(2013) 11 AHC CK 0065

In the Allahabad High Court

Case No : Writ Tax No. 995 of 2007

Shubam Electronics (P.) Ltd. APPELLANT

Vs

State of U.P. RESPONDENT

Date of Decision : 26-11-2013

Acts Referred:

Citation : (2014) 70 VST 452

Hon'ble Judges : Surya Prakash Kesarwani, J;Sunil Ambwani, J

Bench : Division Bench

Judgement

1. We have heard Sri Praveen Kumar for the petitioner. Sri C.B. Tripathi appears for the respondent-Department. The petitioner is aggrieved by notice dated May 21, 2007, issued by Additional Commissioner, Grade-I, Trade Tax, Ghaziabad Zone, Ghaziabad, u/s 21(2) of the U.P. Trade Tax Act, 1948 (in short, "the Act") for reassessment on the ground that the turnover of the electronics goods sold by the petitioner, namely DVD and VCD players, were wrongly taxed at the rate of eight per cent under the residuary entry 75(ii) whereas the items are covered under entry 75(i)(a), which includes; television, video cassette recorder, video cassette player, satellite receiver, wireless set, video cassette, video games and electronics toys at the rate of 12 per cent.

2. Sri Praveen Kumar, appearing for the petitioner submits that in the assessment order for the assessment year 2003-04 dated March 30, 2006, the Deputy Commissioner (Tax Assessment)-12, Trade Tax, Ghaziabad--the assessing authority, taxed the turnover of Rs. 92,73,520 on imported DVD and VCD players (electronics) sold within State of U.P. at the rate of eight per cent. In respect of some of the consignments, namely, bill No. 47 dated February 14, 2004 and bill No. 52 dated March 15, 2004, the petitioner''s contention that the trade tax was wrongly charged at the rate of 12 per cent was accepted.

3. Sri Praveen Kumar submits that in the show-cause notice dated May 21, 2007, u/s 21(2) of the Act, the Additional Commissioner, Trade Tax, Ghaziabad, has taken a ground that the turnover of DVD and VCD players (electronics) is to be

charged at the rate of 12 per cent and not at the rate of eight per cent. Along with amendment application, the petitioner has annexed the order dated June 29, 2007 in which the Additional Commissioner has relied on an order dated February 27, 2007 passed by Commissioner, Trade Tax, U.P., u/s 35 of the Act, in which the Commissioner has clarified that VCD player, stereo cassette player, video cassette player, and video cassette recorder are taxable at 12 per cent. The Additional Commissioner rejected the objection raised by the petitioner that the technology used in video cassette player/recorder, i.e., VCP/VCR is different than the technology used in video compact disc player/digital videos disc player, i.e., VCD and DVD. The petitioner had submitted before the Additional Commissioner that for transmission and receiving, '''rotating head" technology is used in VCR and VCP, which are run with the help of cassettes, whereas in VCD and DVD, Infrared Diode is used for transmission and receiving based on laser beam technology; the information in VCR and VCP are stored in magnetic wave, with a small storage capacity, whereas VCD and DVD stores information based on BITE theory and its storage capacity is very high; the power consumption in VCR and VCP is high as compared to VCD and DVD; in VCP and VCR discreet components are used, whereas in VCD and DVD, large scale semi conductor devices are used. The VCP and VCR is based on analog technology, whereas VCD and DVD is based on digital technology, and thus two categories are different commodities.

4. The Additional Commissioner, prima facie, did not agree with the objections of the petitioner, and he relied on of circular of the Commissioner of Trade Tax u/s 35 of the Act dated February 27, 2007, in which it was held that the trade tax on the turnover of sale of VCD and DVD is to be charged at the rate on which trade tax was charged on the turnover of VCP/VCR.

5. It is submitted by Sri Praveen Kumar that the reassessment proceedings have been initiated on the basis of change of opinion, which is not permissible. He submits that the order of the Commissioner dated February 27, 2007, u/s 35 of the Act is not binding on other assessees, and thus the Department cannot charge trade tax at different rates on the turnover of same type of goods in respect of the petitioner than the other assessees. In any case, the view taken by the Commissioner dated February 27, 2007, u/s 35 of the Act is in prospective nature and would be applicable for the assessment years in future.

