

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 10430 OF 2016

(@ S.L.P. (Civil) No. 28962 of 2013)

Commissioner of Commercial Tax, U.P.

...Appellant

Versus

M/s Oswal Greentech Limited

...Respondent

J U D G M E N T

Dipak Misra, J.

Leave granted.

2. The respondent, a dealer registered under Section 8-A of the U.P. Trade Tax Act, 1948 (for brevity, “the Act”), is a holder of a recognition certificate as per provisions contained in Section 4-B of the Act. The respondent used to make purchases of raw material at the concessional rate of tax

against Form III-B obtained by it from the office of the Trade Tax Officer. As per conditions prescribed under Section 4-B(2) of the Act, the notified goods manufactured out of the raw material produced at the concessional rate of tax against Form III-B is required to be sold by such manufacturer in the State or in the course of inter-State trade and commerce or in the course of export out of India. It is also provided in the said Section that if a recognition certificate holder sells goods manufactured by it out of the raw material purchased at the concessional rate of tax against Form III-B in a manner otherwise than prescribed under Section 4-B(2), the said dealer shall be liable to penal action equal to three times of the tax, thus saved by the said dealer on purchase made against Form III-B.

3. At the time of scrutiny, the assessing authority noticed that the respondent had made purchases of natural gas against Form III-B at the concessional rate of tax, and after manufacture of the notified goods, that is, fertilizers, out of the said purchases of natural gas purchased against Form III-B,

some of the finished goods were transferred outside the State of Uttar Pradesh. The Revenue issued show cause notice to the respondent for the assessment year 2005-06 and after considering the explanation offered, imposed penalty of Rs.10,46.98,335/- vide order dated 28.03.2009. Being aggrieved, the respondent preferred an appeal under Section 9 of the Act before the Joint Commissioner (Appeals)-1, Commercial Tax, Bareilly being Appeal No. 798 of 2009, and the appellate authority vide its order dated 12.11.2009 dismissed the appeal and confirmed the order of the assessing authority dated 28.03.2009 passed under Section 3-B of the Act.

4. The dismissal of appeal constrained the respondent to file a second appeal (Appeal No. 237 of 2009) before the Tribunal, Trade Tax, U.P. (for short, "tribunal"). Since there was difference of opinion in the Division Bench of the tribunal, the case was referred to the Chairman of the tribunal who nominated another Judicial Member for his opinion. The learned Judicial Member gave his opinion in favour of the

respondent. On the basis of the opinion expressed by the nominated Judicial Member, the appeal stood allowed as a consequence of which the order imposing penalty was annulled.

5. Being aggrieved by the order of the tribunal, the Revenue filed Trade Tax Revision No. 579 of 2011 under Section 11 of the Act before the High Court. The question of law that arose for consideration before the High Court was as follows:-

“Whether under the facts and circumstances of the case, the Commercial Tax Tribunal were legally justified in granting the exemption on purchase of raw material against Form III-B whereas the dealer has made a stock transfer of finished goods which is not permissible under law?”

6. The learned Single Judge took note of the fact that the tribunal had relied on a Division Bench decision of the High Court in ***Camphor and Allied Products Ltd. v. State of U.P. & Ors.***¹ and on that basis had come to the conclusion that the assessee had purchased the material and used it in manufacture and there was no violation of Section 3-B of the

¹ (2005) 139 STC 380 (All)

Act and accordingly concurred with the view of the tribunal as a result of which the revision stood dismissed.

7. We have heard Mr. Pawanshree Agrawal and Mr. Rajeev Dubey, learned counsel for the appellant and Mr. Punit Dutt Tyagi for the respondent.

