(2006) 03 AHC CK 0067

In the Allahabad High Court

Case No : Trade Tax Revision No. 465 of 1999

The Commissioner, Trade Tax APPELLANT

Vs

S/S Ovject De Art India RESPONDENT

Date of Decision : 09-03-2006

Acts Referred:
Uttar Pradesh Trade Tax Act, 1948 — Section 11, 2, 3A, 3A(1), 3D

Citation : (2006) 03 AHC CK 0067

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Advocate : B.K. Pandey and S.C, for the Appellant; Vikram Gulati, for the Respondent

Final Decision : Dismissed

Judgement

Rajes Kumar, J.—Present revision u/s 11 of U.P. Trade Tax Act (hereinafter referred to as "Act") is directed against the order of Tribunal dated 12.11.1998 for the assessment year 1992-93.

2. Short question involved in the present revision relates to the taxability of replenishment Licenses (hereinafter referred to as "REP License") Dealer opposite party (hereinafter referred to as "Dealer") was the manufacturer and had been issued REP License by Deputy Chief Controller of Importer and Exporter, Moradabad. Dealer sold the said REP License for a sale consideration of Rs. 51,01,041/- Assessing authority had levied the tax on the sale consideration of REP License treating it as unclassified item. Before the assessing authority, dealer claimed that REP License was not the goods and the amount received was for the surrender of the said license. First appeal filed by the dealer was rejected. Dealer filed second appeal before the Tribunal. Tribunal allowed the appeal and deleted the tax levied on the sale consideration of REP License. Tribunal has held that REP License was an unclassified goods, liable to tax at the point of manufacturer or importer and since the REP License was issued by Deputy Chief Controller of Importer and Exporter, Moradabad, dealer was neither manufacturer

nor importer.

3. Heard learned Counsel for the parties.

4. Learned Standing Counsel submitted that after the issue of license by Deputy Chief Controller of Importer and Exporter, Moradabad, first sale was made by the dealer, therefore, dealer was the manufacturer of such REP License within the definition of Section 2(ee) of the Act. Sri Vikram Gulati, Advocate filed Vaklatnama on behalf of the dealer but despite the case being listed number of times and the list is being revised, Sri Vikram Gulati, Advocate did not appeared. Thus. Sri K. Saxena, Advocate has been asked to assist the Court as amicus curie. Sri K. Saxena, Advocate submitted that there is no dispute that REP License is the goods as held by the Apex Court in the case of Vikas Sales Corporation and Anr. v. Commissioner of Commercial Taxes and Anr. reported in 1996 UPTC, 1097. He submitted that REP License was issued by Deputy Chief Controller of Importer and Exporter, Moradabad and was in the nature of permission, entitlement or order. It is never manufactured. He submitted that the word "manufacture" is defined u/s 2(e-1) of the Act, which contemplates some treatment to the tangible goods while for the issue of license, no such treatment is involved and. therefore, issue of such license does not amount to manufacture as defined u/s 2(e-1) of the Act and thus, dealer can not be held as manufacturer u/s 2(ee) of the Act.

5. Under the provisions of U.P. Trade Tax Act, the sale of goods is liable to tax, subject to rates provided for u/s 3-A of the Act which runs as under:

3.A. Rate of Tax (I). Except as provided in Section 3D, the tax payable by a dealer under this Act shall be levied.

(a)...

(b)...

(c)...

(c-1)...

(d) On the turnover in respect of the goods specified in the schedule at such point and at such rate not exceeding 15% as the State Government may by notification declare.... (e) On the turnover in respect of the goods other than those referred to in Clauses (a), (b), (C1), and (d) at the point of sales by the manufacturer or importer (a) 8%.

Provided that the State Government may from time to time, by notification modify the rate or point of tax on the turnover in respect of any such goods w.e.f. such date as may be notified in that behalf, so however, that the rate does not exceed 8%.

6. From the above provisions, it would follow that the goods specified in the schedule are liable to tax at such point and at such rate not exceeding 1 5% as

notified but those goods which are not included in any notification would be liable to tax @ 8% at the point of sale by the manufacturer or importer as provided by u/s 3A(1-e) of the Act,

7. It is important to note that REP Licences/Exim Scrips were not specified in the schedule during the year under consideration and therefore, sales thereof could be taxable only in the hands of the manufacturer or import (a) 8%.

8. In the present case, it is undisputed that the dealer was not an importer, inasmuch as, REP License had been issued by the Deputy Controller of Imports and Exports, Moradabad. Therefore, the only dispute was as to whether in the facts and circumstances of the case, the dealer could be treated to be a manufacturer so as to subject to tax on the sale of REP Licenses.

