

A.F.R.

OD – 24 & 25

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction [Income Tax]

ORIGINAL SIDE

ITA/158/2010

COMMISSIONER OF INCOME TAX,
KOLKATA – II, KOLKATA

-Versus-

M/S. BIRLA CORPORATION LTD.

ITA/233/2007

COMMISSIONER OF INCOME TAX,
KOLKATA – I, KOLKATA

-Versus-

M/S. BIRLA CORPORATION LTD.

BEFORE :

THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI

And

THE HON'BLE JUSTICE RAJARSHI BHARADWAJ

Date : 18th December, 2023

Appearance :

Sri Tilak Mitra, Adv.

..for the appellant in ITA/ 158/ 2010

Sri Amit Sharma, Adv.

...for the appellant in ITA/ 233/ 2010

Sri J.P. Khaitan, Sr. Adv.

Sri Sanjoy Bhowmik, Adv.

Smt. Swapna Das, Adv.

..for the respondent.

1. Heard Sri Tilak Mitra, learned standing counsel for the appellant/revenue, Sri Amit Sharma, learned standing counsel for the appellant/revenue and Sri J.P. Khaitan, learned senior counsel assisted

by Sri Sanjoy Bhowmik and Smt. Swapna Das, learned advocates for the respondent/assessee.

2. The above noted **Income Tax Appeal No.233 of 2010** relating to assessment year 2002-03 was admitted by this Court by an order dated 22.06.2007, on the following substantial question of law :

“Whether in the facts and circumstances of the case the Income Tax Appellate Tribunal was justified in law in treating the sales tax subsidy of Rs.5,51,59,449/- as capital receipt though the subsidy has been granted to the assessee only after commencement of production?”

3. The above noted **Income Tax Appeal No.158 of 2010** relating to assessment years 2001-02, 2003-04, 2004-05 and 2005-06 was admitted by this Court by an order dated 25.08.2010, on the following substantial question of law :

“Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal is correct in treating the sums of Rs.695.04 lakhs for the assessment year 2001-02, Rs.4,86,26,417 for the assessment year 2003-04, Rs.9,77,29,333 for the assessment year 2004-05 and Rs.23,51,09,072 for the assessment year 2004-05 and Rs.23,51,09,072 for the assessment year 2005-06 received by the assessee as capital receipts, and not as revenue receipts, contrary to the decision of the Hon’ble Supreme Court in the case of Sahney Steel Works Ltd. V CIT (1997) 228 ITR 253?”

4. Thus, in the afore-noted income tax appeals the common question is involved as to whether amount exemption from trade tax on turnover of

sales of the UP Trade Tax Act, 1948, availed by the assessee, is a capital receipt as subsidy or a revenue receipt?

Facts of the Case:

5. As stated by the learned counsel for both the parties before us and as also it emerges from paragraph 2 of the assessment order relating to assessment year 2002-03, the assessee availed exemption from payment of tax under exemption certificate issued under Section 4A of the UP Trade Tax Act, 1948 (hereinafter referred to as “the U.P. Act, 1948”) read with notification No.780 dated 31.3.1995. From the sales amount disclosed by the assessee, a sum representing the tax exemption component as mentioned in the above quoted substantial question of law, was sought to be claimed as deduction by treating it as capital receipt. The claim so made was rejected by the Assessing Officer. The assessee filed appeals before the CIT (Appeals) which were allowed.
6. Aggrieved with the order of the CIA(Appeals) dated 17.11.2006, the revenue filed appeals before the Income Tax Appellate Tribunal which have been dismissed by the impugned order passed in ITA No.1502(Kol)/2006 (assessment year 2002-03) and by another order dated 27.5.2009 passed by the Income Tax Appellate Tribunal in Income Tax Appeal Nos.1817, 1818, 1819 and 1820/Kol/2008 (assessment years 2001-02, 2003-04, 2004-05 and 2005-06). The Income Appellate Tribunal dismissed the appeal of the revenue on the afore-noted question of law and upheld the order of the CIT (Appeals).

Aggrieved with the order of the aforesaid impugned orders of the ITAT, the revenue has filed the present appeals.

