

(2006) 11 AHC CK 0218
In the Allahabad High Court

Nitco Marble and Granite Private Ltd.

APPELLANT

Vs

Commissioner of Trade Tax

RESPONDENT

Date of Decision : 14-11-2006

Acts Referred:

Uttar Pradesh Trade Tax Act, 1948 — Section 10, 4A(3)

Citation : (2007) 8 VST 499

Hon'ble Judges : Arun Tandon, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Arun Tandon, J.—Heard Sri Bharatji Agarwal, Senior Advocate assisted by Sri Piyush Agarwal, Advocate on behalf of revisionist-applicant (Assessee) and learned Standing Counsel on behalf of respondent (department).

2. Revisionist-assessee is a private limited company duly incorporated under the Companies Act. The revisionist company applied for grant of exemption certificate u/s 4-A of the UP. Trade Tax Act for a period of six years. The application so made by the revisionist-assessee was processed and an exemption certificate dated 13th November, 1984 for the period of six years i.e. 1st May, 1984 to 30th April, 1990 was granted in favour of the petitioner.

3. However, on certain facts being brought to the notice of the department, a show-cause notice u/s 4-A (3) of the UP. Trade Tax Act was issued qua cancellation of the eligibility certificate on the ground that the Assessee has installed used machinery/ leased second-hand machineries, and lastly the Assessee instead of manufacturing has traded in Marbles on which no tax has been deposited in the State of Uttar Pradesh.

4. To the show-cause notice so issued, the Assessee submitted reply vide his letter dated 13th November, 1987.

5. Not being satisfied with the explanation so furnished by the Assessee, the

Commissioner Trade Tax, by means of the order dated 18/21st November, 1987 u/s 4-A (3) of the UP. Trade Tax Act, cancelled the exemption granted in favour of the Assessee from the date of grant of exemption itself i.e. 1st May, 1984. Feeling aggrieved by the said order of the Commissioner, Trade Tax, the Assessee filed second appeal under Section-10 of the U.P. Trade Tax Act, before the Trade Tax Tribunal, U.P. Lucknow, which was numbered as Second Appeal No. 4 of 1991. The second appeal so filed by the Assessee has been dismissed by the Trade Tax Tribunal vide order dated 28th October, 1998 and the order passed by the Commissioner, Trade Tax has been affirmed.

6. On behalf of revisionist-assessee it is contended that an Industrial unit at A-2, Sector-3, Noida was established by one M/s Glossica Laminates (P) Ltd. on 10th April, 1984. The said M/s. Glossica Laminates has leased its entire factory to the revisionist-dealer under a lease agreement dated 10th April, 1984 on monthly rent of Rs. 9, 500/-(Rupees nine thousand five hundred only). It is further stated that M/s. Northern India Tiles Corporation, a partnership firm having its principal office, at Zindal Trust Building, entered into an agreement, where under the firm leased out following new machines to the Assessee-revisionist, (i) marble cutting machines, (ii) polishing machines and (iii) hydraulic power pressure pump sets with necessary accessories. In lieu thereof the firm was entitled to be paid commission at the rate of 10% on all the sales affected through orders booked and goods supplied through them.

7. It is, therefore, contended that all the machines, which were installed at the factory of the assessee, either obtained on lease or being part of the lease agreement with M/s. Glossica Laminates (P) Ltd, were in fact new machines, which had neither been used in any other factory/ workshop nor were acquired for use by any other factory. These new machines were installed in the same factory in respect whereof eligibility certificate was granted to the applicant-company. It is stated that all the aforesaid lease agreement were brought on record before the Divisional Level Committee prior to the grant of eligibility certificate and therefore, it cannot be said that revisionist-assessee has not disclosed complete facts or has not complied with the requirements prescribed under law applicable for grant of eligibility certificate. It is stated that there is no allegation of misuse of the exception certificate so as to intale cancellation of the eligibility certificate.

8. Learned Counsel for the Assessee further submits that exemption u/s 4-A of the UP. Trade Tax Act is granted to the industrial unit and not to the legal person, who owns the unit or who runs the unit. In support thereof reference has been made to the judgment of this Court in the case of Jagat Machinery Manufacturers Private Limited, Ghaziabad v. State of Uttar Pradesh and Ors. reported in 1987 U.P.T.C.1358, Prs. 13 & 14, Commissioner of Sales Tax, U.P. v. Goodluck Rubber & Allied Industries, Lucknow reported in 1983 U.P.T.C.909, Prs. 4,7 & 8, and Commissioner of Sales Tax, U.P. v. U.P. Leather Board, Agra reported in 1980 U.P.T.C 287.

