

(2007) 07 AHC CK 0003
In the Allahabad High Court

Ramayan Traders

APPELLANT

Vs

Assistant Commissioner (Assessment-III) Trade Tax and
Additional Commissioner Grade-I, Trade Tax

RESPONDENT

Date of Decision : 13-07-2007

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2007) 07 AHC CK 0003

Hon'ble Judges : R.K. Agrawal, J;Bharati Sapru, J

Bench : Division Bench

Final Decision : Allowed

Judgement

R.K. Agrawal, J.—By means of the present writ petition filed under Article 226 of the Constitution of India, the petitioner, M/s Ramayan Traders, seeks a writ of certiorari quashing the notices dated 30.7.2001 issued by the Assistant Commissioner (Assessment III), Trade Tax, Bareilly, respondent No. 1, for the assessment years 1994-95 and 1995-96, filed as Annexure 10 to the writ petition, as also a writ of mandamus declaring the authorisation issued by the Additional Commissioner, Grade I, Trade Tax, Bareilly, respondent No. 2, under the proviso of Sub-section (2) of Section 21 as invalid.

2. Briefly stated, the facts giving rise to the present petition are as follows:

M/s Ramayan Traders was a partnership firm consisting of two partners, namely, Sarvasri Navin Kumar and Vipin Kumar, which carried on the business of liquid glucose and chemicals etc. at 293, Gangapur, Bareilly upto 18.9.1994. The firm has been reconstituted from 18.9.1994. The reconstituted partnership firm consisted of Sri Navin Kumar and Smt. Petrichha Mehrotra as partners. The erstwhile firm had filed its return for the assessment year 1994-95 upto the period 18.9,1994. The respondent No. 1 passed an assessment order on 23.9.1997 wherein the books of account and disclosed turnover had been accepted. The reconstituted firm also filed its monthly return as required under the provisions of the U.P. Trade Tax Act, 1948 (hereinafter referred to as "the

Act") and the Rules framed thereunder. It had filed the return for the assessment year 1994-95 for the period 18.6.1994 to 31.3.1995. The respondent No. 1 had passed the assessment order on 26.2.1998 accepting the books of account and the disclosed turnover. He had imposed tax @ 7.5% on the sale of liquid glucose. According to the petitioner, in the appeal for the assessment year 1993-94, preferred by the petitioner, the Trade tax Tribunal vide order dated 23.6.2000 had held the liquid glucose to be taxable as a medicine. The respondent No. 1 had sought permission from the Additional Commissioner, Grade I, Bareilly, respondent No. 2, or reopening assessment for the assessment years 1994-95 and 1995-96 under the proviso to Sub-section (2) of Section 21 of the Act. The respondent No. 2 had issued notices on 9.5.2000 of the Act calling upon the petitioner to show cause as to why the permission be not granted. The petitioner submitted its reply. However, the respondent No. 2 had granted the permission to reopen the assessment. Pursuant thereto, the respondent No. 1 had issued notices dated 30.7.2001 calling upon the petitioner to appear alongwith the books of account and other documents for completion of the assessment u/s 21(2) of the Act.

3. The grant of authorisation/sanction as also issuance of notice u/s 21(2) of the Act have been challenged on the ground that the decision of the Gujarat High Court in the case of M/s Cadilla Laboratories on the basis of which sanction has been sought, is not applicable and further, the respondent No. 2 had not considered the reply submitted by the petitioner in detail and had mechanically granted the sanction for reopening the assessment u/s 21(2) of the Act. Further, the entire exercise has been taken on a mere change of opinion. Moreover, this Court in the case of CST v. M.G. & Co. (Delhi) Pvt. Ltd. 1983 UPTC 997 has already held that glucose D is taxable as medicine and the Tribunal, in the petitioner's own case for the assessment year 1993-94, had held the liquid glucose to be taxable as medicine, which order is binding upon the authorities. Thus, there is no case of escapement of any tax whatsoever.

