(2007) 01 AHC CK 0175

In the Allahabad High Court

R.K. Associates APPELLANT

Vs

Commissioner, Trade Tax RESPONDENT

Date of Decision : 25-01-2007

Acts Referred:
Central Sales Tax Act, 1956 — Section 3, 4, 5

Citation : (2007) 01 AHC CK 0175

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajes Kumar, J.—Present three revisions u/s 11 of U.P. Trade Tax Act (hereinafter referred to as "Act") are directed against the order of Tribunal dated 2nd June, 2000 relating to the assessment year, 1989-90, 1990-91 and 1991-92.

2. In all the three revisions, the dispute relate to the payment of interest on the amount refunded by the assessing authority u/s 29 (2) of the Act.

3. Brief facts of the case are that the applicant is a contractor and had executed the works contract during the years under consideration. Applicant applied under the compounding scheme u/s 7-D of the Act, introduced by the State Government. Applications were moved before the Deputy Commissioner (Executive) on 30.08.1991, which were rejected on 15.02.1992, and the Deputy Commissioner (Executive) directed the assessing authority to frame the assessment orders u/s 7 of the Act. In pursuance thereof, notices were issued to the applicant for the purposes of the assessment.

4. Perusal of the assessment record reveals that for all the three assessment years, the applicant filed Form 82 giving the details of the payment along with the chart showing the details of the contracts executed and the payment received from the various departments including the amount of Sales Tax deducted at source. TDS certificates have also been filed. For the assessment year 1989-90, statement was recorded by the assessing authority in which it was

stated that a sum of Rs. 26,774/- was deducted towards tax. For the assessment year, 1990-91, the total deduction of tax at source was disclosed at Rs. 32,792/- and for the assessment year 1991-92 at Rs. 28, 800/-. The assessing authority passed the assessment orders for the assessment years, 1989-90, 1990-91 and 1991-92 on 3.13.1993, 5.1.1994 and 5.1.1994 respectively and for the all the aforesaid assessment years, the applicant has been declared non-taxable.

5. Perusal of the assessment orders show that despite the TDS certificate being filed along with Form 82 the amount of tax deducted at source have not been considered and the amount deposited by way of deduction have not been refunded. Therefore the applicant filed applications on 27.5.1994 claiming for the refund of the excess amount along with interest. When the refund was not allowed the applicant filed writ petition No. 628 of 1996. The writ petition was disposed of on 23rdSeptember, 1997. During the pendency of the writ petition, refund of the principal amount to the extent of Rs. 87,574/- was made, but the interest on the aforesaid amount was not paid. Division Bench of this Court while disposing of the writ petition directed the assessing authority to consider the claim of the interest in case, if the applicant moves fresh applications claiming interest. In ''pursuance thereof, applicant moved the applications and claimed interest on the principal amount paid on 9.10.1996 u/s 29 (2) of the Act inasmuch as the amount has not been refunded within 30 days from the date of the assessment order. Assessing authority rejected the claim of interest vide order dated 11.12.1997 for all the three years. It has been observed that in the assessment orders neither there is any mention of the amount deposited nor any order of refund was passed. It has been further observed that in Form 82, which is available on record, there is no mention about the amount deposited and details of receipt of payment has only been mentioned. It has been held that the applicant filed applications on 20.6.1994 for the refund of the amount on the ground that the tax has been deducted at source, in pursuance of which notices were issued on 12.08.1994 for furnishing of details of tax deducted at source and thereafter the order has been passed on 8.10.1996 for the first time for the refund of the amount and the refund voucher was issued on 9.10.1996. According to the assessing authority the order of the refund was passed for the first time on 8.10.1996 and since the refund voucher was issued on 9.10.1996, the refund was made within three months from the date of the order of the refund and hence, the interest was not payable. Being aggrieved by the order of the assessing authority refusing to allow the interest, applicant filed three appeals before the Deputy Commissioner (Appeals), which were dismissed vide order dated 28.5.1999. Applicant further filed three second appeals before the Tribunal. Tribunal by the impugned order, dismissed all the three appeals.

