

(2011) 02 AHC CK 0341

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 1082 of 1999

Tata Chemicals Limited, Babrala, Distt. Badaun

APPELLANT

Vs

Assistant Commissioner (Assessment) Trade Tax, Badaun and
Another

RESPONDENT

Date of Decision : 24-02-2011

Acts Referred:

Uttar Pradesh Sales Tax Act, 1948 — Section 21

Uttar Pradesh Trade Tax Act, 1948 — Section 21(2), 22

Citation : (2011) 02 AHC CK 0341

Hon'ble Judges : Sunil Ambwani, J; Jayashree Tiwari, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1 Heard Shri Bharat Ji Agrawal, Sr. Advocate assisted by Shri Piyush Agrawal for the Petitioner. Shri S.P. Kesarwani appears for the department.

2 M/s Tata Chemicals Ltd. is aggrieved by the reopening of the assessment proceedings u/s 21(2) of the U.P. Trade Tax Act in respect of assessment years 1991-92, 1992-93 and 1994-95. In Writ Petition No. 1982 of 1999 the notice dated 11.11.1999 for the assessment years 1991-92, 1992-93, 1994-95 is sought to be quashed. In Writ Petition No. 1092 of 1999 notice dated 2.11.1999 for the assessment year 1993-94 issued by the Addl. Commissioner, Trade Tax, Bareilly Zone, Bareilly is under challenge.

3. Brief facts giving rise to these writ petitions are that the Petitioner has established a factory for manufacture of fertiliser (Urea) at Babrala in the district of Badaun. The production started in December, 1994. During the years 1991-92 to 1994-95 the factory was under construction. The Petitioner had given contract for construction of factory building. The material supplied by the Petitioner was taxed by the Asstt. Commissioner (Assessment), Trade Tax, Badaun-the Assessing Authority. The show cause notice for the assessment year 1991-92 was issued on 7th March, 1995 stating that the Petitioner had supplied Tar steel

to various contractors, which is liable to tax. After receiving reply the assessing authority by his order dated 23rd February, 1996 after detailed discussion of the contracts entered into between the Petitioner and business contractors namely Larsen and Tubro Ltd., has held that the supply of iron and steel does not amount to sale. The notional adjustment of the value of iron and steel was not treated as sale except an amount, which did not pertain to the contractors. The assessment order was rectified u/s 22 of the U.P. Trade Tax Act, on 5.8.1994.

4. For the assessment years 1992-93 and 1994-95 also the assessment orders were passed discussing the transactions in detail and the notional adjustment vide orders dated 20.3.1996 and 18.9.1997. The assessment order for the year 1993-94 was made on 31.3.1997.

5. In all the assessment orders as aforesaid the assessing authority after discussing the terms and conditions of the contracts held that since as per the contract the contractor was bound to return the surplus material (steel) to the Petitioner, failing which it would amount to criminal breach of trust, there was no sale attracting the imposition of tax. Clause 9 of the general terms and conditions of the contracts specified:

The return of surplus material supplied by owner-The contractor shall hold all the material supplied by the owner economically and solely for the purpose of the contract and shall not dispose any of them without the prior permission of the owner and return all surplus or unserviceable material that may be left with him after the completion of the contract or at its termination for any reason whatsoever... In the event of the breach of the aforesaid condition, the contractor shall in addition to throwing himself open action for contravention of these terms and / or for criminal breach of trust be liable to owner for all moneys, advantages or profits resulting or which in the usual course would have resulted to him by reason of such breach.

6. On 2.11.1999 the Addl. Commissioner, Bareilly-Respondent No. 2 passed a common order for the assessment year 1991-92, 1992-93, 1993-94 and 1994-95 u/s 21(2) of the U.P. Trade Tax Act, extending the period of limitation for re-assessment. On 11.11.1999 the assessing authority issued notices to the Petitioner for re-assessment u/s 21 for the assessment year 1991-92, 1992-93 and 1994-95. On 17.11.1999 the assessing authority issued reassessment notices u/s 21 to the Petitioner for the assessment year 1993-94.

