(2012) 09 AHC CK 0220

In the Allahabad High Court

Case No : Trade Tax Revision No''s. 85, 88 and 89 of 2012

Raghvendra Mani Tripathi APPELLANT

Vs

Commissioner, Commercial Tax and Others RESPONDENT

Date of Decision : 14-09-2012

Acts Referred:
Uttar Pradesh Trade Tax Act, 1948 — Section 11, 2, 2(i), 2(s), 21

Citation : (2013) 63 VST 310

Hon'ble Judges : Satish Chandra, J

Bench : Single Bench

Advocate : Abhishek Misra, for the Appellant;

Judgement

Satish Chandra, J.—All the three revisions have been filed u/s 11 of the U.P. Trade Tax Act, 1948, against a common order dated April 27, 2012 passed by the Trade Tax Tribunal, Gorakhpur, in Second Appeal Nos. 215, 216 and 217 of 2011 for the assessment years mentioned above. In all the three revisions, the facts and circumstances are identical except the dates and amounts. For this purpose, the assessment year 1999-2000 has been taken as an illustrative year in this order.

2. The brief facts of the case are that the assessee is a society who imports the coal from outside the State and supplies the same to its members, who are the brick-kiln owners. During the assessment years under consideration, the assessee has imported the coal and supplied to its members. It is alleged that the members have collected the coal directly from the railway yard. Thus, the freight charges were not included in the total turnover and the same were shown separately by the assessee.

3. The short issue in these revisions is whether the freight charge, which were shown separately in the books of accounts, is the part of the total turnover or not?

4. Originally, the Assessing Officer (for short, "the A.O.") did not include the

freight charges in the total turnover, so the proceedings, u/s 10B of the Trade Tax Act (for short, "the Act") were started, which were later dropped by the concerned authority. Later, independent proceedings were started u/s 21 of the Act, where the A.O. included these charges in total turnover and brought to the clutches of trade tax. However, the first appellate authority gave a partial relief by upholding the order of the A.O. Further, the Tribunal dismissed all the three revisions filed by the assessee and upheld the decision of the first appellate authority.

5. Being aggrieved, the revisionist has knocked the door of this court by presenting the present revisions.

6. With this backdrop, Sri Abhishek Mishra, learned counsel for the revisionist, submits that earlier, the proceedings u/s 10B of the Act were started, which were dropped by the Joint Commissioner (Executive), Trade Tax, Gonda Division, Gonda, after relying upon the ratio laid down in the case of Vinod Coal Syndicate v. Commissioner of Sales Tax, U.P., Lucknow [1989] 73 STC 317 (SC) : [1988] UPTC 218 (SC).

7. The learned counsel for the revisionist further submits that the Additional Commissioner, Grade I, Trade Tax, Lucknow, has wrongly started the proceedings u/s 21 of the Act, after issuing notice for the relevant years, which is against the law.

8. He also submits that the assessee did not purchase the coal in its own account but merely working as a commission agent for different buyers of the coal. During the relevant years, the assessee has already submitted the evidence to show that the buyers have appointed the revisionist as their agent and ordered for purchase of the coal from outside the State and transporting it on their behalf to their places of business. Thus, the revisionist has acted merely as an agent of the buyers of the coal. The payment of the freight charges is not the burden of the revisionist, as the same were already paid by the buyers and cannot be included in the total turnover of the revisionist.

9. According to learned counsel for the revisionist, the basis/material for granting the permission u/s 21(2) of the Act is the same which was properly discussed in the original assessment order dated March 20, 2003 as well as in the proceedings u/s 10B of the Act. Hence, granting the permission u/s 21(2) of the Act is nothing but merely "change of opinion", which is not sustainable in the eye of law. Therefore, the assessment order u/s 21(2) read with section 30 of the Act, and, subsequently, the orders of the first and second appellate authorities confirming the assessment years are bad in law being without legal and legislative intent and as such liable to be set aside. For this purpose, he relied on the ratio laid down in the case of Aryavarth Chawal Udyog v. State of U.P. [2008] 8 VLJ 98 (All).

10. According to him, while issuing notice u/s 21 of the Act, the concerned authority has changed its opinion, which is not permissible in law. For this

purpose, he relied on the ratio laid down in the case of Ratan Industries (Pvt.) Limited Vs. Additional Commissioner, Trade Tax and Another, , where it was observed that (page 117 in 148 STC):

It is a well-settled principle of law that the question which has been examined in detail in the original assessment proceedings and thereafter the assessment order has passed, then the said assessment order cannot been reopened u/s 21 of the Act on mere change of opinion.

11. The learned counsel for the revisionist also submits that similar views were taken in the case of Royal Trade Company v. Trade Tax Officer [2000] UPTC 64 (All).

12. On merit, learned counsel for the revisionist has relied on the ratio laid down in the case of Vinod Coal Syndicate v. Commissioner of Sales Tax, U.P., Lucknow [1989] 73 STC 317 (SC) : [1988] ATJ 724 (SC), where it was observed that the assessee was a commission agent in the coal business. The freight was separately charged and paid accordingly by the principals. So, it cannot be included in the total turnover of the commission agent.

13. On the other hand, learned standing counsel relied on the impugned order. He submits that as per ratio laid down in the case of India Meters Limited Vs. State of Tamil Nadu, , it was held by the honourable court that the obligation to pay the freight was clearly on the assessee as there was no sale at all. The freight and insurance charges are liable to be taxed and the same are to be included in the total turnover. Similarly, he relied on the ratio laid down in the case of State of Andhra Pradesh Vs. A.P. Paper Mills Ltd., , where the honourable court came to conclusion that the transportation charges and the agent''s commission would be inclusive in "turnover" u/s 2(s) and is liable to sales tax u/s 6(a) of the Andhra Pradesh General Sales Tax Act, 1957.