Submission:

7. Learned counsel for the appellant submits that exemption from trade tax under Section 4A of the UP Trade Tax Act, 1948 availed by the assessee is not a subsidy. The assessee unauthorisedly charged trade tax by including it in sale price. Thus the trade tax was included in the sales turnover. The assessee attempted to claim the aforesaid trade tax component, as capital subsidy which is totally unauthorised and its nature is purely revenue receipt.
8. Learned counsel for the appellant has carried us to the impugned order of the Tribunal and submitted that Section 4A of the UP Trade Tax Act, 1948 and the notification no.780 dated 31.3.1995 issued therein has object of increasing the production of any goods or for promoting development of any industry in the State and to achieve that object the aforesaid notification was issued to declare that the turnover of sales in respect of manufactured goods by a manufacturer holding an exemption certificate shall be conditionally exempt. Since the object is to promote industry and, as such, the tax component which form part of the sales price, although not separately shown as tax in sales invoices; is necessarily a capital subsidy. Therefore, the amount claimed by the assessee as capital receipt was liable to be deducted from the total sales turnover disclosed by the assessee and the CIT (Appeals) and the Tribunal lawfully upheld the claim of the assessee.

Therefore, it requires no interference. Reliance is placed upon the judgment of the Hon'ble Supreme Court in *Commissioner of Income Tax Vs. Ponni Sugars and Chemicals Ltd.* [2008] 306 ITR 392 (SC), *Commissioner of Income Tax Vs. Chaphalkar Brothers* [2018] 400 ITR 279 (SC), *Sahney Steel and Press Works Limited and Others Vs. Commissioner of Income Tax* [1997] 228 ITR 253 (SC), *Commissioner of Trade Tax, U.P. and Anr. Vs. Kajaria Ceramics Ltd.* (2005) 11 SCC 149 (paras 32, 36 and 37), *Shri Ambica Mills Ltd. Vs. The Textile Labour Association, Ahmedabad* AIR 1973 SC 1081 and a judgment of this Court in *Principal Commissioner of Income Tax – I, Kolkata Vs. Shyam Steel Industries Ltd.* [2018] 93 taxmann.com 495 (Cal.)/[2018] 303 CTR 628 (Cal.)

Discussion and Finding:

9. We have carefully considered the submissions of the learned counsel for the parties and perused the records of the appeals and the judgments relied by the learned counsel for the parties.
10. Before we proceed to consider rival submissions of learned counsel for the parties, it would be appropriate to reproduce the relevant provisions of the U.P. Trade Tax Act, 1948 and Section 2(24)(xviii) of the Income Tax Act, 1961 relied by the learned counsel for the respondent/assessee:-

U.P. Trade Tax, 1948

“Section 4-A. Exemption from trade tax in certain cases.

(1) Notwithstanding anything contained in any other provisions except the provisions of section 3-H of this Act, where the State Government is of the opinion that it is necessary so to **do for increasing the production of any goods or for promoting the development of any industry in the State** generally or in any districts or parts of districts in particular, it may on application or otherwise, in any particular case or generally, **by notification, declare that the turnover of sales in respect of such goods by the manufacturer thereof shall**, during such period not exceeding fifteen years from such date on or after the date of starting production as may be specified by the State Government in such notification which may be the date of the notification or a date prior or subsequent to the date of such notification and where no date is so specified from the date of first sale by such manufacturer, if such sale takes place within six months from the date of starting production and in any other case from the date following the expiration of six months from the date of starting production, and subject to such conditions as may be specified, **be exempt from trade tax on sale of goods whether wholly or partly or be liable to tax at such reduced rate as it may fix:**

Provided that in respect of goods manufactured in a new unit having a fixed capital investment of five crore rupees or more or in an existing unit which may make fixed capital investment of five crore rupees or more in expansion, diversification, modernisation and backward integration or in any one of them, within such period not exceeding five years as may be specified in the notification, the exemption from or reduction in the rate of tax may be granted.

...

(4) For the removal of doubts, it is hereby declared that where an eligibility certificate has been cancelled or amended under sub-section (3), the dealer shall be liable to pay tax on his turnover of the period

during which the facility of exemption or reduction under this section is not admissible to him.”

“Section 8-A. Registration of dealers and realisation of tax by dealers

...

