(2000) 08 AHC CK 0145

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 858 of 1995

Swarup Industries and Another APPELLANT

Vs

State of Uttar Pradesh and Others RESPONDENT

Date of Decision : 07-08-2000

Acts Referred:

Central Sales Tax Act, 1956 — Section 8(1)
Companies Act, 1956 — Section 617
Uttar Pradesh Trade Tax Act, 1948 — Section 15A(1), 2, 3A, 3D, 3F

Citation : (2000) 08 AHC CK 0145

Hon'ble Judges : Onkareshwar Bhatt, J;M. Katju, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. Heard Sri Bharatji Agarwal learned Counsel for the Petitioner and the learned Standing Counsel.

2. The Petitioner No. 1 is a registered partnership firm of which Petitioner No. 2 is one of the partners. The Petitioner No. 1 is a registered under both U.P. and Central Sales Tax Act. The Petitioner firm is carrying on the business of manufacture and sale of R.C.C. Spun Pipes and Collars etc. These goods are manufactured and sold by the Petitioner to various government departments including the Public Works Department, Sharda Nahar Samadesh, Lucknow and also to the Chief Development Officer Bareilly/ Lakhimpur-Kheri/ Shahjahanpur/ Moradabad.

3. For the relevant assessment years 1990-91 to 1993-94 the Petitioner sold the R.C.C. Spun Pipes and collars manufactured by them to various government departments. In all the invoices/bills raised by the Petitioner against these government departments it is mentioned that the sales are against form III-D. Since the Petitioner made sales to Government Departments it charged concessional rate of tax at the rate of 4% plus surcharge. In paragraph 7 of the petition it has been held that the Petitioners have been writing regularly to all

these government departments to which it made sales including the departments of Respondents 3 to 5 to issue form III-D but in spite of the best efforts forms III-D were not given by the Departments of Respondents 3 to 5. A summary list of sales made by the Petitioner in the State of U.P. for the relevant assessment years against form III D has been annexed as Annexure 1 to the writ petition. The Petitioner sent several reminders to the Departments of Respondents 3 to 5 but despite that form III D were not issued to the petition.

4. In this connection reference may be made to Section 3G(l)j of the U.P. Trade Tax Act which reads as follows:

3-G Special rate of tax on certain sales (1) Notwithstanding anything contained in Section 3A or Section 3D or Section 3F and subject to the provisions of Sub-section (2) and such conditions and restrictions, if any, as may be specified by the State Government, by notification, tax on the turnover of sales of goods to a department of the Central Government or of a State Government or to a Corporation or undertaking established or constituted by or under a Central Act or an Uttar Pradesh Act, or to a Government Company as defined in Section 617 of the Companies Act, 1956 (not being a Nagar Nigam, Nagar Palika Parishad, Zila Panchayat, Nagar Panchayat, Cantonment Board, a University or an educational institution or an institution managed for the time being by an authorised controller) shall , if the dealer furnishes to the assessing authority a certificate obtained from such department or a declaration obtained from such Corporation, Undertaking or Company in such form and manner and within such period as may be prescribed, be levied and paid at the rate for the time being specified in Sub-section (1) of Section 8 of the Central Sales Tax Act, 1956, or at such rate as the State Government may, by notification, specify in relation to any sales, unless the goods are taxable under any other section of this Act at a rate lower than the said rate.

5. The above provision indicates that when a person makes sale to a government department it is entitled to get form III-D.

Section 8A(2b) of U.P. Trade Tax Act states as follows:

Where trade tax on sale of goods is payable on any turnover by a dealer (including a commission agent or any of the persons mentioned in the explanation to Clause (c) of Section 2 registered under this Act, such a dealer may recover an amount, equivalent to the amount of trade tax on sale of goods payable, from the person to whom the goods are sold by him. Whether on his own behalf or an behalf of his principal.

6. The above provision indicates that when trade tax is payable by a dealer it can recover the amount from the person to whom goods are sold. Since sales were made to the government departments which were covered by Section 3G the Petitioner can realise the tax only at the rate of 4% plus surcharge, since all such sales were made against form III-D, which were to be supplied by the departments of Respondents 3j to 5 to the Petitioner.

7. In paragraph 14 and 15j of the writ petition it is alleged that in view of Section 15A(1)(qq) of U.P. Trade Tax Act the Petitioner could not have realised tax from these department in excess of three times of the tax in excess of 4% other wise the Petitioner would have been liable to penalty to the extent of three times of the tax in excess of 4%. In paragraph 17 of the writ petition it is alleged that the Petitioner made several reminders to the departments concerned to issue form III-D to the Petitioner but the same were not issued, with the result that a huge illegal liability is being created against the Petitioner by the Trade Tax Officer, Sector 3, Bareilly, Respondent No. 2, True copies of the reminders are annexed as Annexures 2, 3 and 4 to the writ petition. In paragraph 19 of the writ petition it is alleged that despite these reminders neither forms III-D were supplied nor any reply sent by these Departments. In paragraph 20 of the writ petition it is alleged that in view of non-issuance of form III-D a huge illegal liability has been created against the Petitioner for the assessment years 1990-91 to 1993-94. In paragraph 21 of the writ petition it is alleged that Petitioner has filed appeal against the assessment order but the appellate authority is not admitting the appeal unless the tax assessed on account of non-furnishing of forms III-D is deposited by the Petitioner which the Respondent No. 6 is treating as the admitted tax for the purpose of filing of ;the appeals.

