
(2004) 12 AHC CK 0048
In the Allahabad High Court

Escorts Limited

APPELLANT

Vs

Commissioner of Trade Tax

RESPONDENT

Date of Decision : 03-12-2004

Acts Referred:

Uttar Pradesh Trade Tax Act, 1948 — Section 11, 28B

Citation : (2008) 11 VST 326

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajes Kumar, J.—Present revision u/s 11 of the U.P. Trade Tax Act, 1948 hereinafter referred to as "the Act") is directed against the order of the Tribunal dated July 15, 1996 relating to the assessment year, 1980-81.

2. Applicant is a public limited company incorporated under the Indian Companies Act, 1956 engaged in the business of manufacture and sale of tractors. The factory of the applicant was situated at Faridabad in the State of Haryana and from there the goods have been despatched to various States. Assessment proceedings had been initiated by the Assistant Commissioner (Assessment) Trade Tax, Ghaziabad, on the basis of the information received from the check-post that the applicant have obtained 109 form XXXIV from the various entry check-posts, but could not surrender the said form XXXIV at the exit check-post. Assessing authority treated the sale of the goods relating to such alleged form XXXIV within the State of U.P. by the applicant and, accordingly, estimated taxable turnover at Rs. 1,34,41,900. Applicant filed appeal against the assessment order before the Deputy Commissioner, Trade Tax, Ghaziabad, which was dismissed. Applicant further filed second appeal before the Trade Tax Tribunal, Ghaziabad, which was allowed vide order dated September 22, 1993 and the case was remanded back to the assessing officer with the direction to frame the assessment order afresh after confronting the applicant with the original form XXXTV or panji 3 duly signed by the person-in-charge of

the vehicle. It was also directed that the complete name and address of the driver/owner of the vehicle should be provided.

3. It is alleged that after the order of the Tribunal remanding back the case to the assessing officer, applicant filed an application before the Assistant Commissioner, Trade Tax, Ghaziabad, and stated that none of the alleged form XXXIV relates to the applicant and the applicant be provided with original form XXXIV or panji 3 before drawing any adverse inference against the applicant. It was also stated that the Trade Tax Tribunal had directed the assessing officer to confront the applicant with original form XXXTV and panji 3, but the same was not provided. It was further alleged that inspite of the various reminders, assessing authority had not confronted with the original form XXXTV or panji 3 duly signed by the person-in-charge of the vehicle, but furnished extract of panji 3 which did not bear the signature of the person-in-charge nor it bears any bill or invoice number nor it mentions the chassis number of the tractor. Photostat copy of the panji 3 have been filed as annexure 3 to the revision. It is alleged that the applicant filed an application before the assessing authority stating therein that the registration number mentioned in panji 3 contains the permanent registration number issued by the Regional Transport Offices of Delhi/Haryana/Punjab, etc., while tractors were sent by the applicant with the temporary registration number ranging from A, B and C.

4. Assistant Commissioner (Assessment) Trade Tax, Ghaziabad, by its order dated March 30, 1995 had passed the assessment order afresh and determined the taxable turnover at Rs. 65 lakhs and levied the tax at Rs. 4,18,000. First appeal filed by the applicant against the assessment order was dismissed. Second appeal filed by the applicant was also dismissed by the Tribunal vide impugned order.

5. Heard learned Counsel for the parties.

Learned Counsel for the applicant submitted that out of initial information of 109 forms XXXIV, adverse inference had been drawn in respect of 52 forms XXXTV only. He submitted that as against alleged information of 109 forms XXXIV, no documents were made available in respect of 47 cases and the documents were made available for 62 cases only and out of 62 cases in respect of 10 cases, it was found that they did not relate to the applicant or was found that some of the entries related to M/s. Eicher Tractor Company and some of the entries related to the various other parties relating to the food-grain, parchoon, rice, etc., and as such 10 informations had not been taken against the applicant. He submitted that in respect of alleged 52 cases, only photostat copies of panji 3 were provided in which there were no signature of the person-in-charge, but according to department applicant obtained form XXXIV. He submitted that the engine number and chassis number of the tractor were not mentioned and for which objection was being made that the registration number mentioned were permanent registration number of Punjab, Haryana and Delhi States while the applicant despatched the tractor on temporary registration number. He submitted

