(2006) 11 AHC CK 0185

In the Allahabad High Court

The Commissioner, Trade Tax APPELLANT

Vs

Qayum Khan Thekedar RESPONDENT

Date of Decision : 06-11-2006

Acts Referred:

Uttar Pradesh Sales Tax (Amendment and Validation) Act, 1978 — Section 19
Uttar Pradesh Trade Tax Act, 1948 — Section 11

Citation : (2009) 23 VST 508

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Rajes Kumar, J.—These four revisions u/s 11 of U.P. Trade Tax Act (hereinafter referred to as "Act") are directed against the order of Tribunal dated 24th February, 2006. Trade Tax Revision Nos. 810, 811 and 682 of 2006 relates to the assessment year 2003-04 and Trade Tax Revision No. 812 of 2006 relates to the assessment year 2002-03. Since the common question of law are involved in all the four revisions, same are being disposed of by the common order.

2. Brief facts of the case are that all the four opposite parties (hereinafter referred to as "Dealers") were civil contractors. They have been awarded several contracts of civil nature by the various Government departments in the years under consideration. The nature of the contracts are admittedly the works contract of civil nature. Dealers were liable to tax on the value of the goods involved in the execution of works contracts u/s 3-F of the Act. All the dealers applied under the compounding scheme, introduced by the State Government u/s 7-D of the Act in respect of the individual civil works contract. Dealers also applied for the issue of certificate for the deduction of the tax @ 1% u/s 8-D of the Act. Under the compounding scheme, dealers were liable to tax 0 1% on the total payment received in respect of civil contracts. Assessing authority vide order dated 17th March. 2004 allowed the applications u/s 8-D of the Act and passed the orders dated 17th March, 2004 for the deduction of tax @ 4%. It has

been observed that the order passed u/s 8-D (1) of the Act will have no effect on the application u/s 7-D of the Act. It appears that alongwith the applications, copy of the contracts were filed. In any view of the matter, the copies of the contracts were available at the time of consideration of the application u/s 7-D of the Act, inasmuch as the same is on record. During the course of the proceedings u/s 7-D of the Act. dealers had filed the complete details of the payment received from the various Government departments in respect of the each contract. Assessing authority on 19th April, 2005 had agreed to accept the tax in lump sum @ 1% on the payments received from the various contracts disclosed by the dealers u/s 7-D of the Act and had also observed that there would be no need to levy any tax u/s 7 of the Act. For the assessment years under consideration, the following amounts have been accepted as tax in lump sum u/s 7-D of the Act in the case of all the four dealers:

Name of the Dealer	Payment Recd.	Tax
Mohd. Qayum Khan	Rs. 23,95,576.00	Rs. 23,956.00
Bundelkhand Construction Company.	Rs. 12,72, 291.00	Rs. 12, 291.00
Shashi Bhushan Dwevedi	Rs. 99,79,022.00	Rs. 99.790.00
Shafika Ali	Rs. 24,79,575.00	Rs. 24,795.00

3. Deputy Commissioner (Executive) initiated the proceedings u/s 10-B of the Act on the ground that as per Clause (5) of the Government Order No. Vidhi-1(3) Civil Sankarm Sanvida (2000-2001)-761/Trade Tax, dated 10th August, 2000 issued u/s 7-D of the Act. applications should be filed within 90 days from the date of the work order and in case, if the application would not be filed within the specified period, same could be filed within another 90 days on payment of 2% interest. On the basis of the aforesaid Clause (5), Deputy Commissioner (Executive) was of the view that the composition amount could not be accepted in respect of those works contracts, which were prior to 180 days from the date of application. Deputy Commissioner (Executive) was of the view that there were some contracts, which were prior to 180 days from the date of the application and thus they were not eligible for consideration under the compounding scheme and liable to be excluded.

