Court No. - 30

Case :- SALES/TRADE TAX REVISION No. - 139 of 2016

Applicant :- M/S Shri Ram Diesel (India)
Opposite Party :- The Commissioner, Commercial Taxes
Counsel for Applicant :- Shubham Agrawal
Counsel for Opposite Party :- C.S.C.,B.K.Pandey

Hon'ble Ashwani Kumar Mishra,J.

1. Dispute in this revision relates to levy of demand of tax for the period from October to December, 2008. The revisionist herein is engaged in the activity of selling Diesel Engine Pump Sets of less than 10 horse power, and is duly registered under the provisions of the Act. It appears that a circular was issued by the State of Uttar Pradesh on 5.9.2012, whereby realization of tax above 4% together with interest was granted remission provided such amount has not been realized by the seller from its consumers. The circular dated 5.9.2012 reads as under:-

> ''उपर्युक्त के संबंध में मुझे यह कहने का निर्देश हुआ है कि शासन द्वारा सम्यक् विचारोपरान्त निर्णय लिया गया है कि दस हार्स पावर तक के डीजल इन्जन पम्प सेट पर दिनांक 30.9.2008 से 31.03.2011 तक की अवधि में 4 प्रतिशत + यथा अतिरिक्त कर से अधिक देय एवं आरोपित कर की बकाया धनराशि तथा उस पर नियमानुसार देय ब्याज को माफ कर दिया जाये बशर्ते उक्त अवधि में व्यापरियों द्वारा क्रेताओं/उपभोक्ताओं से 4 प्रतिशत + यथा अतिरिक्त कर से अधिक देय कर की धनराशि की वसूली नहीं की गयी है। इसके अतिरिक्त जिन व्यापारियों से उक्त अवधि में देय/आरोपित कर वसूली कर लिया गया है, उसे वापस नहीं किया जाएगा। माफी का आदेश पारित करने का अधिकार सम्बन्धित कर निर्धारक अधिकारी को प्रदान किया जाता है।''

2. Revisionist contends that it has not realized any tax from its consumers and had deposited the amount of tax under protest. Subsequently, an application was made to refund this amount, which has been rejected by the assessing authority primarily on the ground that there is no provision in the circular for any refund of tax already realized. This finding has been affirmed in first appeal as well as by the tribunal.

3. Learned counsel for the revisionist contends that revisionist is a sincere tax payer and has complied with the requirement of law, on account of which it is being discriminated, inasmuch as such assessees who have not deposited similar tax are entitled to benefit of remission, but such relief has been denied to the revisionist. Learned counsel has invited attention of the Court to a judgment rendered in ***Anand Gramodyog Samiti vs. Commissioner Trade Tax, 2005 UPTC 741***. Para 16 and 18 of the judgment reads as under:-

> “16. The said argument is misconceived and cannot be accepted for the simple reason that India is a welfare State. A person who has deposited tax out of his own pocket cannot be permitted to be placed in a disadvantageous position than those who have not deposited tax at all. All the three authorities have concurrently found that the dealer applicant has deposited the tax from its own pocket and did not realize the same from the customers. If the argument of learned Standing Counsel is accepted that under Circular there is no provision for remission of tax, fee penalty if levied, but since there is no specific provision for refund of tax, no refund of tax can be ordered even if tax was deposited by the dealer out of his own pocket, would lead to absurd situation. Keeping in mind the object of the Circular and the factual background for which it was issued, it is implied that the persons who have not paid tax etc. if already levied, tax etc. shall not be realized and if already paid by a person without passing on the burden to the customer, the same shall be refunded to the dealer. This view, which I am taking is not only reasonable but is also within the Constitutional Scheme that India is a Welfare State. The provision for refund of fix on the facts of the present case is very much implicit and can be read in the Circular otherwise it would amount to denial of justice to the dealer. Very recently the Hon'ble Supreme Court in the case of B.P. Achla Anand v. S.A. Reddy See has observed that unusual facts and situation posing the issue for resolution is an opportunity for innovation of law. It has observed that the law, as administered by Courts'/transforms into justice. It has quoted the definition of justice mentioned in Justin man's Copus Jurist Civil is (adopted from the Roman Jurist Ulpain) states "justice in constant and perpetual will to render to every one that to which he is entitled". Similarly Ciero described" justice as the deposition of the human mind to render everyone] his due". The law does not remain static. It does not operate In ah vacuum. As social norms and values change laws too have to be interpreted and recast. Law is really a dynamic instrument fashioned by society for the purposes of achieving hormonies adjustment, human relations by elimination of social tensions and conflicts. Lord Dening once said " Law does not stand still; it moves continuously once this is recognized then the task of a Judge is put on a higher plain. He must consciously seek to mould the law so as to serve the needs of time.".

> 18. The argument of the learned Standing counsel that there being no provision for refund of tax in the Circular, therefore, no refund can be granted, is liable to be rejected on another ground. As stated, in the earlier part of judgment that the aforesaid Circular was issued on the representation made by such persons who had not deposited tax. On this basis the Government granted remission from deposit of tax. The observation made above by me should not be misconstrued, therefore by way ot clarification it is mentioned that a persons who has realized tax and deposited the same will not be entitled for refund under the aforesaid Circular. To put it differently only such person and who have not realized tax but deposited it out of their own resources, will be entitled for refund of tax."

