(2014) 04 AHC CK 0280

In the Allahabad High Court

Case No : Sales/Trade Tax Revision No. 91 of 2005

Sarin and Sarin	APPELLANT
Vs	
Commissioner of Trade Tax	RESPONDENT

Date of Decision : 25-04-2014

Acts Referred:

Central Excise Tariff Act, 1985 — Section 1(3), 2
Central Sales Tax Act, 1956 — Section 14, 14(ix), 15, 15(a)
Uttar Pradesh General Clauses Act, 1904 — Section 21
Uttar Pradesh Trade Tax Act, 1948 — Section 11, 25, 3A, 3A, 4

Citation : (2014) 75 VST 328

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Bharat Ji Agrawal, Senior Advocate assisted by Piyush Agarwal, Advocate for the Appellant

Judgement

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Sudhir Agarwal, J.—Heard Sri Bharat Ji Agrawal, senior advocate, assisted by Sri Piyush Agarwal, advocate for the revisionist and learned standing counsel for the respondent. This trade tax revision under section 11 of the U.P. Trade Tax Act, 1948 (hereinafter referred to as "the Act, 1948") has been preferred being aggrieved by the judgment dated October 15, 2004 passed by the Trade Tax Tribunal, Bench-I, Agra, holding that gutkha product, manufactured and sold by the revisionist-assessee under the brand name "Gold Mohar Gutkha" is taxable as unclassified goods at 10 per cent in view of State Government Notification No. 1947 dated June 26, 1997. The revisionist is also aggrieved by the view taken by the Revenue that sale of generator, which was in working/running condition, was taxable at eight per cent and not five per cent .

2. The assessment year in dispute is 2001-02. The dealer disclosed its taxable turnover of Rs. 1,22,37,495.20 and admitted tax liability of Rs. 12,13,795. The maintenance of accounts was not found irregular and, therefore, figures of sale,

purchase and turnover, disclosed by revisionist-assessee, were believed by the assessing authority. However, he found that the dealer has disclosed sale of "gutkha" worth Rs. 22,18,58,748.32 but no tax liability thereon was admitted. It was said that tax on sale of "gutkha" from September 1, 2001 to March 31, 2002 was abolished and for the period April 1, 2001 to April 3, 2011, in view of the judgment of the Supreme Court in Kothari Products Ltd. Vs. Govt. of A.P., , no trade tax was leviable since it is liable for additional excise duty under the Central Excise Tariff Act at 18 per cent . The total sale of gutkha for entire assessment year was Rs. 22,18,58,748.32, out of that, sale during the period April 1, 2001 to August 31, 2001 was Rs. 8,64,71,820.50. The assessing authority held that sale of "gutkha" during the period April 1, 2001 to August 31, 2001, was taxable as unclassified item, i.e., 10 per cent and therefore, dealer was liable to pay tax on sale of "gutkha" during the aforesaid period to Rs. 86,47,182. Similarly on sale of old generator, he impound tax at the rate of 10 per cent which came to Rs. 16,500 and accordingly passed order dated February 28, 2004. There are some other items also with which this matter has no concerned.

3. Disputing imposition of tax on sale of "gutkha" and old generator, revisionist-assessee preferred Appeal No. 122 of 2004. The Joint Commissioner (Appeal)-4, Trade Tax, Agra upheld the view taken by the assessing authority that 10 per cent tax was leviable on sale of "gutkha" treating it as "unclassified item". However, in respect of tax liability on sale of generator, the appellate authority held that instead of treating it as an unclassified item, it was taxable in the category of machinery and therefore, eight per cent tax is leviable. Accordingly, it granted relief to the extent of two per cent in tax rate on the sale of generator. In the total disputed tax liability, relief of Rs. 3,300 was given to the assessee. Dissatisfied with this judgment, the assessee took up the matter to the Tribunal in Second Appeal No. 473/2004 but here also lost as Tribunal has rejected appeal vide judgment dated October 15, 2004 giving rise to the present revision.

4. The questions of law, which have arisen in this revision are:

"(A) Whether in view of the decision of the Supreme Court in Kothari Products Ltd. Vs. Govt. of A.P., , ''gutkha'' being covered under Central excise tariff item Nos. 2404.11 and 2404.12, hence a declared goods, under section 14(ix) of the Central Sales Tax Act, and, it cannot be subjected to tax as an ''unclassified item''?