9. Lastly it is contended that cancellation proceedings u/s 4-A (3) of the U.P. Trade Tax Act, cannot be initiated by the Commissioner, Trade Tax only if the machinery installed at the unit was used or acquired for use for any other factory or workshop. Reference may be had to the judgment of this Court in the case of Shama Rice Mill, Rampur v. Commissioner of Trade Tax reported in 2005 U.P.T.C 825, Prs. 10 & 15 and Raj Oil Mills, Dehradun v. Commissioner of Sales Tax reported in 1998 U.P.T.C. 204.

10. On behalf of department-respondent, it is submitted that during the relevant period, under the explanation to Section- 4 A of the U.P. Trade Tax Act, the definition of new unit, itself excluded factory or workshop were used machines or accessories or components were used.

11. According to the learned Standing Counsel, if the machines have, in fact, been used earlier, the factory or the workshop of revisionist-assessee would not be covered by the definition of new unit entitled for exemption. He submits that the Commissioner, Trade Tax as well as the Trade Tax Tribunal have recorded a categorical finding of fact that the machines, which were earlier purchased by Glossica Laminates had in fact, been used for manufacturer of tiles, which were sold and on such sales tax had been paid by the earlier company. Such machines, if obtained on lease under the agreement by the revisionist, would not entitle him to claim any exemption u/s 4-A of the U.P. Trade Tax Act.

12. In Rejoinder the learned Counsel for the Assessee referred to and has placed reliance upon Sub-section 2-B of the U.P. Trade Tax Act as added to Section 4-A vide U.P. Act No. 28 of 1991 w.e.f. 12th October, 1983.

13. With reference to the aforesaid Section learned Counsel for the Assessee submits that since Sub-section 2 to Section 4-A has enforced from retrospective date, the assessee is entitled to the benefits of such amendment. Therefore, even if it is accepted that in the unit of the assessee had used old machines, his application for exemption requires reconsideration under the added Section 4-A (2). He therefore, submits that the matter may be remanded to the Trade Tax Tribunal to reconsider the application of the revisionist for grant of exemption with reference to Section 4-A (2) (b) of the U.P. Trade Tax Act afresh.

14. I have heard counsel for the parties and have gone through the records of the Trade Tax Revision.

15. Explanation to Section-4A of the U.P. Trade Tax Act at the relevant period defined "New Unit" and reads as under:

"New Unit" means a factory a workshop using machinery or accessories or components not already used or acquired for use in any other factory or workshop in India....

16. The case of the assessee may be examined with reference to the said definition of "New Unit".

17. The nature of the machines obtained on lease by the revisionist-assessee from Glossica Laminates Private Ltd. as well as from M/s. Norther Indian Tiles Corporation has been stated in paragraph Nos. 4, 5 and 6 of the supplementary affidavit filed on behalf of the Assessee, which reads as follows:

4. That Glossica Laminates Private Ltd. was to establish the factory at A-2, Sector-3, Noida and hence the same machineries which were installed in the factory premises at 2-A, Sector-3, Noida, which was owned by M/s Glossica Laminates Private Ltd. were installed and the same were used in the said factory. The earlier agreement was entered into on 1st February, 1984 between M/s Glossica Laminates Private Ltd. and Northern India Tiles Corporation for running the cement mosaic tiles factory situate at A-2, Sector-3, Noida and accordingly, the land, building, plant and machineries were initially given by the agreement dated 1st February, 1984 by M/s. Glossica Laminates Private Ltd. for running the factory for manufacture of cement mosaic tiles at A-2, Sector-3, Noida. The copy of this agreement dated 1st February, 1984 M/s Glossica Laminates Private Ltd. and M/s Northern India Tiles Corporation was filed on 31st August, 1984 which is already on record.

5. That since M/s Northern India Tiles Corporation also could not finalise the installation of factory and the said factory was subsequently given on lease along with the land, building plant and machinery to the present applicant by M/s Glossica Laminates Private Ltd. vide agreement dated 10th April, 1984, a copy of which was filed along with the exemption application dated 14th August, 1984.