4. Before the Deputy Commissioner (Executive) dealers contended that once the assessing authority had accepted the application u/s 7-D of the Act for the payment of tax in lump sum, same could not be reopened. It was submitted that u/s 7-D of the Act, assessing authority entered into an agreement with the applicant to accept the tax in lump sum, thus, the document was in the nature of the agreement and not the order. Therefore, the provisions of Section 10-B of the

Act was not applicable. It was also, contended that the agreement could not be revised by the Deputy Commissioner (Executive). Deputy Commissioner (Executive) did not accept the plea of the dealers and vide order dated 09.09.2005 set aside the so-called orders dated 19.04.2005 passed u/s 7-D of the Act and remanded back the matter to the assessing authority for fresh orders. Being aggrieved by the order u/s 10-B of the Act, dealer filed appeals before the Tribunal. Tribunal by the impugned order allowed the appeal and set aside the orders passed u/s 10-B of the Act. Tribunal held that the Deputy Commissioner (Executive), Trade Tax, Banda had no jurisdiction to revise the agreement dated 19.04.2005 made u/s 7-D of the Act. Tribunal held that dealers filed the copies of the agreement, which were available at the time of accepting the applications u/s 7-D of the Act and the dealers had not concealed any fact. Tribunal held that the assessing authority had agreed for the payment of lump sum u/s 7-D of the Act on the consideration of the entire facts and circumstances of the case, hence was not justified to say that the dealers were not entitled for the benefit of the compounding scheme.

5. Heard Sri B.K. Pandey, learned Standing Counsel and Shri Jamal Ali, learned Counsel for the dealers.

6. Learned Standing Counsel submitted that u/s 7-D of the Act assessing authority could agree to accept the composition money subject to the directions of the State Government. Thus, the assessing authority could not accept the composition money contrary to the directions of the State Government and in case if he acted contrary to the Government Order, such agreement would be invalid. He submitted that under the compounding scheme as per- Clause (5), the application could be filed within 90 days from the date of the contract and the dealer was also entitled to move the application beyond specified period within further period of 90 days on payment of 2?o interest. Thus, application could be moved within 180 days from the date of the contract. He submitted that the compounding application for the contract beyond 180 days were inadmissible. He submitted that in the present case, assessing authority had accepted the composition money in respect of those contract also, which were beyond limitation. Therefore, Deputy Commissioner (Executive) has exercised its power u/s 10-B of the Act and revised/cancelled the orders dated 19.04.2005 u/s 7-D of the Act and directed the assessing authority to pass the fresh orders. He submitted that the orders passed u/s 10-B of the Act were wholly justified and in accordance to the law. Learned Counsel for the dealer relied upon the order of the Tribunal.

7. I have given my considered thought to the rival submission of the parties and perused the order of the Tribunal and the authorities below.

8. It would be useful to refer Section 7-D and Section 10-B of the Act:

Section 7-D. Composition of tax liability.

Notwithstanding anything contained in this Act, but subject to direction of the

State Government, the assessing authority may agree to accept a composition money either in lump sum or at an agreed rate on his turnover in lieu of tax that may be payable by a dealer in respect of such goods or class of goods and for such period as may be agreed upon:

Provided that any change in the rate of tax which may come into force after the date of such agreement shall have the effect of making a proportionate change in the lump sum or the rate agreed upon in relation to that part of the period of assessment during which the changed rate remains in force.

Explanation :- For the purposes of this section the assessing authority includes an officer not below the rank of Trade Tax Officer Grade-II posted at a check-post.

Section 10-B. Revision by Commissioner.

(1) The Commissioner or such other Officer not below the rank of Deputy Commissioner as may be authorised in this behalf by the State Government by notification may call for and examine the record relating to any other (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

(2) No order under Sub-section (1) affecting the interest of a party adversely shall be passed unless he has been given a reasonable opportunity of being heard.

(3) No order under subsection (1), shall be passed-

(a) to revise an order, which is or has been the subject matter of an appeal u/s 9, or an order passed by the Appellate Authority under that section:

Explanation - Where the appeal against any order is withdrawn or is dismissed for nonpayment of fee payable u/s 32 or for non-compliance of Sub-section (1) of Section 9, the order shall not be deemed to have been the subject matter of an appeal u/s 9:

(b) before the expiration of sixty days from the date of the order in question;

(c) after the expiration of four-days from the date of the order in question or after the expiration of two years from the date of commencement of Section 19 of the U.P. Sales Tax (Amendment and Validation) Act, 1978, whichever is latter.

