(2009) 11 AHC CK 0012

In the Allahabad High Court

Ashish Khadya Bhandar APPELLANT

Vs

Commissioner of Trade Tax RESPONDENT

Date of Decision : 04-11-2009

Acts Referred:

Uttar Pradesh Trade Tax Act, 1948 — Section 11, 13A(4)

Citation : (2010) 30 VST 178

Hon'ble Judges : Abhinava Upadhya, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Abhinava Upadhya, J.—The present revision u/s 11 of the Trade Tax Act, 1948 (hereinafter referred to as, "the Act") is filed against the order of the Tribunal dated February 13, 2006, passed in Second Appeal No. 53 of 2005 filed by the trader against the levy of penalty u/s 13A(4) of the Act., relating to the assessment year 2003-04.

2. The facts in brief are that the applicant is engaged in the business of sale and purchase of foodgrains on his own account as well as on commission. The said business is registered u/s 8A of the Act. On June 28, 2003, the business premises of the applicant was surveyed by a team of Special Investigation Branch (SIB), Trade Tax, Bareilly which found 180 quintals of foodgrains in 180 bags, were being loaded on a truck No. HR 046/9342, and 926 quintals of wheats were stored at a nearby godown. In all 1,056 bags were found. For verification of the said stock, books of account were asked for, but they were informed that it was locked in an almirah, and the owner Atul Kumar Mishra has gone out to Shahjahanpur along with keys, therefore, the stock at the time of survey could not be verified from the books of account.

3. A show-cause notice u/s 13A(3) of the Act was issued. The explanation offered was not accepted. The goods were seized and penalty u/s 13A(4) of the Act, for a sum of Rs. 50,688, was levied. Aggrieved by the aforesaid penalty order, the

applicant preferred an appeal before the Joint Commissioner (Appeals), Trade Tax, Bareilly, which was dismissed vide order dated June 2, 2005. Further aggrieved, the applicant filed a second appeal before the Trade Tax Tribunal which has also been dismissed by the impugned order dated February 13, 2006.

4. The question of law framed in this revision is as follows:

(1) Whether, on the facts and in the circumstances of the case, the levy of penalty u/s 13A(4) of the U.P. Trade Tax Act was justified?

(2) Whether, on the facts and in the circumstances of the case, the quantum of penalty u/s 13A(4) of the Act was justified?

5. Heard learned Counsel for the applicant, Shri Kunwar Saxena, and Shri B.K. Pandey, learned standing Counsel for the Department.

6. This Court vide its order dated August 24, 2009 directed the applicant to file a copy of the survey report dated June 28, 2003 (incorrectly mentioned in the order as June 26, 2006), and copy of statement, if any that may have been recorded at the time of survey. Today, a supplementary affidavit along with a copy of survey report of the Assistant Commissioner, Special Investigating Branch (SIB), Second Unit, Trade Tax, Bareilly dated June 28, 2003 is being filed, and taken on record.

7. The survey report as filed, states that a survey was conducted at M/s. Ashish Khadyan Bhandar, shop No. 8A at sub-Mandi Banda, Powaya, Shahjahanpur on June 28, 2003. One Sarvesh Kumar, S/o. Munshi Lal Munim, an employee of the applicant, was present. Upon asking for the books of account, he informed that the proprietor of the firm, Shri Atul Kumar Mishra is in Shahjahanpur and there are no books of account here ("Yahan koi hisab-kitab nahi hai"). He also informed that in truck No. HR-46/9342, 130 bags of wheat have been loaded and 50 more bags will be loaded for being sent to Shahjahanpur. These goods were being loaded from a godown of shop No. 14A. It was informed that the said godown has been taken on rent by the firm. Upon inspection of the godown, 926 bags of wheat were found stored. Since the said goods of the applicant''s firm was not at its declared place of business, the mandi inspector was summoned who certified that the goods belonged to the applicant''s firm. The Mandi Inspector also informed that the said shop No. 14A has been allotted to one M/s. Maharaja Enterprises. The applicant''s firm has taken it on rent from M/s. Maharaja Enterprises, although there is no written information or permission regarding that with the mandi inspector, but he has been informed about it orally. The survey team further required the mandi inspector to produce the record 44A for verifying, whether the said goods have been entered in the mandi account of the applicant''s firm, but the same was also not shown as the mandi assistant with whom the said record was available was not present. It is recorded in the survey report that since the goods were found stored in godown which is not the declared business premises of the applicant, and no books of account having been shown, the 926 bags kept in the godown and 130 bags loaded on the truck

were put under the custody of the mandi inspector with the direction to the proprietor of the firm to appear before the Assistant Commissioner, Special Investigating Branch (SIB) on July 3, 2003 for verification of accounts.