8. It is profitable to refer to the findings recorded by the assessing officer. It has been held by him that under Section 3-B and 4-B(2) of the Act, the finished product manufactured from the raw material purchased at a concessional rate can only be sold in U.P. or in the course of inter-State trade and commerce or can be exported out of country, but stock transfer is not permissible. According to the assessing officer, the trader had purchased natural gas at a concessional rate against Form III-B i.e. 20% minus 15% = 5%, availing the benefit at the rate of 15% and paying tax at the rate of 5%. The production of urea has been done by using the natural gas obtained at a concessional rate and the manufactured product, that is, urea has been sent by way of stock transfer outside the State in clear violation of Section 3-B and 4-B(2) of

the Act. It has been further opined by him that the assessee had acted contrary to the provision of law by purchasing raw material at a concessional rate and thereafter sending the finished goods as stock transfer outside the State which does not come under the term 'sale' and no revenue is generated by the State. Proceeding further, the assessing officer has held thus:-

“The trader without acting under the provisions of the Section 3B and 4B(2) of the Uttar Pradesh Trade Tax Act, had caused loss of revenue to the State. The State had lost revenue at the rate of 15% on the purchase of raw material used in the produced goods sent as stock transfer, which could have received had these were not purchased against Form 3B. Because the tax has been paid at the rate of 5% against form 3B. Had the trader not declared false declaration against Form 3B, and had acted as per the provision of Section 4B(2), then the State Government could have got 20% as Tax and 1% as development tax totaling 21%. The local purchase of natural gas could have been made without form 3B. But the trader had not acted under the provisions of Section 3B. The trader had not also acted u/s 4B (2) which he had declared to act when taking the forms 3B. Hence, the raw material purchased at a concessional rate were utilized in the manufacturing of the notified finished product (Urea), but instead of making any sale (within and outside the State) and without exporting those outside the country, had made stock transfers, thereby had violated Section 4B(2) of the Act. By

making false declaration u/s 3B of the Act, the trader had only deposited tax on the purchase of raw material (Natural Gas) at the rate of 5% only and availed the benefit of 15%. On the other hand without taking any action u/s 4B (2) of the Act, had made stock transfer outside the State, as a result of which had saved tax @ 7.5% apart from the development tax on Urea. As such the trader was able to evade tax @ 22.5% in an illegal manner and thereby had caused double loss of revenue to the State.”

9. The appellate authority, as the order would reflect, has expressed the view that the assessee, after availing the benefit at the concessional rate, has violated the provisions contained in Section 4B(2) of the Act and has been making stock transfers quite often. The appellate authority has opined that the principle stated in the authorities in ***Camphor and Allied Products Ltd.*** (supra), ***Bareilly v. State of U.P.***², ***CTT v. Manoharlal Heeralal Pvt. Ltd.***³ are different and not applicable to the facts of the case.

10. The opinion of the tribunal, as expressed by the judicial member, which is the final view of the tribunal, is that the trader was authorized to purchase the natural gas for the

² 2004 UPTC 331

³ 2006 NTN, Vol. 29 page 223

manufacture of urea and it is undisputed that it had manufactured urea by utilizing the natural gas purchased against the issue of Form III-B. He has proceeded to state that no action can be taken under Section 3-B on the ground that the products utilizing the natural gas purchased against the issue of Form III-B were sent through stock transfer without selling those directly, because Section 4-B of the Act cannot be extended to determine the responsibility under Section 3-B. The judicial member has arrived at the said conclusion on the foundation that Section 4-B has nothing to do with the fact that how the notified goods are to be disposed of because the provision of Section 3-B is not applicable in case the raw material is used for production of the notified goods mentioned in the recognition certificate. The learned member has expressed the view that the decisions in ***Camphor and Allied Products Ltd.*** (supra) and ***Bareilly*** (supra) are fully applicable and the case of the assessee is covered by the principles stated therein. He also took note of the fact that the decisions in ***Camphor and Allied Products Ltd.*** (supra),

Bareilly (supra) and **Manoharlal Heeralal** (supra) have not been assailed before the Supreme Court and, therefore, they are binding precedents in the field. Eventually, the learned member came to hold thus:-

“In the present case it is established that the trader had utilized natural gas purchased against the Form 3B in the production of the ‘Urea’. As such, in my opinion, proceeding u/s 3B should not have been initiated against the trader. The order which has been passed by the assessing officer u/s 3B of the Act and which has been confirmed by the first appellate court, are not justified.”

