(2010) 01 AHC CK 0040

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 1407 of 2005

Super Chemicals	APPELLANT
Vs	
Additional Commissioner, Grade I, Trade Tax, Agra Zone, Agra and Others	RESPONDENT

Date of Decision : 21-01-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 147, 147(a), 148
Penal Code, 1860 (IPC) — Section 26
Uttar Pradesh Trade Tax Act, 1948 — Section 21, 21(1), 21(2), 22, 34(1)(a)

Citation : (2012) 49 VST 139

Hon'ble Judges : S.C. Nigam, J;Rajes Kumar, J

Bench : Division Bench

Advocate : R. R. Agarwal, for the Appellant; S. P. Kesarwani, for the Respondent

Final Decision : Allowed

Judgement

Rajes Kumar, J.—By means of the present writ petition, the petitioner is challenging the order passed u/s 21(2) of the U. P. Trade Tax Act (hereinafter referred to as, "the Act") dated August 6, 2005, passed by the Additional Commissioner (Assessment), Grade I, Trade Tax, Agra, for the assessment year 1999-2000 and in pursuance thereof, the notice issued u/s 21 of the Act dated September 15, 2005 issued by the Deputy Commissioner (Assessment) III, Trade Tax, Agra, annexure 6 to the writ petition. The petitioner is a registered dealer and was carrying on the business of liquid glucose, etc. During the course of the assessment proceedings for the assessment year 1999-2000, the petitioner had admitted the tax liability on the liquid glucose at 7.5 per cent for the period April 1, 1999 to January 16, 2000 and at eight per cent for the period January 17, 2000 to March 31, 2000, which is applicable to the food product. The assessing authority while passing the assessment order on August 20, 2001 levied the tax at 7.5 per cent on the turnover of Rs. 41,76,447 for the period April 1,1999 to January 16, 2000 and at eight per cent on the turnover of Rs. 16,41,710 for the period January 17, 2000 to March 31, 2000. It appears that the limitation of four years had expired and, therefore, under the proviso of section 21(2) of the Act notice u/s 21 of the Act was issued by the Deputy Commissioner (Assessment) III, Trade Tax, Agra on the ground that in accordance with law, the rate of tax on the turnover of liquid glucose should be taxable as an unclassified item.

2. The petitioner filed the reply and stated that in the case of Spyers Enterprises, Agra, the Tribunal vide its order dated May 31,1999 and November 19, 2003 has treated the liquid glucose as food product. The Additional Commissioner vide order dated August 6, 2005, has granted the approval to initiate the proceedings u/s 21 of the Act beyond the period of four years on the ground that against the decision of the Tribunal in the case of Spyers Enterprises, Agra, the Revenue has filed the revision, which is pending and, therefore, he concluded that the tax which has been assessed by the assessing authority is not in accordance with law. In pursuance thereof, the notice u/s 21 of the Act has been issued by the assessing authority.

3. Heard Sri R. R. Agarwal, Learned Counsel for the petitioner and Sri S. P. Kesarwani, learned standing counsel.

4. The Learned Counsel for the petitioner submitted that the proceedings u/s 21 of the Act can only be initiated when there is material on the basis of the belief is formed about the escaped assessment. He submitted that neither there was any material before the Additional Commissioner to grant the approval u/s 21(2) of the Act to initiate the proceedings beyond the period of four years nor there was any material before the assessing authority to form the belief that there was escaped assessment. The proceeding has been initiated on account of change of opinion in the absence of any material.

5. Sri S. P. Kesarwani, learned standing counsel, submitted that liquid glucose cannot be said to be food stuff. He submitted that rate of tax has been wrongly applied in the assessment year, therefore, there was escaped assessment and the proceeding has been rightly initiated.

6. We have perused the impugned orders and considered the rival submission.

7. Section 21(1) and (2) of the Act reads as follows :

21. Assessment of tax on the turnover not assessed during the year.--(1) If the assessing authority has reason to believe that the whole or any part of the turnover of the dealer; for any assessment year or part thereof, has escaped assessment to tax or has been under-assessed or has been assessed to tax at a rate lower than that at which it is assessable under this Act, or any deductions or exemptions have been wrongly allowed in respect thereof'' the assessing authority may, after issuing notice to the dealer and making such inquiry as it may consider necessary, assess or reassess the dealer or tax according to law :

Provided that the tax shall be charged at the rate at which it would have been charged had the turnover hot escaped assessment, or full assessment, as the case may be.

Explanation I.--Nothing in this; sub-section shall be deemed to prevent the assessing authority from making an assessment or full assessment to the best of its judgment.

Explanation II.--For the purposes of this section and section 22, ''assessing authority'' means the officer or authority who passes the earlier assessment order, if any, and includes the officer or authority having jurisdiction for the time being to assess the dealer.

Explanation III.--Notwithstanding the issuance of notice under this sub-section, where an order of assessment or reassessment is in existence from before the issuance of such notice it shall continue to be effective as such, until varied by an order of assessment or reassessment made under this section in pursuance of such notice.

(2) Except as otherwise provided in this section, no order of assessment or reassessment under any provision of this Act for any assessment year shall be made after the expiration of three years from the end of such year or March 31, 1996, whichever is later :

Provided that if the Commissioner on his own or on the basis of reasons recorded by the assessing authority, is satisfied that it is just and expedient so to do authorises the assessing authority in that behalf, such assessment or reassessment may be made after the expiration of the period aforesaid but not after the expiration of eight years from the end of such year notwithstanding that such assessment or reassessment may involve a change of opinion :

Provided further that the assessment or reassessment for the assessment year 1987-88 may be made by March 31, 1993 :

Provided also that if the eligibility certificate granted u/s 4A has been amended or cancelled by the Commissioner under sub-section (3) of section 4A, the order of assessment or reassessment may be made within one year from the date of receipt by the assessing authority of the copy of the order amending or cancelling the aforesaid certificate or by March 31, 1995, whichever is later :

Provided also that the assessment or reassessment for the assessment year 1989-90 may be made by March 31, 1995.