(2) (a) No person who is not a dealer registered under this Act, shall in respect of any sale or purchase made by or through him, realise from any person any amount by way of trade tax on sale or purchase of goods or any amount in lieu of trade tax on sale or purchase of goods by giving it a different name or colour and no dealer registered under this Act, shall, in respect of any sale or purchase made by or through him, realise from any person, other than a person to whom goods are sold by him, any amount by way of trade tax on sale or purchase of goods, or any amount in lieu of trade tax on sale or purchase of goods, by giving it a different name or colour.

(b) **Where trade tax on sale of goods is payable on any turnover by a dealer** (including a commission agent or any of the persons mentioned in the explanation to clause (c) of section 2) registered under this Act, **such a dealer may recover an amount, equivalent to the amount of trade tax on sale of goods payable, from the person to whom the goods are sold by him**, whether on his own behalf or on behalf of his principal:

Provided that no dealer, from whom the Assessing Authority agrees to accept under section 7-D, a composition money in lieu of the amount of tax payable by him, shall realise from any person any amount by way of trade tax on sale of goods or an amount in lieu thereof by giving it a different name or colour.”

“Section 29-A. Procedure for disbursement of amount wrongly realised by dealer as tax.

(1) Where any amount is realised from any person by any dealer, purporting to do so by way of realisation of tax on the sale or purchase of any goods, in contravention of the provisions of sub-section (2) of section 8-A, such dealer shall deposit the entire amount so realised in such manner and within such period as may be prescribed.

(2) Any amount deposited by any dealer under sub-section (1) shall to the extent it is not due as tax, be held by the State Government in trust for the person from whom it was realised by the dealer, or for his legal representatives, and the deposit shall discharge such dealer of the liability in respect thereof to the extent of the deposit.

*(3) Where any amount is deposited by any dealer under sub-section (1) such amount or any part thereof shall, **on a claim being made in that behalf be refunded in the manner prescribed, to the person from whom such dealer had actually realised** such amount or part, or to his legal representatives; and to no other person:*

Provided that no such claim shall be entertained after the expiry of three years from the date of the order of assessment or one year from the date of the final order on appeal, revision or reference, if any, in respect thereof, whichever is later.

Explanation:

The expression "final order on appeal, revision or reference," includes an order passed by the Supreme Court under article 32, article 132, article 133, article 136 or article 137 or by the High Court under article 226 or article 227 of the Constitution.”

Income Tax Act, 1961

“2. Definitions.

...

(24) “income” includes–

*[(xviii) **assistance in the form of subsidy or grant or cash incentive or duty drawback or waiver or concession or reimbursement** (by whatever name called) by the Central Government or a State Government or any authority or body or agency **in cash or kind to the assessee;**]*

[other than,-

(a) the subsidy or grant or reimbursement which is taken into account for determination of the actual cost of the asset in accordance with the provisions of Explanation 10 to clause (1) of section 43; or

(b) the subsidy or grant by the Central Government for the purpose of corpus of a trust or institution established by the Central Government or a State Government, as the case may be;]

...

...

Ins. by the Finance Act, 2015 (20 of 2015), ... (w.e.f. 1-4-2016)”

11. Undisputedly, the respondent/assessee has obtained an eligibility certificate (exemption certificate) under Section 4A of the of the U.P. Act, 1948 read with the notification No.780 dated 31.03.1995. Section 4A of the U.P. Trade, 1948 provides that where the State Government is of the opinion that it is necessary so to do for increasing the production of any goods or for promoting the development of any industry in the State generally or in any district or part of the district in particular, it

may, on application or otherwise, in any particular case or generally, by notification, declare that the **turnover of sales in respect of such goods by the manufacturer thereof shall be exempt from trade tax on sale of goods** whether wholly or partly or be liable to tax at such reduced rate as it may fix. The upper limit and period of exemption and other things have also been provided in the aforesaid sub-section. There is no provision either in Section 4A of the U.P. Act, 1948 or in any other section thereof which empowered the assessee to collect trade tax on turnover of sales and to retain it. Section 4A of the U.P. Act, 1948 merely exempts from trade tax on sales of goods, whether wholly or partly, or to pay tax at such reduced rate as may be fixed. Section 8A(2)(b) of the U.P. Act, 1948 provides that where trade tax on sale of goods is payable on any turnover by a dealer registered under the Act, such a dealer may recover an amount, equivalent to the amount of the trade tax on sale of goods payable, from the person to whom the goods are sold by him, whether on his own behalf or on behalf of his principal. Section 29A of the U.P. Act, 1948 prohibits every dealer from realising tax from any person on sale or purchase of any goods, in contravention of the provision of sub-section (2) of Section 8A and where such an amount is realised, the dealer is required to deposit the entire amount so realised in such manner and within such period as may be prescribed and the amount so deposited by the dealer shall, **to the extent it is not due as tax, be held by the State Government in trust for the person from whom it was realised by the dealer** or his legal representatives, and the deposit shall discharge such dealer of the