8. Learned Counsel for the Petitioner has relied on the decision of this Court in Tracto Auto Industries Pvt. Ltd. v. Union of India and Ors. 1991(1) UPTC 241 where it has been held that there is statutory obligation cast upon the purchasing dealer to issue the declaration forms to the selling dealer where the purchases were made against form III-B. He has also relied on the decision in G.G. Industries Pvt. Ltd. v. Union of India 1994 (2) UPTC 1032 and on the decision of Garg Plastics, Kanpur v. Pradeshiya Co-operative Dairy Federation Ltd. 1995 UPTC 513 to the same effect. Copies of these judgments have been annexed as Annexure 5, 6 and 7 to the writ petition. In M/s Huma Pipes v. State of U.P., writ petition No. 857 of 1995 decided on 11.7.1997 a division bench of this Court directed that forms III-D be issued to the Petitioner in respect of sales to government departments.

9. A counter affidavit has been filed and in paragraph 6 of the same it has been alleged that Assessee could have charged the standard rate of tax from government departments who had not issued form III-D. In paragraph 10 of the counter affidavit it is alleged that in the absence of form III-D the tax liability as ascertained by the assessing authority is correct.

10. A rejoinder affidavit has been filed. In paragraph 3 of the rejoinder affidavit it is stated that Respondent No. 4 the Chief Administrator, Sharda Nahar Samadesh Lucknow has issued forms III-D after the filing of the present writ petition when notices were served on Respondent No. 4 as per the list enclosed as Annexure C.A. 1 to the counter affidavit. However, in respect of sales made by the Petitioner during the assessment year 1990-91 the Respondent No. 4 has not issued form III-D to the Petitioner. A complete list of the bill number, date and

the sales made to the Respondent No. 4 during the assessment year 1990-91 is Annexure R.A. 1 to the rejoinder affidavit.

11. As regards Respondents 3 and 5 it is alleged in paragraph 4 of the rejoinder affidavit that they have not issued the requisite forms III-D for the assessment year 1990-9lj to 1993-94. No counter affidavit has been filed on behalf of the Respondents 3 and 5, and they have not issued form III-D to the Petitioner so far. The Petitioner did not realise any tax in excess of 4% from Respondents 3 and 5 since they were sales to government departments. A complete list of sale made by the Petitioner to the Respondent No. 5 giving the full details is Annexure R.A,3.

12. In our opinion, the stand taken by the Respondent in the counter affidavit is wholly misconceived and not valid. When a sale is made to a Government department in our opinion form III-D has to be issued to the selling dealer in view of Section 3 G. This is a statutory duty and in our opinion the ratio of the decisions in M/s Tracto Auto Industries Pvt. Ltd. (Supra), M/s G.G. Industries Pvt. Ltd. (supra) and M/s Garg Plastics (supra) and M/s R.S. Huma Pipes (supra) squarely apply to the facts of the present case also.

13. No doubt Section 3-G does not expressly mention that form III-D has to be issued by the government department to the seller, but in our opinion this duty is clearly implied by Section 3-G. In modern Proteins Ltd. v. Food Corporation of India 1983 (52) S.T.C. the Andhra Pradesh High Court held that even though there is no express provision imposing a statutory obligation upon the Food Corporation to issue form C there is an implied obligation to issue such forms. The Court held ''when the Act envisages that only a tax of 4% is leviable in the case of inter State Sales and not 10% under the A.P. General Sales Tax Act, and entitles the registered dealer to pay this concessional rate of tax and prescribes the mode by which he can claim the concessional rate, it could not have been the intention of the legislature to defeat this provision at the sweet will and pleasure of the purchaser of the goods. We are in respectful agreement with this decision.

14. Similarly, in L. Hirday Narain Vs. Income Tax Officer, Bareilly, the Supreme Court observed; If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling the Courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right- public or private-of a citizen''. The Supreme Court relied on the decision of the House of Lords in Julius v. Bishop of oxford (1980) 5 A.C. 214 for the proposition that a power is often coupled with an implied duty, and such duty can be enforced by a mandamus. This view has also been taken by the Supreme Court in Comptroller and Auditor General of India v. K.S. Jagannathan AIR 1997 SC 537.

15. Hence in our opinion Section 3-G imposes a duty on the government departments to issue form III-D to the seller whenever sales are made to it.

16. The writ petition is hence allowed and a mandamus is issued to the Respondents 3 to 5 to issue forms III-D to the Petitioner for the relevant assessment years as prayed for within one month of production of a certified copy of this order before the authority concerned.

