
(2008) 09 AHC CK 0212
In the Allahabad High Court

The Commissioner, Trade Tax

APPELLANT

Vs

Kuberji Traders

RESPONDENT

Date of Decision : 09-09-2008

Acts Referred:

Partnership Act, 1932 — Section 4

Citation : (2008) 09 AHC CK 0212

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sunil Ambwani, J.—Heard learned Standing Counsel for the department.

2. The notices sent to M/s Kuberji Traders, Galla Vyapari, Post Kalpi, Jaiaun in registered cover vide registered post No. 3215 dated 30.7.2008 in TTR No. (511) of 2005, have returned back with remarks that on enquiries it was found that, the firm M/s Kuberji Traders, commission agency is closed.

3. The postman has neither recorded the source of information nor the fact whether Shri Jagdish Prasad Gupta, the sole proprietor of the firm was present. Since the question in this case is whether the assessment should have, been made in the name of the firm, which is a sole proprietorship firm of Shri Jagdish Prasad Gupta, the Court assumes on the basis of the service report that Shri Jagdish Prasad Gupta has information of the pendency of the trade tax revision. Notice under the rules of the Court shall, therefore, be deemed to be served.

4. Kuberji Traders, Gal la Vyapari, Kalpi is a proprietor ship firm. Shri Jagdish Prasad Gupta is the proprietor of the firm engaged in the business of sale and purchase of foodgrains, pulses and oil seeds. For the assessment year 1996-97 the assessee produced his account books. The assessee did not admit the tax liability. The dealer produced account books before the assessment authority. The Trade Tax Officer found that out of turn over of Rs. 12,19,940/- the assessee had shown purchase of Chuni of Rs. 6,82,340/-. The dealer explained that for the

month of May he did not show the tax paid purchase by way of an error and that purchase of Chuni was also not disclosed. The account books were rejected on these two grounds and an estimation of turn over was made after taking into account the receipts. The Trade Tax Officer by the impugned order dated 20.11.1999 estimated the turn over of the dealer at Rs. 72 lacs and imposed tax at Rs. 2,86,496/-.

5. The first appeal was dismissed on September 25th, 2001 upholding the grounds of rejection of account books. It was found that declared purchase of Chuni also did not give the bill numbers and name and address of the dealers, in the absence of which the purchases were not verifiable.

6. In second appeal an objection was taken by the dealer before the Tribunal that assessment could not be made in the firm name. Relying upon Circular Letter No. 1787 dated 18.3.1998 and the judgment in Commissioner of Sales Tax v. Bishan Swarup Bansal 1984 STI 79 (SC) it was held that where business is being run by a person in the name of proprietorship concern, assessment must be made in the name of the person and not in the name of the firm, which is only a trade name. The Tribunal found that notice as well as assessment in the trade name was illegal and thus assessment, order cannot be sustained. Thereafter without discussing the matter on the merits, the grounds of rejection of the account books and estimation of the turn over, the second appeal was allowed with directions that entire amount deposited should be returned back to the dealer.

7. The department has preferred this second appeal on following questions of law:

(i) Whether on the facts and in the circumstances of the case the Trade Tax Tribunal was legally justified in granting relief to the dealer only on the ground that the assessment order has not been passed against the proprietor of the firm that the same has been passed in the name of the firm?

(ii) Whether on the facts and in the circumstances of the case the Trade Tax Tribunal was legally justified in deleting the amount of tax specifically when there was sufficient material on record for evasion of trade tax?

8. The definition of "dealer" u/s 2(c) of the U.P. Trade Tax Act, 1949 is a comprehensive definition, which include all categories of business and the persons engaged in business:

(c) "Dealer" means any person who carries on in Uttar Pradesh (whether regularly or otherwise) the business of buying, selling, supplying or distributing goods directly or indirectly, for cash or deferred payment or for commission, remuneration or other valuable consideration and includes-

(i) a local authority, body corporate, company, any cooperative society or other society, club, firm, Hindu undivided family or other association of persons which carries on such business;

(ii) a factor, broker, arhti, commission agent, del credere agent, or any other mercantile agent, by whatever name called, and whether of the same description as hereinbefore mentioned or not, who carries on the business of buying, selling, supplying or distributing goods belonging to any principal, whether disclosed or not;