liability in respect thereof to the extent of the deposit. The amount so deposited by the dealer is to be refunded to the person on claim being made from whom such dealer had actually realised such amount or part or to his legal representatives and to no other person.

12. **There is no statutory provision authorising an assessee to realise trade tax under the Act either in the name of trade tax or by any other name and to retain it instead of depositing it with the Government. When Section 4A exempt tax on turnover of sales of a dealer covered by an eligibility certificate issued under Section 4A, then to the extent of exemption, no trade tax could be recovered. Exemption from tax is freedom of liability from tax on turnover of sales under Section 4A of the U.P. Act, 1948. Hence in the absence of liability to pay trade tax on turnover of sales to the extent provided in the eligibility certificate issued to the assessee under Section 4A of the U.P. Act, 1948, neither trade tax on turnover of sales to the extent of exemption from liability to tax could be collected by the assessee from the purchasers either directly or indirectly nor it could be claimed as capital receipt or subsidy and instead the entire sale price received by the assessee from the purchasers towards sale of goods is revenue receipt. Hence no deduction from revenue receipts in the name of subsidy was permissible. Allowing such claim of the assessee would result in unauthorised collection and retention of trade tax and also unauthorised deduction from taxable income which is statutorily and constitutionally not permissible.**

13. As per the own case of respondent/assessee, the amount of tax component in respect to the assessment years as mentioned in the substantial questions of law afore-quoted, is the tax component which was included by him in the sales turnover of the goods as a sale price of the goods. Once it is admitted case of the respondent/assessee that the amount realized by him from purchaser was the sale price of the goods, there does not arise any question of tax component included in the sale price to be of a capital nature, irrespective of the issue as to whether the respondent/assessee could have recovered it from purchasers or not.

14. Exemption pre-supposes liability to tax. It is not a right but it is granted subject to statutory provision. The Legislature in its wisdom by enacting Section 4A of the U.P. Act, 1948 has exempted turnover of sales of goods subject to certain conditions. Having obtained eligibility certificate under Section 4A of the U.P. Act, 1948, the respondent/assessee became entitled for exemption from tax on sales subject to certain conditions and limit. Bare perusal of Section 4A of the U.P. Act, 1948 clearly indicates that the exemption from tax on turnover of sales is not a subsidy granted by the State Government. Therefore, the judgments relied by the learned counsel for the respondent/assessee in the case of *Ponni Sugars and Chemicals Ltd. (supra)*, *Chaphalkar Brothers (supra)*, *Sahney Steel and Press Works Ltd. & Ors. (supra)* and the judgment of this Court in *Shyam Steel Industries Ltd. (supra)* are of no help to the respondent/assessee. In all those cases, statute itself granted certain amount as subsidy to eligible

person in accordance with the provision of those Acts. In the present set of facts, Section 4A of the U.P. Act, 1948 has not authorised the respondent/assessee either to collect the tax component on exempted sales or to retain it and to grant it as state subsidy.

15. Apart from above, once admittedly the amount as shown in the invoices is the sale price of the goods sold by the respondent/assessee to purchasers, it is revenue receipt. Bifurcation made by the respondent/assessee to claim deduction in the name of capital receipt representing the trade tax component on exempted sales, is a self devised mechanism and not permitted under law. Such a receipt is not of capital nature but being part of sale price of the goods, is certainly revenue receipt. The Income Tax Appellate Tribunal has committed a manifest error law in passing the impugned order to hold the aforesaid part of the sale price to be subsidy or capital receipt. In fact, the ITAT has totally misdirected it and passed the impugned orders without even having reference to the relevant provision of the U.P. Act, 1948, the nature of exemption granted to the respondent/assessee under the notification dated 780 dated 31.3.1995 and the nature of receipts of the assessee which, according to own case of the assessee, was the part of the sale price.
16. In the case of *Amrit Banaspati Co. Ltd. & Anr. v. State of Punjab & Anr.*, the Hon'ble Supreme Court explained exemption from sales tax, realisation of tax and its refund and held as under:

