

Court No. - 19

Case :- SALES/TRADE TAX REVISION No. - 24 of 2009

Revisionist :- M/S Raju Cement Store Oel Through Its Proprietor

Opposite Party :- Commissioner Of Commercial Taxes
U.P.Commercial Tax

Counsel for Revisionist :- P.Agrawal

Counsel for Opposite Party :- C.S.C.

Hon'ble Subhash Vidyarthi J.

1. Heard Shri Amar Mani Tripathi holding brief of Shri Pradeep Agrawal Advocate the learned Counsel for the petitioner and Shri Sanjay Sareen, the learned Additional Chief Standing Counsel for the State.
2. By means of the instant Revision filed under Section 11 of the U.P. Trade Tax Act 1948, the revisionist has challenged validity of an order dated 16.10.2008 passed by the Trade Tax Tribunal, Lucknow Bench-III, Lucknow in Second Appeal No.322 of 2004, which was filed by the petitioner against an order dated 28.01.2004 passed by the Joint Commissioner Appeal 4, Trade Tax, Sitapur. The petitioner has also challenged the decision of Second Appeal No.241 of 2004 filed by the Commissioner, Trade Tax U.P., Lucknow, which appeal has also been decided by the same order.
3. The learned Additional Chief Standing Counsel raised a preliminary objection that the petitioner has challenged orders passed in two separate second appeals. Even if both the second appeals were decided by a common judgment and order, since the order decides two separate appeals, two separate revisions ought to have been filed.
4. The learned counsel for the petitioner could not dispute this preliminary objection.
5. Although there is force in the preliminary objection raised by the learned Additional Chief Standing Counsel, since the revision was admitted by means of an order dated 22.01.2009, I do not think it would be proper to dismiss the revision of the preliminary objection

and in the interest of justice, I proceed to decide the revision on its merits.

6. Briefly stated, facts of the case are that a survey of the petitioner's premises was conducted by the Special Investigation Branch of Trade Tax Department on 25.01.2003. On the basis of findings of the survey, a show cause notice was issued to the petitioner, to which he did not submit a reply. After taking into consideration the uncontroverted findings of the survey, taxable sale of goods worth Rs.18,00,000/- was assessed, on which the petitioner's tax liability of Rs.1,76,000/- was assessed by the Assessing Officer.
7. The First Appellate Authority did not interfere in the finding of the Assessing Authority regarding rejection of account books of the petitioner. Yet it substantially decreased the petitioner's tax liability solely on the ground that at the time of survey made at about 4:30 PM on 25.01.2003, merely a sum of Rs.1,510/- was found in the cash box of the petitioner.
8. In second appeal, the department contended that the First Appellate Authority erred in assessing the petitioner's tax liability only on the basis of cash amount found in the cash box of the petitioner's premises whereas several documents have been recovered showing sales of goods worth huge amount, on credit. In such circumstances, tax liability assessed by the Assessing Authority could not be reduced merely on the basis of quantum of cash received in the petitioner's premises.
9. Slips bearing Nos.36 to 50 found in the petitioner's premises indicated sale of goods worth Rs.1,08,625/- by evasion of tax. Slips bearing Nos.15 to 34 indicated sale of goods worth Rs.35,708/-, including Cement worth Rs.15,442/-. Slips bearing Nos.36 to 50/- established sale of Cement and some other goods by evading tax. The source of purchase of Cement and Iron bars could not be established due to lack of documentary evidence and, therefore, the Assessing Authority assessed liability of tax treating the petitioner to be the manufacturer of the goods. The First Appellate Authority did not record any finding

regarding lack of purchase of documents for Iron bars but regarding Cement, it held that Cement is manufactured in large factories and the same could not have been manufactured by the petitioner.