(B) Whether no notification having been issued in respect of declared goods, namely, ''gutkha'', falling under section 14(ix) of the Central Sales Tax Act, hence in view of the decision of the honourable Supreme Court in Commissioner of Sales Tax, U.P. Vs. Agra Belting Works, , no tax was payable by the applicant?

(C) Whether in view of the facts and circumstances of the case, the Trade Tax Tribunal was justified in imposing tax on the sale of ''gutkha'' at 10 per cent ?

(D) Whether the Trade Tax Tribunal was justified in imposing tax on the sale of ''generator'' in running condition treating it as ''old discarded and unserviceable machinery''?

(E) Whether Trade Tax Tribunal was justified in imposing tax at the rate of eight per cent on the sale of ''generator''?"

5. Questions A, B and C can be considered together since they relate to taxability of "gutkha".

6. Before dealing in detail of the matter, it would be appropriate to know, what "gutkha" is? Though, on record, nothing has been said about it, but learned counsel explain that it is a "pan masala" which also contain "tobacco". To distinguish it from "pan masala", which has no element of tobacco, when tobacco is added, it is commonly known as "gutka/gutkha". In general, gutka is a dry mixture of crushed arecanut, tobacco, catechu, lime (calcium hydroxide), aromas and flavourings as well as other additives.

7. During course of argument it was sought to be argued that "gudaku", "gutka" and "gutkha" are all one and the same thing and for this purpose, my attention was drawn to first paragraph of judgment in Kothari Products Ltd. Vs. Govt. of A.P., , where the court has said as under (page 554 in 119 STC):

"The appeal is filed against the judgment and order of a Full Bench of the High Court at Andhra Pradesh. The appeal in this court is restricted to the product ''gutka'' (gudaku).

(emphasis added)

8. In my view, this impression, as given by learned senior counsel Sri Agrawal is not correct. The term "gudaku" and "gutka" does not appear to be one and the same. Be that as it may, in the case of Andhra Pradesh, entry in the provincial statute was "pan masala including gutkha". The court then referred to entries in Chapter 2404 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957, wherein the words "other manufactured tobacco" also include word "gudaku" and it was found that "gutka" is a tobacco and was referred as "gudaku" in that entry. The term "gudaku" and "gutka", were held synonymous since the contents thereof were found same. But it is not correct for all times to come. The reason being that there is a term "gudakhu", which came to be considered before apex court in State of Orissa v. Radheshyam Gudakhu Factory [1988] 68 STC 92 (SC); [1987] UPTC 1480. The court has noticed the findings of High Court there to the effect that "gudakhu" was a form of smoking tobacco and it is also used as a paste for cleansing the gums of the teeth. The court also refers to the Calcutta High Court decision in Gulabchand Harekchand and Another Vs. State of West Bengal and Others, , wherein it was held that "gudakhu" is manufactured out of tobacco and that its essential character is that of a tobacco product even though molasses and other constituents are added to the tobacco and that it is commonly used for cleansing the teeth.

9. The mere fact that in first paragraph in judgment the term "gutka" has been

shown in bracket as (gudaku), it cannot be said that the term "gudakhu" or "gudaku" would always be the same thing as "gutka". Moreso, that was not a dispute as such, up for consideration, before the apex court. Therefore, it cannot be said that every observation or mention of a fact is a binding law upon this court. When this court is concerned with entries of various statutes, it cannot be said that similarity in the name would mean that the items are also same. It would depend on the constituents. Different entries at different times have been considered and unless it can be shown that entries of all the times were same and have been specifically considered on this issue, it would be dangerous to blindly follow a decision given in respect to a particular entry, when entries in the statutes may be different. Particularly when a matter relates to fiscal statute, which normally go under change very frequently, the court has to extra careful.

10. Now I come to real issue. The State Government issued a notification dated January 31, 1985 exempting certain goods from tax under Act, 1948 with effect from February 1, 1985. The said Notification No. ST-2-7038/X-7(23)/83-UP Act XV/48-Order-85 dated January 31, 1985, contains an entry relevant for the purpose of present case at serial No. 14, which reads as under:

"In exercise of the powers under clause (a) of section 4 of the Uttar Pradesh Sales Tax Act, 1948 (U.P. Act No. XV of 1948), read with section 21 of the Uttar Pradesh General Clauses Act, 1904 (UP Act No. 1 of 1904) and in supersession of all previous notifications issued under aforesaid clause (a) of section 4, the Governor is pleased to exempt, with effect from February 1, 1985, the goods mentioned in column 2 of Schedule hereunder from payment of tax under the said Act of 1948, subject to the conditions, if any, specified in column 3 thereof:

