
(2008) 04 AHC CK 0239
In the Allahabad High Court

Shiva Electronics (India) Pvt. Ltd.

APPELLANT

Vs

Commissioner of Trade Tax

RESPONDENT

Date of Decision : 30-04-2008

Acts Referred:

Income Tax Act, 1961 — Section 119

Citation : (2009) 19 VST 438

Hon'ble Judges : Vikram Nath, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Vikram Nath, J.—This trade tax revision u/s 11 of the U.P. Trade Tax Act, 1948 (hereinafter referred to as, "the Act") has been filed by M/s. Shiva Electronics (India) Pvt. Ltd. (hereinafter referred to as, "the dealer") assailing the correctness of the judgment and order dated June 10, 1997 passed by the Trade Tax Tribunal, Bench-II, Ghaziabad, whereby it allowed the second appeal filed by the Department and restored the order passed by the assessing authority u/s 22 of the Act.

2. The dispute relates to the assessment year 1988-89. The original assessment order for the relevant assessment year was passed on April 29, 1991. The dealer had declared total taxable turnover as Rs. 1,15,68,248.50. The total tax liability determined in the original assessment order was Rs. 6,92,632.80. With regard to the inter-State sales made by the dealer without form "C" prior to September 30, 1988 tax at the rate of 12 per cent was charged. Whereas with regard to the Central sales made after October 1, 1988 till March 31, 1989 without form "C" tax at 13.2 per cent was charged which included the additional tax also. This distinction in the application of different rate of tax for different periods is not explained. As the dealer had already deposited Rs 6,76,382.60, demand for the balance amount of Rs. 16,250.20 was raised along with the interest at two per cent per month for the delayed period. Subsequently notice was given to the dealer u/s 22 of the Act on the ground that on the aforementioned inter-State

sales, without form "C" the dealer was liable to pay additional tax also at 1.2 per cent in view of Section 8(2A) of the Central Sales Tax Act, 1956 read with Section 3E of the Act and as this amount of the additional tax has been left out why it should not be recovered. Basis for issuing this notice was the judgment of the apex court dated January 16, 1992 in the case of Deputy Commissioner of Sales Tax v. Aysha Hosiery Factory (P) Ltd. reported in [1992] 85 STC 106 (SC) : [1992] UPTC 454. The dealer filed his objections to the show-cause notice u/s 22 of the Act, which did not find favour with the assessing authority and it revised the assessment and a revised demand for the additional tax on the inter-State sales without form "C" made prior to September 30, 1988 was raised vide order dated November 19, 1992. The dealer filed appeal which was allowed by the Deputy Commissioner (Appeals) vide judgment dated April 20, 1993. The appellate authority in view of the circular dated August 20, 1982 and the decision of this Court in the case of U.P. Ceramics and Potteries Limited v. Commissioner of Sales Tax reported in [1992] UPTC 1333 that additional tax would not be leviable on Central transactions, held that for the whole of the assessment year no additional tax could be charged on Central sales. Aggrieved by the same the Department filed second appeal before the Tribunal which has been allowed by the impugned judgment and order and after setting aside the order of the appellate authority, the assessment u/s 22 of the Act has been restored.

3. Aggrieved by the same the dealer has preferred this revision. The following question of law has been sought to be raised in this revision:

Whether, on the facts and in the circumstances of the case, the Tribunal is legally justified in reversing the order of the Deputy Commissioner (Appeals) and confirming the demand of additional tax u/s 22?

4. I have heard Sri Kunwar Saxena, learned Counsel for the dealer and Sri B. K. Pandey, learned Standing Counsel on behalf of the department.

5. Sri Saxena has submitted that the original assessment order did not suffer from any infirmity apparent on the record warranting rectification u/s 22 of the Act. According to him Section 3E was inserted in the U.P. Trade Tax Act whereby additional tax was sought to be imposed on a category of dealers who had a turnover of more than Rs. 10,00,000. Under the Central Act the tax which is applicable under the U.P. Act is also to be applied under the Central Act. However by means of a circular dated August 26, 1982 issued by the Commissioner of Trade Tax it was provided that while calculating the tax under the Central Act the additional tax will not be taken into consideration. It is further submitted that during the relevant assessment year and even at the time when the original assessment order was passed this circular was in force. According to him the circular was binding on the authorities and therefore, the assessing authority has rightly not applied the additional tax while calculating the liability under the Central Act.