8. During the penalty proceedings, the assessing authority while considering the reply of the applicant has recorded a finding that upon inspection of "satti bahi" it was found that for the month of May, 2003 up to June 26, 2003, no purchase of goods has been entered. On June 26, 2003, the goods from farmers, namely, Prem Lata, Bholey Nath, Ram Avtar, Chheda Lal and Shamsher Singh, have been received in the quantity of 50 quintals, 30 quintals, 100 quintals, 180 quintals and 200 quintals, respectively, and on June 27, 2003, the goods from farmers, namely, Jalil Khan, Babu Ram and Sher Singh, have been received in the quantity of 170 quintals, 300 quintals, and 300 quintals, respectively. A finding has also been recorded that none of the aforesaid entries of goods brought within the mandi area is verifiable from the mandi records except only for goods of Prem Lata and Bholey Nath 50 quintals and 30 quintals each. The further finding is that such a huge amount of goods was not possible to be loaded on the tractor trolley to be brought in the mandi area. Disbelieving the explanation given by the applicant, it has been held that at the time of survey, books of account was not shown. The goods of the applicants were found at an undeclared place. No purchase entry for goods was found in the books of account for the month of May, 2003 up to June 26, 2003 and in June, 2003 the goods said to have been received from farmers were not verifiable from the mandi papers, and also the goods being brought in by tractors were also not believable, and therefore, the fact that the books of account were not produced at the time of survey and the attending circumstances narrated above, makes it obvious that the dealer had no intention of declaring the said goods for the sole purpose of evading tax, and if, the survey was not conducted the dealer would have succeeded in transporting the unaccounted goods.

9. The first appellate court as well as the Tribunal affirmed the view of the assessing authority and upheld the order of penalty.

10. Shri Kunwar Saxena assailing the aforesaid findings has conceded that Section 12 of the Act requires maintenance of books of account and the same must be produced on demand. But he submits that there can be various reasons for the dealer not to be present at the time of survey, or there can be various bona fide reasons for not showing the books of account on demand, and therefore, this factor alone cannot be determinative of the fact that the goods found were not duly accounted for. He stated that the books of account although were kept in the business premises, but due to the fact that the proprietor of the firm had gone, to Shahjahanpur taking the keys with him could not be shown. On first opportunity even before the date fixed by the survey team, the same was shown to the concerned authority.

11. The learned Counsel has relied upon a decision in the case of Commissioner, Trade Tax Vs. Arihant Traders, The facts of the case were that certain goods in

transit were detained and the dealer was asked to produce the books of account, but adjournments were sought and the books of account were not produced, as a result the goods were seized and a penalty notice u/s 13A(3) was issued upon which the dealer appeared along with books of account and showed the entry of bills in the books of account. The concerned authority disbelieved the same, and levied penalty on the sole ground that the bills issued by the dealer were of irregular serial number. This Court upon consideration of the facts of that case held that if the books of account are not shown to the Officer of (SIB) it does create a doubt, but on this basis alone penalty u/s 13A(4) cannot be levied. It further opined that it was open to the Trade Tax Officer, Special Investigating Branch (SIB) after detaining the vehicle should have immediately gone to business premises and should have checked the books of account or it could have summoned them, but merely, on this basis penalty could not have been levied.

12. Shri Saxena has then relied upon another decision in the case of Commissioner, Trade Tax Vs. Shakti Cement Agency, in which also certain goods were in transit and on inspection it was found that the goods were .booked by one dealer in Gorakhpur and was to be delivered to another dealer in Maharajganj, but on inspection a letter was recovered from the driver addressed to dealer of Maharajganj, Siwan, Bihar regarding delivery and payment of such goods, and therefore, it was held that the aforesaid transaction was in the nature of inter-State and not intra-State. This Court held that the goods were accounted for in the books of account and were relatable to the dealer. The only question for consideration was whether the said transaction could be assessed to tax in the Provincial Act or under the Central Sales Tax Act. This could not have been made ground for levying penalty u/s 13A(4) of the Act.

13. The facts of the aforesaid two cases are distinguishable and do not apply on the facts of this case inasmuch as in both these cases the goods were being transported from one destination to another and in both cases the goods were relatable and identifiable for the purpose of transit from other related documents. In the present case, it was the obligation of the dealer or person in-charge at the time of survey to have kept the books of account at the place of business so that the same could be shown on demand. It is further clear from the survey report that at the time of survey business activity was going on and the goods were being loaded for transportation yet the person present could not produce documents for verification of the goods. In fact, he stated that there are no books of account here ("Yahan koi hisab-kitab nahi hai"). On the contrary, the explanation for not producing the books of account by the dealer that it was locked in almirah with keys not there is unreliable and cannot be accepted in a routine manner as in every survey such a plea can be taken and that would render the survey itself meaningless and ineffective. It is also true that non-production of books of account cannot be the sole reason for rejection of accounts or for imposition of penalty. But non-production of books surely becomes relevant in terms of attending circumstances, at the time of survey. The

honourable Supreme Court in the case of Commissioner, Sales Tax v. Mohan Brickfield reported in [2006] 148 STC 638 : [2007] 1 UPTC 1, has held that the books of account are to be kept at the place of business and if not kept or shown on demand, the exercise of inspection itself becomes redundant and meaningless.

14. It is notable that in the present case, the authorities were not solely guided by the non-production of books of account, but have also taken into consideration the statement of the employee made during survey and various other factual aspects as have been noted above for levying this penalty. In my view penalty is imposed essentially as a deterrent that any violation of statutory requirement by the dealer will have pecuniary ramification and thereby ensuring strict adherence of law.

15. Upon the facts and circumstances of the present case, the imposition of penalty is justified and the Tribunal has committed no error either on facts or in law in upholding the same. The revision lacks merit deserves to be dismissed, and is accordingly dismissed.