(2013) 04 AHC CK 0283

In the Allahabad High Court

Case No : Writ Tax No. 1208 of 2009

S.K. Traders APPELLANT

Vs

State of U.P. and Others RESPONDENT

Date of Decision : 29-04-2013

Acts Referred:

Citation : (2014) 67 VST 290

Hon'ble Judges : Ram Surat Ram (Maurya), J;Prakash Krishna, J

Bench : Division Bench

Advocate : Kunwar Saxena and Krishna Agarwal, for the Appellant; C.B. Tripathi, Special Counsel, for the Respondent

Final Decision : Allowed

Judgement

Prakash Krishna, J.—This is second round litigation in the High Court. Earlier the petitioner had filed Writ Petition No. 483 of 2002 which was decided on July 13, 2007 (S.K. Traders Vs. Additional Commissioner, Grade-I, Trade Tax and Assistant Commissioner (Assessment), Trade Tax,) by allowing the writ petition but the matter was restored back to the authority concerned to redecide the order granting approval u/s 21(2) of the U.P. Trade Tax Act (hereinafter referred to as "the Act"). The earlier order was set aside as it lacked reasons for granting sanction. After remand again, by the impugned order dated March 23, 2009 permission has been granted under the proviso to section 21(2) of the Act to reopen the assessment relating to year 1994-95 (U.P.). The background facts are as follows:

The petitioner is a trader of broken glass which has been carried in its own account as well as in commission agency. For the relevant assessment year 1994-95 the petitioner had sold broken glass for Rs. 1,30,27,655.45. The said broken glass was purchased within the State of Uttar Pradesh from unregistered dealers in its commission agency business from Kabaries. The Assistant Commissioner (Assessment), Trade Tax, Modinagar, Ghaziabad, the assessing authority accepted the account books of the petitioner and granted exemption to the turnover of such broken glass. Thereafter, respondent No. 2 sought permission from the Additional Commissioner, Grade-I, Trade Tax, Zone, Ghaziabad to reopen the assessment under the provisions of sub-section (2) of section 21 of the Act on the ground that the petitioner is deemed manufacturer and as such his turnover of broken glass is taxable.

2. Objections were filed by the petitioner against the above proposal of the assessing authority. Initially the permission was granted by the respondent No. 2 which was challenged in the earlier writ petition referred to above, successfully. After remand by the High Court, now again permission to reopen the assessment has been granted by the impugned order dated March 23, 2009 on the ground that broken glass is "waste product". Such broken glass comes out from the factory while filling the bottles. These broken glasses are returned to the dealers who had supplied the glass bottles which they in turn sold them to Kabaries and as such, the purchases of broken glass from Kabaries should be treated as "waste product".

3. Heard Sri Kunwar Saxena along with Sri Krishna Agarwal, learned counsel for the petitioner and Sri C.B. Tripathi, learned Special Counsel for the respondents.

4. The learned counsel for the petitioner submits that while granting permission, respondent No. 2 has travelled beyond scope of reassessment proceedings. Submission is that so far as the petitioner is concerned, broken glass is not a waste product but is waste material. Elaborating the argument, it was submitted that proposal was given to reopen the assessment on the ground that the petitioner is deemed manufacturer within the meaning of section 2(ee) of the Act, which has been found not legally correct by the High Court in earlier petition of the petitioner. Having failed to succeed on above point, there is no tangible reason to grant permission and the impugned order is based on conjuncture and surmises. It was also submitted that in the case of the petitioner itself, the matter had travelled up to the Tribunal for the assessment years 1990-91, 1991-92 and 1992-93 in Second Appeal Nos. 571 of 1999, 572 of 1999 and 573 of 1999 wherein the Tribunal confirmed the findings of the first appellate authority holding that the broken glass cannot be taxed at the hands of the petitioner at 10 per cent treating it to be waste material. The Department carried the matter further before this court. The aforesaid order of the Tribunal has been confirmed by this court in Trade Tax Revision No. 2889 of 2004.

5. In contra, the learned counsel for the respondents submits that the petitioner has made the purchases of broken glass from Kabaries and as such in view of the judgment of the apex court in the case of Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., and as of learned single judge in the case of Commissioner of Sales Tax, U.P. v. Kabar Khana, Turrmanpur, decided on October 12, 1984, the petitioner is liable to tax under the notification dealing with old, discarded, unserviceable plastic and glass goods being entry No. 32. Further reliance was placed on a Division Bench decision of this court in Lajja Ram Mahesh Dutt Vs. Commissioner of Sales Tax, , wherein it has been held that

burden to prove a particular fact lay upon the assessee to show that the purchases were made inside the State of U.P., u/s 12A of the Act.

6. Considered the respective submissions of the learned counsel for the parties and perused the record.

7. To begin with, it may be stated that the assessment of the petitioner was completed by accepting the account books meaning thereby, the case of the petitioner that it has made purchases of the broken glass from Kabaries within the State of U.P., was accepted by the assessing authority. Permission was sought and was granted to reopen the assessment on the ground that the petitioner is a "deemed manufacturer" within the meaning of section 2(ee) of the Act, by respondent No. 2, earlier. However, this portion of the order granting permission treating the petitioner as deemed manufacturer has been set aside by this court and the judgment is reported in S.K. Traders Vs. Additional Commissioner, Grade-I, Trade Tax and Assistant Commissioner (Assessment), Trade Tax, . The matter was remanded on the ground that the order did not contain reasons. The sanctioning authority has granted permission in question on the ground that the broken glass is obtained from the glass bottles which are broken by the factory at the time of their fillings and thus, broken glass is waste product of the factory. The said broken glass under the contract with the supplier is returned to the suppliers who sell them to Kabaries. It is difficult to obtain the broken glass from any other source. The purchases of broken glass from Kabaries are waste product.