4. Learned counsel for the revisionist has further placed reliance upon a decision of the Apex Court in ***Vikram Cement & Another vs. State of Madhya Pradesh & Others, (2015) 11 SCC 708***. Para 6 of the judgment, which is relevant for the purposes, reads as under:-

> "6. After giving our thoughful consideration to the issue involved, we are of the view that there is force in the submission of the learned counsel for the appellants. The Explanation attached to Notification dated 4.5.1999, or for that mater the Notification dated 5.7.1999, which states that the amount shall not be refunded in any case on the basis that dealer had filed the tax at a higher rate, results in invidious discrimination towards those who have paid the tax at a higher rate, like the appellants, when compared with that category of the persons who were defaulters and have now been allowed to pay the tax at the rate of 1% for the relevant period. The consequence is that it carves out two categories of tax payers who are made to pay the tax at different rates, even though they are identically situated. There is no basis for creating these two classes and there is no rationale behind it which would have any causal connection with the objective sought to be achieved. It would be pertinent to mention that on repeated query made by this Court to the learned counsel for the respondents, he could not explain or show from any material on record as to what led the authorities to provide such an Explanation. Therefore, it becomes apparent that there is no objective behind such an Explanation appended to the Notification dated 4.5.1999 which is sought to be achieved, except that the Government, after collecting the tax from those who had paid at a higher rate, did not intend to refund the same. This can hardly be countenanced, more so when it results in discrimination between the two groups, though identically situated. "

5. Learned counsel for the revisionist has also invited attention of the Court to para 14 of the judgment in Vikram Cement (supra), in which Apex Court has taken note of Article 265 of the Constitution of India, in order to hold that collection of tax

by the State over and above what is permissible in law would amount to unjust enrichment and would be contrary to Article 14 of the Constitution of India. It is contended on behalf of the revisionist that in the facts of the present case, the orders passed by the authorities are not liable to be sustained inasmuch as the only ground taken to non-suit the revisionist is that there exists no provision in the circular permitting refund of the amount, which is in teeth of law laid down by this Court as well as Apex Court.

6. Sri Nimai Das, learned Standing Counsel appearing for the State submits that revisionist's case does not fall within the terms of circular, inasmuch as the revisionist has already realized the tax from its consumers, and therefore, the benefit of circular would not be available to it.

7. I have heard learned counsel for the parties and have perused the materials brought on record.

8. In order to resolve the controversy raised in the present litigation, two distinct aspects needs to be noticed and dealt with. The first aspect relates to determination of factual issue as to whether assessee has not realized the tax from its consumers before it can claim any benefit of circular. On this aspect, this Court finds that the revisionist from the very initial stage has been making a specific claim before the authorities that it has not realized any amount of tax from its consumers over and above 4%. Such contention of the revisionist has been noticed by the authorities, but there is no finding on this aspect of the matter. In the counter affidavit filed by the State before this Court, assertion of assessee that it has not realized tax above 4% from its consumers has been denied. This Court is of the opinion that the issue as to whether the revisionist has realized tax over and above 4% from its consumers is a question of fact, which ought to be gone into by the authorities based upon the evidence led by the revisionists. In

the absence of any finding returned by the authorities on this count, I am not inclined to enter into such factual issue for the first time in exercise of revisional jurisdiction of this Court. For such purpose, it would be appropriate to remit the matter to the assessing authority for a fresh adjudication after affording opportunity of hearing to the revisionist.

9. The second question which arises for consideration is as to whether the relief of remission of tax could be denied to the revisionist merely because the circular contains no provision of refund. On this aspect of the matter, I find substance in the argument advanced on behalf of the revisionist that this Court in Anand Gramodhyog Samiti (supra) after noticing the judgment of the Apex Court, on the issue, has been pleased to hold that mere absence of enabling provision would not be a ground to deny refund of tax, in case tax is not otherwise liable to be realized from the assessee. In case State's action is allowed to stand, it would mean that an honest tax payer would be discriminated since those who have not paid tax have already been granted relief of remission. This issue has also been dealt with by the Apex Court in Vikram Cement (supra) and it has specifically been held that such action on part of the State is otherwise violative of Article 14 of the Constitution of India inasmuch as the tax in the constitutional scheme can be levied only in accordance with law. On the legal aspect, therefore, I am of the opinion that the authorities were not justified in refusing to grant relief of remission merely on the ground that an enabling provision does not exist in the circular. The orders of the authorities, therefore, cannot be sustained insofar as it refuses to grant relief of remission to the revisionist on the ground of absence of enabling provision in the circular.

10. In view of the discussions aforesaid, the instant revision succeeds and is allowed. The orders passed by the authorities

are set aside. Matter is remitted to the Assessing Authority for a fresh consideration on the question as to whether revisionist has realized tax over and above 4% from its consumers or not. In case it is found that revisionist has not realized tax over and above 4% and its case is covered by the circular dated 5.9.2012, the claim of revisionist for refund of tax would not be denied merely on the ground of absence of enabling provision in the circular. The required exercise would be undertaken within a period of four months from the date of presentation of certified copy of this order.

Order Date :- 3.1.2017
Ashok Kr.

(Ashwani Kumar Mishra, J.)