4. A supplementary affidavit has been filed enclosing a copy of the order dated 12.7.2001 passed by the respondent No. 2 granting approval/authorisation to the respondent No. 1 for proceeding u/s 21(2) of the Act.

5. In the counter affidavit filed by Sri R.N. Ram, Assistant Commissioner, III, Trade Tax, Bareilly, respondent No. 1, on behalf of both the respondents, it has been stated that the permission has been sought from the Additional Commissioner under the proviso to Sub-section (2) of Section 21 of the Act on the basis of the decision given by the Hon'ble Supreme Court in the case of Cadilla Laboratories v. State of Gujarat, in SLP No. 383 of 1992, wherein the Apex Court has held that the liquid glucose is neither a chemical nor a drug. The petitioner was given ample opportunity by the respondent No. 2 before granting permission and there is no provision under the law or the Rules to communicate the order granting permission to initiate proceeding u/s 21(2) of the Act. Even re-assessment proceeding, initiated on change of opinion, is permissible u/s 21(2)

of the Act and the decision given by the Apex Court, being binding, has to be followed. Thus, the proceedings are justified. The liquid glucose is taxable @ 10% and not 7.5% as alleged.

6. In the rejoinder affidavit filed by the petitioner, it has; been stated that the Apex Court had simply dismissed the SLP without adjudicating the matter on merit. It cannot be taken as laying down the binding law to the effect that the liquid glucose is not a drug. It has simply declined to entertain the SLP against the judgment of the Gujarat High Court. Further, the decision of the Tribunal, which is inter partes, relating to earlier assessment, is binding upon the respondents till such time it is not set aside by a competent Court of law. The authorisation has also been given mechanically, without assigning any reason, which is liable to be set aside on this ground alone.

7. We have heard Sri Kunwar Saxena, learned Counsel appearing for the petitioner, and Sri M.R. Jaiswal, learned Standing Counsel, appearing for the respondents.

8. Sri Kunwar Saxena, learned Counsel, submitted that from a perusal of the order dated 12.7.2001 passed by the Additional Commissioner, it would be seen that he had not assigned any reason whatsoever as to why permission/sanction be granted to the respondent No. 1 for proceeding u/s 21(2) of the Act. Relying upon a Division Bench decision of this Court in the case of Manaktala Chemicals Pvt. Ltd. v. State of U.P. and Ors. 2006 UPTC 1128, he submitted that the authorisation dated 12.7.2001 is liable to be set aside on this ground alone. He further submitted that the order of the Tribunal for the assessment year 1993-94, which is inter partes, wherein the Tribunal had held that the liquid glucose sold by the petitioner is liable to tax as medicine, is binding upon the respondents and, in this view of the matter also, there cannot be any escapement of tax warranting proceeding u/s 21(2) of the Act. he further submitted that the Apex Court in the case of M/s Cadilla Laboratories has not held that the liquid glucose is not a drug. It has simply dismissed the Special Leave Petition, which does not amount to laying down a binding law. According to him, the respondent No. 1 has not brought any other material on record to justify the proceeding for reassessment and is based on mere change of opinion, which is not permissible. He placed reliance upon the decision of this Court in the case of M.G. & Co. (Delhi) Pvt. Ltd. (supra).

9. In reply. Sri M.R. Jaiswal submitted that as the Apex Court in the case of Cadilla Laboratories (supra) has held that the liquid glucose to be not a drug, which is binding upon the authorises and, therefore, there has been a short levy of tax or a case of under assessment. He further submitted that the Additional Commissioner is not required to assign any reason while granting approval/sanction for proceeding u/s 21(2) of the Act. He, thus, justified the proceeding. In support of his aforesaid plea, he has relied upon a decision of the Apex Court in the case of Maharaj Kumar Kamal Singh Vs. The Commissioner of Income Tax, Bihar and Orissa,

10. We have given our anxious consideration to the various pleas raised by the learned Counsel for the parties.

11. We find that in the original assessment order passed for the assessment years 1994-95 and 1995-96, the respondent No. 1 has imposed tax @ 7.5% on the sale of liquid glucose effected by the petitioner. In respect of the previous year, i.e., 1993-94, the Tribunal, vide order dated 23.6.2000 had held that the liquid glucose sold by the petitioner is liable to tax @ 7.5% as medicine. The order of the Tribunal appears to have been become final between the parties as no material has been placed before us by either of the parties that the said order was subject matter of challenge before this Court by way of revision u/s 11 of the Act.