6. Heard learned Counsel for the parties.

7. Learned Counsel for the applicant submitted that in all the three assessment years ; long with Form 82, charts were filed giving complete details of the payment received from the various departments and the tax deducted at source

and the tax deduction certificates issued by the contracted were also filed, which are available on record. He submitted that while passing the assessment orders, the assessing authority ought to have considered the tax deducted at source and should have a lowed the refund. In case, if the refund has not been allowed in the assessment order, it was the mistake on the part of the assessing authority and the applicant cannot be held responsible. He submitted that the refund arises from the date of the assessment order in which the applicant has been declared non-taxable In support of his contention, he relied upon the decision of this Court in the case of Deora Electric Works v. State of U.P. reported in 1995 UPTC 241 Division Bench decision of this Court in the case of Deora Electric Works v. State of U.P. reported in 2003 UPTC 571 and Technical Construction Company v. Trade Tax Officer, Sector-I, Muzaffarnagar and Ors. reported in 2006 UPTC 1378 He further submitted that since the assessing authority had illegally withheld the refund of the principal amount of tax for about two years 10 months and the applicant was dragged to file the writ petition for the refund of the principal amount and thereafter the interest amount has been withheld by the assessing authority, the applicant is entitled for the interest on the interest amount and heavy cost for the arbitrary inaction on the part of the assessing authority. According to the learned Counsel for the applicant, the amount of interest for all the three years comes to Rs. 13,655/-, 16,232/- and 13,864/-, total Rs. 43,75 1 - from the date of the assessment order till the date of payment at the rate of 18 percent and on the aforesaid amount, interest comes to Rs. 4,374/-.

8. Learned Standing Counsel submitted that u/s 29 (2) of the Act, interest is payable only if the amount to be refundable in accordance with Sub-section (1) is not refunded within three months from the date of order of refund passed by the assessing authority. He submitted that in the present case, order of refund was passed on 8.10.1996 for the first time and the refund voucher was issued on 9.10.1996, therefore, the interest was not payable.

9. Having heard the learned Counsel for the parties, I have perused the order of the Tribunal and the authorities below and the assessment record produced by the learned Standing Counsel.

10. Section 29, 8-D and Rule 90 reads as follows.

Section 29. Refund.-(1) The assessing Authority shall, in the manner prescribed, refund to a dealer any amount of tax, fees or other dues paid in excess of the amount due from him under this Act:

Provided that the amount found to be refundable shall first be adjusted towards the tax or any other amount outstanding against the dealer under the Central Sales Tax Act, 1956 (Act 74 of 1956), and only the balance, if any, shall be refunded.

(2) If the amount to be refunded in accordance with Sub-section (1) is not refund as aforesaid within three months from the date of order of refund passed

by the Assessing Authority, or as the case may be, from the date of receipt by him of the order of refund, if such order is passed by any other competent authority or Court, the dealer shall be entitled to simple interest on such amount at the rate of (eighteen per cent) per annum from the date of such order or, as the case may be, the date of receipt of such order of refund by the Assessing Authority to the date of the refund.

Provided that for calculation of interest in respect of any period after the 26th day of May, 1975, this subsection shall have effect as if for the words ''six months'' the words ''three months'' were substituted and for the words ''six percent'' the words ''twelve percent'' were substituted.

(3) Notwithstanding any judgment, decree or order of any Court or authority, no refund shall be allowed of any tax or fee due under this Act on the turnover of sales or purchases or both, as the case may be, admitted by the dealer in the returns filed by him or at any stage in any proceedings under this Act.

(4) Notwithstanding anything contained in subsections (1), (2) and (3) where the tax has been paid by a dealer on purchase of certain goods and the value of goods manufactured out of such goods is inclusive of such tax and the State Government remits the tax liability on such purchases retrospectively, the dealer shall not be entitled to refund of tax paid on purchases of such goods unless he proves to the satisfaction of the Assessing Authority that he has not passed on the liability of such tax to any third party as a result of any sale or otherwise.

Explanation 1.- The date of refund shall be deemed to be the date on which intimation regarding preparation of the refund voucher is sent to the dealer in manner prescribed.

Explanation II.- The expression ''refund'' includes any adjustment under the proviso to Sub-section (1).

(The figure eighteen has now been substituted by twelve by U.P. Act No. 17 of 2004 with effect from 12th August, 2004).

8-D. Tax deduction from the amount payable to works contractor.-(1) Notwithstanding anything contained in Sub-section (2) of Section 8-A, every person responsible for making payment to any dealer (hereinafter in this Section referred to as the contractor) for discharge of any liability on account of valuable consideration payable for the transfer of property in goods (whether as goods or in any other form) in pursuance of a works contract, not being a building contract of such class or value as may be notified by the State Government in public interest in this behalf, shall at the time of making such payment to the contractor, either in cash or in any other manner, deduct an amount equal to four per centum of such sum towards part or, as the case may be, full satisfaction of the tax payable under this Act on account of such works contract.