that inspite of directions given by the Tribunal for the confrontation of original panji 3 signed by the vehicle-in-charge, same had not been confronted and as such the direction given by the Tribunal had not been complied with. Therefore, adverse inference drawn by the authorities below including the Tribunal against alleged 52 entries in panji 3 is illegal. Learned Standing Counsel supported the order of the Tribunal.

6. I have perused the order of the Tribunal and the authorities below.

Tribunal confirmed the order of the first appellate authority on the ground that the first appellate authority perused the entries of panji 3 in which the name and address of the applicant, place of movement of tractor and other details are mentioned which proves that the alleged form XXXTV was obtained by the applicant which could not be surrendered at the exit check-post. Tribunal, accordingly, held that the presumption drawn by the assessing authority about the sale of goods is justified.

7. In my opinion, order of the Tribunal cannot be sustained, Section 28B of the U.P. Trade Tax Act, 1948 and Rule 87 of the U.P. Trade Tax Rules, 1948 reads as follows.

28B. Transit of goods by road through the State and issue of authorisation for transit of goods.--When a vehicle coming from any place outside the State and bound for any other place outside the State, and carrying goods referred to in Sub-section (1) of Section 28A, passes through the State, the driver or other person-in-charge of such vehicle shall obtain in the prescribed manner an authorisation for transit of goods from the officer-in-charge of the first check-post or barrier after his entry into the State and deliver it to the officer-in-charge of the last check-post or barrier before his exit from the State, failing which it shall be presumed that the goods carried thereby have been sold within the State by the owner or person-in-charge of the vehicle.

Provided that where the goods carried by such vehicle are, after their entry into the State, transported outside the State by any other vehicle or conveyance, the onus of proving that goods have actually moved out of the State shall be on the owner or person-in-charge of the vehicle.

Explanation.--In a case where a vehicle owned by a person is hired for transportation of goods by some other person, the hirer of the vehicle shall for the purpose of this section, be deemed to be the owner of the vehicle.

87. The transit of goods by road through the State.--(1) The driver or person-in-charge of a vehicle coming from any place outside the State and bound for any other place outside the State shall present the trip sheet in triplicate to the officer-in-charge of the check-post or barrier, if any, established near the point of entry into the State hereinafter referred to as entry check-post.

(2) The officer-in-charge of the entry check-post shall after examining the document and after making such enquiries as he deems necessary specify on all

the copies of the trip sheet the check-post or the barrier (hereinafter referred to as the exit check-post) of the State to be crossed by the vehicle or vessel and the time and date up to which it should be so crossed and deliver two copies of the trip sheet to the driver or person-in-charge of the vehicle retaining one copy himself.

(3) The driver or person-in-charge of the vehicle or vessel shall stop his vehicle at such exit check-post surrender one copy of the trip sheet and allow the officer-in-charge of the check-post to inspect the documents, consignments and goods in order to ensure that the consignment being taken out of the State are the same as mentioned in the trip sheet. The officer-in-charge of the exit check-post shall issue a receipt on the other copy of the trip sheet surrendered by such driver or person-in-charge of the vehicle.

(4) The officer-in-charge of the exit check-post shall have the power to detain, unload and search the contents of the vehicle for the purpose mentioned in Sub-rule (3).