8. Perusal of section 21(2) of the Act reveals that the proceedings can only be initiated if there is reason to believe that there is escaped assessment. The word "reason to believe" came up for consideration before the apex court in several decisions. Apex court held that the belief must be formed on the basis of the material, which has a nexus to the escaped turnover.

9. In the case of Johri Lal (H.U.F.), Agra Vs. The Commissioner of Income Tax, , the apex court has held as follows :

The formation of required belief by the income tax Officer before proceedings can be validly initiated u/s 34(1)(a) is a condition precedent: The fulfilment of this condition is not a mere formality, it is mandatory, and failure to fulfil that condition would vitiate the entire proceedings. Further, the formation of the required belief is not the only requirement : The officer is further required to record his reasons for taking action u/s 34(1)(a) and obtain the sanction of the Central Board or the Commissioner, as the case may be.

10. In Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, , the honourable Supreme Court held that the reasons for the formation of the belief contemplated by reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the income tax Officer and the formation of his belief. The honourable Supreme Court further observed that though it is true that the court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the income tax Officer on the point as to whether action should be initiated for reopening the assessment yet at the same time we have to bear in mind that it is not any and every material, however, vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment.

11. The question whether the assessing officer had reasons to believe is a question of jurisdiction, a vital thing, which can always be investigated by the court under article 226 of the Constitution as held in Daulatram Rawatmal Vs. Income Tax Officer and Another, , JAMNA LAL KABRA Vs. Income Tax OFFICER, B WARD, BAREILLY, AND OTHERS., , Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, , C.M. Rajgharia and Another Vs. Income Tax Officer and Others, and Madhya Pradesh Industries Ltd. Vs. Income Tax Officer, Special Investigation Circle ''B'', Nagpur, .

12. If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the assessing officer could not have reason to believe. In such a case, the notice issued by him would be liable to be struck down as invalid as held in the case of Ganga Saran and Sons P. Ltd. Vs. Income Tax Officer and Others, .

13. In the case of Indra Prastha Chemicals (P) Ltd. and Others Vs. Commissioner of Income Tax and Another, , this Court held as follows (page 119 in 271 ITR) :

Thus, it is well-settled that the ''reason to believe'' u/s 147 must be held in good faith and should have a rational connection and relevant bearing on the formation of the belief and should not be extraneous or irrelevant. Further, this Court in proceedings under article 226 of the Constitution of India can scrutinize the reasons recorded by the Assessing Officer for initiating the proceedings u/s 147/148 of the Act. The sufficiency of the material cannot be gone into but relevancy certainly be gone into.

14. In the case of Royal Trading Co., Saharanpur v. Trade Tax Officer, Saharanpur reported in [2000] 16 NTN 290, the Division Bench of this Court while considering section 21 of the U. P. Trade Tax Act held as follows :

Therefore, action u/s 21 of the Act cannot be taken on the whims of the assessing officer by resorting to conjecture of imagination. He has to have before him the facts which are germane to the issue and on the basis of which a rational man can have reason to believe that the whole or any part of the turnover has escaped assessment or has been under-assessed. In Income Tax Officer and Others Vs. Madnani Engineering Works Ltd., Calcutta, , the honourable Supreme Court while dealing with somewhat similar provision u/s 147 of the income tax Act, 1961 held that the existence of reason to believe on the part of the ITO was a justifiable issue and it was for the court to be satisfied whether in fact the ITO had reason to believe that income had escaped assessment. In Joti Parshad v. State of Haryana [1992] 6 JT 94 (SC), the honourable Supreme Court while dealing with the meaning of expression ''reason to believe'' in section 26 of the Indian Penal Code held that the reason to believe is not the same as suspicion and a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning conclude or infer regarding the nature of the thing concerned. In Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, , the honourable Supreme Court held that the reasons for the formation of the belief contemplated by section 147(a) of the income tax Act, 1961, for the reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the income tax Officer and the formation of this belief. The honourable Supreme Court further observed that though it is true that the court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the income tax Officer on the point as to whether action should be initiated for reopening the assessment yet at the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. This view was reiterated by the honourable Supreme Court while dealing with the provisions of section 21 of the U. P. Trade Tax Act in The Commissioner of Sales Tax, U.P. Vs. Bhagwan Industries (P) Ltd., Lucknow, in which it was held that 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 this 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 this section.

15. Perusal of the order of the Additional Commissioner reveals that there was no

material on the basis of which belief has been formed that tax has been wrongly assessed on the liquid glucose except that according to his view the correct rate of tax has not been applied by the assessing authority and the order of the Tribunal is subject-matter of consideration before this Court. The assessing authority in the notice u/s 21 of the Act has also not recorded any reason on the basis of which belief of escaped turnover has been formed.

16. On the facts and circumstances, we are of the view that the proceedings u/s 21(2) of the Act is without any material on the basis of which belief of escaped assessment could be formed, namely, that the tax on the liquid glucose has been wrongly assessed to tax.

17. In the facts and circumstances, the order u/s 21(2) of the Act passed by the Additional Commissioner, dated August 6, 2005 and consequential notice u/s 21 of the Act dated September 15, 2005 issued by the Deputy Commissioner (Assessment) for the assessment year 1999-2000, annexure 6 to the writ petition, are liable to be set aside. In the result, the writ petition is allowed. The order of the Additional Commissioner dated August 6, 2005 and the consequential notice dated September 15, 2005, annexure 6 to the writ petition, are hereby quashed.