(iii) an auctioneer who carries on the business of selling or auctioning goods belonging to any principal, whether disclosed or not, and whether the offer of the intending purchaser is accepted by him or by the principal or nominee of the principal;

(iv) a Government which, whether in the course of business or otherwise, buys, sells, supplies or distributes goods, directly or otherwise for cash or for deferred payment or for commission, remuneration or other valuable consideration;

(v) every person who acts within the State as an agent of a dealer residing outside the State, any buys, sells, supplies or distributes goods in the State or acts on behalf of such dealer as-

(A) a mercantile agent as defined in the Sale of Goods Act, 1930, or

(B) an agent for handling of goods or documents of title relating to goods; or (C) an agent for the collection or the payment of the sale price of goods or as a guarantor for such collection or such payment;

(vi) a firm or a company or other body corporate, the principal office or head quarter whereof is outside the State, having a branch or office in the State, in respect of purchases or sales, supplies or distribution of goods through such branch or office;

Provided that a person who sells agricultural or horticultural produce grown by himself or grown on any "land in which he has an interest, whether as owner, usufructuary mortgagee, tenant, or otherwise, or who sells poultry or dairy products from fowls or animals kept by him shall not, in respect of such goods, be treated as a dealer.

(vii) every person who carries on the business of transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(viii) every person who carries on business of transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

9. A firm u/s 2(c)(C)(iv) includes a firm or company or other body corporate. A firm whether registered as proprietor ship firm or a partnership firm, may be a dealer and may carry on business after its registration under the Act. Rule 54 of the rules framed under the Trade Tax Act, 1948 provides for making a declaration, which in Colurrm-1 provide the name of the proprietor/partner of the firm, who wishes to carry on business. Coinmn-2 provides for status of the

dealer, which may be individual, joint in the family, firm, corporation, limited company, society, club, association or government department etc. as the case may be. Form No. 15 is to be filled by a dealer, for registration. The name of the dealer, who wants to carry on the business, is to be given in the declaration made by the person.

10. A partnership is defined u/s 4 of the Indian Partnership Act and is included in List 3 at item 7 of the VIT1" Schedule of the Constitution of India. A relationship between persons, who have agreed to share the profits on a business to be carried on by all or any of them acting for all, is a partnership. It is contract of two or more competent persons to place their money, efforts, labour, and skill or some or all of them in lawful commerce or business and to divide the profit and bear the loss in certain proportions.

11. Justice Storey defined a partnership to be a voluntary contract between two or more competent persons to place their money, effects, labour and skill or some or all of them in lawful commerce or business with the understanding that there shall have a communion of the profits thereof between them.

12. In order to create a partnership there must be an agreement entered into by the parties concerned to share the profits of the business. In the absence of any such agreement, they cannot be held to be partners or members of a firm. A proprietorship firm is different entity than the partnership firm. A proprietorship firm is registered for the purposes of giving it a commercial name. A proprietorship is nothing but an individual carrying on business in a particular name. For the purposes of assessment, a dealer is required to comply with statutory requirements of registration, filing of returns, disclosure, and is also liable to be penalised under the Act for failure to comply with the statutory requirement or for evasion of tax. A person carrying on business as sole proprietor in a trade name as such is liable to be assessed in his name and not in the trade name, which is not a legal entity.

13. The Tribunal did not commit any error in holding that the assessment order made in the name of the firm Kuberji Traders, was an illegal order and was liable to be set aside. This, however, could not have resulted into setting aside the assessment and the appellate order and accepting the returns filed by Shri Jagdish Kumar Gupta, the proprietor of the firm. After allowing the second appeal the Tribunal was required to remit the matter back to either the assessment authority or the appellate authority, to complete the proceedings for assessment in the name of the individual. It was a formal defect, which could be cured without giving any notice, as Shri Jagdish Kumar Gupta, the proprietor of the firm had filed the return and produced the account books before the assessment authority.

14. Where the name and address of the proprietor of the firm is known and that the proprietor has received the notice and has filed the return, it is not necessary that fresh notices be issued to him in his individual capacity for assessment, in

the present case the assessment authority was not required to make a fresh assessment after giving a notice. It was only required to correct the description of the person subject to assessment and on whom the tax liability was to be enforced.

15. The trade tax revision is allowed. The matter is sent back to the assessment authority to pass appropriate orders in the light of the discussions in the judgment.