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**(2004) 05 AHC CK 0125**

**In the Allahabad High Court**

**Case No :** Civil Miscellaneous Writ Petition No. 910 of 2003

Rai Bareilly Flour Mills

APPELLANT

Vs

Trade Tax Tribunal

RESPONDENT

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**Date of Decision :** 14-05-2004

**Acts Referred:**

Uttar Pradesh Trade Tax Act, 1948 — Section 2(1), 22, 30(3), 4A

**Citation :** (2004) 137 STC 105

**Hon'ble Judges :** Prakash Krishna, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## Judgement

Prakash Krishna, J.—This is a petition under Article 226 of the Constitution of India. By means of this petition a writ, order or direction in the nature of certiorari for quashing the order dated May 5, 2003 passed by the Sales Tax Tribunal, Ghaziabad, Bench II, (respondent No. 1) (annexure No. 11 to the writ petition) and the order passed by the Assistant Commissioner (Assessment), (respondent No. 2), Trade Tax, Bulandshahar, dated July 15, 2002 for the assessment years 1995-96 and 1996-97 (annexures Nos. 7 and 8 to the writ petition), has been prayed for. Further a writ of mandamus has been sought for directing the respondents to set aside the orders for assessment years 1995-96 and 1996-97 in accordance with section 30(3) of the U.P. Sales Tax Act, 1948 and to refund the amount of Rs. 1,49,604 for the assessment year 1995-96 and Rs. 12,45,416 for the assessment year 1996-97 in view of grant of eligibility certificate dated May 25, 2000.

2. The factual matrix of the case is that the petitioner is a registered dealer under the U.P. Trade Tax Act, 1948 (hereinafter referred to as, "the Act") and carries on the business of manufacture and sale of atta, maida and suji. It claimed itself a new unit within the meaning of Section 4-A of the Act and applied for the grant of eligibility certificate, granting exemption from payment of trade tax. The eligibility certificate was ultimately granted on May 25, 2000 by the

Divisional Level Committee vide annexure No. 3 to the writ petition. The said eligibility certificate has been granted for the period January 16, 1995 up to January 15, 2004. During the pendency of the application for grant of the eligibility certificate the assessing authority vide its order dated March 31, 1998, imposed a tax liability of Rs. 15,06,290.88. Similarly for the assessment year 1996-97 it created a tax liability of Rs. 40,26,754 vide order dated May 27, 1999. These orders were challenged before the first appellate authority, who ultimately reduced the tax liability for the assessment year 1995-96 but the appeal for the assessment year 1996-97 was allowed and remanded to the assessing authority vide order dated July 9, 1999. The petitioner challenged the two orders passed by the first appellate authority in respect of both the assessment years, by filing appeals before the Trade Tax Tribunal. The Trade Tax Tribunal decided both the appeals. It granted further relief of Rs. 23,125 for the assessment year 1995-96 vide its order dated January 6, 1999. For the next assessment year, i.e., 1996-97 vide order dated January 13, 2000 the Tribunal reduced the tax liability to Rs. 34,57,254. The eligibility certificate was ultimately granted by the Divisional Level Committee after the aforesaid two orders of the Tribunal for the assessment years 1995-96 and 1996-97. Thus the petitioner became entitled for the refund of the tax deposited in pursuance of the assessment orders for the assessment years 1995-96 and 1996-97 as modified by the Tribunal in the light of the eligibility certificate.

3. Armed with the eligibility certificate the petitioner filed two applications both dated February 13, 2001 before its assessing officer for refund of tax deposited by it with the allegation that the tax was not realised from the customers and the same was deposited by the petitioner-company out of its own pocket. True copies of these applications have been filed as annexures Nos. 4 and 5 to the writ petition. The assessing authority, the respondent No. 2, by two identical orders both dated July 15, 2002 (annexures 7 and 8) rejected the two applications filed u/s 30(3) of the Act on the ground that the original assessment orders in respect of the relevant assessment years are no longer in existence as they have been merged into the orders passed by the first appellate authority as well as in the Tribunal's orders. Thereafter, the petitioner filed the applications u/s 30(3) of the Act before the Tribunal in the two second appeals filed by it earlier for the assessment years 1995-96 and 1996-97. These applications have been dismissed by the Tribunal by the impugned order dated May 5, 2003 (annexure No. 11 to the writ petition) on the ground that the applications filed u/s 30(3) of the Act were time barred as they were not filed within the period of one year from the date of grant of the eligibility certificate. The applications were filed on August 8, 2002 while the eligibility certificate was issued on May 25, 2000 and was received on June 20, 2000. There was delay of one year, one month and eight days. Challenging the aforesaid orders the present writ petition has been filed.

