(2016) 08 AHC CK 0277

In the Allahabad High Court

Case No : Writ Tax No. 435 of 2016

Samsung India Electronics Pvt. Ltd. APPELLANT

Vs

State of Uttar Pradesh RESPONDENT

Date of Decision : 01-08-2016

Acts Referred:
Uttar Pradesh Value Added Tax Act, 2008 — Section 29, Section 29(7)

Citation : (2017) 95 UPTC 63

Hon'ble Judges : Sudhir Agarwal and Kaushal Jayendra Thaker, JJ.

Bench : Division Bench

Advocate : Nishant Mishra, Tarun Gulati, Advocates, for the Petitioner; C.B. Tripathi, C.S.C, for the Respondent

Final Decision : Allowed

Judgement

1. Hard Sri Tarun Gulati, learned counsel for petitioner and Sri C.B. Tripathi for respondents.

2. By way of this petition, petitioner has challenged notices dated 2.2.2016 and 18.3.2016 issued under Section 29 (7) and 29 of U.P. Value Added Tax Act. Impugned order came to be passed on 30.3.2016. The brief facts leading to controversy as culled out from the facts are as follows.

3. Petitioner is a leading manufacturing company of consumer electronics, IT and Telecom products in the Indian market having various offices across the states of India. Petitioner is engaged in the manufacture and import of various products like mobile phones, electronics goods, home appliances, consumer durables etc., in various states. Petitioner, in order to undertake, inter alia, the sale of mobile phones in the state of Uttar Pradesh, has registered itself under the Act and has also obtained TIN being 09166000174C. The petitioner has its registered office at B-1, Sector 81, Phase 2, NOIDA, with its principal place of business at NOIDA.

4. Notices have been challenged mainly on two grounds namely that for very same period and very same products, petitioner was already assessed by

department. Petitioner has mainly contended that there was no reason to believe that income has escaped assessment. It is submitted that Section 29 (1) of the Act qualifies change of opinion and re-assessment proceeding cannot be initiated on the basis of change of opinion. The subsequent decision has to be passed on the fact and material which was not before the authority concerned when Ist assessment was made. It is further submitted that just because a subsequent judgment taking a different view has been pronounced, there cannot be a change of opinion.

5. Present case is one of reassessment where original assessment is sought to be superseded on the ground that it was erroneous. The case is one relating to indirect taxes where assessee has to take several actions contemporaneously as per mandated by Statute. He has to raise an invoice stating the tax, which is collected from the buyer. The seller cannot collect any tax in excess of what is due and makes a self-assessment on that basis. All these actions are to be taken according to the law prevalent at relevant time. A subsequent judgment cannot be pressed into service to disturb those actions taken in good faith and in accordance with law prevalent on that date.

6. Respondents have filed counter-affidavit wherein it is submitted that against reassessment order, petitioner has a remedy of appeal under Section 55 of the Act and remedy of further appeal before the Commercial Tax Tribunal under Section 57 of the Act and remedy of revision under Section 58 of the Act and, as such, writ petition challenging reassessment order is not maintainable and is liable to be dismissed.

7. It is submitted that from proposal sent by assessing authority and from order passed by Additional Commissioner under Section 29 (7) of the Act, it clearly reveals that basis to initiate reassessment proceedings is based on judgment of Hon''ble Court in case of State of Punjab v. Nokia India Pvt. Ltd., 2014 (16) SCC 410.

8. It is further submitted that in original assessment order, there is no discussion of tax liability for mobile battery charger and there is total non-application of mind on the said issue and i.e. why the reassessment proceedings have been initiated. It is further submitted that Apex Court in the case of M/s. A.L.A. Firm v. Commissioner of Income Tax, Madras, reported in 1991 UPTC 918, has been pleased to hold that so as to initiate reassessment proceeding, the assessing authority may get the information from the records itself and if on research into law he finds a direct decision on the subject the reassessment proceeding can be initiated.

9. On the submissions made and decision relied on, we have no hesitation in holding that all the material was before the authorities concerned. Judgment in State of Punjab v. Nokia India Pvt. Ltd., 2014 (16) SCC 410, could not have been followed so as to invoke the jurisdiction under Section 29 of the Act because in the case on hand as far as Nokia was concerned, the phone charger was sold as

a separate accessory and, therefore, Apex Court held that it is not part of mobile phone. The battery was supplied with mobile phone and, therefore, battery charger was earlier classified as cell phone and it''s part and that battery charger was sold as a separate entity and not as accessory. On merit, we hold that petitioner placed before respondents various facts to show that petitioner was a single unit as a cell phone and that assessments, which were made, could not have been reopened on the basis of a subsequent judgment and same was bad in the eyes of law. Said notice on the basis of reason to believe is bad. All material was before assessing authority. Notices and impugned orders are in complete contravention of principles enunciated by Apex Court in the case of State of U.P. v. Aryaverth Chawl Udyog, C.A. No.6714 of 2009, decided on 27.11.2014, wherein Apex Court has laid down principles where doctrine of reason to believe can be invoked.

10. In the facts of this case, it cannot be said that there was any fresh material nor any tangible material which would permit the authorities to reassess or issue said notice. Decision of Nokia will not apply to facts of this case. The factual scenario in the case on hand are as under:

(a) The judgment has been rendered in context of Punjab VAT Act. The entry in the Schedule under the Act reads differently and, as such, provisions are different.