6. It has further been submitted by Sri Saxena that the apex court in the case of

Deputy Commissioner of Sales Tax Vs. Aysha Hosiery Factory (P) Ltd. and Others, which related to the State of Kerala, the imposition of additional tax under the Kerala Additional Sales Tax Act was challenged wherein it was held that the additional tax would be applicable to the transactions covered by the Central Act. On the basis of the said decision, the circular dated August 26, 1982 issued by the Commissioner of Sales Tax was rescinded by means of another circular dated October 29, 1992. It was provided that the additional tax would be applicable to the transactions under the Central Act.

7. According to Sri Saxena this was not a case for rectification u/s 22 of the Act. u/s 22 of the Act scope is very limited and the authority could rectify any mistake in any order passed by it under this Act apparent on the record. He has further submitted that Section 3E of the Act did not prescribe any rate of tax on goods but it related to imposition of the additional tax at 10 per cent on the tax and that too on a limited category of dealers and not in general as a whole. It did not provide for rate of tax on goods but it provided that there would be an additional 10 per cent tax leviable on the tax on the dealers having turnover of more than Rs. 10,00,000.

8. He has relied upon the following decisions in support of his contention:

1. U.P. Ceramics and Potteries Limited, Ghaziabad v. Commissioner of Sales Tax reported in [1992] UPTC 1333.
2. Union of India v. Arviva Industries (I) Ltd. reported in [2007] 209 ELT 5 (SC).
3. Deva Metal Powders Pvt. Ltd. Vs. Commissioner, Trade Tax, U.P.,
4. State of Kerala and Others Vs. Kurian Abraham Pvt. Ltd. and Another,

9. On the other hand Sri Pandey, learned Standing Counsel, submits that the circular was contrary to the statutory provisions and therefore, was not binding on the authorities. By not following the circular, the Tribunal has not committed any error. He has further submitted that the decision of the apex court had interpreted the law and laid down the correct proposition to be applied and there was no question of prospective application of the said decision and therefore, the law having been clarified by the apex court the additional tax would be applicable to the transactions under the Central Act, the order passed u/s 22 of the Act as affirmed by the Tribunal is just and proper.

10. The questions which arise for consideration in this revision are firstly with regard to the binding force of the circulars issued by the Commissioner on the Department and secondly with regard to the scope of Section 22 of the Act.

11. It is not in dispute that during the relevant assessment year, i.e., 1988-89 and at the time when original assessment order was passed on April 29, 1991, the circular issued by the Commissioner of Trade Tax on August 26, 1982 providing that additional tax would not be leviable under the Central Act, was in existence.

12. It is also well-settled in view of the decisions relied upon by the counsel for the dealer that even an erroneous circular or the circular contrary to the statutory provisions would be binding upon the authorities of the Department. Reference may be made to the recent decision of the apex court in the case of *Arviva Industries* [2007] 209 ELT 5 (SC) wherein the apex court in paragraph 5 has referred to and approved the principles laid down by the apex court in the case of *Commissioner of Customs, Calcutta Vs. Indian Oil Corporation Ltd. and Another*, which read as follows:

1. Although a circular is not binding on a court or an assessee, it is not open to the Revenue to raise a contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the statute.

2. Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.

3. A show-cause notice and demand contrary to the existing circulars of the Board are *ab initio* bad.

4. It is not open to the Revenue to advance an argument or file an appeal contrary to the circulars.

13. The Commissioner is entrusted under rule 4 of the U.P. Trade Tax Rules, 1948 with the powers to issue instructions generally regulating the procedure to be followed in carrying out the provisions of the Act or the Rules. By virtue of the powers conferred by the Central Act the concerned State may make provisions for proper administration and application of the provisions of the Central Act. Thus the Commissioner of Trade Tax of the State can make provisions with regard to carrying out the provisions of the Central Act. The Commissioner having provided by means of the circular dated August 26, 1982 that additional tax imposed vide Section 3E of the State Act would not apply to the transactions under the Central Act was well within his powers and authority. This issue is also supported by a judgment of the apex court in the case of *State of Kerala and Others Vs. Kurian Abraham Pvt. Ltd. and Another*,

14. Paragraph 19 of the judgment in the case of *State of Kerala and Others Vs. Kurian Abraham Pvt. Ltd. and Another*, reads as follows : (at page 13 of VST)

One more aspect needs to be mentioned. Provisions of Section 3(1A) are similar to the provisions of Section 119(1) of the Income Tax Act, 1961 ("1961 Act") inasmuch as both the sections have used the expression "for the proper administration of this Act". According to "The law of Income Tax by Kanga and Palkivala", the Board is entrusted with the power to give effect to the provisions of the Act and to provide "fair and just administration" in the matter of imposition and collection of tax. This is where it becomes the incumbent duty of the Board to grant administrative relief in appropriate cases. In such exercise,

incidentally the Board has to consider the effect of the items enumerated in the entry. Therefore, it is not open to the State Government to contend that the Board in this case had entered into an area which is earmarked for the Legislature/executive. In our view, the said circular grants administrative relief to the business. It was entitled to do so. Therefore, it cannot be said that the Board had acted beyond its authority in issuing the said circular. One more reason needs to be stated. Whenever such binding circulars are issued by the Board granting administrative relief(s) business arranges its affairs relying on such circulars. Therefore, as long as the circular remains in force, it is not open to the subordinate officers to contend that the circular is erroneous and not binding on them.