11. To appreciate the controversy in proper perspective and to scrutinize the analysis of the departmental authorities on one hand and the tribunal and the High Court on the other, it is necessary to scan the statutory scheme and its real import. Section 3-B of the Act reads as follows:-

"Section 3-B. Liability on issuing false certificate, etc.-Notwithstanding anything to the contrary contained elsewhere in this Act, and without prejudice to the provisions of Sections 14 and 15-A, a person, who issues a false or wrong certificate or declaration, prescribed under any provision of this Act or the Rules framed thereunder, to another person by reason of which a tax leviable under this Act on the transaction of purchase or sale made with or by such other person ceases to be leviable or

becomes leviable at a concessional rate, shall be liable to pay on such transaction an amount which would have been payable as tax on such transaction had such certificate or declaration not been issued :

Provided that before taking any action under this section, the person concerned shall be given an opportunity of being heard.

Explanation.-Where a person issuing a certificate or declaration discloses therein his intention to use the goods purchased by him for such purpose as will make the tax not leviable or leviable at a concessional rate but uses the same for a purpose other than such purpose, the certificate or declaration shall, for the purpose of this section, be deemed to be wrong."

[Emphasis supplied]

12. Section 4-B(2) and 4-B(6) of the Act which are relevant to the controversy at hand and further on which the Revenue has laid immense emphasis are extracted hereunder:-

“(2) Where a dealer requires any goods, referred to in sub-section (1) for use in the manufacture by him, in the State of any notified goods, or in the packing of such notified goods manufactured or processed by him, and such notified goods are intended to be sold by him in the State or in the course of inter-State trade or commerce or in the course of export out of India, he may apply to the assessing authority in such form and manner and within such period as may be prescribed, for the grant of a recognition certificate in respect thereof, and if the applicant satisfies such requirements

including requirement of depositing late fee and conditions as may be prescribed, the assessing authority shall grant to him in respect of such goods a recognition certificate in such form and subject to such conditions, as may be prescribed.

Explanation.-For the purposes of this sub-section,-(a) goods required for use in the manufacture shall mean raw materials, processing materials, machinery, plant, equipment, consumable stores, spare parts, accessories, components, sub-assemblies, fuels or lubricants ; and

(b) 'notified goods' means such goods as may, from time to time, be notified by the State Government in that behalf.

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(6) Where a dealer in whose favour a recognition certificate has been granted under sub-section (2) has purchased any goods after payment of tax at concessional rate under this section, or as the case may be, without payment of tax and the goods manufactured out of such raw materials or processing materials or manufactured goods after being packed with such packing material are sold or disposed of otherwise than by way of sale in the State or in the course of inter-State trade or commerce or in the course of export out of the territory of India, such dealer shall be liable to pay an amount equal to the difference between the amount of tax on the sale or purchase of such goods payable under this section and the amount of tax calculated at the rate of four per cent, on the sale or purchase of such goods."

13. It is submitted by Mr. Agrawal, learned counsel for the appellant that recognition certificate is granted where a dealer uses the goods (raw material) in the manufacture of notified goods by him in the State or in the course of inter-State trade and commerce or in the course of export outside India and the fulfillment of aforesaid two conditions is a pre-requisite for claiming exemption, but in the case at hand, the assessee though has purchased the goods at concessional rate by furnishing Form III-B under Rule 25-B(1) has engaged itself in stock transfer and, therefore, the penal provisions gets fully attracted. Relying on sub-section (6) of Section 4-B, it is urged by him as no differential tax has been paid by the assessee, certificate in Form III-B continues to be a false or a wrong certificate as regards the purchase of natural gas and used in the manufacture of urea, hence the penalty has been correctly levied. It is his further submission that decision in **Camphor and Allied Products Ltd.** (supra) is not applicable to the facts of the present case, for in the said case the camphor manufactured by the assessee was transferred by way of stock

transfer outside the State of U.P. on which the differential tax was paid in accordance with Section 4-B(6) of the Act, but in the present case, no differential tax has been paid by the respondent, and such violation as a natural corollary leads to the inevitable conclusion that the certificate in Form III-B continues to be a false or wrong certificate. Lastly, it is contended by him that the Division Bench of the High Court has not correctly laid down the law in ***Camphor and Allied Products Ltd.*** (supra) inasmuch as it has confined its consideration to the first part of condition enshrined under Section 4-B(2) of the Act, whether the raw material has been used in the manufacture or not, but has not considered the second part, that is, the goods had been sold intra-State or inter-State or exported out of India.

