

(2003) 07 AHC CK 0216

Allahabad High Court

Case No: Sales Tax Revision No. 149 of 1991

Hind Lamps Limited

APPELLANT

Vs

Commissioner of
Sales Tax

RESPONDENT

Date of Decision: July 24, 2003

Acts Referred:

- Uttar Pradesh Sales Tax Act, 1948 - Section 29

Citation: (2004) 136 STC 483

Hon'ble Judges: Prakash Krishna, J

Bench: Single Bench

Advocate: Bharat Ji Agarwal and Rajesh Kumar Agarwal, for the Appellant; The Standing Counsel, for the Respondent

Final Decision: Allowed

Judgement

This Judgment has been overruled by : [Commnr. of Sales Tax, U.P. Vs. Hind Lamps Ltd., \(2008\) 8 JT 590 : \(2008\) 10 SCALE 665](#)

Prakash Krishna, J.

The question involved in the present revision is whether the dealer was not entitled under the U.P. Sales Tax Act, 1948 for the adjustment made by it while depositing tax for the months of April, May and August, 1977, out of excess amount of tax deposited by it during the assessment years 1968-69 to 1971-72, which assessment were set aside in appeal and were remanded.

2. The factual scenario, which is almost undisputed, is that the applicant made adjustment of admitted tax in the months of April, May and August 1977, out of the excess amount of tax deposited by it for the earlier assessment years.

3. Against the assessment orders for the assessment years 1969-70 to 1971-72 the applicant filed various appeals before the Assistant Commissioner (Judicial), Sales Tax. The appeals were allowed and the matter was remanded for reconsideration by the assessing authority. The applicant had to deposit following amounts in respect of following assessment years which became due on account of remand order passed by the Assistant Commissioner (Judicial), Sales Tax :

1968-69 . . . Rs. 74,833

1969-70 . . . Rs. 95,506

1970-71 . . . Rs. 1,35,666

1971-72 . . . Rs. 2,38,435

The applicant adjusted the above amount due to it in the payment of tax for the months of April, May and August, 1977. In the final assessment proceeding the assessing authority for the relevant assessment year 1977-78 vide order dated February 27, 1982 refused to grant adjustment of the said amount in the admitted tax liability for the months of April, May and August, 1977 on the ground that there is no such provision for adjustment under the Act and the dealer cannot itself adjust the outstanding dues payable to him by the department. Consequently he imposed interest for late payment to the said admitted tax liability which was sought to be adjusted by the dealer amounting to Rs. 48,845.18. The said order was confirmed by the first appellate authority as well as by the Tribunal vide order under revision.

4. Undaunted by the failure the dealer has raised the above question of law and submitted that in view of Section 29 of the U.P. Sales Tax Act, 1948 the refusal of the authorities below to grant adjustment and consequential demand of interest amounting to Rs. 48,845.18 is illegal

5. Heard learned counsel for the parties.

6. The power to impose tax on sale or purchase of goods other than newspaper has been given by item No. 54 of List II of the Seventh Schedule to the Constitution of India. The power to legislate with respect to tax comprehends the power to impose tax, to prescribe machinery for collecting the tax, designate the officer, by whom the liability may be enforced and to prescribe the authority, obligation and indemnity of those officers. The Supreme Court in various decisions has held that the matter of granting refund of tax improperly or illegally collected is subsidiary or ancillary power of the State Government under the aforesaid entry. Reference can be made to [The Orient Paper Mills Ltd. Vs. The State of Orissa and Others](#), The aforesaid observation of the Supreme Court has been approved in [R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another](#), . Again the same view has been reiterated in [Amar Nath Om Prakash and Others Vs. State of Punjab and Others](#), . On equity also the State Government is bound to refund excess tax illegally realised by it subject to any statutory restriction. The refund of excess tax realised by the Government in pursuance of the order which has been set aside or modified in

appeal is a sort of restitution to the dealer-assessee of the excess amount illegally realised by the State Government,

7. A division Bench of this Court in 1988 UPTC 144 (Guru Charan Industrial Works v. Union of India), has held as follows :

"3. Right to claim refund of tax or duty paid under mistake of law with corresponding obligation of State to repay has been consistently upheld by courts. Taxation is sovereign power of the State. But it is subject to Constitutional restriction under Article 265 that no tax shall be levied or collected except by authority of law. Therefore, any levy or collection, which is contrary to law, has to be struck down. When moneys are paid to the State which the State has no legal right to receive, it is ordinarily the duty of the State subject to any special provisions of any particular statute or facts or circumstances of the case to refund the tax of the amount paid : [Commissioner of Sales Tax, U.P. Vs. Auriaya Chamber of Commerce, Allahabad](#), . [See also [Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf](#), , [State of Madhya Pradesh Vs. Bhailal Bhai and Others](#), , State of Kerala v. Aluminum Industries Ltd. [1965] 16 STC 689 (SC).]"

