Commissioner of Sales Tax U.P. Lucknow

Vs

M/s Mool Chand Shyam Lal, Belanganj, Agra

Civil Appeal No. 2551 (NT) of 1988

(Sabyasachi Mukharji, S. Ranganathan JJ)

01.08.1988

JUDGMENT

SABYASACHI MUKHARJI, J. –

1. Special leave granted. The appeal is disposal of by the judgment herein.

2. The appeal relates to the assessment year 1976-77, period being April 1, 1976 to January 3, 1977 under the U. P. Sales Tax Act, 1948 (hereinafter called 'the Act'). The dealer runs a Roller Flour Mills under the name and style of M/s Mool Chand Shyam Lal Roller Flour Mills, Agra in which atta, maida, suji, bran and refraction are manufactured. For the manufacture of atta, maida and suji the wheat is supplied by the Food Corporation of India and regional Food Controller under the U. P. Roller Flour Mills (Regulation of Use of Wheat) Order. The sale price of the said wheat products i. e. atta, maida, suji has been fixed by the State Government from time to time under U. P. Roller Flour Mills (Ex-Mill Price Control) Order, 1975 under the notifications issued by the government. The State Government has further issued the Notification No. S. T. 4602/29-Wheat-127/175 dated June 28, 1975 under the U. P. Roller Flour Mills (Ex-Mill Price Control) Order, 1975 fixing the ex-mill price of he sales of wheat products and also authorised the mills in the said notification to realise the proportionate amount of octroi, terminal tax, purchase tax or sales tax, duty or excise duty payable by the mills on the wheat crushed in addition to the fixed ex-mill price. The dealers have realised the amount of the wheat products as fixed by U. P. Roller Flour Mills (Ex-Mill Price Control) Order, 1975 and have also realised the amount of he wheat sales tax or wheat purchase tax and octroi on the wheat used in the manufacture of wheat products, for the sale of atta, maida, suji, bran and refraction in accordance with the aforesaid notification. The dealers have further realised the proportionate amount of the wheat purchase tax and wheat sales tax and octroi as consideration of the sale price in addition to the sale price fixed by the State Government on the sales of wheat products. It is the case of the revenue that the amount of wheat sales tax and wheat purchase tax as well as the octroi paid by the dealers for the purposes of purchases of wheat, which was used for the manufacture of wheat products, has been kept in the separate account in the account books of the dealer. It is further the case of the revenue that the amount of wheat sales tax and wheat purchase tax, which the dealer paid for the purposes of purchase of wheat, was collected by the dealer as part of the sale price of the wheat products. For the assessment year 1976-77 the assessment order was passed on February 22, 1979 under Rule 41 (7) of the U. P. Sales Tax Rules read with Section 18 (3) of the Act for the period from April 1, 1976 to January 3, 1977 by which the assessing authority while passing the assessment order has accepted the contention of the dealer that the amount of the wheat purchase tax, wheat sales tax and octroi charged separately by the dealer in the cash memo of sale of atta, maida and suji are the part of the turnover and included in the disclosed turnover of the dealer. The assessing authority in he regular assessment had treated this wheat purchase tax, wheat

sales tax and octroi which were aid by the dealer separately inn the cash memos and the wheat products sole by the dealer, as part of the ex-mill price of the wheat product. The assessing authority had imposed the tax on this amount treating it as a part of the turnover of the dealer. But after the completion of the assessment, the Assistant Commissioner (Assessment) issued a notice under Section 15-A (1) (qq) of the Act to show cause as to why penalty should not be imposed in respect of the realisation of wheat purchase tax and wheat sales tax during the aforesaid period. A reply was filed by the dealer to the said notice. The Assistant Commissioner by his order dated February 24, 1979 imposed a sum of Rs 25,000 as penalty under Section 15-A (1) (qq). Section 15-A (1) (qq) reads as follows :

> (qq) realised any amount as sales tax or purchase tax, where no sales tax or purchase tax is legally payable or in excess of the amount of tax legally payable under this Act : or