10. The Tribunal held that although a sum of merely Rs.1,510/- was found in the cash box at the time of survey made by the Special Investigation Branch at 04.30 PM on 25.01.2003 and the petitioner's brother present at the time of survey claimed that this was the amount of sale that took place on the said date, no cash memos were produced at the time of survey or even before the Assessing Authority. The petitioner's could not produce regular account books to support the claim of sale of goods worth merely Rs.1,510/-. Loose slips found at the time of survey regarding sale of Cement, Iron bars, Sand, Morang, Gitti etc. on credit prove that huge quantity of goods were sold on credits also, besides some sale on cash payments.
11. The Tribunal found that on the basis of documents found at the time of survey, a show cause notice was issued to the petitioner and when the petitioner did not submit any reply to the show cause notice, tax liability of Rs.1,76,000/- was assessed, which does not appear to be improper keeping in view the facts and circumstances of the case. Although the First Appellate Authority concurred with the conclusion of the Assessing Authority regarding absence of account books and rejection of the petitioner's claim which was not supported by the account books, it drastically reduced the tax liability of the petitioner merely on the basis of the amount of cash found in the cash box, which was not a valid basis of reduction of the tax liability.
12. The Tribunal held that when documents have been recovered at the time of survey establishing sale of huge amount of goods on credit, the decision of the First Appellate Authority reducing the tax liability merely on the basis of cash from the premises of the petitioner, was unsustainable in law. The Tribunal further held that Iron bars and Cement, both are manufactured in large factories but this cannot be a reason for reducing the amount of tax assessed by the Assessing Authority, when the petitioner could not produce documents in

support of purchase of Iron bars and Cement both. It is also recorded in the order passed by the Tribunal that in spite of sufficient information of the second appeal, nobody had appeared on behalf of the petitioner in the second appeal.

13. The petitioner claims that it had given an application dated 22.11.2008 under Section 22 of the Trade Tax Act for recall of the ex-parte order dated 16.10.2008, a copy whereof was served upon the petitioner on 09.11.2008. The petitioner claimed that the proprietor and *Pairokar* of the Firm Anis Ahmed remain confined to bed from 04.10.2008 to 24.10.2008, but no orders were passed on that application.
14. However, as the petitioner has challenged validity of the judgment and order dated 16.10.2008 by filing a revision, the application for setting aside the aforesaid order on the ground that it was passed ex-parte, loses its significance, as this Court has admitted the revision for final hearing and the validity of the order dated 16.10.2008 is being examined on its merits.
15. The revision was admitted on 22.01.2009 on all the questions of law formulated in the memorandum of revision, which are as follows: -

“1. Whether the learned Tribunal was justified in rejecting the appeal filed by the applicant and to allow the cross appeal filed by the Opp.Party, without giving any reasons enhanced the turnover as fixed by the First Appellate Authority.

2. Whether the learned Tribunal was justified in not considering the material evidence on record and the law laid down by this Hon’ble Court that in order to determine the taxable event the onus of proof lay on the assessing authority.

3. Whether the learned Tribunal was justified to ignore that the applicant has not obtained any form 31 from the Trade Tax Department and is dealing in tax paid goods and the entire purchases were made within the State of U.P. which are verifiable from the purchase vouchers.

4. Whether the learned Tribunal was justified in enhancing the turnover determined by the First appellate authority without controverting the findings recorded by the First appellate authority and dismissed the appeal filed by the applicant by recording the perverse findings of facts which gives rise to this Revision.

5. Whether the learned member Tribunal was justified to enhanced the turnover determined by the First appellate authority merely on the basis that the cash of Rs. 1510/- was found at the time of survey at 4.30 P.M. when the applicant himself has shown sales of Rs. 8,100/- per day

6. Whether the learned Tribunal was justified in ignoring the findings recorded by the First appellate authority wherein each and every parcha seized during the course of survey was duly considered and determined the turnover on the said basis.

7. Whether the learned Tribunal was justified to reject the application for recall which was duly supported by an affidavit and the medical certificate without any cogent reason.

8. Whether the learned Tribunal was justified in proceedings on extraneous consideration and committed not only factual but legal error as well which has vitiated the findings recorded in the order.”

16. So far as the 1st question of law framed in the revision is concerned, a bare perusal of the impugned order indicates that sufficient reasons have been given in the order for restoration of the assessment made by the Assessing Authority and setting aside the order of the First Appellate Authority, as the order of the First Appellate Authority was based on the sole reason that merely a sum of Rs.1,510/- was found in the cash box of the petitioner, ignoring the documentary evidence found at the time of survey which clearly establish sale of huge amount of goods on credit. Therefore, it cannot be said that the Tribunal has set aside the order of the First Appellate Authority and restored the order passed by the Assessing Authority without giving any reasons.
17. Regarding the 2nd question formulated in the memo of revision, suffice it to say that the Tribunal has taken into consideration the entire material available on record, including the slips found at the time of survey which established large scale sale made on credit by evading payment of tax, and it cannot be said that the Tribunal had passed the order without considering the material evidence available on record. It is also relevant to note in this regard that no documentary evidence in this regard had been adduced by the revisionist.