14. Mr. Tyagi, learned counsel for the assessee, *per contra*, would contend that the respondent-assessee is engaged in the manufacture and sale of fertilizer and as per the recognition certificate, it is entitled to procure natural gas at a concessional rate and the respondent has procured natural

gas from two sources (1) from GAIL at a concessional rate against Form III-B and (2) from outside the State from BPCL/GAIL at normal tax. Learned counsel would submit that the respondent has disposed of urea by local sale and has also transferred the stock to various States which have been pursuant to and in compliance of Movement Orders issued by the Government of India from time to time. He has referred to directions issued by the Ministry of Chemicals & Fertilizers under the Fertilizer (Movement Control) Order, 1973. It is urged by him that as per the Fertilizer (Movement Control) Order, 1973 unless the Government of India authorizes a manufacturer to make stock transfer of a particular quantity of urea in a particular month, no urea can be transferred/sold from one State to another. Learned counsel would put forth that the State never disputed the stock transfers made under Fertilizer (Movement Control) Order, 1973. Learned counsel would further propound that show cause notice was issued under Section 3-B for alleged violation of Form III-B and it cannot change the foundation to raise a fresh plea under

Section 4-B(6) of the Act. It is further urged by Mr. Tyagi that the pronouncement in ***Camphor and Allied Products Ltd.*** (supra) is absolutely correct and, in fact, it has been holding the field for considerable length of time as far as the State of U.P. is concerned. To substantiate the contentions he has raised, he has placed reliance on ***CCE v. Gas Authority of India Ltd.***⁴ and ***SACI Allied Products Ltd. v. CCE, Meerut***⁵. Though Mr. Tyagi has contended with regard to limitation in exercise of revisional jurisdiction and the bar on the part of revenue to accept the judgment on the same question in the case of one assessee and question its correctness in the case of another assessee and in support of the same has cited certain authorities, we need not enter into the said arena, for what we are going to hold.

15. In ***Camphor and Allied Products Ltd.*** (supra) the High Court took note of the fact that the RFO and furnace oil was purchased against Form III-B and the same was used in the manufacture of camphor and other goods mentioned in the

⁴ 2008 (232) ELT 7 (SC)

⁵ 2005 (183) ELT 225 (SC)

recognition certificate granted under Section 4-B of the Act. It took note of the two earlier decisions in **Commissioner of Trade Tax v. Spox India and Allied Industries**⁶ and **Arora Steel Udyog (P) Ltd. v Commissioner of Trade Tax, U.P.**⁷ and quoted a passage from the latter authority, which is to the following effect:-

"It is well-settled that proceedings under Section 3-B shall be initiated only when the assessee issues a false or wrong certificate or declaration provided under any of the provisions under the Act or Rules framed thereunder. This view has been constantly taken by this Court in Sahni Engineering Works v. Commissioner of Sales Tax 1994 UPTC 70, Commissioner of Sales Tax v. B.K. & Co. Engineering Works, Agra 1995 UPTC 502 and S.G. Industries v. State of Uttar Pradesh [1998] 108 STC 328; 1997 UPTC 616 of this Court. Therefore, unless it was shown that the form III-B issued by the revisionist were false or wrong, or the declarations made therein was false or wrong, no proceedings under Section 3-B of the Act could have been initiated. It is also not the case of the department that the assessee did not use the goods purchased by him for the purpose for which exemption certificate was granted to him. Therefore, the assessee cannot be deemed to have issued a wrong certificate."

⁶ 1998 UPTC 631

⁷ 1999 UPTC 277

It also took note of the decision relied upon by the Revenue in ***Puri Industries v. Commissioner of Sales Tax***⁸, which took a different view and thereafter came to hold as follows:-

“28. The petitioner purchased RFO/furnace oil against form III-B for manufacture of its final product, namely, camphor and other allied products. Section 3-B clearly shows that it is the user of the goods which is relevant for the purpose for which form III-B was given and not how the finished product or manufactured goods are sold. Admittedly form III-B was issued for use in manufacture of camphor and other allied products and RFO/furnace oil for which the recognition certificate was granted. Hence in our opinion the petitioner cannot be deemed to have issued any wrong or false certificate and tax cannot be legally charged under Section 3-B of the Act.

