
(2010) 06 AHC CK 0032
In the Allahabad High Court
Case No : Trade Tax Revision No. 141 of 2010

Paras Traders

APPELLANT

Vs

Commissioner of Commercial Tax

RESPONDENT

Date of Decision : 16-06-2010

Acts Referred:

Entry of Goods Act, 2007 — Section 25

Limitation Act, 1963 — Section 5

Uttar Pradesh Value Added Tax Act, 2008 — Section 55(3), 55(6)

Citation : (2010) 32 VST 455

Hon'ble Judges : Yogendra Kumar Sangal, J

Bench : Single Bench

Advocate : Anand Dubey, for the Appellant; Chief Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Yogendra Kumar Sangal, J.—Heard Learned Counsel for the revisionist, the Learned Counsel for the opposite party Department and perused the record.

2. This is a revision filed by the assessee/revisionist with a prayer to set aside the Order of the lower court/Tribunal and to grant 100 per cent stay of the recovery of disputed tax for the assessment year of 2009-10 (third quarterly) till the disposal of the first appeal. The record shows that the assessing authority has imposed the tax liability of Rs. 2,05,74,974 on the basis of the record available to it.

3. To challenge this Order of the assessing authority, a first appeal was filed on behalf of the revisionist saying that the assessment Order has been passed in ex parte proceedings without giving opportunity of hearing to the assessee/revisionist, although Section 25 of the Act (U. P. Tax on Entry of Goods Act, 2007) provides that the Order can be passed after giving opportunity of hearing to the assessee. Other grounds of challenge were that the authorities have grossly erred in the eye of law and have levied the tax on the basis of

presumption while no material facts have been pointed out in the Order by the assessing authority and other several grounds.

4. As the appeal was time-barred, an application to condone the delay in filing the appeal was also moved with an application to stay the recovery of the disputed tax as above till disposal of the appeal. The Order passed by the appellate court is available as annexure 3 without giving any finding on the delay in filing the appeal and whether there is a prima facie case made out in favour of the appellant or not for granting stay only mentioning the request of the appellant recovery of 70 per cent tax was stayed. The revisionist-assessee was not satisfied with this Order of the first appellate court. He challenged the Order of stay of 70 per cent recovery by filing second appeal before the Tribunal and prayed that 100 per cent stay of the recovery of the tax be allowed. The learned Tribunal had decided the appeal by the impugned Order without expressing any opinion on the merits of the case saying that already a first appeal is pending before the first appellate court and only taking the argument of the appellant into consideration and his financial position 70 per cent stay of recovery held in lower side and enhanced the stay of recovery up to 90 per cent. No finding of the second appellate court is there whether the compliance of Section 55(3) and (6) of the U.P. Value Added Tax Act, 2008 was complied or not by the appellant/assessee. The assessee/revisionist again having grievance with this Order of second appellate court, filed this revision.

5. The Learned Counsel for the opposite party Department argued that when the first appeal is still pending and the matter is to be seen by the first appellate court on the merits, a revision against the Order of the second appellate court is not maintainable. Further, it was argued that there is no jurisdictional error in the Order of the Tribunal. The Order passed by the Tribunal is in favour of the revisionist.

6. No doubt under the provisions of the U. P. Act No. 5 of 2008, the appellate authority may on the application of the appellant after giving opportunity of hearing to the opposite party, stay the operation of the Order of the assessing authority of imposing the tax and of realizing the same till the disposal of the appeal but under certain conditions given in Sub-clause (6) of Section 55 of the Act.

7. In the present case, undisputedly, the appeal has been filed with delay. An application was moved to condone the delay in filing the appeal. Till the delay condoned in filing the appeal, it was not proper under the provisions of law without admitting the appeal for hearing on the application for stay of the operation of the Order of assessing authority, that the Order of stay should have been passed. There is no observation in the Order of the first appellate court that the delay in filing the appeal has been condoned or not. Moreover, when recovery of the tax is to be stayed during the pendency of the appeal, it was the duty of the first appellate court to see whether any strong prima facie case is made out in favour of the appellant or not.

8. While taking into consideration the financial position of the assessee/appellant, the first appellate court has also to see the safeguard of the interest of the revenue to be collected by the Department for State. In view of the settled proposition of this Court in a case where evidence to establish that the disputed tax which is being charged being paid or is not payable then the financial capacity of the assessee is not the sole criteria for either accepting or rejecting the prayer made by the assessee for stay or waiver of pre-deposit. It is not clear from the Order passed by the first appellate court that the court has considered these pre-conditions before passing the Order of stay of recovery of 70 per cent of the tax assessed by the assessing officer. The same was repeated by the Tribunal while passing the Order in second appeal. It simply referred to the prayer of the assessee regarding his financial condition and not taken into consideration the interest of the State of collection of revenue and not given any finding that any prima facie case is made out or not but enhanced the stay of recovery of tax up to 90 per cent. Further without satisfying that till today the assessee has fulfilled the pre-conditions of Section 55(3) and (6) or not the appellate court has passed the Order. Now the assessee has approached this revisional court to extend the stay Order up to 100 per cent without showing that compliance of Section 55(6) of the Act made out or not.

9. The Learned Counsel for the revisionist failed to point out any jurisdictional error in the Order passed by the second appellate court in favour of the revisionist itself while recovery of tax up to 90 per cent has been stayed.

10. In the facts and circumstances of the case, this Court is of the view that no interference in revisional jurisdiction is required in the impugned Order. The first appeal of the revisionist is still pending. In place of filing the second appeal and the revision, he was free to move an application before the first appellate court itself to enhance the percentage of stay of recovery of tax up to 100 per cent. The revision has no force and the same is hereby dismissed.

11. However, it is still not clear that compliance of Sub-section (6) of Section 55 has been made or not and it is also not clear whether the delay in filing the appeal has been condoned or not by the first appellate court and the matter of recovery of tax and interest of the State collection of revenue is also to be seen. A direction is required to the first appellate court to dispose of the appeal expeditiously without any further delay.

12. If the first appellate court finds that compliance of Section 55(6) has been made and there is sufficient ground for condoning the delay in filing the appeal, the first appellate court after admitting the appeal decide the same within a period of 45 days (including the period of disposal of the application u/s 5 of the Limitation Act) after seeing that ten per cent of the tax assessed by the assessing officer is deposited or not. If this is still not deposited the appellant will not be permitted to proceed in the appeal. Copy of the Order be sent to the first appellate court for compliance forthwith.