8. Now, we have to consider as to whether on the basis of the said reasoning, it cannot be said that the turnover of the petitioner has escaped or not.

9. u/s 21 of the Act, action for taking reassessment proceedings can be taken where the turnover of a dealer has escaped assessment, not necessarily the escapement of assessment to tax was due to concealment by the assessee and ignorance on the part of the assessing officer is good ground to reopen the assessment, if the turnover has escaped assessment as held in the case of Shyam Babu Vaishya and Co. and Another Vs. Assistant Commissioner, Trade Tax and Others, . One of the conditions for reopening of the assessment is that the assessing officer should have reason to believe that turnover of the dealer has escaped assessment. Reason to believe is not equivalent to have a vague feeling that the turnover of the dealer has escaped assessment. There should be some material in possession of the assessing authority to form a belief in good faith that the turnover has escaped assessment; it cannot be merely a pretence. It has been laid down that it is open to the court to examine whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section 21 of the Act. Belief of assessing authority cannot be purely subjective. It must be held upon relevant material, howsoever meager. Reasons for the formation of the belief must have rational connection or live link between the material coming in possession of the assessing authority and the escapement of turnover of the

assessee from assessment in the particular year or part of the year. There should be some reasonable ground for the assessing officer to form an opinion objectively that the turnover has escaped assessment.

10. Coming to the facts of the present case, a bare perusal of the impugned order would show that it is based on hypothesis that broken glass in huge quantity cannot be found out except from filling factories. This approach is wholly conjectural and is not based upon any material.

11. Be that as it may, the petitioner is a trader and is not a manufacturer actual or deemed and his case that he has purchased the broken glass from Kabaries, has not been disputed either in the original assessment proceedings or in the reasons recorded in the impugned order.

12. A Division Bench decision of this court in the case of J & J Enterprises v. Commissioner, Trade Tax, U.P., Lucknow [1996] 102 STC 51 (All) : [1996] UPTC 471, has held that there is distinction between "waste product" and "waste material". Relevant paragraph is reproduced below (page 53 in 102 STC):

Shri Divedi, learned Additional Advocate-General, relying upon a decision of the learned single judge in the case of Commissioner of Income Tax Vs. Tribeni Tissues Ltd., , submits before us that it is not necessary that the old PVC shoes and chappals purchased by the petitioner should be waste product for the manufacturer and it is enough if they constitute waste material. We are not impressed by this submission, inasmuch as, the words ''waste product'' and ''waste material'' have different connotations. When we talk of waste product then it is necessary to co-relate that with the manufacturing process of a manufacturer but the same is not necessary in the case of waste material. Anything lying waste may be said to be waste material but they cannot partake the character of being waste products...

13. In the above case, the same entry, i.e., entry No. 32 of the notification dated September 7, 1981 was up for consideration. The said notification is reproduced below:

14. The facts of the case on hand are parallel to the facts of the case of J & J Enterprises [1996] 102 STC 51 (All) : [1996] UPTC 471.

15. Strong reliance was placed by the learned counsel for the respondents on a single judge decision of this court in the case of Commissioner of Sales Tax, U.P. v. Kabar Khana, Turrmanpur, decided on October 12, 1984. It is a short judgment having six paragraphs in all. Learned single judge of this court without giving any its own reasoning has allowed the revision of the Department ex parte by simply observing that the Tribunal has committed error in ignoring the aforesaid notification dated September 7, 1981. The relevant paragraphs are reproduced below:

4. None has appeared on behalf of the assessee.

5. I have given my careful consideration to the contentions raised by the standing counsel appearing for the Department and I am of the opinion that the Tribunal committed an error in ignoring the aforesaid which clearly fixes the liability of sales tax of old and discarded and unserviceable goods on sales to consumers.

16. The High Court has not given any reason and had no occasion to examine the differences, if any, between the waste product and waste material as the same was not either argued or placed before the Department. This being so, he relied upon the decision as a precedent. There being no ratio decidendi.

17. Strong reliance was placed on Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., . The aforesaid decision has been considered by a Division Bench in the case of J & J Enterprises [1996] 102 STC 51 (All) : [1996] UPTC 471. Point of tax involved in the case of Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., was of purchase tax. Here, in the case on hand, reasons recorded are with regard to liability of the petitioner, if any, to the trade tax/sales tax and not of purchase tax. The reason does not contain that the purchases made by the petitioner have escaped assessment. The reasons proceed on the ground that the sale of broken glass is taxable at the hand of the petitioner on the point of sale. Therefore, the aforesaid decision has no application to the facts of the present case. The other decision in the case of Lajja Ram Mahesh Dutt Vs. Commissioner of Sales Tax, has hardly any application to the facts of the present case as the initial burden that the turnover of the petitioner has escaped assessment is on the Department, to cloth it with power to initiate the reassessment proceedings.

18. In view of the above discussions, we find sufficient substance in the argument of the petitioner that the reasons recorded in the impugned order are not sufficient to form an opinion that the turnover of the petitioner has escaped assessment. It is based on conjecture and surmises. The sanction granted by the impugned order to reopen the assessment cannot be allowed to stand. In the result, the writ petition succeeds and is allowed. The impugned order dated March 23, 2009 is, hereby, quashed. No order as to costs.