7. Shri Bharat Ji Agrawal, learned Counsel for the Petitioner submits that the Addl. Commissioner, Bareilly-Respondent No. 2 has passed orders u/s 21(2) extending the period of limitation without giving any reasons, the orders have been passed on cyclo-style sheets of papers with common printed material, mechanically. He relies upon Maniktala Chemicals v. State of U.P. and Ors. 2006 UPTC 1128 and S.K. Traders v. Additional Commissioner Trade Tax 2008 UPTC 392 in support of his submissions that an order reopening the assessment must disclose reasons for reaching conclusion for extending the limitation. The reasons

to be recorded by the assessing authority must be communicated to the Assessee, so that he can show whether the reasons are relevant or are incorrect. Mere reproductions of the language used in the proviso to Section 21(2) of the Act is not sufficient.

8. Shri Bharat Ji Agrawal submits that in S.K. Traders (Supra) the Division Bench of this Court held that where no reasons are given for granting permission/sanction for the proposal to reopen the assessment, and for making reassessment in the extended period of limitation, the order cannot be sustained. He submits that the judgment has been followed in Yadav Traders v. State of U.P. and Ors. 2009 UPTC 576. He has also relied upon Steel Authority of India v. Sales Tax Officer Rourkela 2008 UPTC 875 (Civil Appeal No. 4290 of 2008 decided on 10th July, 2008). In this judgment the Supreme Court held; "reason is the heart beat of every conclusions as it introduces clarity in an order, without the same it becomes lifeless. Failure to give reasons amounts to denial of justice. The reasons are the live links between the mind of the decision taker of the controversy and the conclusion arrived at."

9. Shri Agrawal has also relied upon the judgments of the Supreme Court in Assistant Commissioner, Commercial Taxes v. Shukla and Brothers JT (2010) 4 35 the judgment of this Court in Swati Gramodyog v. State of U.P. and Ors. (2009) 40 NTN 269 and U.P. Cooperative Federation Ltd. v. State of U.P. 2010 (8) VSTI 607. In these cases the Court has held that at least prima facie findings should have been recorded by the Addl. Commissioner to indicate that how and in what manner the Petitioner is liable to pay tax under escaped liability. Even if statute does not provide, it is obligatory upon the administration or the quasi judicial authority to assign reason while affecting civil rights of a party.

10. Shri Agrawal submits that in Rashtriya Ispat Ltd. v. State of Andhra Pradesh 1998 UPTC 727 there was no penal clause provided for not returning goods by the contractors. The show cause notices were issued in the present case on the basis of N.M. Goel's judgment on 7.3.1995. The Petitioner gave a reply to the assessing authority. The notice and reply were considered including various clauses of contract and after distinguishing N.M. Goel's case and following other judgments in the case of IFFCO the assessments were made of the relevant years. Hence no reassessment proceedings should be taken u/s 21 of the U.P. Trade Tax Act on the same material for review of the original assessment order, which virtually amounts to change of opinion. In Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, the difference between power of review and power of reassessment was explained. The reassessment has to be based on fulfillment of certain preconditions and if the concept of "change of opinion" is removed, then in the garb of reopening the assessment review could take place.

11. Shri S.P. Kesarwani appearing for the Department submits that the Petitioner has challenged the notices issued subsequent to the grant of sanction by the Commissioner for initiating proceedings u/s 21(2) of the Act. There is no illegality or infirmity in the sanction given by the Addl. Commissioner. The factual

controversy cannot be decided by this Court in writ jurisdiction. Section 21(2) prescribes extension of the period of limitation by the Addl. Commissioner, which has been done in the present case. Notice issued u/s 21(2) is therefore not barred by limitation. The notice u/s 21(2) was served and received by the Petitioner on 11.11.1999. There is no substance and legal grounds to challenge the grant of sanction.