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31. In the present case RFO and furnace oil have admittedly been used in the manufacture of camphor and allied products for which recognition certificate was granted. Hence it cannot be deemed that the petitioner has issued any wrong or false certificate. It is evident from the facts that the petitioner has not issued any wrong or false certificate or declaration in form III-B inasmuch as both RFO and furnace oil have been used for the same purpose, namely, in the process of

⁸ 1988 UPTC 1197

manufacture of goods, i.e., camphor, and another allied products.”

16. We have already analysed the statutory scheme and what has been dwelt with by the High Court in ***Camphor and Allied Products Ltd.*** (supra) and what has been pressed into service by Mr. Tyagi. Presently, text and context in detail. Section 4-B(2) is applicable to the dealer who manufactures notified goods in the State or engaged in packaging of such notified goods manufactured or processed by him. The said dealer can apply to the assessing authority in such form, manner and within the time prescribed for grant of the recognition certificate. The assessing authority can grant the recognition certificate to the dealer in respect of goods used in the manufacture of the notified goods or packing of the notified Goods. Explanation to the sub-section defines the word “Goods” which means raw materials, processing material, machinery, spare parts and also fuels. The expression “Notified Goods” means such goods as notified by the State government from time to time.

17. Sub-section (2) to Section 4-B also requires that the notified goods should be “intended” to be sold by the dealer within the State or in the course of inter-State trade or commerce or in the course of exports out of India. The expression “intended” is significant and important. It refers to the intention of the dealer after the goods are manufactured and packed. The expression “in the course inter-State trade or commerce” is quite broad and wide. An issue may arise as to whether the stock transfer outside the State in terms of directions issued by the Central Government can be considered as sale or transaction in the course of inter-State trade or commerce. In the case at hand, we would not decide the said issue or question, for it was not raised or argued before the authorities and can be examined in an appropriate case when raised and considered. Be it noted, sub-section (6) is a specific provision which deals with the case of the dealer who has been issued the recognition certificate and has purchased goods without payment of tax or at concessional rates, but has sold the manufactured goods or packaged goods

otherwise than by way of sale in the State, or in the course of inter-State trade or commerce or export out of India. The provision specifically deals with cases where the dealer manufactures or packs the notified goods and has taken benefit of lower/concessional or nil rate of tax on the raw material but is unable to fulfill the intendment, i.e., he has not been able to sell the notified goods by way of sale within the State or in course of inter-State trade or commerce or by way of export. In such cases, the dealer is liable to pay the amount of difference on the amount of sale or purchase of such goods on which concession or nil rate of tax was paid on account of issue of the requirement certificate and the amount of tax calculated @ 4%. The sub-section is a particular and a specific section which deals with and specifies the consequences when the dealer is unable to meet and comply with intendment. The sub-section (6) would, thus, be applicable.

18. Section 3-B undoubtedly commences with a non-obstante clause, but the provision has to be read

harmoniously with sub-section (6) to Section 4-B. Any other interpretation would make sub-section (6) a dead letter, for if we accept the plea of the Revenue whenever there is violation or failure to abide with the “intendment”, Section 3-B would be invoked and applied, not sub-section(6) to Section 4-B. Section 3-B would apply when a false and wrong certificate or declaration is made. Sub-section (6) on the other hand, deals with cases where the dealer is unable to comply with the intendment, i.e., for some reason he is unable to sell the goods within the State, export them or sell them in the course of inter-State trade or commerce. Intendment of the said nature has not been treated as false or wrong declaration as consequences have been prescribed in sub-section (6). It is essential to be stated that consistency and certainty in tax matters is necessary. In cases relating to “Indirect Taxation”, this principle is even more important. Clarity in this regard is a necessity and the interpretative vision should be same.

19. In view of the aforesaid analysis, we find the view expressed by the tribunal which has been concurred by the

.....J.
(SHIVA KIRTI SINGH)

Page 22