15. This Court in 1992 itself while dealing with the similar controversy arising out of the interpretation of the same circular dated August 26,1982, in the case of U.P. Ceramics and Potteries Limited [1992] UPTC 1333 has held in so many words that the said circulars would be binding on the authorities during its period of currency. However it is only after its withdrawal that the additional tax could be levied under the Central Act from the date of such withdrawal only. Paragraph 7 of the said judgment reads as follows:

However, in my opinion this revision is liable to succeed on another point. It appears that a circular was issued by the Additional Sales Tax Commissioner, U.P., dated August 26,1982 in which it was mentioned that while calculating the Central sales tax the additional sales tax will not be taken into consideration. In my opinion, since the Department itself had decided that the additional sales tax under the U.P. Sales Tax Act will not be taken into consideration for calculating the Central sales tax, it is not open to the Department, as long as this circular is in force, to urge that additional sales tax has also to be added while calculating the Central sales tax. The Department having taken a particular stand through the aforesaid circular cannot be permitted to turn around and deny the benefit to the applicant so long as this circular is in force. However, once the circular is withdrawn the additional tax has to be added from the date of such withdrawal.

16. From the above discussion and the legal position which emerges it is beyond doubt that the Department would be bound by the circulars issued by the Commissioner even if it is not in consonance with the statute, till such time it is in existence and is not withdrawn or rescinded. The finding recorded by the Tribunal to the contrary therefore, cannot be accepted. The order of the appellate authority deserves to be restored.

17. Further proceeding to the second issue it may be noticed that Section 22 of the Act provides for rectification of a mistake in the order apparent on the record. Thus, what is required while exercising power u/s 22 of the Act is that mistake in the assessment order must be existing on the date when it was passed. In the present case on April 29,1991, the date of the original assessment order, the circular dated August 26, 1982 was in force and according to it additional tax was not leviable with regard to the transactions under the Central

Act. The decision of the Deputy Commissioner of Sales Tax Vs. Aysha Hosiery Factory (P) Ltd. and Others, as also the circular dated October 29, 1992 withdrawing the earlier circular dated August 26, 1982 are subsequent to the date of the original order of assessment. Thus, by any stretch of imagination it cannot be said that any mistake was apparent on the record on the date when the assessment order was made. There can be no question of rectification as such u/s 22 of the Act. Authorities cannot extend the scope of Section 22 of the Act for changing their opinion which may have occasioned on the ground of any subsequent development after the original assessment order was made.

18. The apex court, recently in the case of Deva Metal Powders Pvt. Ltd. Vs. Commissioner, Trade Tax, U.P., has reconsidered the scope of Section 22 of the Act. According to the apex court only a mistake apparent from the record is rectifiable. Relevant part of paragraph 10 of the Report reads as follows : (at page 755)

A bare look at Section 22 of the Act makes it clear that a mistake apparent from the record is rectifiable. In order to attract the application of Section 22, the mistake must exist and the same must be apparent from the record. The power to rectify the mistake, however, does not cover cases where a revision or review of the order is intended. "Mistake" means to take or understand wrongly or inaccurately; to make an error in interpreting; it is an error, a fault, a misunderstanding, a misconception. "Apparent" means visible ; capable of being seen; obvious; plain. It means "open to view, visible, evident, appears, appearing as real and true, conspicuous, manifest, obvious, seeming". A mistake which can be rectified u/s 22 is one which is patent, which is obvious and whose recovery is not dependent on argument or elaboration. In our view rectification of an order does not mean obliteration of the order originally passed and its substitution by a new order. . .

19. In view of the above discussion, it is apparent that the Tribunal committed an error while allowing the second appeal on the ground that the circular was not binding on the authorities as according to it the circular was not in accordance with law. The Tribunal has exercised powers beyond the scope of Section 22 of the Act. The view taken by the Tribunal is contrary to the various decisions of this Court as also the apex court referred to above and as such the order of the Tribunal cannot be sustained.

20. It is accordingly set aside and the appellate order is restored.

21. The revision stands allowed. Tax, if any, deposited by the dealer would be liable to be refunded in accordance with law.

There shall however be no order as to costs.