12. Shri S.P. Kesarwani has relied upon *Karya Palak Engineer C.P.W.D., Bikaner v. Rajasthan Taxation Board, Ajmer and Ors.* 2004 UPTC 1178 SC. He submits that by the use or consumption of material supplied in the work of construction, there was passing of property and by virtue of receipt of value of such transferred property, by way of adjustment in bills, the consideration has also passed, which satisfied the definition of sale. Relying upon *Rashtriya Ispat Nigam Ltd. v. State of Andhra Pradesh* 1998 UPTC 727 (SC) and *N.M. Goel and Company v. S.T.O* 1990 UPTC 865 (SC) the Supreme Court held that by the use or consumption of material supplied in the work of construction, there was passing of property and by virtue of receipt of value of such transferred property by way of adjustment in the bills, the consideration has also passed, which satisfies the definition of sale in the local Sales Tax Act. Shri S.P. Kesarwani submits that Sub-section (2) of Section 21 creates a bar on the assessment or reassessment for any assessment year after the expiration of two years from the end of such year or March 31st, 1998, whichever is later, provided that the Commissioner on his own, or on the basis of reasons recoded by the assessing authority is satisfied that it is just and expedient so to do authorise assessing authority in that behalf such assessment or reassessment may be made after expiration of the period aforesaid but not after the expiration of 6 years from the end of such year or after March 31st, 2002, whichever is later, notwithstanding that such assessment or reassessment may involve a change of opinion.

13. In assessment orders the assessing authority held that the recovery of cement and steel by adjustment does not amount to sale. The assessing authority relied upon the judgment of the Supreme Court in *N.M. Goel's* case, and discussed the difference in the case with the case of *N.M. Goel's* case (Supra). He found the reasons to support the conclusion, namely (1) there is no mode of recovery of the value in the contract, books of account to show that while returning the goods, no deduction was made. The engineer has verified from the running bills the utilisation of cement and iron and has made deductions from the running bills; (2) the contractor is bound to return the surplus goods. There is no provision in the contract that he will return goods on the notice, failing which he will be free to take away the goods; and (3) in the event of breach of the aforesaid conditions the contractor shall in addition to throwing himself open to action for contravention of these terms, and or for criminal breach of contract.

14. The assessing authority has, thereafter, discussed similarities with the ONGC's case *Oil and Natural Gas Commission v. Commissioner, Sale Tax* 1992

UPTC 170, namely (1) there is provision in the contract for keeping the goods in double lock and key; (2) and (3) the contractor will be bound to return surplus material and the company will be bound to take it back, failing which price of goods will be returned at twice the value of the goods, and the liability for breach of contract; (4) and (5) the daily account of verification and go-downs will be prepared; (6) the provision for return of empty bags and iron and (7) if the goods are not in same form in which they were supplied, there will be credit of value, if there is use of more than 3%, the same will also be deducted from the bills. The assessing authority thus came to conclusion that since the contractor was required to return the goods and there was a provision for criminal breach of contract, recovery of surplus cement and steel does not come within the definition of sale.

15. The order of the Addl. Commissioner, Bareilly dated 2.11.1999 was not enclosed or challenged in the writ petition filed by the Petitioner on 30.11.1999 (Writ Petition No. 1082 of 1999), and on 2.12.1999 (Writ Petition No. 1092 of 1999). The Petitioners had only challenged the notices u/s 21 dated 11th November, 1999 issued by the assessing authority in the year 1991-92, 1992-93 and 1994-95 and notice dated 17th November, 1999 for the assessment year 1993-94.

16. The order u/s 21(2) of the Act passed by the Addl. Commissioner, Bareilly on 2.11.1999, for all the aforesaid assessment years u/s 21(2) extending period of limitation, by an amendment application on 3.10.2009, ten years after the writ petitions were filed. The amendment applications were allowed on 12.8.2010.

17. The order u/s 21 of the Act in the writ petitions was challenged on merits, namely on the grounds that M/s Rashtriya Ispat Nigam Ltd. (Supra), there was no penal provision for non-return of goods; the assessing authority had no jurisdiction to initiate proceedings u/s 21 in as much the power could only be exercised, when turn over had escaped assessment or there was under assessment or Assessee has been assessed to tax on lower rate or any deductions or exemption has been wrongly allowed. In the ground Nos. 9, 10 and 11 the notice u/s 21 was questioned on the ground that the extension of period of limitation can be made only if the assessing authority has reasonable belief that whole or any part of the turn over of the dealer had escaped assessment or tax has been under assessed or assessed at a rate lower than the rate applicable or any deduction or exemption has been wrongly granted.

18. There was no pleading to the effect that the order u/s 21(2) of the Act has not been passed or that the order u/s 21(2) of the Act extending the limitation did not contain any reasons.

