(2005) 11 AHC CK 0180

In the Allahabad High Court

Case No : Trade Tax Revision No. 1275 of 1996

The Commissioner, Trade Tax — APPELLANT

Vs

Jagdamba Agencies — RESPONDENT

Date of Decision : 14-11-2005

Acts Referred:
Uttar Pradesh Trade Tax Act, 1948 — Section 10A, 10B, 11, 21, 22

Citation : (2006) 148 STC 524

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Advocate : V.K. Pandey and S.P. Kesarwani and S.C, for the Appellant; R.D. Gupta and J.N. Singh, for the Respondent

Final Decision : Allowed

Judgement

Rajes Kumar, J.—Present revision u/s 11 of the U.P. Trade Tax Act (hereinafter referred to as the "Act") is directed against the order of the Tribunal dated 20th June, 1996 relating to the assessment year, 1990-91by which the Tribunal has set aside the order passed u/s 10-B of the Act.

Dealer/opposite party (hereinafter referred to as "Dealer") was parrying on the business of diesel engines. The assessing authority passed the assessment order on 25th February, 1995 and accepted the books of account and disclosed turnover of Rs. 11,79,200/-, Later on, Deputy Commissioner (Executive) issued notice dated 31st August, 1995 u/s 10-B of the Act. The notice was issued mainly on the ground that on the perusal of the record, it was found that the dealer had opening stock of 47 diesel engines and upto 31st July, 1990 the diesel engines have not been imported and 29 diesel engines imported against Form 31 No. 2227291 crossed Fatehpur Sikri check post on 31.07.1990, could be sold after 31st July, 1990 and total turnover by 31.07.1990 was disclosed at Rs. 3,47,200/-. Thus he was of the view that 47 diesel engines which were in the opening stock were available for sale at Rs. 3,47,200/- and according to which the selling rate comes to Rs. 7,387/- per diesel engine in this way, the profit earned should be Rs. 1 lac on the sale of only 47 diesel engines upto the period of 31st July, 1990. It has also been stated that for the period 1st August, 1990 to 31st March, 1991, the average selling rate per diesel engine shown was Rs. 5,262/- and the average purchase value was Rs. 5,470/-. Thus, it has been inferred that the lesser sale price has been disclosed. It has also been stated that as per details furnished closing balance was disclosed at Rs. 4,50,070/- while in the assessment order a sum of Rs. 5,50,070/- was mentioned. On the aforesaid fact dealer was asked to appear and explain the aforesaid discrepancy.

2. Counsel for the opposite party appeared on 12th September, 1995 and a short submission was tiled, in which it had been stated that the Trade Tax Officer, Sector-1, Fatehgarh had already issued notice u/s 21 of the Act. thus, the notice u/s 10-B of the Act is not justified. However. when Counsel was directed to file the reply on the objection raised in the notice u/s 10-B of the Act the Counsel stated chat he would give the reply subsequently and requested for the adjournment of the case and on his request, the case was adjourned to 17.10.1995. On 17.10.1995, no one appeared on behalf of the dealer. Thus, the Deputy Commissioner (Executive) proceeded ex parte and held that the assessment order was improper and illegal and estimated the taxable turnover at Rs. 15, 50.000/-. With regard to the notice issued u/s 21 of the Act, it was stated that the notice u/s 21 of the Act dated 28th March, 1995 was issued fixing 30th March, 1995 and the said notice was despatched on 31st March, 1995 and as per process server report dated 31st March, 1995 it was served by affixation. The Deputy Commissioner (Executive) was of the view that the service of the notice was illegal and it is not clear that why the notice u/s 21 of the Act was issued and the learned Counsel has admitted the service of the notice as proper just to misguide though in accordance to the various decisions of this Court it was not a valid notice. The opposite party filed appeal against the said order passed u/s 10-B of the Act before the Tribunal. Tribunal by the impugned order set aside the order u/s 10-B of the Act.