4. Heard the counsel for the parties and perused the record. Before proceeding further it is necessary to refer Section 30(3) of the Act which was inserted by U.P. Act No. 31 of 1995, and came into force on May 14, 1994. It reads as

follows :

"(3) If a dealer is granted an eligibility certificate u/s 4-A for the period for which an order of assessment or reassessment or an order in appeal has been passed prior to the grant of eligibility certificate, such order may be set aside either on its own or on the application of the dealer, by assessing or appellate authority having jurisdiction within one year of the receipt by him of the copy of the order granting such eligibility certificate or March 31, 1995, whichever is later, and a fresh order may be passed according to law :

Provided that where the application under this sub-section has been made by the dealer within the period aforesaid, it may be disposed of even beyond such period."

5. A bare perusal of the aforesaid section shows that a right has been given to a dealer who has been granted the eligibility certificate u/s 4-A of the Act to file application before the assessing authority or appellate authority, where an order of assessment or reassessment or an order in appeal has been passed prior to the grant of eligibility certificate for setting aside of such order. The said application is required to be filed within one year of the receipt of the copy of the order granting eligibility certificate or by March 31, 1995 whichever is later. The power can be exercised by the assessing or the appellate authority suo motu. The proviso, to the aforesaid provision shows that the application can be disposed of even beyond the period prescribed u/s 30(3) of the Act. Two things are clear. The power to pass fresh order according to the law can be exercised by the assessing or appellate authority either on the application filed by a dealer holding eligibility certificate or they may exercise the suo motu power. For the exercise of suo motu power no period of limitation appears to have been prescribed by the Legislature for the assessing or appellate authority. The intention of the Legislature not to provide any period of limitation for the exercise of suo motu power is clear. It is to avoid the co-existence of two conflicting orders, namely, assessment order or appellate order creating demand and eligibility certificate granting exemption from payment of tax for the same period. To avoid such situation the Sub-section (3) of Section 30 was inserted and it is more in the nature of enabling provision. It may be noticed here that this sub-section was inserted w.e.f. May 14, 1994 although the Section 4-A has been on the statute book from a fairly longer period of time.

6. A close reading of Sub-section (3) of Section 30 discloses a very interesting thing that power has been given to the assessing and the appellate authorities only and not to a Tribunal. In this connection the definition of appellate authority may be looked into. Section 2(a-1) defines the "appellate authority". It means the authority to whom an appeal lies u/s 9. Obviously the Sales Tax Tribunal is not included therein. Appeal to the Tribunal lies u/s 10 of the Act. "Tribunal", as has been defined in Section 2(h-1) means the Sales Tax Tribunal constituted by Section 10.

7. The upshot of the above discussion is that Section 30(3) of the Act is not applicable to the Tribunal. Therefore there is no difficulty in coming to the conclusion that a Tribunal does not possess power to entertain and decide an application u/s 30(3) of the Act.

8. Now the question which immediately falls for consideration, in the facts of the present case is, what should be done by a dealer when the assessment order has been subject-matter of second appeal before the Tribunal. If the theory of the merger is accepted the application in such circumstances cannot be filed before the appellate authority also. To answer the above question resort can be made to Section 22 of the Act. Section 22 of the Act gives power to any officer or authority or the Tribunal or the High Court to rectify mistakes on its own motion or on the application of the dealer or any other interested person. A conjoint reading of Section 22 with Section 30(3) of the Act shows that Section 30(3) of the Act does not in any way control or abridge the power of Tribunal or the High Court to rectify any mistake in any order passed by the Tribunal or the High Court under the Act apparent on the record within three years from the date of the order sought to be rectified. The field of operation of Section 30(3) is very limited one, i.e., it will operate only when the eligibility certificate u/s 4-A has been passed subsequently for the period for which an order of assessment or reassessment or an order has been made. The field of operation of Section 22 is bigger. Therefore, the application though it purported to have been filed u/s 30(3) of the Act should have been treated by the Tribunal u/s 22 of the Act. It is fairly settled that if an authority has power to exercise jurisdiction in a particular set of facts, its power and jurisdiction are not affected if in an application merely a wrong provision of law or section has been mentioned or quoted. Reference can be made to few such cases quoted below :