9. Section 7-D of the Act came up for consideration before the Division Bench of this Court in the case of Kothari Contract Interiors v. Trade Tax Officer, Modinagar reported in 2005 NTN (Vol.26), 427. Division Bench of this Court held that Section 7-D of the Act has over riding effect over other provisions of the Act and once the compounding application is accepted u/s 7-D of the Act, proceeding u/s 21 of the Act can not be taken.

10. In the case of Vora Electric Service, Kanpur v. State of U.P. and Ors. reported in 2005 UPTC, 977. Division Bench of this Court held as follows:

Section 7-D of the Act starts with obstance clause, i.e. "notwithstanding anything contained in the Act." Thus it has an overriding effect over the provision of the Act Perusal of section shows that it contemplates payment by agreement in lump sum. Once the department agrees to accept the tax in the name of compounding money in lump sum, in lieu of tax payable, it displaces the regular assessment proceeding.

11. Division Bench further held that it is settled principle of law that power to revise the order can not be exercised unless it is specifically contemplated under the Act or scheme.

12. Full Bench of this Court in the case of Bhadauria Gram Sewa Sansthan, Fatehpur v. Assistant Commissioner, Sales Tax, Allahabad Division, Allahabad and Ors. in Civil Misc. Writ Petition No. 252 of 1994 decided on 13th January, 2006 held as follows:

It is the choice of a dealer to opt for compounded payment of tax and if the said choice is in accordance with the scheme and is ultimately accepted by the authority concerned, it becomes an agreed amount of tax. The department as also the dealer are bound by the said agreement A dealer who has opted to pay the tax in lump sum u/s 7-D of the act after it has been accepted by the department, any demand for that period is not relatable to the actual turnover but the sum agreed upon. In other words, the department as well as the dealer both know the amount payable and receivable by each other. The determination of lump sum amount in lieu of tax displaces the requirement of regular assessment proceeding and the quantification of tax liability is by agreement as per the term of the scheme which would bind both the parties. The object of introducing such a scheme under a taxing statute is well established as so many advantages are attached to such scheme besides being hassle free to the dealer. It also avoids unnecessary litigation. The department in its turn receives a fixed amount of tax without undertaking the assessment work and, thus, saves a lot of time. It also facilitates the speedy recovery of tax.

13. Like Section 7-D of the Act the similar provisions are also available under the Kerala General Sales Tax Act, Central Excise Act, U. P. Sugarcane Purchase Tax Act etc. Apex Court and the High Court had occasions to consider the scope of such provisions.

14. In the case of State of Kerala and another Vs. Builders Association of India and others, the Apex Court while considering the constitutional validity of Sections 7(7) and 7(7-A) and 5(l)(iv) of the Kerala General Sales Tax Act, 1963, which provided for payment of tax in lump sum in place of actual amount of tax, has held that the alternate method of taxation provided by Sub-section (7) or (7-A) of Section 7 is optional. It is wholly at the choice or pleasure of the contractor and the contractor who has opted to the said alternate method of taxation, cannot complain. It has further held that having voluntarily and within the full knowledge of the features of the alternate method of taxation, opted to be

governed by it, a contractor cannot be heard to question the validity of the relevant sub-sections or the Rules. The impugned sub-sections have been evolved for convenient, hassle free method of assessment of tax, just as the system of levy of entertainment tax on the gross collection capacity of the cinema theatre and by opting to this alternate method, the contractor saves himself the botheration of book keeping, assessment, appeals and all that it means. It has also held that it is not necessary to enquire and determine the extent or value of goods which have been transferred in the course of execution of a works contract, the rate applicable to them and so on. It is only an alternative method of ascertaining the tax payable, which may be availed of by a contractor if he thinks it advantageous to him. The Constitution does not preclude the Legislature from evolving such alternate, simplified and hassle free method of assessment of tax payable making it optional for the assessee.