3. Tribunal held that as per the various decisions of the High Court and the Supreme Court, on the initiation of the proceedings u/s 21 of the Act, the action could not be taken u/s 10-B of the Act. It has been held that when the proceeding u/s 21 of the Act had been initiated to remove same defect, the proceeding u/s 10-B of the Act was not in accordance to the law. Tribunal further held that the order u/s 10-B of the Act appears to have been passed in hurry. Tribunal observed that in the order passed u/s 21 of the Act dated 30th September. 1995, assessing authority had considered the complete details of the opening stock, purchases, closing stock etc and held that the value of the diesel engines and closing stock were verifiable and the value of the closing stock at Rs. 5,50,070/- was mentioned by typographical mistake in the assessment order. Tribunal further observed that the assessment order was passed under Rule 41(8) on the basis of the various details which were got verified from the books of account and such details were also being verified in the proceeding u/s 21 of the Act. Tribunal further observed that if the Deputy Commissioner (Executive)

would have passed the order after considering the order passed u/s 21 of the Act. the alleged objection could not survive. Tribunal. accordingly, set aside the order passed u/s 10-B of the Act

4. Heard learned Standing Counsel and Sri R.D. Gupta, learned Counsel appearing on behalf of the opposite party.

5. Learned Standing Counsel submitted that the Tribunal has erred in hold that proceeding undertaken by the Deputy Commissioner (Executive) u/s 10-B of the Act was illegal in view of initiation of proceeding u/s 21 of the Act. He submitted that both Sections 21 of the Act and 10-B of the Act operates on a different footing. According to him, u/s 21 of the Act proceeding are taken when assessing authority forms an opinion on the basis of the material which leads to an inference of escaped assessment, while u/s 10-B of the Act proceeding are taken when the revising authority is satisfied on the basis of the material available on record that the order is improper or illegal. If the revising authority is of the view that the order passed is without proper enquiry or for any other reason, the order is improper, he can revise the order or direct the assessing authority to make enquiry and pass the order. He submitted that the Tribunal has illegally held the order passed u/s 10-B of the Act was illegal, though the opposite party could not appear before the Deputy Commissioner (Executive) and could not explain the discrepancy pointed out in the notice u/s 10-B of the Act merely on the basis of the order passed by the assessing authority u/s 21 of the Act in which various objections raised u/s 10-B of the Act have been considered. Tribunal also observed that if the Deputy Commissioner (Executive) would have looked into the order passed u/s 21 of the Act, the alleged discrepancy could not surviced is erroneous.

6. Learned Counsel for the opposite party submitted that the order of the Tribunal is legal, correct and justified and based on the material on record. He submitted that once the notice u/s 21 of the Act was issued on 28th March, 1995 and had been served on 30th March, 1995, the proceeding u/s 10-B of the Act should not be initiated. He submitted that the alleged discrepancies raised in the notice u/s 10-B of the Act had been duly considered by the assessing authority in the order passed u/s 21 of the Act and before passing the order u/s 10-B of the Act the revising authority ought to have looked into the order passed u/s 21 of the Act and if order u/s 21 of the Act would have been seen, there would be no occasion to pass the order u/s 10-B of the Act inasmuch as the objections stood explained and ceased to exist. He submitted that vide circular dated 12th March, 2005, it has been explained by the Commissioner that proceeding u/s 10-B of the Act may be taken only where the proceedings u/s 21 and 22 of the Act is not possible. He further submitted that in the case of United Tractors, Gorakhpur v. State of Uttar Pradesh reported in 1996 UPTC 1185, the Division Bench of this Court held that parallel proceedings u/s 10-B and 21 of the Act cannot be taken on the basis of same material. He further submitted that in the case of M/S Samrat Carpet, Allahabad Versus Commissioner of Trade Tax reported in 1999

UPTC 1203, this Court held that u/s 10-B of the Act, revising authority has no power to make the enquiry and for want of enquiry if revising authority finds that the impugned order is improper or illegal, he may direct the assessing authority to make the enquiry and pass the fresh order, but he himself cannot make the enquiry and pass the order.

7. Having heard rival submissions of the Counsel for the parties and perused the order of the Tribunal and the authorities below.

8. Section 21 and 10-B of the Act reads as follows:

Section 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 a 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.

Section 10-B. Revision by Commissioner of Sales Tax.

(1) The Commissioner of Sales Tax or such other officer not below the rank of Deputy Commissioner of Sales Tax as may be authorised in this behalf by the State Government by notification may call for and examine the record relating to any order (other than an order mentioned in Section 10-A) passed by any officer subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such order and may pass such order with respect thereto as he thinks fit.