Provided further that where any deduction has been made by a contractor for the payments made to his sub-contractor in accordance with Sub-section (2) the amount of such payments shall be deducted from the amount on which deduction is to be made under this sub-section.

Provided also that where the goods referred in this sub-section are covered by Sections 3, 4 or 5 of the Central Sales Tax Act, 1956, no amount shall be deducted under this sub-section in respect of such goods.

(2) Any contractor responsible for making any payment or discharge of any liability to any subcontractor, in pursuance of a contract with the subcontractor, for the transfer of property in goods, whether as goods or in some other form, involved in the execution whether wholly or in part, of the work undertaken by the contractor, shall, at the time of such payment or discharge in cash or by cheque or draft or by any other mode, deduct an amount equal to four percent of such payment or discharge, purporting to be a part of full amount of the tax payable under this Act on such transfer from the bills or invoices raised by the subcontractor as payable by the contractor.

Provided that no deduction under this sub-section shall be made on the amount on which deductions has already been made under Sub-section (1).

(3) The amount deducted under Sub-section (1) or Sub-section (2) shall be deposited into the Government Treasury by the person making such deduction before the expiry of the amount following that in which deduction is made.

(4) The person making such deductions under Sub-section (1) or Sub-section (2) shall, at the time of payment or discharge furnish to the person, from whose bills or invoice such deduction is made a certificate in such form and manner and within such period as may be prescribed.

(4-A). The person responsible for making the payment to the contractor or sub-contractor shall submit such return of such payments at such intervals, within such period, in such form and verified in such manner, as may be prescribed, but the Assessing Authority may in its discretion, for reasons to be recorded extent the date for the submission of the return by such person.

(5) Any deduction made in accordance with the provisions of this Section and credited into the Government Treasury shall be treated as a payment of tax on behalf of the person from whose bills or invoices the deduction has been made and credit shall be given to him for the amount so deducted on the production of the certificate referred to in Sub-section (4), in the assessment made for the relevant assessment year.

(6) If any such person as is referred to in Sub-section (1) or Sub-section (2), falls to make the deduction or after deducting, fails to deposit the amount so deducted, as required by Sub-section (3), the Assessing Authority may, after giving to such person an opportunity of being heard, by order in writing, direct that such person shall pay, by way of penalty, a sum not exceeding twice the amount deductible under this section but not so deducted and, if deducted, not so deposited into the Government Treasury.

(7) Without prejudice to the provisions of Sub-section (6), if any such person fails to make the deduction or, after deducting, fails to deposit the amount so deducted, he shall be liable to pay simple interest at the rate of eighteen percent per annum on the amount deductible under this section but not so deducted and, if deducted, not so deposited, from the date on which such amount was deductible to the date on which such amount is actually deposited.

(8) Where the amount has not been deposited after deduction, such amount together with interest referred to in Sub-section (7) shall be a charge upon all the assets of the person concerned.

(9) Payment by way of deduction in accordance with Sub-section (1) or Sub-section (2) shall be without prejudice to any other mode of recovery of tax due under this Act from the contractor or sub-contractor, as the case may be.

Explanation.- For the purposes of this section, Assessing Authority means the officer having jurisdiction over the place where the place of business or residence of the person is located.

Rule 90. When a claim for refund is made, the Trade Tax Officer shall, after proper scrutiny of all relevant records and necessary verification, satisfy himself that the amount is refundable. If no dues are outstanding against the dealer for any year, the refund voucher shall be prepared. If any dues are outstanding against the dealer for any year or if the dealer makes a request for adjustment or the refundable amount against further dues, an adjustment voucher shall be prepared for the adjustment of the excess refundable amount towards such dues.

11. Assessment record for all the three years reveal that during the course of the assessment proceedings along with Form 82, the applicant had filed chart giving complete details of the payment received, the amount of tax deducted at source and the certificates of the TDS issued by the contractee were also filed, therefore, at the time of passing of the assessment orders, details of the tax deducted at source was available. Tax was deducted at source by the contractee u/s 8-D of the Act in the years under consideration; therefore, while passing the assessment orders it was obligatory on the part of the assessing authority to consider the amount of tax deducted at source and allowed the refund. For all the assessments years, the applicant has been declared non-taxable and no tax was due against the applicant and, therefore, the amount deducted at source by the contractee which is deemed to be the tax deposited by the contractee u/s 8-D of the Act was liable to be refunded. u/s 29 (1) of the Act refund of the excess amount should be granted by the assessing authority suo moto. No application for the refund of the excess amount is required to be made if it is clear from the record that there is excess deposit of tax. It is only on account of inaction on the part of the assessing authority, the applicant had to move the application for on the refund of the excess amount and to file writ petition for necessary direction. It may be mentioned here that the refund of Rs. 87,574/- was given on the basis of the TDS Certificates filed along with the Form 82 and at no stage refund