(b) The case has been decided on facts of another assessee i.e. Nokia India Pvt. Ltd. And cannot be applied to facts of petitioner which are distinct. Nokia had admitted in its reply to notices and as also before Tribunal in State of Punjab that battery charger is an accessory. It is submitted that it is not case of petitioner that battery charger is an accessory and, as such, Nokia judgment does not apply.

(c) The Court in para 17 has noticed Rule 3 (b) of the General Rules of Interpretation of Ist Schedule of Customs Tariff. Rule 3 (b) applies to three distinct categories of goods being mixtures, composite goods consisting of different materials and goods put up in sets for retail sale.

(d) For all three categories, text for classification is that goods are classified as if they consisted of material or component which gives "essential character". The only finding given by the Court is that merely because goods are sold in a composite pack, it does not become "composite goods", perhaps because it was argued that cellphone and battery charger are composite goods. Petitioner in present case has never argued that two are composite goods. Instead it''s case is that these goods are put up in sets for retail sale and fall under category (c) noticed above. There is no finding of the Court that if goods fall in category (c), they cannot be classified according to essential character test. By use of words, "as if" Rule 3 (b) applies a fiction by which it is assumed that component which gives essential character is only component which is relevant and common classification of all goods put up in the set has to be classification of component which gives the set its essential character. Undoubtedly, in a set or a composite box containing the cellphone and the battery charger, the essential character of set is that of cellphone and entire set is to be classified as a cellphone.

(e) No argument was raised in Nokia and there is no finding on the issue in that case that there is a legal impossibility of making a separate classification and having a separate value for each component in a composite box containing the cellphone and the battery charger. Under the Legal Metrology Act, the MRP of product has to be mentioned on the package. Only one MRP of the product can be mentioned on the package and that MRP will be that of entire package. There is no possibility of splitting the value of different products and subjecting them to classification and assessment separately.

(f) There is no mechanism in the Act or Rules to split consideration in the case of a composite contract. Where there is no machinery created under statutory provisions for computation of the tax, it has to be presumed that statute did not contemplate a tax on the subject matter (CC v. Larsen & Toubro, (2016) 1 SCC 170 and CIT v. BC Srinivasa Shetty, (1981) 2 SCC 460). In the present case, neither there is a separate price for the mobile charger nor can it be determined under the Act/Rules and, therefore, it has been merely estimated at Rs.180/- per piece in a most arbitrary manner. As the Act/Rules do not provide for a mechanism to disintegrate a composite contract, no tax can be charged separately on a mobile charger. These arguments were never raised or considered in Nokia''s case.

11. Further, a subsequent judgment cannot be used to reopen assessments or disturb past assessments which have been concluded. [See Para 7, Austin Engineering v. JCIT (2009) 312 ITR 70 (Guj.) Para 4 and 5, Bear Shoes 2011 (331) ITR 435 (Mad.), B.J. Services Co. Middle East Ltd. v. Deputy Director (2011) 339 ITR 169 (Uttarakhand), Sesa Goa v. JCIT 2007 (294) ITR 101 (Bom.), Geo Miller and Co. 2004 (134) Taxmann 552 (Cal)]. Reliance is also placed on the decision of the Hon''ble Supreme Court in MEPCO Industries v. CIT, (2010) 1 SCC 434, where the CIT on the basis of a subsequent decision of the Supreme Court sought to rectify his earlier order. The Hon''ble Court held that this would amount to a change of opinion.

12. How a product is to be taxed, is a matter of intent of the parties. In a composite contract, it depends on what the parties intended to buy and sell. (See Idea Mobile v. CCE, Cochin (2011) 12 SCC 608). In the facts of the present case, the intention of the parties was to sell the mobile phone alone, and not the mobile charger which was supplied along with the mobile phone in a composite pack.

13. Further, the petitioner has from the very beginning submitted that the impugned notices were pre-meditated and in the light of judgment of the Hon''ble Supreme Court in Oryx Fisheries v. Union of India, 2011 (266) ELT 422 (SC), the impugned notice and the consequent impugned orders deserve to be

set aside. In that case, the issue before the Hon''ble Supreme Court was whether the show cause notice was issued with a predetermined mind. Reliance is placed on Paras 28 to 32 of the said judgment. It may be noted that in Orys''s case, a writ petition had been filed assailing a show cause notice that was premeditated. In the present case, the petitioner has been repeatedly pointing out that the impugned notice are premeditated and such he the outcome of the adjudication of the notice itself was obvious to the petitioner and that the adjudication was only an empty formality. It is thus submitted that the impugned notice and the impugned order deserves to be set aside on this ground alone. Therefore, the cost of Rs.50,000/- is awarded to the petitioners as they have been forced to move this Hon''ble Court by way of this petition against the impugned illegal notice which was premeditated and are against the mandate of the Apex Court.

14. Impugned notices are bad and against principles enunciated by Apex Court in afore quoted decisions. This renders the notices and orders bad and have been passed in colourable exercise of powers and are without jurisdiction.

15. This writ petition has to be allowed with cost as law is well settled that assessment once having become final should not have been reopened on the basis of judgment of the Apex Court which has no applicability to the facts of this case and is in ignorance of factual position as is very clear from facts narrated herein above.

16. Writ Petition is allowed with a cost of Rs.50,000/-, which, at the first instance, shall be paid by respondent No.1. It shall be at liberty to recover said amount from higher Officer holding posts of respondent nos. 2 and 3 at the time of passing of order. Notices as well as impugned order are hereby quashed.