6. That the three machines namely, marble cutting machines, polishing machines and complete hydraulic power pressure pump sets with necessary accessories were purchased by Northern India Tiles Corporation for the purposes of installation in the factory premises situate at A-2. Sector-3. Noida which premises was owned by M/s Glossica Laminates Private Ltd. and since the terms of the lease entered into between M/s Glossica Laminates Private Ltd. and M/s Northern India Tiles Corporation could not be acted upon, hence the aforesaid three machines which were acquired by M/s Northern India Tiles Corporation for the purposes of installation in the same factory premises i.e. A-2. Sector-3. Noida was given on hire to the applicant company for which a certificate dated 22nd August 1987 was filed before the Commissioner, Trade Tax, U.P. A photostat copy of the said certificate dated 22nd August, 1987 which was filed before the Commissioner, Trade Tax, U.P. is also being filed herewith and marked as Annexure-SA.3 which was filed before the Commissioner, Trade Tax, U.P. also has already been filed as Annexure-9 to the main revision.

18. Reference may also be had to the note appended on the document filed on behalf of the Assessee at the time of grant of exemption certificate, which reads as follows:

Sl. Installation Date Qty. Amount 1. 24.... P.S. All machines are new and purchased at lowest prices.

19. Learned Counsel for the Assessee stated that the aforesaid note appended to the document as enclosed at page-20 of the Supplementary Affidavit in the list of the machines, which form part of the lease agreement executed by the M/s. Glossica Laminates Private Ltd. and this note has been written on behalf of M/s. Glossica Laminates Private Ltd.

20. It is apparent from said paragraphs of the supplementary affidavit that earlier M/s. Glossica Laminates Private Ltd. entered into a lease agreement with M/s. Northern India Tiles Corporation, in respect of the land, plant and machinery installed at its factory premises at 2-A Sector 3 Noida purchased by Glossica Laminates were also used for the manufacturing purposes before agreement dated 1st February, 1984 Was entered with Northern Indian Tiles Corporation. Since the Corporation could not finalise the installation of the factory, the same was given on lease to the assessee by M/s Glossica Laminates Pvt. Ltd. vide agreement dated 10th February, 1984.

21. The Commissioner, Trade Tax, U.P. in its order of cancellation of the exemption has specifically recorded amongst others as follows:

Issey pramarit hota hai ki in machino ka prayog karney ke liye Sarva Sri Glossica Laminates Private Ltd., Delhi dwara arjit ki gayee thi. Yahi nahi balki utpadan meyn prayog bhi ki gai hai. Ish firm key manager ney dinank 18-12-85 ko bikrikar adhikari ke samakchh upasthit hokar byan diye hai ki rupya 7,479=15 ka kachcha mal kharida gava hai. Nirmal mal mevn sev 7.200/- ki bikri prant ke bhitari aur rupya 300/- ki antar prantive bikri ki gavee hai.

22. In respect of other machines which were purchased by M/s Northern India Tiles Corporation and had been obtained on lease by the assessee, following findings have been recorded by the Commissioner, Trade Tax in its order:

Sarva Sri Nilko Tiles Private Lt. Sev rupya 8000/- ki machine kharidi aavee hai. Yah firm bhi tiles ityadi banati hai jo praman patra diya hai ushmeyn likha hua hai ki bechi gavee machine navee hai. Stock meyn padi huyee thi, prayog nahi ki gayee. Ishshey yah pramarit ho iata hai ki Sarva Sri Nilko Tiles Private Ltd. yah machine apnev karkhanev meyn pravoa karnev ke live arjit ki thi. Aishi machino ka bhi pravoa navee ikaee dwara nahi kiva ia sakta hai. Ish tar ah yah pramarit ho jata hai ki wapari nev purani pravoa ki aavee va anva karkhanev mevn pravoa karnev ke live ariit machino ka pravoa va machine apney karkhanev meyn prayog karney ke liye arjit ki thi. Aishi machino ka bhi prayog navee ikai dwara nahi kiyaja sakta hai.

23. The aforesaid findings of fact recorded by the Commissioner, Trade Tax, UP. have not been successfully challenged in the 2nd appeal filed by the Assessee before the Tribunal in any manner. Reference in that regard may be had to the memo of second appeal filed by the assessee. The only ground relevant is mentioned at page No. 35 of the paper book of present trade tax revision and which has been referred to on behalf of the assessee for questioning the aforesaid findings in the order of Commissioner, reads as follows:

4. That the overwhelming evidence filed of purchase invoices in respect of this machinery purchased by M/s Glossica Laminates Pvt. Ltd.. clearly established that all the machineries were new which were purchased for the purposes of manufacture of Tiles from Ahmadabad but due to certain reasons M/s Glossica Laminates could not run the factory having installed new machinery and run the same on trial basis for some time.

