
(2006) 04 AHC CK 0165
In the Allahabad High Court
Case No : Trade Tax Revision No. 304 of 2005

R.L. Virendra and Company	Vs	APPELLANT
Commissioner, Trade Tax		RESPONDENT

Date of Decision : 12-04-2006

Acts Referred:

Limitation Act, 1963 — Section 5
Uttar Pradesh Trade Tax Act, 1948 — Section 11

Citation : (2006) 04 AHC CK 0165

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Advocate : Kunwar Saksena, for the Appellant; U.K. Pandey and C.S.C., for the Respondent

Final Decision : Dismissed

Judgement

Rajes Kumar, J.—Present revision u/s 11 of the U.P. Trade Tax Act (hereinafter referred to as the "Act") is directed against the order of the Tribunal dated 5th May, 2005 relating to the assessment year, 1996-97.

2. The applicant was carrying on the business of Kerosene oil, Engine oil, Greece. Mobil oil etc. The applicant has maintained books of account in the regular course of business and disclosed turnover at Rs. 95,91, 954/- and has not admitted the liability on any of the turnover. Assessing authority rejected the books of account and estimated the taxable turnover at Rs. 30 lacs and imposed tax at Rs. 3 lac. First appeal filed by the applicant was rejected. Applicant filed second appeal before the Tribunal, which has been allowed by the impugned order. Tribunal has remanded back the matter to the assessing authority to pass assessment order afresh.

3. Heard learned Counsel for the parties.

4. The only submission made by the learned Counsel for the applicant is that the assessment order passed on 23rd March, 1999 for the assessment year 1996-97

was barred by limitation, while the Tribunal has erred in treating it as within time. He submitted that the last date of hearing fixed by the assessing authority was 22nd March, 1999 and in absence of the applicant, file was kept for disposal and the order was shown to have been passed on 23rd March, 1999. The said order was dispatched on 30th March, 1999 which has been served upon the applicant on 3.4.1999. According to the applicant, order was not passed on 31st March, 1999. He submitted that upto 31st March, 1999, applicant was making the enquiry from the Trade Tax Officer and upto that time no order was passed and in this regard a telegram was given to Additional Commissioner, Trade Tax, District Magistrate, Meerut and Deputy Commissioner (Executive) on 2.4.1999. In addition to this, applicant personally met the Deputy Commissioner (Executive), and Additional Commissioner, Trade Tax and requested to seal the record of Sri Raj Kumar, Trade Tax Officer, but no action was taken. In support of his contention an affidavit has also been filed, which has not been controverted. In this view of the matter, he submitted that the assessment order alleged to have been passed on 27th March, 1999 held to be barred by limitation. It is submitted that the averments made in the affidavit, which are not controverted are liable to be accepted. In support of his contention, he relied upon the decisions of the Apex Court in the case of *Mehta Parikh And Co. v. Commissioner of Income Tax, Bombay* reported in 30 ITR 181, *Juggi Lal Kamla Pat Vs. Ram Janki Gupta and Another*, and *Kalap Nath Rai v. Commissioner of Sales Tax* reported in 1984 UPTC 457.

5. Learned Standing Counsel submitted that the assessment record shows that the date of hearing was fixed on 22nd March, 1999 and in absence of the applicant, file was kept for final disposal and the assessment order was passed on 27th March, 1999 and was dispatched on 30th March, 1999 and has been served upon the applicant on 3.4.1999. He submitted that the entire sequence shows that the order was passed within time before 31st March, 1999. He submitted that the averments made in the affidavit is contrary to the record and cannot be accepted. He submitted that the record itself is an evidence to controvert the averments made in the affidavit and no affidavit was required to controvert the averments made in the affidavit. In support of his contention, he relied upon the decisions of this Court in the case of *Maheshwari Brick-Kiln v. Commissioner of Sales Tax* reported in 1989 STI 114, *M/S Rajpoot Tube-Well Bearing House v. Commissioner of Sales Tax* reported in 1988 UPTC 1308 and *Kesodhan Galla Bhandar, Pandey Bazar, Basti v. Commissioner of Sales Tax* reported in 1992 UPTC 964.

6. Having heard the learned Counsel for the parties, I do not find any substance in the arguments of the learned Counsel for the applicant.

7. Perusal of the record clearly shows that the assessment order was passed on 27th March, 1999 and was dispatched on 30th March, 1999 and has been served on 3.4.1999. There is absolutely no material to believe that the order was not passed on 27th March, 1999 and was passed after 31st March, 1999. The

applicant has not adduced any evidence to controvert the aforesaid facts, except bare statement in the affidavit, which is not supported by any evidence. The averments made in the affidavit stand controverted by the assessment record itself. It is true that the uncontroverted averments made in the affidavit should normally be accepted, but this principle is not a conclusive principle and it depends upon the facts and circumstances of the case. Any averment made in the affidavit not supported by any evidence and is contrary to the record cannot be accepted, even though the concerned party may not controvert it by filing the affidavit.