9. In my view, both the sections operate on a different field and under different circumstances. If the assessing authority is of the view that there was an escaped assessment, on the basis of the material came in the knowledge of the Assessing Authority subsequently, proceeding u/s 21 of the Act can be initiated. However, power of Section 10-B of the Act can be exercised to examine the legality and propriety of any order on the basis of the material existed on record at the time of assessment proceeding The Division Bench of this Court in the case of United Tractors, Gorakhpur v. State of Uttar Pradesh reported in 1996 UPTC 1185 has held that Section 10-B of the Act in one sense is wider than Section 21 of the Act, as under this Section the Commissioner may re-assess and re-examine the material and the law as was before such authority, while u/s 21 of the Act re-assessment by fresh appraisal of the original order would amount to change of opinion which is not permissible.

10. In the present case, The Deputy Commissioner (Executive) on the examination of the material on record found certain discrepancies, which have been alleged in the notice u/s 10-B of the Act to explain. Notice u/s 21 of the Act was issued in the month of March, 1995 as alleged, but it is not clear on which

ground it was issued. Perusal of the order passed u/s 21 of the Act shows that the objection raised in the notice u/s 10-B of the Act has been examined by the assessing authority and on examination concluded that there was no escapement of turnover. In my view, the submission of the learned Counsel for the opposite party that once notice u/s 21 was issued, proceeding u/s 10-B of the Act could not be taken, cannot be accepted. This argument can be accepted only in a situation when proceeding u/s 10-B of the Act is initiated on the basis of the fresh material which resulted to the escaped assessment because on the basis of such material, proceeding u/s 21 of the Act could only be initiated and not u/s 10-B of the Act. This view has been taken by the Division Bench of this Court in the case of United Tractors, Gorakhpur v. State of Uttar Pradesh (supra) and in the case of A.K. Corporation and Anr. v. State of U.P. repotted in 1994 UPTC 75. but the Deputy Commissioner (Executive) is not debarred to examine the record which was available at the time of the assessment proceeding to arrive to a conclusion that order was improper or illegal merely because the notice u/s 21 of the Act was issued. Thus, the view of the Tribunal that once a notice u/s 21 of the Act was issued, proceeding u/s 10-B of the Act could not be taken is not correct and cannot be sustained. Tribunal is also not correct in saying that before passing the order u/s 10-B of the Act. Revising authority should have looked into the order passed u/s 21 of the Act and if the order u/s 21 would have been looked into, objection raised in the notice u/s 10-B of the Act would have ceased to exist. According to the Tribunal, the objection raised in the notice u/s 10-B of the Act have been dealt with by the assessing authority in the order passed u/s 21 of the Act in detail and it has been concluded that no adverse inference can be drawn and all the objections stood explained. Once in a notice u/s 10-B of the Act the various objections have been raised, it was the duty of the opposite parry to explain those objections. It is the satisfaction of the revising authority to satisfy himself about the explanation, in respect of the various objections and the satisfaction of the assessing authority was not material. In the present case, the opposite party could not appeared on the date fixed and could not file the explanation to the various objections raised in the notice, therefore, there was no occasion with the Deputy Commissioner (Executive) to examine the explanation. Perusal of the order of the Tribunal shows that the Tribunal has also not himself examined the explanation in respect of the various objections raised in the notice u/s 10-B of the Act. Tribunal has only observed that the assessing authority has considered those objections in the order u/s 21 of the Act and that has been taken as conclusive. In my opinion, this view of the Tribunal is not correct. Tribunal either should have examined each and every objection itself and arrive to an independent conclusion or would have remanded back the matter to the Deputy Commissioner to provide an opportunity to the opposite party to furnish the explanation and to examine the explanation In the present case, the order subject to revision u/s 10-B of the Act was an original assessment order and not the order passed u/s 21 of the Act and, therefore, it was not obligatory on the putt of the revising, authority to look into and examine the order passed u/s 21 of the Act. The order of the Tribunal in this respect is erroneous.

11. On the facts and circumstances of the case, I am of the view that the matter requires reconsideration by the Deputy Commissioner (Executive;). The Deputy Commissioner (Executive) may provide opportunity to the opposite party to explain the various objections raised in the notice. If the Deputy Commissioner (Executive) will be satisfied with the explanation, he may drop the proceeding and if any enquiry in the matter is required, he may ask the assessing authority to make an enquiry and pass the order afresh and if no enquiry is required, he may pass order as he may deem fit in accordance to law.

12. In the result, revision is allowed. The order of the Tribunal dated 20th June, 1998 is set aside and the matter is remanded back to the Deputy Commissioner (Executive) to pass fresh orders in the light of the observations made above