15. Similar view has been taken by the Apex Court in the case of Mycon Construction Ltd. v. State of Karnataka and Anr. reported in 2002 UPTC 585 (SC). The Apex Court has repelled the submission that while evolving a simplified method of payment of tax such is the case in the instant case; the law cannot give an option to the assessee, which is in the teeth of constitutional provision. It has held that this argument does not survive in view of the principles laid down by the Apex Court in the case of State of Kerala and Anr. v. Builders Association of India and Ors. (Supra).

16. In the case of Commissioner of Central Excise and Customs Vs. M/s. Venus Castings (P) Ltd., , the Apex Court while considering the provision of Section 3 A(4) of the Central excise Act. 1944 and Rule 96ZO(3) of the Central Excise Rules, which envisaged the composition method of payment of duty, has held that they provided two alternative procedure to be adopted at the option of the assessee and they do not clash with each other. The manufacture if they have availed of the procedure under Rule 96ZO(3) at their option, cannot claim the benefit of determination of production capacity u/s 3A(4) of the Act, which is specifically excluded.

17. In the case of Jalan Castings (P) Ltd. Vs. Commissioner, Central Excise, this Court has held that where an assessee has himself asked for a lump sum method of assessment and this was agreed to by the Department, then the assessee cannot go back and claim that he should be assessed by the normal mode as the assessee cannot blow hot and cold at the same time. The decision of this Court has been approved by the Apex Court in the case of Commissioner, Central Excise v. Venus Castings (P) Ltd.,(supra).

18. The same view was taken by the Apex Court in the case of Union of India and Others Vs. Supreme Steels and General Mills and Others, In the aforesaid case, it has been held by the Apex Court that it was absolutely optional for the manufacturer to opt for payment of excise duty in accordance with Sub-rule (3) of Rule 96ZO on the basis of total finished capacity installed as provided thereunder and the manufacturer cannot opt twice during one financial year first

choosing to pay in accordance with Sub-rule (3) of Rule 96ZO and thereafter to switch over to actual production basis u/s 3A(4) of the Central Excise Act. 1944 in case it is less than the duty payable under Sub-rule (3) of Rule 96ZO. The said sub-rule is quite clear that the option under it is available subject to the condition that once having opted it, the benefit, if any, under Sub-section (4) of Section 3A of the Central Excise Act, 1944 shall not be available.

19. In the case of Satish Prakash Ajay Kumar v. Assistant Sugar Commissioner, Saharanpur and Ors. reported in 1980 UPTC 64 (FB) Full Bench of this Court while interpreting the provisions of Section 3(1)(b) of the U.P. Sugarcane Purchase Tax Act, 1961 and Rule 13 of the Rules framed thereunder, has held that the said Act and the Rules do not contemplate exemption from the liability for payment of tax by the owner of a unit who has opted for the assumed basis merely because he has, either by choice or on account of some mechanical defect, been unable to work some of the crushers composing his unit for any length of time during a particular assessment year.

20. In the case of Venkateshwara Theatre Vs. State of Andhra Pradesh and Others, the Apex Court while considering the scheme announced by the Government of Andhra Pradesh, providing that instead of payment of entertainment tax on the basis of actual number of cinema goers, the proprietor of a cinema hall may opt to pay a consolidated levy on the basis of gross collection capacity per show, has held that the compound payment of entertainment tax is a more convenient mode of levy of the tax inasmuch as it dispenses with the need of verification or to enquire into the number of person admitted to each show and to verify the correctness or otherwise of the returns submitted by the proprietor containing the number of persons admitted to each show and the amount of tax collected. The aforesaid decision has been followed by the Apex Court in the case of State of Kerala and Anr. v. Builders Association of India and Ors. (supra) wherein the Apex Court has held that the object of levy of compound payment of tax is hot to increase the revenue. The legislature provides the alternate method of taxation with a view to realise the tax with least discomfort to the assessee. It is only a convenient mode of realisation of tax. It also ensures the fixed amount of payment of tax to the Government irrespective of the fact that the business of the assessee earned profit or not. Similar view has been taken by the Apex Court in the case of M/s Mycon Construction Ltd., M/s Venus Castings (P) Ltd. and Supreme Steels and General Mills (supra).