It has further been held that refund of tax or duty is founded on principle of absence of levability. That is what was paid was not tax or duty but money either because it was not taxable or at the point of time it was paid it was exempt under any provision of law. This Court has gone to the extent in the aforesaid case that the claim for refund of duty, tax collected illegally is liable to be refunded, notwithstanding the claim having become barred by time under the statute. Necessary direction could be issued under Article 226 for refund of the amount paid under mistake of law.

8. In the above background now let us have a look at the statutory provision, if any, under the U.P. Sales Tax Act. Reliance was placed upon Section 29 of the U.P. Sales Tax Act, 1948, which reads as under :

"Section 29. Refunds.--(1) The assessing authority shall, in the manner prescribed, refund to a dealer any amount of tax, fees or other dues paid in, excess of the amount due from him under this Act :

Provided that the amount found to be refundable shall first be adjusted towards the tax or any other amount outstanding against the dealer under this Act or under the Central Sales Tax Act, 1956 and only the balance, if any, shall be refunded.

(2) If the amount found to be refundable in accordance with Sub-section (1) is not refunded as aforesaid within three months from the date of order of refund passed by the assessing authority, or as the case may be, from the date of receipt by him of the order of refund, if such order is passed by any other competent authority or court, the dealer shall be entitled to simple interest on such amount at the rate of eighteen per cent per annum from the date of such order or, as the case may be, the date of receipt of such order of refund passed by the assessing authority to the

date of the refund.

Explanation I.--The date of refund shall be deemed to be the date on which intimation regarding preparation of the refund voucher is sent to the dealer in the manner prescribed.

Explanation II.--.....

.....

The expression "refund" includes any adjustment under the proviso to Sub-section (1)."

Proviso to Sub-section (1) of Section 29 says that the amount found to be refundable shall first be adjusted towards the tax or any other amount outstanding against the dealer under this Act or under the Central Sales Tax Act, 1956 and only the balance, if any, shall be refunded. Explanation II provides that the expression "refund" includes any adjustment under the proviso to Sub-section (1). This section has been interpreted by a division Bench judgment of our court in the case of *Dhingra Mechanical Works v. Commissioner of Sales Tax* [1972] 29 STC 238 : 1971 UPTC 821 and interpreting Section 29 of the proviso attached thereto it has been held that the said proviso clearly casts a duty upon the assessing authority to adjust the refund due to the assessee towards the outstanding liability of tax or penalty, etc. The facts of the case were that the appeal filed by the dealer was held to be non-maintainable on account of shortage of three paise towards admitted tax liability. The contention of the assessee that a sum of Rs. 620 was refundable to the assessee from the department and, as such shortage of three paise can very well be adjusted against the refund due to the assessee and, as such, appeal cannot be said to be incompetent. Interpreting Section 29 of the Act the aforesaid plea was accepted in that case with the following observation :

"When a tax liability is to be discharged by an assessee, he can ask the Sales Tax Officer to adjust against such liability any amount which may "be refundable to him. Under this proviso, there is a provision for an automatic adjustment so that in a case like the present one, there shall be deemed to have taken place an automatic adjustment of the amount refundable to the assessee against his liability of admitted tax."

To my mind the aforesaid judgment squarely applies to the facts of the case in hand.

9. A learned single Judge in *Greenfield v. Commissioner of Sales Tax* 1981 UPTC 1183, has further interpreted the aforesaid judgment and it was held that there is no reason why principle of adjustment is not applicable to the tax due or admitted liability. Relevant paras 3 and 5 are quoted below :

"3.....There is no reason why the principle of adjustment is not applicable to tax due or admitted liability. The effect in law of such adjustment would be that where

the amount to be refunded is more there cannot be any arrear consequently no default. In such a case the penalty proceedings would be without jurisdiction and the notice shall have to be discharged. If the amount is less than the tax due, it may not affect the jurisdiction but it shall affect quantum.

.....

5. In equity also the department cannot claim default so as to confer jurisdiction to initiate proceedings for imposition of penalty. It would be unfair to block assessee's money and yet penalise him. Money due from department and money due to department do not have separate identity."