5. That the acquisition of the new machinery by a earlier owner of the new unit would not render the present owner of the new unit ineligible for grant of eligibility certificate on transfer on lease of factory to new owner as such the cancellation of eligibility certificate by the Learned Commissioner of Sales Tax was legally not correct

24. Thus use of the machines by M/s Glossica Laminates Pvt. Ltd. (original owners) for manufacture of tiles, sale of the manufactured goods to the tune of Rs. 7,200/- (within the State) and Rs. 300/- outside the State was not disputed. The Trade Tax Tribunal on the basis of material on record and with reference to the definition of new unit as was applicable on the relevant date, has recorded a categorical findings of fact that since the machines, which were purchased by M/s. Glossica Laminates Pvt. Ltd. were in fact used by the said company for manufacture of tiles, therefore, these machines cannot be said to be new machines. Similarly the Trade Tax Tribunal has further recorded a categorical finding that the machines, which were obtained on lease from M/s. Northern India Tiles Corporation, Delhi were purchased by the said firm for its own industrial unit, which fact establishes that the machines were in fact purchased for another industrial unit.

25. On both grounds, the Tribunal has come to the conclusions that the assessee was not entitled to the grant of exemption u/s 4-A of the U.P. Trade Tax Act as it was not covered by the definition of New Unit under Explanation to Section 4-A. It may be recorded that in their exemption application (enclosed as Annexure-SA-I to the supplementary affidavit specifically page 2 of the prescribed form) it has been hand written that "all are new machines." The statement so made in the application is now proved to be fake and therefore, cancellation of the exemption certificate cannot be faulted with.

26. In the opinion of the Court the findings of fact recorded by the Commissioner, Trade Tax as well as by the Trade Tax Tribunal while cancelling the exemption certificate earlier granted to the assessee cannot be said to be perverse or based on no evidence, so as to call for any interference under the revisional power conferred by Section 11 of the UP. Trade Tax Act.

27. From the records, transfer of machines (some of which had been used earlier by the company/firm), which had purchased the same for its own factory (transferred to the assessee (transferee), is an admitted fact. The judgments relied upon by the Assessee in the case of Jagat Machinery Manufacturers Private Limited, Ghaziabad (Supra) and Commissioner of Sales Tax, U.P. v. Goodluck

Rubber & Allied Industries, Lucknow (Supra) are clearly distinguishable in the facts of the present case, inasmuch as in none of the aforesaid case, transfer of the machines by the earlier purchaser to the assessee concerned was involved, even otherwise transfer of used machines was also not an issue in those cases.

28. Further the Assessee has not been able to explain the note appended to the document filed along with supplementary affidavit at page-20, which according to the Court clearly records an incorrect fact, about all the machines being new.

29. It may also be noticed that the judgment in the case of Jagat Machinery Manufacturers Private Limited, Ghaziabad (Supra) and Commissioner of Sales Tax, U.P. v. Goodluck Rubber & Allied Industries, Lucknow (Supra) have all been delivered prior to the introduction of Section 2B to Section 4-A in the year 1991. The said Section 2B has clarified the extent of exemption which can be claimed by a purchaser, leasee, licensee etc (i.e. the transferee). The right in that regard has been restricted to the unexpired period only irrespective of the fact that the earlier manufacture had applied for exemption or not. It may be recorded that with reference to paragraph 15 of the judgment of Jagat Machinery Manufacturers Private Limited, Ghaziabad (Supra), which reads as follow:

The object and purpose with which Section 4-A has been enacted rules out the view, strenuously canvassed for by the learned Standing Counsel, that the ownership of the unit is the predominant factor for determining the question whether it was a new unit entitled to exemption from tax and that the change in ownership would alter the character of the unit as a "new unit". The emphasis clearly is upon the nature of the Unit being a new unit and not upon the ownership of the unit. If the legislature wished to exclude availability of exemption from tax on the ground of ownership of the new unit, It would have specifically said so in some clause of the definition of "new unit". The matter would not have been left for speculation

the legislature has now stepped in and has excluded the purchaser, licensee and leasee from Section 4A and has confined their right for exemption only to the extent of unexpired period u/s 4B.

30. It is no doubt true that the exemption u/s 4-A of the U.P. Trade Tax Act is granted to the industrial unit and not to the person, who owns the industrial unit or who runs the industrial unit. The legal position in that regard has been explained in the case of Jagat Machinery Manufacturers Private Limited, Ghaziabad (Supra) and Commissioner of Sales Tax, U.P. v. Goodluck Rubber & Allied Industries, Lucknow (Supra). At the same time it has to be kept in mind that in all the judgments relied on behalf of the assessee, no transfer of the machines by the original purchaser to a third person claiming the exemption as "New Unit" was involved.