21. In the case of Bharathi Knitting Co. Vs. DHL Worldwide Express Courier Division of Airfreight Ltd., , the Apex Court has held that when a person signs a document which contains certain contractual terms, normally parties are bound by such contract and it is for the party to establish exception in a suit. When a party to the contract disputes the binding nature of the signed documents, it is for him to prove the terms in the contract or circumstances in which he came to sign the document, need to be established and in appropriate case where there is an acute dispute of facts, necessarily the Tribunal has to refer the parties to

original Civil Court established under the CPC or the State law, to have the claim decided between the parties but when there is a specific term in the contract, the parties are bound by the term in the contract.

22. Under the provisions of the U.P. Trade Tax Act, tax is being collected either as a result of levy of tax in an assessment proceeding as provided u/s 7 of the Act or to accept in the form of composition amount in lump sum in lieu of tax payable. Once the dealers offers for the payment of composition amount in lump sum for a particular period and the assessing authority agrees to accept such composition amount it displaces the regular assessment. Any documents, which is executed in any form u/s 7-D of the Act reflecting the agreement to accept the composition money, the nature of such documents would be only a document of agreement and not in the nature of order contemplated under any other provision of the Act.

23. Section 7-D of the Act has overriding effect over other provisions of the Act. Thus, any agreement made u/s 7-D of the Act would not be subject to Section 10-B of the Act and can not be revised by the authorities u/s 10-B of the Act. u/s 10-B of the Act, revising authority has a power to call for and examine a "record relating to any order" passed by any authority 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 thereof as he may think fit. Thus, the power u/s 10-B of the Act can be exercised in respect of the order passed by any subordinate officer and not in respect of any agreement. Section 10-B of the Act is special provision provides power to revise the order should be construed strictly.

24. Full Bench of this Court in the case of Bhadauria Gram Sewa Sansthan, Fatehpur v. Assistant Commissioner, Sales Tax, Allahabad Division, Allahabad and Ors. (Supra) has categorically held that the department as well as dealer both are bound by the agreement. Thus, once the assessing authority agrees to accept the computation money in respect of contract, such agreement can not be revised unless specific power is provided in this regard. Apex Court in several cases held that the power of review can not be exercised unless it is specifically provided. (Kapra Mazdoor Ekta Union v. Management of Birla Cotton Spinning and Weaving Mills Ltd. and Ors. AIR 2005 SCW 1561.

25. In my view, the agreement u/s 7-D of the Act can not be revised or altered under any of the provision of the U.P. Trade Tax Act except in a situation provided under the scheme. Clause (12) of the scheme provides that in case, if it is found that in the application or in the affidavit any fact has been concealed or wrong details have been furnished, assessing authority would have power to cancel the agreement for the composition amount in lump sum.

26. In the present case, there is no allegation that any fact has been concealed or wrong details have been furnished, inasmuch as no action has been taken under Clause (12) of the scheme by the assessing authority. Learned Standing

Counsel submitted that Clause (3) of the scheme provides that in relation to the dispute of the civil contract, the decision of the Commissioner of Trade Tax shall be final. According to him under this clause, Joint Commissioner, who is included within the definition of the Commissioner could exercise the power u/s 10-B of the Act. In my view, submission of the learned Standing Counsel is misplaced. Clause (13) of the scheme is applicable in a case where there is any dispute about the nature of civil contract and the matter is referred to the Commissioner of Trade Tax, then his decision may be final but the aforesaid clause does not provide that Commissioner can exercise the power u/s 10-B of the Act.

27. For the reasons stated above, I do not find any merit in all the revisions.

28. In the result, all the four revisions fail and are accordingly, dismissed.

