

Shivan Industries and anr. Vs. State of Uttar Pradesh and ors.

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Court : Allahabad

Decided On : Nov-09-1990

Reported in : [1991]81STC104(All)

Judge : A.N. Varma and R.K. Gulati, JJ.

Acts : Uttar Pradesh Sales Tax Act, 1948 - Sections 3D(2) and 3D(7); Uttar Pradesh Sales Tax Rules, 1948 - Rule 12B(7)

Appeal No. : Civil Miscellaneous Writ Petition No. 546 of 1979

Appellant : Shivan Industries and anr.

Respondent : State of Uttar Pradesh and ors.

Advocate for Def. : The Standing Counsel

Advocate for Pet/Ap. : K.M.L. Hajela and ;R.B. Saxena, Advs.

Disposition : Writ petition allowed

Judgement :

R.K. Gulati, J.

1. This writ petition is directed at the instance of two petitioners, namely, Shivan Industries of district Lakhimpur Kheri and Luxman Das Radhey Shyam of Shahjahanpur, hereinafter referred to as 'first and second petitioner' respectively.

2. The dispute relates to the assessment year 1976-77. During the relevant year the first petitioner was engaged in the business of manufacture and sale of khandsari sugar. It sold sugar directly and also through commission agents. The second petitioner in the year in question was acting as commission agent on behalf of its principals, one of them being the first petitioner and claims to have sold certain quantity of khandsari sugar manufactured by the first petitioner, as its selling agent. Although a number of reliefs have been claimed through this writ petition but during the course of hearing learned counsel for the petitioners stated that principal relief is directed against the assessment order passed against the second petitioner for the assessment year 1976-77, in so far it brings to tax under Sub-section (2) of Section 3-D of the U.P. Sales Tax Act, 1948, the turnover of sales of khandsari sugar which the second petitioner had sold, as the selling agent of the first petitioner. According to the petitioners the disputed turnover of khandsari sugar was not liable to any tax, for the sugar sold through the second petitioner had already suffered excise duty both basic and additional, leviable under the Additional Duties of Excise (Goods of Special Importance) Act, 1957. In proof of the claim that such excise duty had already been paid by the first petitioner, the second petitioner filed a certificate to that effect before its assessing officer, which was issued by one of the partners of the first petitioner. However, the assessing authority rejected the claim for exemption taking the view that the certificate ought to have been in the prescribed form as contemplated under Sub-rule (7) of Rule 12-B of the U.P. Sales Tax Rules, 1948, i.e., to say, in form III-C(5). The present writ petition has been filed challenging the assessment order and for grant of relief set out earlier.

3. As a result of a Notification No. ST-1615/X-902(9)-52 dated 13th August, 1959, issued under Section 4 of the U.P. Sales Tax Act (for short 'the Act') the sale of khandsari sugar was exempted from tax with effect from 28th February, 1959, on the condition that the Central excise duty both basic as well as additional leviable thereon from 1st March, 1959, had been paid and that the dealers thereof furnished proof to the satisfaction of the assessing authority that such duty has been paid.

4. Section 4 of the U.P. Sales Tax Act provides that no tax under the Act shall be payable on the sale or purchase of commodities named in Clauses (a) and (b) of that section or any other goods, which the State Government may, by a notification exempt. Under the proviso to that section the State Government is authorised to impose conditions to which the exemption may be made available. In other words, the provisions contained in the proviso entitles the State Government to grant exemption in respect of certain commodity either unconditionally or on certain conditions to be set out in the notification.

5. The State Government issued another notification under Section 3-D of the Act being Notification No. ST-II-6204/X-1012-72 dated 29th September, 1972, providing, inter alia, that with effect from 1st October, 1972, the turnover of first purchaser in respect of khandsari sugar on which additional excise duty is not leviable under the Additional Duties of Excise (Goods of Special Importance) Act, 1957, or, if leviable, it has specifically been exempted from such duty, shall be liable to tax at the rate of 3 per cent under Clause (b) of Sub-section (1) of Section 3-D of the Act. The rate of 3 per cent was enhanced to 4 per cent as a result of another notification issued under the aforesaid provision being Notification No. ST-II-8447/ X-1(2)-75 dated 1st October, 1975.

6. As noticed earlier, the assessment in the instant case has been made under Sub-section (2) of Section 3-D of the Act. That provision reads as under :

'(2) Where in respect of any goods notified under Sub-section (1), the purchaser or, as the case may be, the first purchaser whether on his own account or on account of any one else, is a person other than a registered dealer, there shall be levied and paid, for each assessment year or part thereof, a tax on the turnover, to be determined in the prescribed manner, of sale of such goods by the dealer who sells the goods or through whom the goods are sold to such purchaser, and the rate of tax shall be the same as notified under Sub-section (1).'