“10. Exemption from tax to encourage industrialisation should not be confused with refund of tax. They are two different legal and distinct concepts. An exemption is a concession allowed to a class or individual from general burden for valid and justifiable reason. For instance tax holiday or concession to new or expanding industries is well known, to be one of the methods to grant incentive to encourage industrialisation. **Avowed objective is to enable the industry to stand up and compete in the market. Sales tax is an indirect tax which is ultimately passed on to the consumer. If an industry is exempt from tax the ultimate beneficiary is the consumer. The industry is allowed to overcome its teething period by selling its products at comparatively cheaper rate as compared to others. Therefore, both the manufacturer and consumer gain, one by concession of non-levy and other by non-payment.** Such provisions in an Act or Notification or orders issued by Government are neither illegal nor against public policy.

11. But refund of tax is made in consequence of excess payment of it or its realisation illegally or contrary to the provisions of law. A provision or agreement to refund tax due or realised in accordance with law cannot be comprehended. **No law can be made to refund tax to a manufacturer realised under a statute. It would be invalid and ultra vires.** The Punjab Sales Tax Act provided for refund of sales tax and grant of exemption in circumstances specified in Ss.12 and 30 respectively. Neither empowered the Government to refund sales tax realised by a manufacturer on sales of its finished product. Refund could be allowed if tax paid was in excess of amount due. An agreement or even a notification or order permitting refund of sales tax which was

*due shall be contrary to the statute. To illustrate it the appellant claimed refund of sales tax paid by it to the State Government on sale made by it of its finished products. But the tax paid is not an amount spent by the appellant but realised on sale by it. What is deposited under this head is tax which is otherwise due under provisions of the Act. **Return or refund of it or its equivalent, irrespective of form is repayment of refund of sales tax. This would be contrary to Constitution.** Any agreement for which refund being contrary to public policy was void under S.23 of the contract Act. The constitutional requirements of levy of tax being for the welfare of the society and not for a specific individual the agreement or promise made by the Government was in contravention of public purpose thus violative of public policy. No legal relationship could have arisen by operation of promissory estoppel as it was contrary both to the Constitution and the law. **Realisation of tax through State mechanism for sake of paying it to private person directly or indirectly is impermissible under constitutional scheme.** The law does not permit it nor equity can countenance it. The scheme of refund of sales tax was thus incapable of being enforced in a Court of law.”*

17. From bare perusal of Section 4A, 8A(2) and 29A of the U.P. Act, 1948 and the law laid down by the Hon’ble Supreme Court in *Amrit Banaspati Co. Ltd. (supra)* it is evident that the exemption from trade tax on turnover of sales was allowable to a class of entrepreneurs from burden of tax for valid and justifiable reasons to encourage industrialisation. Sales Tax being an indirect tax is ultimately passed on to the consumer. Once turnover of sales has been exempted, trade tax as per scheme of the Act, 1948, could neither be realized by the

sellers not it could be retained. No provision under the U.P. Act, 1948 has been shown to us by the learned counsel for the respondent/assessee which empowers the assessee to withhold the amount of tax recovered or which empowers the respondent/assessee to collect tax on exempted sales and to retain it as subsidy. The receipts have been shown by the respondent/assessee as sale price received by him from the purchasers. Once the amount has been received as sale price, no part of it could be termed as capital receipts.

18. For all the reasons afore-stated, the substantial questions of law as framed above in the above noted two appeals are answered in favour of the revenue and against the assessee. Consequently, the impugned orders of the Tribunal to the extent of the amount mentioned in the afore-noted substantial questions of law to be capital subsidy and not the revenue receipts, are hereby set aside.
19. Both the appeals (ITA/158/2010 and ITA/233/2007) are allowed to the extent indicated above.

(SURYA PRAKASH KESARWANI,
J.)

(RAJARSHI BHARADWAJ, J.)