SCHEDULE

11. By Notification No. Ka.San.Vi.-2-1947/Gyarah-9(7)/97-U.P.Adhi.-15-48-Adesh-97 dated June 26, 1997, which was published in gazette on July 1, 1997, the aforesaid entry 14 was substituted as under:

12. It excluded, therefore, specifically "tobacco containing pan masala", with whatever name it is known.

13. Another amendment was made by Notification No. T.I.F.-2-595/XI-9(4)/99-U.P. Act-15-48-Order-98 dated April 6, 1999 published in Gazette dated April 10, 1999 and entry 14 was substituted as under:

"In exercise of the powers under clause (a) of section 4 of the Uttar Pradesh Trade Tax Act, 1948 (U.P. Act No. XV of 1948), read with section 21 of the Uttar Pradesh General Clauses Act, 1904 (UP Act No. 1 of 1904), the Governor is pleased to make, with effect from the date of publication of this notification in Gazette, the following amendment in Government Notification No. ST-2-7038/X-7 (23/83-U.P. Act-XV-48-Order-85, dated January 31, 1985 (Sl. No. 14) as amended from time to time:

AMENDMENT

In the Schedule to the aforesaid notification for entries at serial numbers 14, 27, 52 and 53, the following entries column wise shall be substituted, namely:

14. For our purpose, it is sufficient to notice that "pan masala containing tobacco" by whatever name called, continued to be excluded from the term "all products of tobacco" vide notification dated April 10, 1999. Meaning thereby, exemption specifically withdrawn in respect to "pan masala containing tobacco", by whatever name called, by notification dated June 26, 1997, continued even after issuance of notification dated April 6, 1999.

15. In view of the above notifications, it can be little doubted that in assessment year 2001-02, product of revisionist-assessee was taxable. Since it was not otherwise covered by any specific entry, it could have been taxed by treating it as "unclassified goods".

16. Then comes the effect of provisions of the Central Excise Tariff Act, 1985 (hereinafter referred to as "the CET Act, 1985"). This Act came into force on February 28, 1986 by notification issued under section 1(3) thereof. Section 2 of the CET Act, 1985 provides:

"Duties specified in the Schedule and the Second Schedule to be levied.--The rates at which duties of excise shall be levied under the Central Excise Act, 1944 are specified in the First Schedule and the Second Schedule."

(emphasis added)

17. It is worthy to mention that earlier, only the word "the Schedule" was mentioned in section 2, which has now been substituted by the word "First Schedule and Second Schedule" by the Finance Act, 27 of 1999, section 134 with effect from May 11, 1999. The First Schedule of the CET Act, 1985, Chapter 24, deals with "tobacco and manufactured tobacco substitutes". This Chapter 24 has four headings 24.01 to 24.04. These headings as substituted by Finance Act, 33 of 1996 vide section 82, Third Schedule, Part II, and came on the statute book, read as under:

(emphasis added)

(The court is excluding rate of duty, mentioned in column (4) since that is not relevant for the present purpose.)

18. It is worthy to notice at this stage that entries after sub-heading 2404.39, rest have been substituted/inserted for the sub-heading 2404.40 by the Finance Act 14 of 2001 and the entry "pan masala containing tobacco" has been inserted for the first time by the aforesaid Act with effect from May 11, 2001.

19. At this stage, this court is not concerned with rate of excise duty imposed on the aforesaid items. If any of the items under heading No. 2404 is bearing a brand name, it would also be governed by sub-heading No. 2404.99. It may not be disputed that the product of the assessee, in the case in hand, may be covered by entry 2404 under the CET Act, 1985 but in order to claim that only by

virtue thereof such item would not be subjected to tax under provincial trade tax statute, there has to be some provision in the provincial statute.

20. Sri Bharat Ji Agrawal, learned counsel for the assessee, however, relied on the apex court''s decision in Kothari Products Ltd. Vs. Govt. of A.P., ; [2000] 9 SCC 263, which deals with provisions contained in the Andhra Pradesh General Sales Tax Act, 1957 and in particular, entry 194 in the First Schedule thereof.

