section, where an order of assessment or re-assessment 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.

17. Section 21 (1) gives power of assessment of tax on the turnover not assessed during the year. If the assessing authority has reason to believe that the whole or any part of the turnover of the dealer for any assessment year or part thereof has 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 enquiry as it may consider necessary, assess or reassess the dealer or tax according to law.

18. We do not find that Section 21 (1) necessarily refers to any new material, which may be discovered or which may have been brought to the notice of the competent authority, as a pre-condition for initiating proceeding for re-assessment. Even if the material has been disclosed at the time of assessment, if the assessing authority has reason to believe that such material having connection with assessment, was not considered, as a result of which the whole or any part of the turn over has escaped assessment to tax, or has been under-assessed or has been assessed to tax at a lower rate or any deductions or exemptions have been wrongly allowed, the proceeding for re-assessment may be initiated. There has to be a rational and intelligible nexus between the reasons and the belief. Such material should not be vague and indefinite, distant, remote or fat-fetched, which would in such case not warrant the formation of the belief relating to escapement of assessment of turn over.

19. In this case, though the entire material was before the assessing authority, he did not apply his mind to it, and or has failed to consider it, on account of which the whole or any part of the turn over may have escaped assessment or has been underassessed. There can be no denial that the consumption of raw material is relevant for the purposes of determination of turn over. The assessing authority made assessment without giving any weight to it for ascertaining the turn over. The assessing authority is in such case justified in making re-assessment u/s 21 (1) of the Act.

20. We agree with learned counsel for the petitioner, that Section 21 (1) does not permit reassessment of turnover, which after due consideration has been subjected to assessment for tax, merely because the assessing authority subsequently comes to take a different view of the matter vide *Delhi Cloth and General Mills Co. Ltd. Vs. State of Rajasthan and Others*, . Further where an opinion has been formed in the assessment order, that the turnover of sale was exempted from sales tax, the assessing authority should not issue notice u/s 21 for re-assessment vide *M/s Palco Lining Co. v. State of UP* 1983 U.P.T.C. 116. The assessing authority may also not be allowed to have a second thought about the applicability or effect of the survey vide *Commissioner of Sales Tax v. Gopalji*

1974 U.P.T.C. 277, and that where primary facts necessary for assessment or fully and truly disclosed to the Income Tax Officer at the stage of original assessment proceedings, he is not entitled on a change of opinion to commence proceedings vide Commissioner of Income Tax, Gujarat Vs. Bhanji Lavji, Porbandar, and Commissioner of Income Tax, West Bengal II Vs. Dinesh Chandra H. Shah and Others, , but where the assessing authority did not apply its mind at all and completely omitted consideration of the purchase of raw material in bulk quantity, even if it was in relation to both manufacture and ancillary activities, the reason to believe for reassessment may not be doubted. There has to be application of mind by the assessing authority and the consideration of the material having co-relation with manufacture, turnover or sale, before it can be said that there is any change of opinion or re-assessment on the turnover, which has already been assessed.

21. In this case, we find that the assessing authority in all the four relevant assessment orders, did not apply his mind, considered and discussed the bulk purchases of diesel and its co-relation with the consumption in manufacture, sale and turnover of paper. It may not have been necessary to consider the unit-wise consumption per tonne of manufacture of paper but it was necessary for the assessing authority to consider as to how much quantity of purchase of diesel was utilised for manufacture of paper and the quantities which had no co-relation with such manufacturer and was used for allied purposes, before accepting the disclosed turnover.

22. The argument of learned counsel appearing for the petitioner, that a part of the electricity generated from the diesel generating sets was used for purposes other than manufacture, cuts across his argument that once the entire purchase of diesel was disclosed and which was construed as other raw material for manufacture of paper, any further enquiry would be barred for reassessment on the ground of change of opinion. We also do not find substance in the argument that there are no reasons recorded in the notice, and in the order passed by the Additional Commissioner, Trade Tax as a precondition for initiating proceedings for re-assessment. The huge quantity of diesel purchased by the petitioner for running diesel generating sets should have been examined both for the purposes of its utilisation in manufacture and for ancillary purposes. There is no such error in law, in recording the reasons to believe, that the failure of the assessing authority to consider the utilisation of the diesel oil as fuel purchased by the petitioner is not sufficient material, even if it was disclosed by the assessee for the purposes of the assessment. The writ petition is dismissed.