9. The term "manufacture" has been defined u/s 2(e-1) of the Act which reads as follows:

(e-1). "Manufacture"- means producing, making mining, collecting, extracting, altering, ornamenting, furnishing or otherwise processing, treating or adopting any goods but does not include such manufacturers or manufacturing process as may be prescribed.

10. The term "manufacturer" has been defined u/s 2(ee) of the Act which runs as under:

(ee). "Manufacturer" - in relation to any goods means the dealer who makes the first sale of such goods in the State after their manufacture and includes....

11. The main dispute in the present case is therefore, whether the dealer can be treated to be a manufacturer. The case of the Revenue is that these REP Licenses were manufactured by the authority granting license and the sale of such manufactured goods was made by the dealer and. therefore, it would be treated as the manufacturer and thus liable to tax @ 8%.

12. In the case of Vikas Sales Corporation and Anr. v. Commissioner of Commercial Taxes and Anr. (Supra), REP License has been considered by the Apex Court. The Hon''ble Supreme Court observed that the Central Government had been issuing from time to tune, what was called the Import and Export Policy published in a form of a Brochure. The Import policy in vogue during the years concerned herein provided for issuance of what is called replenishment licenses (for short REP Licenses). The objective behind the license was to provide to the registered exporters, facility of importing essential inputs required for the manufacture of products exported, The essential idea was to encourage export and for that purpose import licenses called REP licenses were issued equal to prescribed percentages of the value of export. These licenses were made freely transferable. It was provided that the transfer of such licenses did not require any endorsement or permission from the Licensing Authority. It only required a letter from the transferor recording and evidencing the transfer. On that basis the transferee became due and lawful holder of the license and could import the

goods permitted thereunder or sell it to another in turn. With effect from July 3, 1991 the name of the license was changed to Exim Scrips (Export & Import Licenses). The provisions governing Exim Scrips were broadly the same as those governing REP Licenses with certain minor variations, which were not relevant for the present purpose.

13. After examining the definition of the term "goods" under Karnataka Sales Tax Act, 1957 as also Kerala General Sales Tax Act (which is substantially same as under U.P. Trade Tax Act), their Lordships observed that the goods meant all kinds of movable property excluding certain goods, which were specifically mentioned therein. Their Lordships then referred to the expression "property" given in various legal dictionaries and certain decisions and then observed that the word "property" is commonly used to denote everything which is subject of ownership, Corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make-up wealth or estate. It extends to every species of valuable right and interest and includes real and personal property, easements, franchises and incorporeal hereditaments.

14. Their Lordships further observed that the expression "movable property" is stated to include corporeal as well as incorporeal property, debts contract and other chooses inaction are said to be chattels, not less than furniture or stock-in-trade. Similarly patents, copyrights & other rights, in rem, which are no right over land, are also included within the meaning of movable property.

15. After having examined the definition of the term "goods" and the expression "movable property" as also the provisions of Import and Export Policy of the Government of India (1990-1993), their Lordships held "the above provisions do establish that REP Licenses have their own value. They are bought and sold as such. The original license or the purchaser is not bound to import the goods permissible there under. He can simply sell it to another and that another to yet another person. In other words, these licenses/Exim Scrips have an inherent value of their own and are traded as such. They are treated and dealt with in the commercial world as merchandise goods. For all purposes and intents, it is goods.

16. From the above observations of the Hon''ble Supreme Court, it would appear distinctly that REP Licenses/Exim Scrip are goods and their sale would be liable to tax.

17. The movable goods can broadly be categorized under two heads:

(i) Corporeal, Tangible or Visible goods.

(ii) Incorporeal. Intangible or Invisible goods.

18. It is obvious that REP Licenses, even though, fall under the category of goods but they are incorporeal, intangible or invisible. The definition of the term manufacture applies only to corporeal, tangible and visible goods. The definition of the term manufacture as contained in Section 2(e-1) refers to various

processes undertaken to bring in a new commodity. These processes can be performed only on tangible goods and not on intangible goods as will be demonstrated by the following decisions of the Hon''ble Supreme Court and our own High Court.

19. In the case of State of Maharashtra v. Shiv Dutt & Sons reported in 1984 STC 497, the Hon''ble Supreme Court considered the definition of the term manufacture u/s 2(17) of Bombay Sales Tax Act which is akin to the definition of the term manufacture under U.P. Trade Tax Act and held as follows:

the mere fact that the words used in definition of manufacture are very wide should not lead us to so widely interpret them as to render the provision practically meaningless and so as to treat the goods sold as to be merely because some slight additions or changes are made in the goods which are purchased before they are sold. It is true that under the section it is not necessary that there should be "manufacture" in the sense that a new commodity has been brought into existence as would have been required, if those words are interpreted in its literal sense. But at the same time the section should be so interpreted to mean only of such various processes referred to in the definition and applied to the goods as are of such a character as to have an impact on the nature of the goods.