21. I have gone through the aforesaid judgment carefully and finds that in section 8 of the Andhra Pradesh General Sales Tax Act, 1957, there was a provision that a dealer, who deals in the goods specified in the Fourth Schedule thereto, shall be exempt from tax thereunder in respect of such goods. Therefore, all the goods, which were specified in the Fourth Schedule to the Andhra Pradesh State statute, levying tax on sales of goods in the State of Andhra Pradesh, were exempted from tax by virtue of a specific provision contained in that statute, i.e., section 8 of the Andhra Pradesh General Sales Tax Act. There was an entry No. 7 in the Fourth Schedule of the Andhra Pradesh statute, which mentions the word "tobacco". There was an Explanation also therein, which says that goods mentioned in entry 7 "shall be goods included in the relevant heads and sub-heads of the First Schedule to the Additional Duties of Excise (Goods of Special Importance) Act, 1957, but does not include goods where no additional duties of excise are levied under that Schedule". The court found that the Additional Duties of Excise (Goods of Special Importance) Act, 1957, in entry 2404, under sub-heading "other manufactured tobacco" refers to "gudaku" and was an entry contained therein. It is in this view of specific provision, contained in the Andhra Pradesh Act, that, the court held that gutka (gudaku) being an entry under the First Schedule to the Additional Duties of Excise (Goods of Special Importance) Act, 1957, therefore, is exempted from tax under the Andhra Pradesh General Sales Tax Act, 1957.

22. The assessment period of dispute in Andhra case is not clear from the judgment. No corresponding provision in Act, 1948 has been shown in the present case. Earlier notification of 1985, obviously, was much wider and included tobacco products like gutka, pan masala containing tobacco. This was exempted by virtue section 4(1) itself and by not with reference to any statute like Central Excise Act, etc. The mere fact that something has been included in the CET Act, 1985, that would stand exempted from tax is not correct unless specific provision is contained in the provincial statute.

23. Now, it is to be seen whether there is any provision under the Central Sales Tax Act, 1956 (hereinafter referred to as "the CST, 1956"), read with Act, 1948 which may come to rescue the assessee.

24. Section 14 of the CST Act, 1956 contains declaration of certain goods of special importance in inter-State trade or commerce. There was an entry (ix), which has now been omitted by Taxation Laws (Amendment) Act, 2007 (Act No. 16 of 2007), with effect from April 1, 2007, but since it existed during the

relevant assessment year in question, i.e., 2001-02, it would be appropriate to reproduce the relevant extract of section 14 along with item (ix), as it was at the relevant time, hereunder:

"14. Certain goods to be of special importance in inter-State trade or commerce.--It is hereby declared that the following goods are of special importance in inter-State trade or commerce:--

(ix) unmanufactured tobacco and tobacco refuse covered under sub-heading No. 2401.00, cigars and cheroots of tobacco covered under heading No. 24.02, cigarettes and cigarillos of tobacco covered under sub-heading Nos. 2403.11 and 2403.21 and other manufactured tobacco covered under sub-heading Nos. 2404.11, 2404.12, 2404.13, 2404.19, 2404.21, 2404.29, 2404.31, 2404.39, 2404.41, 2404.50 and 2404.60 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986)"

25. It is worthy to mention that section 14(ix) does not mention sub-heading number 2404.49. Even erstwhile sub-heading 2404.40 is not mentioned in section 14(ix). Similarly, entry 2404.99 is also not mentioned in section 14(ix).

26. Section 15(a) of the CST Act, 1956 provides that sales tax law of State shall not impose tax on sale and purchase of declared goods exceeding five per cent. Section 15 of the CST Act, 1956, as it stood during the relevant period of assessment, reads as under:

"15. Restrictions and conditions in regard to tax on sale or purchase of declared goods within a State.--Every sales tax law of a State shall, insofar as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions, namely:--

(a) the tax payable under that law in respect of any sale or purchase of such goods inside the State shall not exceed (five per cent) of the sale or purchase price thereof, and such tax shall not be levied at more than one stage."

27. The learned counsel for the revisionist has tried to rely on decision of apex court in Kothari Products Ltd. Vs. Govt. of A.P., , but it is evident that entries of statute, as were up for consideration therein are not the same, as would be applicable in the case in hand. Since the period of assessment in dispute is 2001-02, therefore, this court has to look into various entries, as existed in various statutes at the time for which dispute is up for consideration and not to earlier entries, which are of no relevance at all.