31. The case pleaded by the assessee may also be examined with a different angle. Section 2B as added to Section 4-A of the U.P. Trade Tax Act (vide Act No. 28 of 1991) reads as follows:

(2-B) If there is discontinuation of business, within the meaning of Sub-section (1) of Section 18, of the manufacturer who was eligible for exemption from or reduction in the rate of tax under Sub-section (1), whether such exemption from or reduction in rate of tax was already granted or not, and if he is succeeded by another manufacturer, by means of sale, licence, contract, lease, managing agency or in any other manner such successor manufacturer may, subject to the provisions of Sub-section (3), apply to the officer competent to grant eligibility certificate under Clause (d) of Sub-section (2), within sixty days of such succession, for the grant, under this section, of exemption from or reduction in rate of tax for the unexpired portion of the period for which exemption from or reduction in the rate of tax was or could be granted to the former manufacturer:

Provided that the aforesaid officer may, in its discretion and for adequate and sufficient reasons to be recorded in writing, entertain an application moved within six months of the date of the expiration of the period specified in this sub-section.

Provided further that such manufacturer and successor manufacturer for the purpose of liability of tax shall be treated as the transferor and the transferee u/s 3-C.

Provided also that in computing the unexpired portion of the period, the period during which the production of successor manufacturer remains closed on account of an order passed by any Court or Board for Industrial and Financial Reconstruction or Appellate Authority for Industrial and Financial Reconstruction shall be excluded.

32. With the addition of Section 2B to Section 4A the legislature provided for exemption being granted to the purchasers, licencees, leasee etc. of old manufacturing units only to the extent of the unexpired portion of the period for which exemption from or reduction in the rate of the tax was or could be granted to former purchaser.

33. Prior to the date on which Section 2B was brought on the Statute Book i.e. in the year 1991 (although the Section 2B has been given retrospective effect i.e. from 12th October, 1983) there was no concept of exemption being granted to purchasers, licencees, leasees of manufacturing units installed by former manufacturer.

34. Therefore, the conclusion is that purchaser of old units where machines were installed and used by another company or firm could not be the basis for grant of exemption to the subsequent purchaser (assessee) u/s 4-A as it then stood, is fortified by the amendment, which has been incorporated by adding Sub-section 2 (B) to Section 4-A by Amending Act No. 28 of 1991.

35. In the facts of the case the assessee had never applied for exemption for the unexpired period on the ground that he had purchased old machinery at any point of time even after Introduction of Sub-Section 2 (B) to Section 4 A.

36. So far as the claims now set up by the Assessee for the first time before this Court in Rejoinder with reference to Section 4-A (2) (B) of the UP. Trade Tax Act is concerned, it may be recorded that such plea became available to the Assessee at the time his appeal was pending before the Trade Tax Tribunal, inasmuch as Section 4-A (2) (B) as U.P. Act No. 28 of 1991 had been brought on the Statute Book in the year 1991. During all this period the revisionist-assessee did not claim any benefit under Sub-section 2(B), now after the Tribunal has adjudicated the merits of the case pleaded by the Assessee and held against him, he has come up with this alternative submission without any relevant facts of the date on which used machines were purchased for the first time by the original company/firm be disclosed.

37. This Court in exercise of revisional jurisdiction cannot upset the findings of Tribunal on the new plea, was not raised by the Assessee before the Tribunal, more so when claim u/s 4-A (2) (B) would necessarily require consideration of new facts based on entirely new case.

38. It is worthwhile to record that the assessee has obtained a factory situate at A-2, Sector-3, Nodia, on lease on a monthly rent of Rs. 9, 500/- (Rupees nine thousand five hundred only) from M/s. Glossica Laminates Pvt. Ltd. Some machines have been purchased by the revisionist-assessee from M/s Nitco Tiles (P) Ltd., Bombay worth Rs. 8,000/- (Rupees eight thousand only). On the strength of the aforesaid investment, the revisionist-assessee has applied for grant of exemption certificate u/s 4-A of the U.P. Trade Tax Act by including the total value of the land, plant and machines installed along with some new investment said to be mad by it. Thus with an investment of 8000/- and a liability of rent of 9500/- per month the assessee claims exemption from Trade Tax for the value of the Land, Plant and Machines installed giving into Lakhs of Rupees to be exact 14.25 lakhs. The Court is satisfied that exemption u/s 4-A is not contemplated for such assesseees and any concession to the contrary would frustrate the very purpose for which Section 4-A has been added.

39. The present Trade Tax Revision is accordingly dismissed.