19. In the amendment application it is stated in para 9 and 10 that the Petitioner made an application for certified copy of the order of the Addl. Commissioner, Trade Tax, Bareilly Zone, Bareilly dated 2.11.1999 on the basis of which notice u/s 21 was issued. Certified copy of the order dated 2.11.2009, was issued by the

Addl. Commissioner, Grade-1, Trade Tax Bareilly, which was a common order for all the four assessment year. The order u/s 21(2) of the Act is also challenged on the grounds that it does not give any reasons.

20. Notices u/s 21 of the Act dated 11th November, 1999 in respect of assessment year 1991-92, 1992-93 and 1994-95; the notice (challenged in Writ Petition No. 1082 of 1999) and the notice u/s 21 dated 17.11.1999 for the assessment year 1993-94, challenged in Writ Petition No. 1092 of 1999 clearly mentions in the opening paragraph that it was issued on the authorisation of the Addl. Commissioner, Grade-1, Trade Tax, Bareilly by his order letter No. SS Ka Na u/s 21(2) /1999-2000 dated 2.11.1999 under proviso to Section 21(2) of the Act. The Petitioner did not challenge the order of the Addl. Commissioner dated 2.11.1999 in the writ petition. The order dated 2.11.1999 was challenged by way of amendment application, filed 10 years later to the filing of the writ petition. As stated above the writ petitions were filed on 30.11.1999 and 2.12.1999, whereas the amendment applications were filed on 3.10.2009. The order dated 12.8.2010 passed on the amendment applications in both the writ petitions are quoted as below:

Heard Shri Bharat Ji Agrawal, learned Counsel for the Petitioner. Shri S.P. Kesarwani, learned Addl. Chief Standing Counsel appears for the State. The amendment application challenging the order of the Addl. Commissioner pending on record is allowed. Let the amendment be incorporated in the writ petition.

Learned Standing Counsel will file counter affidavit within two weeks. The rejoinder affidavit may be filed within one week, thereafter. List on 21st September, 2010.

21. Though the amendment applications have been allowed, we find that the challenge to the orders passed by the Addl. Commissioner on 2.11.1999 was clearly barred by gross laches. The Court can always look into the delay, even if the amendment application was allowed. It is apparent that taking the benefit of the decision in *Maniktala Chemical v. State of U.P.* decided on 20th July, 2006, and *S.K. Traders v. Addl. Commissioner, Trade Tax* decided on 2.11.1999, the Petitioner took an opportunity to challenge the order dated 2.11.1999. The order allowing amendment applications, without considering or condoning the gross laches, does not operate as estoppel, to raise the issue of delay and consequent bar on the jurisdiction to decide the issue. The principles of estoppel and acquiescence are principles derived from the law of evidence, and are not applicable, to estop the courts to consider any plea, which is open to be raised and considered. The public policy stops the applicability of these pleas on the jurisdiction of the Court.

22. In the order dated 2.11.1999 the Addl. Commissioner, Grade-1, Trade Tax, Bareilly Zone has observed that on the examination of the reasons given by the appointing authority in making assessment for the year 1991-92 to 1994-95, he found it appropriate and in the interest of justice that even if reassessment may

require a change of opinion, it is necessary to do so, and therefore he authorised the Asstt. Commissioner, Trade Tax, Badaun for assessment or reassessment. By this order passed under the proviso to Section 21(2) the Addl. Commissioner, extended the limitation, and authorised the issuance of notice, which is under challenge.

23. We do not find any good ground to allow the Petitioner to challenge the order u/s 21(2) passed on 2.11.1999, and clearly mentioned in the notice u/s 21, after a period of 10 years. The challenge to the order dated 2.11.1999 is grossly barred by laches and is not bonafide.

24. Where the orders under the proviso to Section 21(2) of the Act challenging period of limitation are based without disclosing any reasons, the same may be challenged on the ratio in Maniktala Chemicals Pvt. Ltd. and S.K. Trader's case. Where, however, Petitioner is fully aware of the reasons, which are disclosed in notice u/s 21 and which is the basis on which limitation was extended u/s 21(2), it is not open to the Petitioner to contend after 10 years, that no reasons have been disclosed by the Addl. Commissioner in the order u/s 21(2) of the Act.

