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(2011) 11 AHC CK 0483

In the Allahabad High Court

Case No : Writ Tax No. 1257 of 2007

Swastik Fragrances Limited — APPELLANT

Vs

State of U.P. and Others — RESPONDENT

Date of Decision : 14-11-2011

Acts Referred:
Constitution of India, 1950 — Article 301, 304(b)

Citation : (2012) 53 VST 317

Hon'ble Judges : Sunil Ambwani, J;Kashi Nath Pandey, J

Bench : Division Bench

Advocate : Bharat Ji Agrawal, assisted by Piyush Agarwal, for the Appellant; S.P. Kesarwani, Additional Chief Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

1. We have heard Sri Bharat Ji Agrawal, learned senior counsel, assisted by Sri Piyush Agarwal for the petitioners. Sri S. P. Kesarwani, Additional Chief Standing Counsel appears for the State-respondents. The petitioners are registered partnership firm (in Writ Tax No. 1257 of 2007); a public limited company (in Writ Tax No. 1258 of 2007) and a private limited company (in Writ Tax No. 1357 of 2007), engaged in the business of manufacture and sale of Rajnigandha (pan masala), "tulsi (tobacco mixed pan masala) and "tulsi" (tobacco mixed pan masala), respectively. By U.P. Tax on Luxuries Ordinance, 1994, luxury tax was imposed on the sale of pan masala and gutka (without tobacco), with effect from June 15, 1994. The constitutional validity of the Ordinance was challenged in this court in W.P. No. 619 of 1994 (Varshney General Sales and Another Vs. State of U.P. and Others,). A Division Bench of this court allowed the writ petition on November 2, 1994, declaring the levy of luxury tax to be ultra vires the Constitution of India and also violative of article 301, which is not saved by article 304(b) of the Constitution of India. The judgment was challenged in a special appeal by the State of U.P. in the Supreme Court, which was dismissed.

2. It is alleged that in Writ Tax No. 1257 of 2007, the petitioner/s M/s. Swastik

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Fragrances Ltd. deposited a sum of Rs. 16,91,740 as luxury tax for the month of July 1994 and Rs. 19,20,661 for August 1994 from its own pocket, without realizing the same from any of the customers and hence, was entitled to refund. In Writ Tax No. 1258 of 2007, M/s. Dharampal Satyapal Limited claims to have deposited Rs. 77,55,525 in July 1994 and in Writ Tax No. 1357 of 2007, M/s. Dharampal Satyapal Sons Pvt. Limited deposited Rs. 61,38,106 for July 1994 in August 1994 and Rs. 39,39,251 for August 1994 in September 1994, towards luxury tax, without having realized the same from the consumers.

3. W.P. No. 112 of 1996 filed by Swastik Fragrances Ltd. v. State of U.P. filed by the petitioners, was allowed by this court on April 9, 2007, with directions for an enquiry to be conducted to record as to whether the petitioner had collected the luxury tax from, the consumers and if so, in the case of refund to the petitioner, whether and why it will not be possible for the same to be refunded to the consumers from whom it was collected. This enquiry was to be made on the exceptions to the principles of unjust enrichment, laid down by the Supreme Court in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, .

4. In reply to the notices given to the petitioners on July 31, 2007, the petitioners submitted a reply, stating therein, in reply to para No. 4 as follows:

That in reply to para No. 4, we submit that the manufacturing profit and loss account for all the products of the company is prepared in a consolidated statement and there is no provision for showing the cost price and selling price of various products separately. We have already filed our complete final accounts along with balance sheet which have been prepared and audited as per statutory provisions.

5. The Deputy Commissioner (Commercial Tax), Noida, by its separate orders dated August 13, 2007, challenged in Writ Tax Nos. 1257 of 2007 and 1258 of 2007 and by order dated August 20, 2007, challenged in Writ Tax No. 1357 of 2007, rejected the applications for refund on common grounds, giving rise to these writ petitions.

6. The M/s. Somaiya Organics (India) Ltd. Vs. State of Uttar Pradesh and Another, , made enquiries as to whether the petitioner had passed on the burden of tax on the consumers. He recorded the findings that the luxury tax has been deposited by the petitioner for the months of July 1994 and August 1994. The luxury tax for the month of September, 1994 was not deposited. The entire luxury tax deposited has been shown in the profit and loss account. The petitioners did not separately disclosed charge any amount as luxury tax in its bills. They however did not disclose the cost of the units product-wise, nor the basis on which its sale prices were determined and thus, the petitioner did not disclose the source from which they deposited the amount. They did not disclose the gradients which were counted in the determination of the sale price. The Deputy Commissioner thus assumed that the luxury tax was charged along with in the profits included in the sale price. The Deputy Commissioner (Commercial

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Tax), Noida, further observed that since the petitioner has shown the amount of tax in the profit and loss account on expenditure side, it is clear that the goods were sold (tobacco/tobacco products), including the luxury tax.