6. Sri Praveen Kumar has relied on a judgment of the Supreme Court in Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, , in which considering the question of income tax Act, it was held that there was conceptual difference between "power to review" and "power to reassess". The assessing officer has no power to review; he has the power to reassess. The reassessment has to be based on fulfillment of certain precondition and if the concept of change of opinion is removed, then in the garb of reopening the assessment, review would take place.

7. Sri C.B. Tripathi, appearing for the respondent-Department submits that the assessing authority in the assessments of the relevant year did not express any

opinion as to whether turnover on VCD and DVD players would be taxed under entry 75(ii) at the rate of eight per cent or under entry 75(i)(a) at the rate of 12 per cent. He simply accepted the return filed by the assessee on the taxability of the turnover of VCD and DVD players. He however accepted that on some consignment the tax was erroneously charged at higher rate of 12 per cent.

8. Sri C.B. Tripathi has relied on judgment rendered by three Judges of the Supreme Court in The Commissioner of Sales Tax, U.P. Vs. Bhagwan Industries (P) Ltd., Lucknow, , in which it was held by the Supreme Court as follows (page 299 in 31 STC):

The controversy between the parries has centered on the point as to whether the assessing authority in the present case had reason to believe that any part of the turnover of the respondent had escaped assessment to tax for the assessment year 1957-58. Question in the circumstances arises as to what is the import of the words ''reason to believe'', as used in the section. In our opinion, these words convey that there must be some rational basis for the assessing authority to form the belief that the whole or any part of the turnover of a dealer has, for any reason, escaped assessment to tax for some year. If such a basis exists, the assessing authority can proceed in the manner laid down in the section. To put it differently, if there are, in fact, some reasonable grounds for the assessing authority to believe that the whole or any part of the turnover of a dealer has escaped assessment, it can take action under the section. Reasonable grounds necessarily postulate that they must be germane to the formation of the belief regarding escaped assessment. If the grounds are of an extraneous character, the same would not warrant initiation of proceedings under the above section. If, however, the grounds are relevant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under the section. Whether the grounds are adequate or not is not a matter which would be gone into by the High Court or this court, for the sufficiency of the grounds which induced the assessing authority to act is not a justiciable issue. What can be challenged is the existence of the belief but not the sufficiency of reasons for the belief. At the same time, it is necessary to observe that the belief must be held in good faith and should not be a mere pretence.

9. Sri C.B. Tripathi also relied on judgments of the court in Sonpal Sanjay Kumar, Aligarh v. Sales Tax Officer, Sector-1, Hathras, Aligarh [1997] UFTC 73 and Shyam Babu Vaishya and Co. and Another Vs. Assistant Commissioner, Trade Tax and Others, , in which it was held that action u/s 21 of the Act can be taken for reassessment on the basis of material already on record at the time of original assessment if escapement of assessment to tax was due to concealment by the assessee or negligence and ignorance on part of assessing officer.

10. We have considered the submissions and have carefully gone through the orders passed by the authorities and notice of reassessment u/s 21(2) of the Act. We do not find that the assessing authority has recorded any finding or had

taken view either way as to whether VCD and DVD players, would attract tax at the rate of 12 per cent under entry 75(i)(a) or at the rate of eight per cent in the residual entry 75(ii), (iii). The assessing authority simply accepted the return filed by the assessee, and agreed that there was an error in respect of some of the consignments in which tax was erroneously charged at the rate of 12 per cent. He did not express any opinion with regard to taxability of the items so as to accept the argument that the proceedings of reassessment were based on change of opinion. We also do not accept the submission that the order of the Commissioner dated February 27, 2007 u/s 35 of the Act was the basis for initiating proceedings of reassessment u/s 21(2) of the Act. The order of the Commissioner u/s 35 of the Act would form the material, the basis on which the reassessments proceedings have been initiated is the wrong application of rate of tax by the assessing authority. The order of the Commissioner may not be conclusive in that regard but would definitely be a material to initiate proceedings u/s 21(2) of the Act. It will be open to the petitioner to establish by producing all such material, which may be relevant that VCD and DVD players are based on different technology and would not fall within the category of entry 75(i)(a), for the purpose of rate of tax, in the proceedings for reassessment. The writ petition is dismissed.