14. To counter it, Sri Abhishek Mishra, learned counsel for the revisionist, has distinguished the ratio laid down in the case of India Meters Limited Vs. State of Tamil Nadu, by submitting that this case is not applicable in the case of revisionist as the cited case is related to State of Tamil Nadu and definition clause of Tamil Nadu Trade Tax Act is entirely different from the definition clause of the Trade Tax Act applicable in the State of Uttar Pradesh.

15. He further submits that the factum as well as case of the revisionist is quite different from that of India Meters Limited Vs. State of Tamil Nadu, . Section 2(r) of the Tamil Nadu General Sales Tax Act describes "turnover" and upon perusal of entire definition of "turnover" there is nowhere description of freight. Whereas section 2(i), Explanation II(i) of the U.P. Trade Tax Act, 1948 clearly establishes that if freight is separately charged then it shall not form a part of taxable turnover. He further submits that the verdict given by the honourable Supreme Court of India in Vinod Coal Syndicate [1989] 73 STC 317 (SC) : [1988] UPTC 218 (SC) is still relevant and has not been reversed or overruled by the apex court. It is the burden of the opposite-revenue party to show in which case ruling

has been overruled.

16. Lastly, he prays that the reassessment order passed u/s 21 of the U.P. Trade Tax Act, 1948 may kindly be set aside along with the consequential orders.

17. After hearing both the parties, it appears that the petitioner has assailed the order passed u/s 21 of the Act on the ground that earlier on similar facts/ material, proceedings u/s 10B of the Act were dropped.

18. Needless to mention that in the case of The Commissioner, Trade Tax Vs. Jagdamba Agencies, , wherein it was observed that the proceedings u/s 10B and section 21 can be taken simultaneously as both the sections operates a different fields under the different circumstances.

19. In view of above, the plea of the revisionist that it is a matter of change of opinion is not sustainable.

20. On merit, it appears that in the case of Vinod Coal Syndicate [1989] 73 STC 317 (SC) : [1988] UPTC 218 (SC), it was observed that when the cost or amount is separately charged, that amount could not be included in the total turnover.

21. Similarly, Explanation II of clause (i) of section 2 of the U.P. Trade Tax Act provides that:

(i) the amount for which goods are sold or purchased shall include the price of the packing material in which they are packed, and any sums charged for anything done by the dealer in respect of the goods sold, at the time of or before the delivery thereof, other than cost of freight or delivery or cost of installation or the amount realised as trade tax on sale or purchase of goods when such cost or amount is separately charged.

22. In the case of India Meters Limited Vs. State of Tamil Nadu, , where by upholding that the amount of freight is to be included in the taxable turnover, the apex court observed as under (page 279 in 34 VST):

When the transfer of the property or the goods is to be at the place of the buyer to which the seller is under an obligation to transport the goods, the expenditure incurred by the seller on freight in order to carry the goods from his place of manufacture to the place at which he is required under the contract to deliver, would thus become part of the amount for which the goods are sold by the seller to the buyer and would fall within the scope of ''turnover''.

23. However, it is pertinent to mention that in the case of India Meters Limited Vs. State of Tamil Nadu, , the assessee was not the commission agent, but was a dealer. So, the vital issue is the status of the revisionist, i.e., an agent or a dealer.

24. The judgment in the case of Vinod Coal Syndicate [1989] 73 STC 317 (SC) : [1988] UPTC 218 (SC) was considered in the case of Commissioner of Sales Tax v. Sharma Coal Company [1999] UPTC 62, where it was observed that:

...In the case of Vinod Coal Syndicate [1989] 73 STC 317 (SC) : [1988] UPTC

218 (SC) the dealer was commission agent, i.e., a person who does not make purchases or sale on his behalf but acts as an agent for purchase and sale of goods on behalf of his principal and it was for this reason that the honourable Supreme Court held that if the freight has been separately charged, the same would not be included in the turnover....

25. It has been further held therein that where the dealer is not a commission agent, the ruling of the Supreme Court Vinod Coal Syndicate [1989] 73 STC 317 (SC) : [1988] UPTC 218 (SC) will not apply. Thus, the benefit of Vinod Coal Syndicate [1989] 73 STC 317 (SC) : [1988] UPTC 218 (SC) is to be given only to a commission agent.

26. Moreover, if the assessee is merely an agent then the freight charges which were maintained and shown separately cannot form a part of total turnover. But if the assessee is a dealer, the freight even if charged separately is not liable to be excluded from his total turnover as per the ratio laid down in the case of Commissioner, Trade Tax Vs. Kapil Vastu Ent. Nirmata Kalyan Samiti, .

27. In the instant case, the Tribunal being the final fact finding authority (as per the ratio laid down in the case of Kamala Ganapathy Subramaniam and Another Vs. Controller of Estate Duty,), has not gone through this core issue whether the revisionist is merely a commission agent or a dealer. The Tribunal has not recorded any finding by examining the income of the revisionist under the head of commission in respect of the purchase of coal on behalf of various parties, i.e., principals.

28. In these circumstances, and, in the interest of justice, the matter is remanded back to the Tribunal with a direction to determine as to whether the revisionist is a commission agent or a dealer by examining the relevant material.

29. In view of the above, the impugned order dated April 27, 2012 is hereby set aside and the matter is remanded back to the Tribunal with a direction to pass a fresh orders for the assessment years under consideration.

30. In the result, all the three revisions are disposed of. No cost.