claimed was adjudicated and rejected. In the circumstances the dates of assessment orders are the dates on which the amount of tax had become refundable. The order-dated 8.10.1996 cannot be said to be the order by which the refund was allowed.

12. In the case of Deora Electric Works v. State of U.P. (supra), this Court held as follows:

A perusal of the aforesaid provisions would indicate that in the assessment of the contractor the deposit of the amount by the contractee in the Government Treasury is not a pre-condition for the credit to be given to the contractor. That is the reason why neither the statute nor the Rules have placed any burden on the contractor to ensure that the amount deducted from the bills is also paid into the Government Treasury and that he has to satisfy his assessing officer that the amount so deducted has actually been deposited, in order to claim a credit for the same. Provisions of sub-sections (6), (7), (8) and (9) clearly indicate that once the deduction has been made the liability for its payment and the consequence of default are on the contractee and no action whatsoever can be taken against the contractor.

In view of the aforesaid legal position the conduct of the assessing officer in not granting the refund to the petitioner till he is able to verify that the amount deducted from the bills of the petitioner have actually been paid was not legally sustainable. The dealer having furnished the tax deduction certificate and the assessing officer not doubting their genuineness, he could not delay the refund till the verification nor could he require the assessee to furnish information regarding the date of deposit and the Government Treasury Challan number, etc. As a matter of law it was not his duty to do so.

As is evident, in this case the amounts due to the petitioner have been unjustifiably withheld by the respondents in their zeal to verify that the amount had actually been paid into the Government Treasury. That was an exercise not required in the assessment of the petitioner. As a matter of fact this legal position is recognized by the Commissioner of Sales Tax in a circular dated 22nd October, 1991, a copy of which is Annexure 3 to the writ petition in which it has been stated that withholding of the credit in case of a contractor who has filed the tax deduction certificate is unjustified and if there is anything to doubt, the credit should be given as an interim measure and if later it is found that the facts stated in the tax deduction certificate are not correct appropriate action may be taken.

In view of the above discussions, the writ petition deserves to be allowed. The assessments for the assessment years 1988-89 and 1989-90 were completed on 25th March, 1992 and the refunds should have been granted immediately. u/s 29 (2) interest is payable @ 18 percent if the amount is not refunded within three months from the date of the order of refund. The order of refund in this case would be the assessment order itself which declared the dealer to be not liable to any tax.

13. The aforesaid decision has been followed by the Division Bench of this Court in the case of Deora Electric Works v. State of U.P. reported in 2003 UPTC 571. In a recent case Technical Construction Company v. Trade Tax Officer reported in 2006 UPTC 1378, Division Bench of this Court held as follows:

In view of the settled proposition the plea that the excess amount which was directed to be refunded in the order of the Assessing Authority and the Appellate Authority can be refunded only when it is verified and there is no liability for payment of interest till such verification takes place, cannot be accepted. The period of three months provided under Sub-section (2) of Section 29 of the U.P. Act is only for that purpose and if for any reason the respondent No. l had failed to refund the amount within the specified period then the liability of payment of interest arises. The respondent No. l cannot, therefore, absolve himself for payment of interest.

14. In the case of Trade Link India, Ghaziabad v. Trade Tax Officer reported in 2002 UPTC 136, this Court after referring to the provisions of Section 29(2) of the U.P. Act and Rule 90 of the U.P. Trade Tax Rules has held as follows:

From a conjoint reading of Section 29 (2) of the Act and Rule 90 of the Rules, it is clear that the Statute had itself taken care to afford sufficient time to the authorities for scrutinizing the record and making verification of the claim of refund and that is why a period of three months has been stipulated, after expiry of which, the interest would start running, if amount is not refunded within the said period. The manner in which the interest is to be calculated, its starting point, as also the date upto which the interest shall be paid, has all been specified in Section 29(2) of the Act. Thus, the plea of bonafide making enquiry and taking about an year is actually refunding the amount will not absolve the respondents from their liability to pay interest as per Section 29(2) of the Act. There is no justification on the part of the respondents in not paying the interest at the rate of 18 per cent per annum from the date of order till date of refund in terms of Section 29 (2) of the Act.

