(2010) 11 AHC CK 0351

In the Allahabad High Court

Case No : Writ Petition No''s. 8770 (MB) of 2009 and 4346 (MB) of 2010

Puneet Atta Mills Pvt. Ltd. — APPELLANT

Vs

State of U.P. and Others — RESPONDENT

Date of Decision : 11-11-2010

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2012) 51 VST 302

Hon'ble Judges : Ritu Raj Awasthi, J;Pradeep Kant, J

Bench : Division Bench

Advocate : Pradeep Agrawal, for the Appellant; H.P. Srivastava, Additional Chief Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

1. Heard Mr. Pradeep Agrawal, learned counsel for the petitioner as well as Mr. H.P. Srivastava, learned Additional Chief Standing Counsel for the State and perused the records. These two writ petitions, raise common question of law and facts with respect to the terms and conditions of the Compounding Scheme floated by the State Government u/s 7D of the U.P. Trade Tax Act, 1948 (hereinafter referred to as, "the Act") and the meaning thereof though with respect to the different assessment years.

2. In Writ Petition No. 8770 (MB) of 2009, the challenge has been made to the assessment order dated March 18, 2009 for the assessment years 2005-06 and 2006-07 and also the order passed in appeal dated July 16, 2009, whereas in Writ Petition No. 4346 (MB) of 2010, the assessment year is 2007-08 and the order of the assessing authority dated March 29, 2010 has been challenged.

3. At the very outset, the learned counsel for the petitioner submitted that the appeal filed against the assessment orders for the assessment years 2005-06 and 2006-07, which are the subject-matter of challenge in writ petition No. 8770 (MB) of 2009, has been dismissed as being not maintainable after observing that

in a matter of dispute regarding the claim of benefit of the scheme floated u/s 7D of the Act (Compounding Scheme), the competent authority is the Commissioner, Trade Tax and no other authority including the appellate authority; therefore, the petitioner has not filed any appeal against the present assessment order in writ petition No. 4346 (MB) of 2010, but has approached this court under article 226 of the Constitution.

4. In earlier writ petition an interim order of stay was passed on September 9, 2009 by a Division Bench of this court taking into consideration the aforesaid plea that under the Scheme it is only the Joint Commissioner (Executive) who has power to make an inquiry in respect of the capacity and it is only the Commissioner of Trade Tax, who has the power to reject the application but the assessing authority has no jurisdiction to make any such determination and that too without affording any opportunity. The recovery proceedings were accordingly stayed vide aforesaid order dated September 9, 2009, which is still operative.

5. The State Government floated a scheme known as compounding scheme in exercise of powers u/s 7D of the Act, on October 5, 2005, providing therein that for the period commencing from April 1, 2007 to December 31, 2007, i.e., immediately before the date on which U.P. VAT Act has come into force, viz., January 1, 2008, the dealers who are engaged in manufacturing atta, maida and sooji, may take the benefit of compounding scheme for the purposes of payment of trade tax in the manner given in the scheme itself, as per chart given below :

Length of roller body

Pisai/production by roller mills against installed capacity (in %)

Compounding tax amount per roller body (in Rs.)

Up to 40 inch

Up to 100 per cent

Rs. 2,92,970

Up to 40 inch

More than 100 per cent and up to 120 per cent

Rs. 3,90,625

More than 40 inch

Up to 100 per cent

Rs. 3,51,563

More than 40 inch

More than 100 per cent and up to 120 per cent

Rs. 4,49,220

6. The above chart gave the length of roller body, its installed capacity and the amount of tax which has to be deposited by such manufacturing unit for taking the benefit of compounding scheme. It mentioned that for rollers of 40 inches length to the extent of installed capacity of 100 per cent, the compounding tax would be Rs. 2,92,970.

7. In paragraph 2 of the scheme, it has been provided that the application, which was to be furnished for accepting the compounding scheme within a given time, must clearly indicate the pisai/production as against the installed capacity for which the benefit of compounding scheme is being prayed for.

8. Clause 4 of the scheme permitted inspection/verification of the facts mentioned in the application, made by the dealer/manufacturer, by the officers of the Commercial Tax Department, in which inspection the employees of the dealer/ manufacturing unit would not create any hindrance and that if the inspection is not allowed to be done smoothly, then the Commissioner, Trade Tax, can reject the application of the dealer, besides taking actions against him as provided under the Act. The Commissioner, Trade Tax, has been made the final authority with respect to these matters and his decision would be final.

9. Clause 6 says that for determination of the installed capacity of the roller of flour mills or atta chakki, the assessing authority would be free to make an inspection but in a matter of dispute regarding capacity, the decision of the Joint Commissioner (Executive) would be final.

10. The petitioner in pursuance of the aforesaid scheme applied for taking the benefit of the compounding scheme and in his application, which was supported by an affidavit, he mentioned that he was running four atta chakkees during the financial year. According to him, the installed capacity of these four atta chakkees is equivalent to one roller body. The assessing officer did not agree with the contention of the petitioner that it was the actual quantity of production as against the installed capacity, which would be relevant for taking the benefit of compounding scheme and held that the petitioner had claimed that he was operating only four atta chakkees, whereas he was having installed capacity of six roller bodies. After recording such a finding the assessing officer observed that in view of the scheme framed u/s 7D of the Act, the petitioner was to make the payment of compounding tax on the basis of the installed capacity, i.e., six roller bodies of 40 inches size, whereas the petitioner has deposited the tax for only one roller body, i.e., Rs. 2,92,970 as against the total tax of Rs. 13,18,368.