7. Learned counsel for the petitioners contended that the provisions under which the assessment was made were not available to the assessing authority, inasmuch as sale of khandsari sugar was a commodity exempt from tax under Section 4 of the Act in view of the notification issued under that section which we

have noted earlier. It was further argued that in any case the petitioners were entitled to adduce evidence on the question whether the disputed turnover of sale was duty-paid or not and the assessing authority acted illegally by refusing to look into the evidence produced in the form of letter to that effect. On the other hand, the learned Standing Counsel appearing for the respondents disputed the correctness of these submissions. He argued that the exemption under Section 4 was hedged with certain conditions contained in the notification under which the exemption was being claimed by the petitioners and unless it had been shown to the satisfaction of the assessing authority that the petitioners had satisfied the requirements and conditions under which the exemption was available, Section 4 of the Act could not come to their aid. Learned Standing Counsel further argued that if the dealer fails to satisfy the assessing authority about the factum of payment of excise duty, the provisions of Section 3-D are immediately attracted because of the notification issued under Section 3-D(1)(b) referred by us earlier. As regards the question about furnishing of evidence in respect of payment of excise duty, the learned Standing Counsel urged that where a particular mode is prescribed under the statutory provisions or rules, the petitioners were not entitled to produce any other evidence to satisfy the assessing authority that the goods were duty-paid except by furnishing the prescribed declaration form, i.e., form III-C(5).

8. In our opinion it is not necessary to go into the correctness of rival contentions set out above. The fate of this writ petition can be decided on another aspect of the matter that arises in the present case. The non-submission of the evidence in the prescribed manner, as contended for the Revenue, as to the factum of payment of excise duty at worst would make the second petitioner amenable to assessment in accordance with the provisions contained in Sub-section (2) of Section 3-D of the Act. In order that the provisions of Sub-section (2) of Section 3-D may apply in a given case, certain conditions must be satisfied. These conditions are : sale or purchase of the goods notified under Sub-section (1) ; the purchaser purchasing for himself or as an agent for another is an unregistered dealer and the sale is made by a dealer for himself or as a selling agent for another. On these conditions being satisfied, then on the turnover of such sale, the selling dealer would be liable to pay sales tax. Before a case is caught within the

mischief of Sub-section (2) of Section 3-D, one of the essential ingredients is that the sales must have been effected to a person other than a registered dealer. In other words, such sales should be to unregistered dealers. A perusal of the impugned assessment order shows that there is no whisper much less any finding in the assessment order that the second petitioner had made sale of the disputed turnover to the unregistered dealers. There is also nothing in the counter-affidavit filed on behalf of the respondents to give such a suggestion. The assessing authority has proceeded to frame the assessment labouring under an erroneous impression that the moment a selling dealer fails to file form III-C(5), that is the end of the matter and such dealer automatically becomes liable to pay sales tax irrespective of whether the prerequisite conditions for invoking the provisions of Section 3-D(2) were made out or not. This, in our opinion, is an incorrect approach which the assessing authority adopted. As observed earlier, the effect of non-filing of form III-C(5) is that the dealer may become amenable to assessment, but it does not mitigate or do away with the requirements contained in Sub-section (2) of Section 3-D for making a valid assessment. The learned Standing Counsel invited our attention to Clause (b) of Sub-section (7) of Section 3-D and contended that there is a presumption that the sale shall be deemed to a person other than a registered dealer unless the dealer selling the goods proves otherwise to the satisfaction of the assessing authority, having furnished such a declaration or certificate obtained from the purchaser of such goods and in such form and manner as prescribed. It is true that the above provision contains a rebuttable presumption, nevertheless it is necessary for the assessing authority to record a finding in the assessment order that a dealer in a given case had failed to rebut the presumption contained in Clause (b) of Subsection (7) of Section 3-D and had not filed the requisite form or declaration or certificate as prescribed under the Act or Rules. We have already observed that the impugned assessment order lacks in this respect and does not contain any such finding. In fact the assessing authority never applied its mind in that regard. The sole basis of the impugned assessment is that the second petitioner has failed to furnish form III-C(5) as envisaged under Sub-rule (7)(e)(ii) of Rule 12-B framed under the Act. On this score alone the impugned assessment cannot be sustained. As there is no finding that the disputed sales were to the unregistered dealers and the petitioners had failed to

discharge the presumption contemplated under Clause (b) of Subsection (7) of Section 3-D of the Act, the assessment order is not liable to be sustained.

9. We accordingly quash the assessment order, a copy whereof is annexure 3 to the writ petition, to the extent it brings to tax the turnover of sales in respect whereof the second petitioner acted as a selling agent of the first petitioner.

10. Normally, in the circumstances as obtaining in the instant case, a direction should have been issued to the assessing authority to frame a fresh assessment order after recording a proper finding and in accordance with law. However, having regard to the fact that the impugned assessment relates to assessment year 1976-77 and a period of over 13 years has already gone by and in particular the tax in dispute is a small amount of Rs. 274 only, we do not think it to be a fit case in which such direction be issued for a fresh assessment.

11. In view of the discussion made above, the writ petition succeeds and is accordingly allowed. There will be no order as to costs.