15. In the case of M/s Triveni Fuels (supra) this Court after considering the provisions of Section 29 of the UP. Act and Rules 89 to 104 of the U.P. Trade Tax Rules has held as follows;

From a reading of the provisions of Section 29 of the Act, reproduced above, we find that it is the obligation and statutory duty of the Assessing Authority to refund to the dealer any amount of tax, fee or other dues which have been paid in excess of the amount due from him under the Act. However, before refunding the amount, the Assessing Authority is enjoined upon to adjust the same towards the tax or any other amount outstanding against the dealer under the Act or under the Central Sales Tax Act and only the balance, if any, is to be refunded. The State Legislature has also taken care of the delay, if any, caused in making the refund. Under Sub-section (2) of Section 29 of the act, it has been provided that if the amount found to be refundable is not refunded within three months from the date of the order of refund passed by the Assessing Authority or, as the case may be, from the date of receipt by him of the order of refund, if such order is passed by any other competent authority or Court, the dealer has been made entitled to simple interest @18% per annum from the date of such order or, as the case may be, the date of receipt of such order of refund passed by the Assessing Authority to the date of refund. Explanation I provides that the date of refund shall be deemed to be the date on which intimation regarding preparation of the refund voucher is sent to the dealer. Thus, according to Section 29 of the Act, if the amount which has been found refundable, is not refunded within three months from the date of the order of refund or the receipt of the order, in case the order of refund is passed by a higher authority or the Court, then interest @ 18% per cent per annum is payable from the date of the order or the receipt of the order.

16. In the case of M/s Bal Govind Bhola Nath Construction Corporation, Allahabad reported in 2005 (41) STR 224 this Court has followed the aforesaid decision in the case of Trade Link India (supra) and has held that u/s 29 of the Act a period of 90 days has been provided in order to enable the Trade Tax Authorities to make verification of the claim of refund and that is why the interest starts running when the refund is not made within a period of 90 days. It has further held that the plea of verification appears to have been taken by the respondents to cover up their deeds of not granting lawful refund within a stipulated period and, therefore, it is not accepted.

17. In the case of Ramji Das Darshan Kumar Pvt. Ltd., Ghaziabad reported in 2005 IPTC 1009, this Court has held that the statute itself had provided sufficient time for verification of the amount of deposit for making the refund and if, for any reason the respondent having failed to verify the deposit from its record, the liability for payment of interest arises after expiry of three months.

18. In this view of the matter, for the reasons stated above, it is held that the applicant is entitled for the interest at the rate of 18 percent from the date of the assessment order on the amount which was refundable.

19. Now coming to the question whether on the facts and circumstances of the case applicant is to be compensated for withholding the interest. The Division Bench of this Court in the case of Triveni Fuels v. State of U.P. reported in 2006 UPTC 371 and Technical Construction Company v. Trade Tax Officer (supra) following the decision of the Apex Court in the case of Commissioner of Income Tax Vs. Narendra Doshi, . has awarded 10 percent interest on the amount of interest unlawfully and unjustifiably withheld by the assessing authority and has also awarded exemplary cost.

20. In the case of Sandvik Asia Ltd. Vs. Commissioner of Income Tax-I, Pune and Others, the Apex Court has held that the Income Tax Act recognizes the principle that the person should be taxed only in accordance with law and where the

excess amount of tax is collected or any amount is wrongfully withheld from the assessee without following the provisions of law, the Revenue must compensate the assessee. The Apex Court has referred to its earlier decision in the case of Narendra Doshi (Supra). In cat view the same principle would be applicable to the U.P. Trade Tax Act also.

21. In the circumstances, following the aforesaid decisions, it is held that the applicant is also entitled for the interest at the rate of 10 percent on the amount of interest for unlawfully and unjustifiably withholding the amount of interest. The applicant is also entitled for exemplary costs of Rs. 10.000/- (Ten Thousand).

22. In the result, all the three revisions are allowed. The order of the Tribunal is set aside and the assessing authority is directed to pay interest on the principal amount for all the three years at the rate of 18 percent from the date of the assessment orders and also to pay the interest at the rate of 10 percent on the interest and exemplary cost of Rs. 10,000/- (Rs. Ten Thousand) within a period of 15 days from the date of presentation of certified copy of the order.