11. Arguments have been advanced from both the sides with respect to the interpretation of the Scheme, whether the compounding amount has to be paid on the basis of the installed capacity (with respect to six roller bodies in the instant case) or on the basis of the probable/actual manufacturing as against the installed capacity.

12. A further question has been raised that when the petitioner had already made it clear in his application that he was not utilising four roller bodies for the entire financial year, therefore, he cannot be subjected to deposit the tax towards the installed capacity.

13. We are, prima facie, satisfied with terms of the aforesaid scheme but in view of the fact that the learned counsel for the petitioner as well as the State failed to agree on the point of dispute regarding capacity, the matter would be looked into by the Joint Commissioner (Executive) and thereafter decision would be taken by the Commissioner;

14. In the earlier writ petition No. 8770(MB) of 2009 also, the assessing officer has made like observation. The reference on such a question must be made to the Commissioner and leave it open for the Commissioner to take an appropriate decision.

15. In the case of Vora Electric Service, Kanpur v. State of U.P. reported in (2005) UPTC 977, a Division Bench of this court took a view that "section 7D of the Act starts with a non obstante clause, i.e., ''notwithstanding anything contained in the Act''. Thus, it has a overriding effect over the provision of the Act. A perusal of section shows that it contemplates payment by agreement in lumpsum. Once the Department agrees to accept the tax in the name of compounding money in lumpsum, in lieu of tax payable, it displaces the regular assessment proceeding. Clause 15 of the electrical compounding scheme, which has been annexed as CA-4 to the counter-affidavit states that in case if it is found that in the application/affidavit any fact has been concealed or any wrong details have been furnished, Commissioner of Trade Tax will have a right to cancel the agreement for the lumpsum payment and direct for the regular assessment..."

16. In the case of Kothari Contract Interiors Vs. Trade Tax Officer, , the Division Bench of this court took notice of the judgment passed in the case of Sri Durga Brick Field v. State of U.P. reported in (1991) UPTC 510, wherein it has been held that where a dealer elects to pay the sales tax in lumpsum u/s 7D, it is not open to him to contend that the agreement or the election is not binding on him, because the unit was lying closed or the turnover turned out to be either nil or inadequate on account of various factors. It would not be open to the dealer to pay a reduced amount on the ground that the unit did not work or the turnover was less than anticipated. In a case where option is exercised for payment of sales tax in lumpsum u/s 7D, the demand is not based on the turnover but on the agreement to pay the tax in lumpsum, i.e., the demand is not relatable to the actual turnover.

17. In paragraph 11 of the aforesaid judgment it has been observed (page 67 in 10 VST) :

Thus, the payment of compounded tax is a convenient hassle-free and simple method of assessment. A dealer who has opted for payment of lumpsum amount in lieu of tax is not required to file monthly or quarterly returns of the turnover. A dealer has to pay a fixed sum of money as tax as agreed upon by the Department. It is the choice of a dealer to opt for compounded payment of tax, If the said choice is in accordance with the scheme and is ultimately accepted by the authority concerned, it becomes an agreed amount of tax. The Department as well as the dealer both are bound by the said agreement. The necessary corollary of this is that a dealer whose application for compounding has been accepted cannot turn around and urge that he is not liable to pay any tax for any reason, such as closure of business or low turnover, etc.

18. Learned counsel for the petitioner submits that the case of Sri Durga Brick Field (1991) UPTC 510, was a case where it appears that the dealer had agreed for payment of lump sum tax but thereafter he came forward with the plea that after the agreement having been entered into, the dealer he did not make an attempt to pay the lumpsum amount of tax as agreed upon on the ground that the mill was lying closed or the unit did not work, whereas in the instant case, the petitioner in his application had made it clear that he was not running four roller bodies for the entire financial year.

19. We do not intend to enter into this controversy, as we find that the matter requires consideration by the Joint Commissioner (Executive) of the Department, who will submit a report to the Commissioner, whose decision would be final.

20. We, however, take notice of the fact that the assessing officer was not competent to make assessment of his own as against the agreement/the application moved by the petitioner under the compounding scheme floated by the State Government u/s 7D of the Act. In case the assessing officer was of the view, that too, after making an inspection in such a manner, which might be necessary, that there was some dispute with respect to the installed unit/ capacity of the petitioners-industry or the capacity entered into in terms of the Scheme itself, he was to refer the matter itself to the Commissioner, who would have taken necessary steps for adjudicating upon the aforesaid limited issue but he could not have power to assess the amount under the Scheme on a different capacity.

21. For the reasons aforesaid, we are of the view that the assessment orders passed in both the writ petitions as well as the appellate order cannot be sustained, which are hereby set aside.

22. The matter is remitted to the assessing officer, who shall forward it to the Joint Commissioner (Executive), who will make an enquiry in the matter and shall submit his report to the Commissioner within a maximum period of one month from the date of receipt of a certified of this order. The Commissioner shall pass appropriate orders, after giving adequate opportunity to the parties concerned within next one month.

23. This direction is issued only for the financial years of 2005-06, 2006-07 and 2007-2008. The writ petitions stand allowed.