7. Sri Bharat Ji Agrawal, learned counsel for the petitioner, submits that once the levy of luxury tax was declared to be unconstitutional, without any prospective effect, the entire amount deposited by the petitioners was liable to be refunded. The enquiry made by the Deputy Commissioner (Commercial Tax), Noida, in pursuance of the directions of this court, was limited to the fact whether the petitioner had deposited the luxury tax declared as ultra vires after collecting it from the consumers. The question of refund thereafter was to be looked into with the possibility whether and why it may not be possible for the same to be refunded to the consumers from whom it was collected. He argues that the petitioners, submitted the entire books of accounts, and had clearly stated that they did charge luxury tax from the consumers and had deposited it for the months of July 1994 and August 1994. The traders had also shown the deposit of tax towards the expenditure side in their profit and loss accounts. These deposits by itself were sufficient to establish that the luxury tax was not charged by the petitioner from the consumers. The presumptions, if any, on the collection or non-collection of the luxury tax, was to be made in favour of the petitioners and not the Department. Sri Bharat Ji Agrawal further submits that the presumptions drawn by the Department are not based on any valid material on record. There is no statutory presumption that the tax deposited has not been collected, unless the details of the unit cost and the sale price is furnished.

8. We have gone through the notice and the reply submitted by the petitioner as well as the findings recorded by the Deputy Commissioner (Commercial Tax), Noida. We do not find any error in the conclusion drawn by him, drawing a presumption that the luxury tax deposited was collected from the consumers.

9. In order to ascertain whether the luxury tax was charged from the consumers, it was necessary for the petitioner to establish the unit cost as well as the sale price. It is only from these two components that the fact whether the tax was realized from the consumers could be established. The petitioners did not disclose the gradients of the Unit Cos. Section 8A(1D)(ii) of the U.P. Trade Tax Act, obliged the petitioners to show the price of goods sold and the amount of tax realized separately on the cash memo or the bills. During the period in question, the petitioners were responsible to collect tax and deposit, which they actually did.

10. The exceptions to the principles of unjust enrichment have to be strictly construed. It is difficult to believe that a person engaged in the business of manufacture and sale of tobacco products, such as pan masala and gutka, would deposit the luxury tax without collecting it from the consumers. The burden of proof of not collecting luxury tax, for the months in question was entirely on the petitioners. There is no pleading nor there is any material to show that inspite of interim orders, the petitioners were under any notice or coercive action to collect

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any deposit luxury tax on its products from consumers.

11. The enquiry was confined only to the refund of the luxury tax and not for realization. The observations made by the Deputy Commissioner (Commercial Tax), Noida, for the month of September 1994 for which the luxury'' tax was not deposited nor any refund was claimed, was not uncalled for.

12. Sri S.P. Kesarwani, appearing for the State-respondents, has drawn our attention to paragraphs 98 and 99 of Godfrey Phillips India Ltd. and Another Vs. State of U.P. and Others, in which the Constitutional Bench observed as follows (page 576 in 139 STC):

97. It was stated on behalf of the State Governments that after obtaining interim orders from this court against recovery of luxury tax, the appellants continued to charge such tax from consumers/customers. It is alleged that they did not pay such tax to respective State Governments. It was, therefore, submitted that if the appellants are allowed to retain the amounts collected by them towards luxury tax from consumers, it would amount to ''unjust enrichment'' by them.

98. In our opinion, the submission is well-founded and deserves to be upheld. If the appellants have collected any amount towards luxury tax from consumers/ customers after obtaining interim orders from this court, they will pay the said amounts to the respective State Governments.

13. In these cases, we are concerned with refund of the luxury tax deposited by petitioners and not with realizations made by the petitioners. The Trade Tax Department has not given any notices, nor intimated any process to recover the unpaid luxury tax, collected by the petitioners from consumers. We thus leave it open to the respondents to make an enquiry in this regard and if they arrive at the conclusion, after giving notice and hearing the petitioners, that any amount of luxury tax, collected from consumers, has not been paid deposited, to recover the same from the petitioners. All the writ petitions are dismissed.

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