8. The provision of Section 28B came up for consideration before the honourable Supreme Court in the case of *Sodhi Transport Co. v. State of U.P.* reported in [1986] 62 STC 381 : [1986] UPTC 721. In the said case the apex court upheld the validity of the provision of Section 28B on the ground that it is a machinery provision to check the evasion of tax. It has been further held that presumption u/s 28B of the Act is rebuttable. Following observations The quotation appears to be from *Madhya Bharat Transport Carrier v. Commissioner of Trade Tax* [2006] 143 STC 493 (pp 498-500) of the honourable Supreme Court are referred below:

Section 28B of the Act is a machinery section to check the evasion of tax. It is not a charging section. Every person has a right to move freely and to carry business throughout the territory of India as guaranteed by Articles 19 and 301 of the Constitution of India, State Legislature is competent to make the law for levy of tax on purchases and sales of any goods other than newspaper under entry 54 of List II of the Seventh Schedule to the Constitution of India and as an incidental and ancillary power can also enact machinery provisions to check the evasion of tax. If any person wants to carry the goods from one place to another place through the State of U.P., in order to ensure that such goods have not been sold inside the State of U.P., the provisions of Section 28B has been introduced. The validity of Section 28B of the Act has been challenged before the honourable Supreme Court in the case of *Sodhi Transport Co. v. State of U.P.* reported in [1986] 62 STC 381 : [1986] UPTC 721 on the ground that (i) The provisions were outside the scope of entry 54 of List II of the Seventh Schedule; (ii) They infringed freedom of trade, commerce and inter-course guaranteed under Article 301 of the Constitution of India; and (iii) imposed unreasonable restrictions on the freedom of trade guaranteed under Article 19(1)(g) of the Constitution of India. Honourable Supreme Court has upheld the validity of the provision. The apex court held as follows:

Now the impugned provisions are just machinery provisions. They do not levy and charge by themselves. They are enacted to ensure that there is no evasion of tax. As already observed, the Act is traceable to entry 54 in List II of the Seventh Schedule to the Constitution which reads thus: "54. Taxes on the sale or purchase of goods other than news papers, subject to the provisions of entry 92A of List I". It is well-settled that when the Legislature has the power to make a law with respect to any subject it has all the ancillary and incidental powers to make the law effective.

...

The provisions of Section 28B of the Act and Rule 87 of the Rules which are impugned in these cases as mentioned above are just machinery provisions. They impose no charge on the subject. They are enacted to ensure that a person who has brought the goods inside the State and who has made a declaration that the goods are brought into the State for the purpose of carrying them outside the State should actually take them outside the State. If he hands over the transit pass while taking the goods outside the State then there would be no liability at all. It is only when he does not deliver the transit pass at the exit check-post as undertaken by him, the question of raising presumption against him would arise. We shall revert to the question of presumption again at a later stage, but it is sufficient to say here that these provisions are enacted to make the law workable and to prevent evasion. Such provisions fall within the ambit and scope of the power to levy the tax itself.

...

A presumption is not in itself evidence but only makes a prima facie case for party in whose favour it exists. It is a rule concerning evidence. It indicates the person on whom the burden of proof lies. When presumption is conclusive, it obviates the production of any other evidence to dislodge the conclusion to be drawn on proof of certain facts. But when it is rebuttable it only points out the party on whom lies the duty of going forward with evidence on the fact presumed, and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over. Then the evidence will determine the true nature of the fact to be established. The rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts and circumstances.

...

In our opinion a statutory provision which creates a rebuttable presumption as regards the proof of a set of circumstances which would make a transaction liable to tax with the object of preventing evasion of the tax cannot be considered as conferring on the authority concerned the power to levy a tax which the Legislature cannot otherwise levy. A rebuttable presumption which is clearly a rule of evidence has the effect of shifting the burden of proof and it is hard to see

how it is unconstitutional when the person concerned has the opportunity to displace the presumption by leading evidence.

9. Perusal of Section 28B of the Act shows that in case of non-surrender of form XXXIV, it may be presumed that the goods for which form XXXIV was obtained had been sold inside the State of U.P. Therefore, before taking any action against any person, it has to be primarily established that alleged form XXXIV is obtained by the person against whom presumption is sought to be raised. On the receipt of the information from the check-post about non-surrender of form XXXIV and in pursuance thereof when the notice is issued to the person, there can be two situations, firstly, that the person may accept the information relating to it and either furnish the evidence to rebut the presumption or fail to rebut the presumption and secondly, person concerned disputes the information connected to it, in such a situation burden lie on the revenue to prove that said information relates to the applicant and the alleged form XXXIV was obtained by it.