25. The Petitioners have neither pleaded nor taken any ground in the amendment application that any notice was required to be given and that such notice was not given to the Petitioners before the Addl. Commissioner made the order under the proviso to Section 21(2) of the Act dated 2.11.2009 extending the period of limitation. The facts of the case in Maniktala, R.K. Traders, M/s Swati Gramodyog Sewa Sansthan, and Yadav Traders are entirely different. In all those cases the order issued by the Addl. Commissioner under the proviso to Section 21(2) was under challenge. In the present case the Petitioners did not challenge the notice u/s 21 based upon the order under proviso to Section 21(2) of the Act. It has challenged the orders under proviso to Section 21(2) after a period of 10 years. The facts and circumstances and the merits on which the department decided to reopen the assessment were not only in the knowledge of the Petitioner but that the Petitioner had also taken several grounds including the terms of the contract in challenging the notice. In these circumstances, can it be said that the order under the proviso to Section 21(2) has to struck down as it does not contain any reason? The law does not insist on recording reasons, where the reasons are not only known, but have also been challenged in the writ petitions. The principles of law are required to be applied by appreciating the facts and circumstances of each case. In the present case the only ground urged to challenge notice u/s 21 of the Act is that there was detailed discussion in the assessment order and that since there was a stipulation in the contract for taking action against breach of contract, if surplus stores were not returned, the reduction of the surplus stores by the contractor and the entries by which price was deducted from his bills will not amount to sale. The Addl. Commissioner on the reasons disclosed in the assessment order decided to extend the period of limitation. The Petitioner was fully aware of these reasons on which notice u/s 21 was given and had challenged the same in detail in the writ petition.

26. It was open to the Petitioner to have applied for certified copy of the order u/s 21(2) of the Act. It preferred to wait for ten years to obtain a copy of the order. It is like putting the cart before the horse.

27. In *George Oakes (Private) Ltd., Addison and Co. (Private) Ltd. and Rane (Madras) Ltd. Vs. State of Madras*, it was held that language of Section 21 of the U.P. Sales Tax Act, 1948 is wide enough to cover any case in which even by mistake, whether by fact or law or by mere omission the assessing authority does not assess the whole or part of turn over in any particular year. It is not necessary that there should be any concealment on the part of Assessee or that any fresh material should be discovered. The reason to believe u/s 21 was interpreted by the Supreme Court in *The Commissioner of Sales Tax, U.P. Vs. Bhagwan Industries (P) Ltd., Lucknow*, it was held that the words "reason to believe" in Section 21 convey that there must be some rational basis for the assessing authority to form the belief that the whole or any part of turn over of a dealer has, for any reason, escaped assessment to tax for some year. If there are, infact, some reasonable grounds for the assessing authority to form such belief, 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.

28. In *Addl. Commissioner (Legal) and Anr. v. Assistant Commissioner, Trade Tax 1999 UPTC 45 SC* the scope of the powers under proviso to Section 21(2) of the Act was under consideration. The Supreme Court held that one may go into the intention of the legislature in enacting such provision. The date of commencement of the proviso does not control its retrospective operation. Under the amended provision, the Commissioner of Sales Tax authorises assessing authority to make assessment or reassessment after the expiration of 8 years on the end of such year notwithstanding that such assessment or reassessment may involve a change of opinion (para 25).

29. Hon''ble Mr. Justice M. Katju (as he then was) and Hon''ble Mr. Justice Umeshwar Pandey in *Shyam Babu Vaishya and Anr. v. Asstt. Commissioner, Trade Tax 2004 UPTC 210* refused permission to challenge the reopening of the assessment u/s 21(2) on the ground that the writ petition was filed in September, 2003, seven months after the order was passed on 13th March, 2003. It was held that reopening of the assessment can be made 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 the part of the Assessing Officer.

30. For the aforesaid reasons, we find that the challenge to the order dated 2.11.1999 passed by the Addl. Commissioner, Bareilly-Respondent No. 2 under proviso to Section 21(2) extending the period of limitation is grossly barred by latches and further that the Petitioners were fully aware of the reasons on which the order was passed and the notice u/s 21 of the Act was issued, and that the

Petitioner had challenged the same by filing the writ petition in the year 1999.

31. Both the writ petitions are accordingly dismissed.