20. In the case of B.P. Oil Mills Limited v. Sales Tax Tribunal and Ors. reported in 1998 UPTC 1020, the Hon''ble Supreme Court observed as under:

the nature and extent of processing may vary from case to case, in one case the processing may be slight and in another it may be extensive but in each process suffered the commodity should experience a change.

21. In the case of State of Mahrashtra v. Mahalaxmi Stores reported in 2002 STI (SC) 97, the Hon''ble Supreme Court held crushing of boulders into small sizes known as gitti does not amount to manufacture within the definition of Section 2(17) of Bombay Sales Tax Act.

22. In the case of S.R. Cannery, Allahabad v. Commissioner, Trade Tax reported in 2006 (3) VLJ 8, this Court after referring to a large number of cases on the subject held that the process of preservation and tinning does not amount to manufacture. It was further held that every type of variation of the goods or finishing the goods would not amount to manufacture unless it results in emergence of new commercial commodity.

23. From the perusal of the aforesaid cases it would appear that some process has to be carried out on a commodity to obtain a new manufactured commodity. In every case of manufacture there has to be some process whether slight or extensive. This act of processing can be carried out only in tangible goods and not in respect of intangible goods: therefore, definition of the term manufacture given u/s 2(e-1) of the Act apply only to tangible goods and not to intangible goods. RLP Lieenses/Exim Scrips being intangible goods are incapable of being

manufactured in the sense in which term manufacture has been defined under U.P. Trade Tax Act. Thus, the authority granting licence can not be treated as manufacturer of licence.

24. It may be mentioned here that the first notification in respect of Patents, Trade Mark. Import License, Export Permit or License or Quote was issued by the State Government in exercise of powers under proviso to Section 3A(1)(e) of the Act vide Notification No. ST-710. dated 2702.1999 whereby sales of the aforesaid goods were made liable to tax @ 4% in the hands of importer or the person in whose name the license/Permit had been issued. The proviso under which this notification has been issued stated that the State Government may modify the rate or the point of tax while subjecting these goods to tax. Significantly the liability of tax under the aforesaid notification has not been fastened on the manufacturer of these permits and licenses. This is so apparently because these permits and licenses are not manufactured and there can be no manufacturer thereof. In fact, licenses or permits are issued or granted and not manufactured and. therefore, in the said notification the words manufacturer are significantly missing. It is also important to mention that the aforesaid notification has been issued under the same provisions i.e. u/s 3A(1-e) under which the revenue wants in the present case to levy tax on the dealer treating him to be a manufacturer.

25. A subsequent notification is relevant to explain or to understands the intent of legislature with regard to the person on which the tax is proposed to be levied, (Pappu Sweets and Biscuits etc. v. Commissioner of Trade Tax reported in 1998 U.P.T.C 1086). Even though, this notification was not available for the year under consideration yet it throws sufficient light on the intent of the Legislature that in regard to licenses and permits, the tax was exigible either on the importers or sale by permit holders to another person, During the year under consideration 1992-93, there was no notification on the subject and, therefore, tax could be levied only at the point of sale by manufacturer or importer. In the present case there being no importer or manufacturer, no liability of tax could be fastened on dealer.

26. It is also very significant to point out the Section 2 of the Act which contains various definitions, including definition of the term manufacturer, starts with the phrase "in this Act unless there is anything repugnant in the subject or context". This phrase came up for consideration before this Hon''ble Court in the case of Commissioner, Sales Tax v. Maha Prabandhak, Jal Sansthan, Kanpur reported in 2000 UPTC 1000 After referring to several decisions of Hon''ble Supreme Court this Court observed that the meaning to be ordinarily given is what is given in the definition clause but this is not inflexible and there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word has been used and that will be giving effect to the opening sentence in the definition section namely "unless there is anything repugnant in the subject or context". this Court further held that no doubt u/s

2(e-1) manufacture would be complete if any of the process mentioned therein is undertaken but in view of the opening phrase in Section 2 of the Act as aforesaid, the meaning of the word "manufacturer" as given in Section 2(e-1) of the Act is to be restricted while interpreting the word manufacturer occurring in Section 3-G(2) of the Act.

27. In view of the aforesaid decision also it would appear that the meaning of the word "manufacturer" has to be restricted and can not be applied as such if there is anything repugnant in the subject or context.

28. Before parting with the case, the Court would like to express thanks to Sri Kunwai Saxena for effective assistance in the matter.

29. For the reasons stated above, revision fails and is accordingly, dismissed.