10. As per procedure contemplated under Rule 87, driver of the vehicle or the person-in-charge submits three copies of form XXXIV at the entry check-post. One copy is being retained by the entry check-post officer and two copies are provided to the driver or the vehicle-in-charge. Then both copies of forms XXXIV, are being surrendered at the exit check-post. Officer of the exit check-post put the signature on both the forms XXXIV, retains one copy of form XXXIV and return one copy of said form XXXIV after necessary endorsement to the driver or vehicle in-charge. In case, if the officer concerned does not receive information from the exit check-post about surrender of form XXXIV issued by the entry check-post or receives information that said form XXXIV has not been surrendered, necessary proceeding is being taken on the presumption that goods have been sold against the owner of the vehicle or person-in-charge. In such proceeding, it is obligatory to confront the copy of form XXXIV which bears the signature of the driver or the vehicle-in-charge. Form XXXIV is the primary evidence on the basis of which the proceeding is initiated and the adverse inference is being proposed and, therefore, it has to be confronted. It is the case of the Revenue that they maintain panji 3 at the entry check-post in which the details of form XXXIV are being incorporated as a record. In my opinion, panji 3 is the record maintained by the revenue authority and has no concern with the driver or person-in-charge. In panji 3, the signatures of the driver or the persons concerned are not taken and, therefore, entry of panji 3 cannot be held binding on the driver or the person-in-charge.

11. Vide order dated July 15, 1996, the Tribunal has remanded back the matter to the assessing officer with specific direction to confront the original form XXXIV and the original copy of panji 3 bearing signature of the driver. Said order has become final inasmuch as no revision against the said order has been filed. Therefore, the assessing authority was bound by the direction given by the Tribunal. Admittedly, original copies of form XXXIV and the original panji 3 bearing signatures of the driver or the person-in-charge have not been

confronted to the applicant and, therefore, the direction given by the Tribunal has not been complied with. Record shows that initially the information was for 109 form XXXTV. As per the own case of the assessing authority, documents relating to 47 cases are not available, thus the information was found incorrect. Assessment order shows that the information relating to 10 cases were also found incorrect inasmuch as entries were not relating to the applicant. Therefore, it is clear that informations from the check-post is not always correct and cannot be relied upon as gospel truth and cannot be made sole basis for assessment. In my opinion, in case, where the party disputes that information and any connection of the alleged form XXXIV with it, it is obligatory upon the officer concern to confront the form XXXTV or any other document signed or acknowledged by party concern to prove that said form XXXTV was obtained by it. In the present case, admittedly, copies of form XXXTV were not confronted in any form whether in original or photostat. Photostat copies of panji 3 of 52 cases were submitted in which, admittedly, there are no signature of driver or person-in-charge. Therefore, the entries made in panji 3 cannot be held binding upon the applicant. In the absence of copies of form XXXTV, if the Revenue wants to rely upon the entries of panji 3 and wants to take action on the basis of the entries of panji 3 a very heavy burden lies upon the Revenue to establish that these entries relate to the person concerned by other corroborative evidence. In the present case, such burden has not been discharged. In my view, Section 28B of the Act only raises presumption of sale of goods inside the State, by the driver or the person-in-charge in case of non-surrender of form XXXIV. Therefore, it is not safe to presume the sale inside the State on the basis of the entry of panji 3 which has not been signed or acknowledged by the driver or the person-in-charge for creating the liability of tax in absence of specific evidence of sale.

12. For the reasons stated above, order of the Tribunal and the authorities below are not sustainable and are liable to be set aside.

13. In the result, revision is allowed. Order of the Tribunal and the authorities below are set aside.