3. In the aforesaid circumstances after an inquiry as it may deem necessary the assessing authorities may direct that such dealer shall pay, by way of penalty, in addition to the tax, if any payable by him mentioned therein. Against the aforesaid order of the Assistant Commissioner, the dealer filed an appeal before the Deputy Commissioner (Appeals). The Deputy Commissioner (Appeals) dismissed the appeal and confirmed the order of imposition of penalty. Against the said order of the Deputy Commissioner (Appeals) the dealer filed a second appeal before the Tribunal. The Tribunal also upheld the order of the lower authorities and dismissed the appeal. Against the judgment and order passed by the Tribunal, the dealer moved the High Court by way of a revision. The High Court allowed the revision.

4. The High Court held that on the facts found, it should be examined if the excess realisation was of sales or purchase tax thus incurring penal liability under sub-clause (qq) of sub-section (1) of Section 15-A or it was excess realisation of price over and above that the assessee was entitled to charge from this customers under Notification No. 4602 of the Essential Commodities Act. It was urged that the assessee did not commit any breach of the Act. It was contended that the assessee was entitled to realise price and the purchase tax from customers under notification but it it realised more than it was (sic) excess realisation by way of price, there would be breach of the Control Order for which no penalty could be levied under this Act. What the assessee has realised from customers was price and not tax. Section 15-A postulates as set out hereinbefore under clause (qq) certain conducts. As it is apparent from the provisions set out above, that the realisation must be by the dealer of the amount as sales tax or purchase tax where no sales tax or purchase tax was legally payable or in excess of the amount of tax legally payable under the Act. Therefore, it is necessary that realisation must be of the sales tax or purchase tax, secondly, that realisation must be in excess and thirdly the amount of tax, secondly, that realisation must be in excess and thirdly the amount of tax should be legally payable under the Act. The High Court has construed the expression "as" in the beginning of the sub-clause as significant. Penalty is legible for excess realisation of tax, therefore, realisation of the amount should be as tax and not in any other manner. Then excess should be over and above the amount of tax legally payable. This expression obviously means tax payable under the Act, rules or notification. Therefore, realisation by the assesses from customers should not be of only sales or purchases but it should be of of the tax legally payable. If the purchaser realises more money that by itself will not attract the penal provisions. In the instant case, the High Court noted that it has been found that the dealer charged sales tax at the rate of Rs 5 per quintal. There is no finding that it was in excess of tax leviable or legally payable under the Act. The excess thus charged was in contravention of the provisions of the notification. But that alone was not sufficient for initiation or levy of penalty under sub-clause (qq) of Section 15-A (1) of the Act. It has to be

realised as sales or purchase tax and tax so charged must have been in excess of tax payable. The assessing authorities have not found in the instant case that Rs 5 per quintal was in excess of tax payable under the Act.

5. On behalf of the revenue, our attention was drawn to sub-clause (b) of sub-section (2) of Section 8-A of the Act. The said sub-clause read as follows :

> (b) Where sales tax 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 sales tax payable, from the person to whom the goods are sold by him, whether on his behalf or on behalf of his principal.

6. This is a method of realisation in case of indirect tax. Penalty can be levied or is leviable for realisation of excess of tax legally payable and not for contravention of Section 8-A (2)(b). Realisation of excess amount is not impermissible but what is not permissible is realisation of excess amount as tax. The High Court noted that the assessee did not act fairly in this case. By way of price it raised from its customers more than what it was entitled to under Notification No. 4602 but in order to avoid any consequences under the Essential Commodities Act such as suspension or cancellation of its licence etc. the excess realisation was shown as amount covered by Explanation II of the notification. On these facts the High Court found the provisions of Section 15-A (1) (qq) were not applicable. It has to be borne in mind that the imposition of a penalty under the Act is quasicriminal and unless strictly proved the assessee is not liable for the same.

7. In that view of the matter, the High Court was right in the view it took. There is no scope for interference under Article 136 of the Constitution. The appeal, therefore, fails and is dismissed accordingly. There will be no order as to costs.

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