12. We also find that against the decision of the Gujarat High Court in the case of M/s Cadilla Laboratories (supra), the SLP had been dismissed by the Apex Court vide order dated 7.12.1992. A copy of the order dismissing the SLP has not been placed before us. However, the reporting contained in 1993 (18) STC 5 (From our reporter at the Supreme Court) has been produced. It only mentions that the Apex Court had dismissed the SLP against the decision of the Gujarat High Court in the case of Cadilla Laboratories (supra). The reporter had given some brief fact about what had been held by the Gujarat High Court. From the report, it does not follow that the Apex Court had given any reason for upholding the decision of the Gujarat High Court that, the liquid glucose is not a drug.

13. In the case of Kunhayammed and Others Vs. State of Kerala and Another, , the Supreme Court has considered the effect of dismissal of SLP and has held that dismissal at the stage of SLP by a non-speaking order, does not constitute res judicata and does not culminate in merger of the impugned decision. In the case of Indian Oil Corporation Ltd. Vs. State of Bihar and others, the Apex Court has held that the dismissal of the SLP in limine by a non-speaking order does not, therefore, justify any inference that by necessary implication the contentions raised, in the SLP on the merits of the case have been rejected by the Apex Court.

14. Thus, it is not correct to say that the Apex Court in the case of Cadilla Laboratories (supra) had held that the liquid glucose is not a drug. The dismissal of the SLP cannot be taken to be an expression on the merits of the case by the Apex Court.

15. Coming to the question of assigning reason by the respondent No. 2 while granting approval/sanction for proceeding u/s 21(2) of the Act is concerned, the respondent No. 2 had passed the following order:

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vr% mRrj izns"k dj vf/kfu;e dh /kkjk &21?2? ds ijUrqd es fd;s x;s vf/kdkjks dk iz;ksx djrs gq, eS ,fM"kuy dfe"kuj xzsM&1] O;kikj dj cjSyh tksu cjSyh mDr lanfHkZr okn es vfLVsUV dfe"uj ?d0fu0? r`rh; O;kikj dj cjSyh dks dj fu/kkZj.k ;k iqu% dj fu/kkZj.k djus ds fy, vf/kd`r djrk gwWA

16. From a perusal of the aforesaid order, it would be seen that he has not dealt with any of the grounds given in the reply submitted by the petitioner. He has only given his conclusion. No finding has been recorded nor any reason has been assigned as to why the approval/sanction should be granted. Except for the aforesaid order dated 12.7.2001, which has been brought on record by the petitioner, the respondents have not brought any other order passed by the respondent No. 2, which may show that any other reasons have been assigned. The order dated 12.7.2001 does not contain any reason and. therefore, as held by this Court in the case of Manaktala Chemicals Pvt. Ltd. (supra) and S.K. Traders v. Additional Commissioner, Grade - I, Trade Tax, Zone Ghaziabad and Anr. Civil Misc. Writ Petition No. 483 of 2002, decided today, reasons have to be assigned by the Additional Commissioner while granting sanction/approval for initiating proceeding u/s 21(2) of the Act. As no reason has been assigned, the authorisation/sanction dated 12.7.2001 cannot be sustained and is hereby set aside.

17. As the authorisation itself has been set aside, the proceedings taken in pursuance thereof also cannot be allowed to stand and are set aside.

18. In this view of the matter, it is not necessary for us to go into the merits of the other issues raised on behalf of the petitioner. The Additional Commissioner is directed to pass a fresh order in accordance with law in the light of the observations made above and the direction given by this Court in S.K. Traders (supra) would also apply in the present case.

19. In the result, the writ petition succeeds and is allowed. However, there will be no order as to costs.