18. Regarding the 3rd question relating to Form 31, the findings of the survey and the material placed by the petitioner could not establish that the revisionist is dealing in tax paid goods only. The revisionist could not produce any documentary evidence regarding purchase of huge quantity of goods and Iron bars. In these circumstances, the claim of the revisionist that it had not obtained any Form 31, is without any basis.
19. Regarding the 4th question, the Tribunal has set aside the order passed by the First Appellate Authority, which had been passed without taking into consideration the entire facts and circumstances of the case and which was based on perverse findings and it has restored the well reasoned order of the Assessing Authority and the Tribunal's order cannot be termed as perverse.
20. The 5th question has already been answered while answering the previous question that the First Appellate Authority had erred in reducing the amount of tax assessed by the Assessing Authority, which assessment was made after considering the entire record found during survey, including the slips establishing large scale sale of taxable goods on credit by evading payment of tax. In these circumstances, the Tribunal was justified in restoring the order passed by the Assessing Authority after taking into consideration the entire relevant material found during survey, which was not rebutted by the petitioner by submitting any reply to the show cause notice that was issued to him before making the assessment.
21. Regarding the 6th question, it is apparent that the First Appellate Authority had not taken into consideration the sale made by the petitioner on credit by evading tax and had assessed the amount of tax merely on the basis of cash amount found in the cash box. Therefore, the Tribunal was fully justified in setting aside the order passed by the First Appellate Authority and restoring the appeal passed by the Assessing Authority.
22. Question No.7 framed in the memo of revision, i.e. "Whether the Tribunal was justified in rejecting the application for recall?" is

contradictory to the submissions made by the learned counsel for the petitioner that the application was not considered and decided by the Tribunal. When the application was not considered, there is no question of its rejection.

23. Moreover, Rule 68(4) of U.P. Trade Tax Act 1948 provides as follows:-

“On the date of hearing, if all the relevant records of appeal have been received, the parties present shall be given reasonable opportunity of being heard and the Appellate Authority of the Tribunal, as the case may be, made, after examining of the relevant records, decide the Appeal:

Provided that if, despite proper service of the notice either party is not present, the appeal may be heard and decided ex-parte.”

24. The appellant itself had filed Second Appeal No.322 of 2004 and, therefore, the appellant had sufficient knowledge of filing of the appeal as the same was filed by itself. The learned counsel for the appellant had attended the proceedings of appeal on some earlier dates but on the date of its decision, his counsel neither appeared before the Tribunal, nor did he seek an adjournment. In these circumstances, the provisions contained in the proviso appended to Rule 68(4) are attracted and the Tribunal was justified in proceedings to decide the second appeal ex-parte.
25. Regarding the last question that the Tribunal has proceeded on extraneous considerations and has committed factual and legal errors, the learned counsel for the revisionist could not point out any material to establish the allegation that the Tribunal has proceeded on any extraneous consideration.
26. In **Commissioner of Sales Tax U.P. Versus Kumaon Tractors & Motors**: (2009) 9 SCC 379, the Hon'ble Supreme Court has held that Section 11 of the Trade Tax Act confers a limited jurisdiction on the High Court to interfere in the order of the Tribunal only on the question of law and while doing so, this Court cannot re-appreciate the evidence.

27. In the case of **Commissioner, Commercial Tax U.P. Lucknow Versus S/S D.I.C. India Ltd.** 2024:AHC:13269, a Co-ordinate Bench of this Court held that:-

“It is well settled that the Tribunal is the last fact finding body and that this Court in revision would not go into an enquiry with regard to the factual aspects that have been decided by the Tribunal. In exercise of revisional jurisdiction, the High Court has a limited mandate. The scope of revisional jurisdictional, is primarily focused on questions of law, jurisdictional errors, or procedural irregularities. The High Court in a revision petition must refrain from engaging in a de novo inquiry into factual matters already adjudicated upon by the Tribunal, unless compelling grounds warranting such intervention are made.”

28. As the Tribunal has passed the impugned order after taken into consideration the entire relevant material placed by the department, which had not been refuted by the petitioner by adducing any evidence and the petitioner had not even disputed the allegations against him contained in the show cause notice by giving a reply to it, the Tribunal has not committed any error in allowing the second appeal.
29. There appears to be no illegality in the impugned order dated 16.10.2008 passed by the Trade Tax Tribunal, Lucknow Bench-III, Lucknow in Second Appeal No.322 of 2004 and 241 of 2004.
30. The Revision lacks merit and the same is hereby ***dismissed***.
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(Subhash Vidyarthi J.)

Order Date: 23.05.2024

-Amit K-