1. State of Karnataka Vs. Muniyalla, .

2. J.K. Steel Ltd. Vs. Union of India (UOI), .

3. P. Balakotaiah Vs. The Union of India (UOI) and Others, .

9. In these cases it has been held that if the exercise of a power can be treated to be a legitimate source, the fact that the same was purported to have been exercised under a different power does not vitiate the exercise of the power in question.

10. Therefore, I am of the opinion that the Tribunal should have treated the said applications one filed u/s 22 of the Act and not u/s 30(3) of the Act.

11. Now the question arises as to whether it can be said in the light of the eligibility certificate that there is an error apparent on the face of record in the order of the Tribunal as the eligibility certificate has been granted to the petitioner-dealer subsequently. The High Court in the case of Ram Singh and Sons Engineering Works and Another Vs. The State of Uttar Pradesh and Another, has held that where assessment order was passed treating the contract as works

contract, subsequently similar transaction of the assessee in earlier years declared by High Court as sales liable to tax, initiation of rectification proceeding was justified. In the case of Karam Chand Thapar and Bros. (Coal Sales) Limited Vs. State of Uttar Pradesh and Another, it has been held that on the basis of subsequent judgments of the High Court and of the Supreme Court the order of the authority taking a contrary view can be corrected. The said principle is extended and is made applicable in the case of grant of eligibility certificate also. Otherwise the very purpose of grant of eligibility certificate would become meaningless. It is a matter of common experience and knowledge that the grant of eligibility certificate consumes a considerable period of time and the assessing authority without waiting for the final outcome of the application of the eligibility certificate passes assessment orders so that the assessment order is passed within the prescribed period of limitation. There is no provision under the U.P. Trade Tax Act for extending the period of limitation for framing an assessment order by excluding the period during which the application for grant of eligibility certificate remains pending. The grant of eligibility certificate is not a mere formality and its meaningful purpose and object is to promote the industry in the State of U.P. Taking into consideration all these factors it is reasonable to conclude that the Tribunal can rectify its earlier order so that it may be in consonance with the order granting eligibility certificate.

12. This conclusion can be arrived at from a different angle also. The idea of granting suo motu power to the assessing and the appellate authorities and not prescribing any period of limitation is to give preference to eligibility certificate over the assessment and appellate orders passed during the intervening period. I am of the view that the filing of an application within a period of one year is simply an intimation to the authority concerned bringing to its notice about the factum of the passing of the eligibility certificate. The suo motu power has been given to the assessing and the appellate authorities with some purpose and object to be achieved is to recall or modify the assessment or appellate order in the light of the eligibility certificate which has been granted subsequently. The Legislatures were conscious about the fact that some time is bound to be spent in the processing and the final adjudication of the application for grant of eligibility certificate over which a dealer has no control. The idea appears to be that a person should not suffer and a beneficial provision may not become nugatory due to no fault of the dealer and for the circumstances beyond the control of the dealer.

13. By adopting same logic and the line of reasoning I am of the view that the assessing and the appellate authorities can rectify the assessment or appellate order even if the application is filed beyond the period of one year as prescribed u/s 30(3) of the Act.