8. In the case of *Kesodhan Galla Bhandar, Pandey Bazar, Basti v. Commissioner of Sales Tax (Supra)*, this Court held as follows:

The learned Counsel for the applicant urged that the affidavit filed on behalf of the applicant remained uncontroverted and, therefore, it should have been accepted. Similarly because 110 counter affidavit has been filed it does not mean that the affidavit filed by the applicant should be accepted as gospel truth. It has to be evaluated along with the other evidence on record and the circumstances of the case. The contention of the applicant that he could not send the goods without permission of the marketing officer was rightly rejected by the authorities below because such transactions do take place even without permission. The information received in this behalf was definite mentioning the name and address of the purchaser and of the seller i.e. applicant, the name of the commodity and its quantity. Thus, there is no force in this revision, which is dismissed.

9. In the case of *M/S Rajpoot Tube-Well Bearing House v. Commissioner of Sales Tax (supra)*, during the course of survey some loose parchas were found. It was pleaded that parchas related to independent business of job work carried on by the person from whose possession they were recovered has not been accepted. Applicant submitted that an affidavit has been filed in this regard which was uncontroverted and thus, should be accepted. This Court has not accepted the submissions of the applicant and held as follows:

The learned Counsel for the assessee argued that Sri Nathu Singh had filed an affidavit before the Sales Tax Officer to the effect that the papers seized during the survey belonged to him, and in absence of any other evidence forthcoming from the Revenue, the said affidavit could not have been disbelieved by the Tribunal. There is no substance in this argument also.

The Tribunal has specifically referred to the affidavit of Nathu Singh and also rejected it by saying that it was procured document to serve the interest of the assessee. Sri Nathu Singh was called upon to produce the account books before the final assessment, but the same were not produced on the plea that they had been lost, and instead he chose to file an affidavit before the sale Tax officer. The affidavit, which on the face it was not acceptable, is not entitled to any credence, particular so, when there is other evidence which is incompatible with the

assertions made in the affidavit. In the above circumstances, I do not find any error in the view taken by the Sales Tax Tribunal that the affidavit filed by Sri Nathu Singh was of no assistance to the assessee and the same, in my opinion, was rightly rejected by the Sales Tax Tribunal.

10. In the case of Maheshwari Brick-Kiln v. Commissioner of Sales Tax (supra), this Court that self-serving affidavit without supported by evidence if not accepted by the Tribunal, the view of the Tribunal cannot be said to be erroneous.

11. In the case of Juggi Lal Kamla Pat v. Ram Janki Gupta (supra), the Division Bench of this Court held that it is not open to a party to brush aside the averments of his opponent made in affidavit filed in support of his application by merely stating that the allegations were untrue. A statement on oath, whether true or false, has to be met by a counter affidavit in reply, or by challenging the statement by cross-examining the deponent. If that is not done, it would be presumed that the allegations, if untrue, would have to be rebutted.

12. In the case of Mehta Parikh And Co. v. Commissioner of Income Tax, Bombay (Supra), the Apex Court held as follows.

It has to be noted, however, that beyond these calculations of figures, no further scrutiny was made by the Income Tax Officer or the Appellate Assistant Commissioner of the entries in the cash book of the appellants. The cash book of the appellants was accepted and the entries therein were not challenged. No further documents or vouchers in relation to those entries were called for, nor was the presence of the deponents of the three affidavits considered necessary by either party. The appellant took it that the affidavits of those parties were enough and neither the Appellate Assistant Commissioner, nor the Income Tax Officer, who was present at the hearing of the appeal before the Appellate Assistant Commissioner, considered it necessary to call for them in order to cross-examine them with reference to the statements made by them in their affidavits. Under these circumstances it was not open to the Revenue to challenge the correctness of the cash book entries or the statements made by those deponents in their affidavits.

13. In the case of Kalap Nath Rai v. Commissioner of Sales Tax (supra), appeal was filed beyond time along with an application u/s 5 of the Limitation Act. In the application the reasons for the delay was shown as illness and in support of the plea taken in the application, an affidavit has been filed. Application u/s 5 of the Limitation Act has been rejected. The matter came up to this Court. The Learned Single Judge of this Court held as follows:

Normally, the allegations of facts contained in an affidavit are to be accepted, unless controverted or rebutted. However, I would not like to go to the extent of saying that the allegations contained in an unrebutted or uncontroverted affidavit must be invariably accepted. There may be instrinsic material which may justify rejection of the averments made in an affidavit. If the authority before whom an affidavit has been filed, does not feel satisfied about the correctness of the

allegations contained in it, it can, notwithstanding the fact that the other side has not cared to rebut or controvert the allegations put question in the nature of cross-examination and enquiry to the deponent with regard to the contents of the affidavit in order to test the veracity of the averments. The deponent may even be required to produce more material in support of his allegations. After such a course, if it is deemed necessary, the question may be decided whether the allegations of fact contained in the affidavit are worthy of reliance.

14. The aforesaid decisions cited by the learned Counsel for the applicant are not applicable to the present case. The aforesaid decisions show that if the averments of the affidavit are uncontroverted, normally it should be accepted and worthiness of the affidavit has to be considered. The decision also held that the averments made in the affidavit cannot be accepted as a gospel truth. No doubt, its worthiness has to be examined and tested. If the averments made in the affidavit remain uncontroverted and there is no contrary material on record, the same should normally be accepted, but if the averment of the affidavit is contrary to the record, though it is uncontroverted cannot be accepted. In the present case, the averments made in the affidavit are contrary to record, thus, cannot be accepted.

15. In the result, revision fails and is, accordingly, dismissed.