28. Under section 14(ix), heading and sub-heading of the CET Act, 1985, which relates to pan masala containing tobacco and any other, which could have been relevant in the case in hand, are not shown to be a declared goods of special importance. The tobacco and its other products, covered under specific sub-headings are mentioned specifically in section 14(ix). The sub-headings, as were available in the assessment year 2001-02 did not include sub-heading, which could have applied to "pan masala containing tobacco", whether with a brand

name or otherwise. That be so, it cannot be held to be a declared goods and therefore, restriction of rate of tax by virtue of section 15 would also not come into picture. In view thereof, it cannot be said that product of the assessee, in the case in hand, is exempted from tax altogether or taxable with lessor rate of tax under the provisions of the CET Act, 1985 read with the CST Act, 1956. There is not even otherwise any notification available under the Act, 1948 to come to the rescue of the assessee for claiming exemption from tax on its above product in the disputed period.

29. In the result, I have no hesitation in holding that tax imposed upon sale of gutkha in the case in hand treating it to be "unclassified item" and imposing tax at the rate of 10 per cent is absolutely valid and correct. Questions A, B and C are accordingly answered in favour of the Revenue and against the assessee.

30. Coming to questions D and E, it is evident from record that used generator was sold but that was not in "discarded and unserviceable condition". It also cannot be said to be "obsolete" since it was in running condition. But if it is an old machinery even then it is covered by item 29 of Notification No. KA.NI.-2-101/XI-9(231)/94-U.P.Act-15-48-Order-2000 dated January 15, 2000, which reads as under:

"In exercise of the powers under clause (e) of sub-section (1) of section 3-A of the Uttar Pradesh Trade Tax Act, 1948 (UP Act No. XV of 1948), read with section 21 of the Uttar Pradesh General Clauses Act, 1904 (U.P. Act No. 1 of 1904) and in supersession of all previous notifications issued in this behalf, the Governor is pleased to declare that, with effect from January 17, 2000, the turnover in respect of the goods mentioned in column 2 of the List below shall be liable to tax at the point of sale specified in column 3 of the said List at the rate specified against each in column 4 thereof:

31. It would also be brought on record that item 29 of notification dated January 15, 2000 has been amended by substitution with effect from February 17, 2000 vide Notification No. KANI.-2-523/XI-9(231)/94-U.P. Act-15-48-Order-2000 dated February 17, 2000, published in Gazette dated February 18, 2000 and amended provision reads as under:

"WHEREAS, the State Government is satisfied that it is necessary so to do in public interest:

NOW, THEREFORE, in exercise of the powers under clause (e) of sub-section (1) of section 3A read with section 25 of the Uttar Pradesh Trade Tax Act, 1948 (U.P. Act No. 15 of 1948), and section 21 of the Uttar Pradesh General Clauses Act, 1904 (U.P. Act No. 1 of 1904), the Governor is pleased to make, with effect from January 17, 2000, the following amendment in Government Notification No. KA.NI.-2-101/XI-9(231)/94-U.P. Act-15-48-Order-2000, dated January 15, 2000 [S. No. 427], as amended from time to time:

AMENDMENT

In the List to the aforesaid notification,--

(1) the entries at serial numbers 69, 72, 73 and 74 shall be omitted;

(2) for entries at serial numbers 17, 23(i), 24, 29, 31(ii), 34, 39(i), 44, 53, 59, 60 and 64 the following entries respectively shall, column wise be substituted, namely:--

32. The cumulative reading of both the notifications would show that notification dated January 15, 2000 was given effect from January 17, 2000 and therefore, amendment made by notification dated February 17, 2000 is from the same date. In the contents of item No. 29, column 2, virtually there is no difference but real difference lies in the rate mentioned in column 4, which instead of eight per cent has been made five per cent.

33. It is contended that words "discarded, unserviceable, obsolete" should be read ejusdem generis with the word "old" so as to apply the aforesaid notification to such machineries which are virtually unusable, unworkable or unfunctional. However, I do not find any reason to read all these terms ejusdem generis since all these terms have a distinct meaning. Moreover, use of the word "or" between "unserviceable" and "obsolete" clearly shows intention of State that all these words have been used to cover different situations. If an old machinery is sold even if it is in running and usable condition, in my view, it would be covered by entry 29. Therefore, question D is answered in favour of the Revenue by holding that sale of generator is covered by entry 29 of notification dated January 15, 2000 as amended by notification dated February 17, 2000 with effect from January 17, 2000 but question No. E is answered in favour of the assessee by holding that rate of tax would be only five per cent and not eight per cent.

34. In the result, the revision is partly allowed and the impugned order dated October 15, 2004 passed by the Tribunal shall stand modified accordingly.

35. A copy of this order should be sent to the Tribunal forthwith so as to enable it to pass consequential order in the light of answer given herein on the questions formulated above. There shall be no order as to costs.