Again the said controversy arose in the case of Victor Cables Corporation v. Assistant Commissioner (Assessment) Sales Tax [1983] 54 STC 94 ; 1982 UPTC 1023. The division Bench has followed the above case of Dhingra Mechanical Works [1972] 29 STC 238. Thus beyond pale of any doubt, consistent view of our court is that in view of Section 29 of the Act the assessee can ask the Sales Tax Officer to adjust the refund amount due to him in discharge of outstanding sales tax dues against him. In the facts of the present case the applicant along with the return filed applications dated May 25, 1977, June 12, 1977 and September 29, 1977 for adjustment of the refund amount due to him against the admitted tax liability for the months of April, 1977, May, 1977 and August, 1977. Filing of applications for the adjustment of the amount is not disputed even by the assessing authority. The factum of filing of these applications do find place in the assessment order. The Tribunal on mis-interpretation of Section 29 of the Act held that the dealer-applicant was not entitled to claim adjustment as after remand final assessment orders in respect to the assessment years 1968-69 to 1971-72 were not passed. The Tribunal took a view that refund amount shall become due only after passing of fresh assessment order as a consequence of the remand order. In my view the Tribunal has not correctly interpreted Section 29 of the Act. As soon as the order is set aside any amount deposited over and above the admitted tax liability is refundable to the dealer on the principles of restitution. The principle of restitution is well-recognised principle of law and finds place in Section 144 of the Code of Civil Procedure, 1908. The said section provides that where any decree or an order is varied or reversed in any appeal, revision or other proceeding is set aside or modified in any suit instituted for the purposes, the court which passed the decree or order shall restore to the party any benefit by way of restitution or otherwise and place the parties in a position which they would have occupied, but for such an order or decree. It is a principle of law that acts of courts should not be allowed to work injury on the suitors. One of the first duty of the court is to take care that the act of the court does no injury to the suitors. The doctrine of restitution contemplates a case where the property has been received back by the decree holder under his decree and the decree is subsequently whole or partially reversed or varied in other proceedings.

10. On a plain reading of Section 29 of the Act, the view taken by the Tribunal cannot be sustained. A division Bench of this Court in the case of Pankaj Gas Cylinders Limited v. State of U.P. [2004] 136 STC 482 : 2003 UPTC 499 has observed that the excess amount refunded by the petitioner to the Indian Oil Corporation for the relevant assessment year will be adjusted towards the tax liability for the assessment year 1989-90.

11. In this connection Rule 71 of the U.P. Trade Tax Rules, 1948 is also relevant. It has made a provision for giving effect to the revisional order. It says that if an order passed on the appeal or revision has the effect of varying any order, the Sales Tax Officer shall refund the excess tax or fees or realised deficit, as the case may be.

12. The learned Standing Counsel could not point out any provision either under the U.P. Trade Tax Act or under the rules framed therein to justify the observations of the Tribunal that the amount of refund shall be due in the case of remand order only after passing of fresh assessment order. By putting interpretation on word "due" the Tribunal has held that the amount will be refundable only after fresh assessment. According to it the word "due" in tax matter means a sum payable only after quantification of the amount in the assessment proceedings. This interpretation of the Tribunal in my view, is out of context. When an assessment order is set aside, varied or annulled in appeal, any excess amount paid by a person over and above admitted liability is due to him. Placing such a construction as I proposed to on the provisions of Section 29 of the Act is permitted by well-settled principles of interpretation, as observed by the Supreme Court in [D. Saibaba Vs. Bar Council of India and Another](#),

"Justice G.P. Singh states in Principles of Statutory Interpretation (Eighth Edition, 2001), "it may look somewhat paradoxical that plain meaning rule is not plain and requires some explanation. The rule, that plain words require no construction, starts with the premise that the words are plain, which is itself a conclusion reached after construing the words. It is not possible to decide whether certain words are plain or ambiguous unless they are studied in their context and construed (p. 45). The rule of literal interpretation is also not to be read literally. Such flexibility to the rule has to be attributed as is attributable to the English language itself.

The learned author states again, "In selecting out of different interpretations "the court will adopt that which is just, reasonable and sensible rather than that which is none of those things" as it may be presumed "that the Legislature should have used the word in that interpretation which least offends our sense of justice"." (p. 113, *ibid.*) "The Court strongly lean against a construction which reduces the statute to a futility. A statute or any enacting provision therein must be so construed as to make it effective and operative "on the principle expressed in the maxim : *ut res magis valeat quam pereat*"." (p. 36 *ibid.*). "If the language used is capable of bearing more than one construction, in selecting the true meaning regard must be had to the consequences resulting from adopting the alternative constructions. A construction

that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results".

13. To clarify further I may add that the party is entitled to refund of only those amount, which were paid or deposited during the pendency of appeal, not referable to any admitted tax liability. Recently under the Income Tax Act in the case of [Commissioner of Income Tax, Bhopal Vs. Shelly Products and Another](#), it has been held that when assessment order under the Income Tax Act, is set aside and no fresh assessment takes place, the deposit of tax amount by the assessee by way of advance tax, self-assessment will not be refundable to him. The advance tax and self-assessment tax which is paid by the assessee of his own assessment of his liability and is based on the return of income filed by him. The tax so paid represents the admitted liability of the assessee and failure or inability to frame another assessment after the earlier assessment is set aside or nullified in appropriate proceedings, does not entitle the assessee to claim refund caused to this extent, the assessee has admitted his liability to pay tax, in accordance with law.

14. In view of the above, the order of the Tribunal so far as it relates imposition of interest on the admitted tax liability, which was sought to be adjusted by the applicant against the refund amount, cannot be sustained. No other point was pressed in the revision.

In the result the revision succeeds and is allowed and the demand of Rs. 48,845.18 towards interest is set aside.