14. The Supreme Court in D.N. Roy and S.K. Bannerjee and Others Vs. The State of Bihar and Others, has observed that where suo motu jurisdiction is to exercise not only should this fact be intimated but also the ground on which it was

proposed to exercise such power. In that case a revision filed by the aggrieved person against the order of the State Government was rejected and the order passed by the Central Government subsequently was sought to be justified on the ground that even though the Central Government may not have a power to review its earlier order it could still revise the order of the State Government under its suo motu power conferred by Section 30. It was in this context that the observations referred to above were made. This judgment of the Supreme Court has been applied to the proceedings u/s 48 of the U.P. Consolidation of Holdings Act when the Deputy Director of Consolidation rejects an application in revision at initial stage on the ground that either it was barred by time or suffers from such other defect which rendered it liable to be rejected and yet chooses to exercise his suo motu power. A Full Bench judgment of this Court in Ramakant Singh Vs. Deputy Director of Consolidation, U.P. and Others, has held that even if the revision filed u/s 48 of the U.P. Consolidation of Holdings Act was barred by time, the Deputy Director of Consolidation, after the record has been called for, should examine the record to decide whether it was a fit case for exercise of the revisional jurisdiction suo motu.

15. Again the Supreme Court in the case of Vijayabai v. Shri-ram Tukaram JT (1998) 8 105 has held the purpose of grant of suo motu power in the following word :

"Every exercise of suo motu power explicitly or implicitly reveals to correct an error crept in under a statute, what ought to have been done was not done or which escaped the attention of any statutory authority, or error or deliberate omission or commission by the subject concerned requires correction, of course, within the limitation of any under such statute. This has to be based on some relevant material on record, it is not omnipower to be exercised on the likes and dislikes of such an authority. Though such a power is a wide power but has to be exercised with circumspection within the limitations of such statute."

16. At this juncture it may also be noticed that the Section 30(3) of the Act came into existence after a long period of time than Section 4-A of the Act. To my mind the insertion of aforesaid section is merely in the nature of clarification. It does not either take away or give any right to any person. It is true that the interpretation which I am putting would render otiose, the Sub-section (3) and such an intention cannot be attributed to the legislation. But as observed by the Supreme Court in Hakim Ali v. Board of Revenue 1990 ALJ 966 in para 12 that ".....no doubt it is true that as a general rule Legislature may be presumed not to make a superfluous provision. But this presumption is not a strong presumption and it is not uncommon to find the Legislature inserting superfluous provision under the influence of what may be abundant caution. (See G.P. Singh on Principles of Statutory Interpretation, 4th Edition page 51)".

17. Coming to the merits of the case indisputably the application purporting to be u/s 30(3) of the Act was filed within the period of one year from the date of the issue of the eligibility certificate before the assessing authority. The said

application remained pending without any adjudication. The assessing authority after the expiry of the period of one year rejected the same very conveniently applying the theory of merger. If the application was not entertainable by it, it was expected from such person or the authority to pass the appropriate orders shortly after the receipt of the application. Had the assessing authority been vigilant and passed the order shortly after the receipt of the application, the petitioner could have approached the appropriate forum or authority within the prescribed period of limitation. By not doing so the petitioner has been greatly prejudiced and the benefit given to the petitioner under the eligibility certificate has been jeopardised. No person should suffer for the lapse or inaction on the part of the authority concerned unless the person himself is responsible. It is not in dispute that the applications before the assessing authority were filed well within the period of time.

18. In such circumstances, the principle of return of the plaint as enshrined in the Civil Procedure Code, 1908 and the Limitation Act with regard to the return of the plaint and appeal can be invoked. Though strictly speaking these statutes are not applicable as the U.P. Trade Tax Act is self-contained Act but the principle of return of document and plaint by a court having no jurisdiction for presentation before an appropriate court or forum, and exclusion of time spent from the date of presentation before the wrong court up to the return of the plaint or appeal are based on principle of fair play and justice. These principles are well-known from the ancient time. It is fairly settled that every procedure is permitted, unless expressly prohibited by law.

19. To err is human and the courts are meant to do justice and are not meant to punish a person for human err committed inadvertently.

20. The learned Standing Counsel in opposition of the writ petition could only reiterate the reasoning given by the authorities below in the impugned orders. He could not show me anything otherwise to take a different view of the matter.

21. In the result the writ petition is allowed. The impugned orders dated May 5, 2003 annexure 11 to the writ petition and the order dated July 15, 2002 annexures 7 and 8 to the writ petition are quashed. The respondent No. 1 is directed to hear and decide the two applications filed by the petitioner treating them u/s 22 of the Act on merits in accordance with law, preferably within a period of two months from the date of production of the certified copy of the order.