(2013) 11 GUJ CK 0082

In the Gujarat High Court

Case No : Special Civil Application No. 1038 of 2013

Futura Ceramics (P.) Ltd. APPELLANT

Vs

State of Gujarat RESPONDENT

Date of Decision : 13-11-2013

Acts Referred:

Citation : (2014) 43 GST 500

Hon'ble Judges : R.P. Dholaria, J;Mukesh R. Shah, J

Bench : Division Bench

Advocate : Devan Parikh and Nirav P. Shah, for the Appellant; Jaimin Gandhi, for the Respondent

Judgement

Mukesh R. Shah, J.—By way of this petition under article 226 of the Constitution of India, petitioner has prayed for an appropriate writ, direction and order quashing and setting aside the show-cause notice dated 12.03.2012 [Annexure C to the petition] as well as the impugned order dated 31.03.2012 passed by the Assistant Commercial Tax Commissioner-(2), Nadiad by which an order of reassessment has been passed by the Commercial Tax Officer directing the petitioner to pay an amount of Rs. 78,39,802/- towards the balance tax under the Gujarat Value Added Tax Act, 2003 [hereinafter referred to as "VAT Act"]. Facts leading to the present special civil application in nut-shell are as follows:

1.1 That the petitioner is a dealer registered under the VAT Act. That the petitioner is excisable to tax on the basis of its turnover under the VAT Act. For the financial year 2007-08, the petitioner filed its return with the authorities under the Act. Such return was processed by the authorities and the order thereon was passed and accordingly the petitioner paid the value added tax of Rs. 24,40,056/-.

1.2 A notice came to be issued on 12.03.2012 by the adjudicating authority indicating that for the period from 01.04.2007 to 31.03.2008, he has reason to believe that taxable turnover of the petitioner-assessee has escaped assessment.

That petitioner was required to attend the officer on 31.03.2012. That the petitioner appeared before the Commercial Tax Officer - Assessing Officer and submitted that they have come to know that authority has received certain information from central excise ie. DGCEI and on the basis of the show-cause notice issued by the Central Excise Department, adjudicating authority has intended to enhance the sales and also intended to reassess u/s 35(1) of the VAT Act. It was also submitted that except the show-cause notice issued by the Central Excise Department, there is no material to show that the petitioner had suppressed the sales and has evaded the tax liability. That solely on the basis of the show-cause notice issued by the Central Excise Department, the AO came to the conclusion that there was a sale of Rs. 18,57,56,610/- and accordingly at the rate of 4%, the tax liability would be Rs. 66,83,580/- against which the credit of Rs. 24,40,056/- is adjusted. The petitioner is liable to pay the VAT of Rs. 1,01,00,176/- and giving the credit of Rs. 22,61,274/- paid by the petitioner towards the tax, the petitioner is liable to pay balance of Rs. 78,39,802/- towards VAT. Consequently, by order dated 31.03.2012, the AO has passed the reassessment order directing the petitioner to pay the balance amount of Rs. 78,39,802/- which is inclusive of the balance amount of VAT, interest and penalty.

Feeling aggrieved and dissatisfied with the impugned order, the petitioner has preferred the present special civil application under Article 226 of the Constitution of India.

1.3 At the outset it is required to be noted that we are conscious of the fact that against the impugned order of reassessment the petitioner has a statutory remedy available by way of appeal however, considering the fact in the identical facts and circumstances earlier this Court has entertained the petition and has quashed and set aside the order of reassessment, in the facts and circumstances of the case, we have entertained the present petition.

1.4 The petitioner has challenged the impugned order passed in reassessment proceedings, which is passed solely on the basis of the show-cause notice issued by the excise department and the additions are made. Learned counsel appearing on behalf of the petitioner has vehemently submitted that this should be wholly impermissible.

2. Shri Parikh, learned counsel appearing on behalf of the petitioner has heavily relied upon the decision of this Court in the case of Futura Ceramics Pvt. Limited and Another Vs. State of Gujarat and Others, and relying upon the said decision, it is submitted that similar reassessment order passed by the AO solely on the basis of the show-cause notice issued by the Excise Department has been set aside by this Court. Therefore, it is requested to quash and set aside the impugned order passed by the AO.

3. Shri Jaimin Gandhi, learned AGP appearing on behalf of the respondent is not in a position to dispute the above. He is also not in a position to dispute that similar reassessment order has been set aside by this Court in the case of Futura

Ceramics (P.) Ltd. (supra). However, Shri Gandhi, learned AGP appearing on behalf of the respondent has requested to reserve the liberty in favour of the AO and/or appropriate authority to pass reassessment order afresh in accordance with law and on merits.

3.1 Shri Parikh, learned counsel appearing on behalf of the petitioner has submitted that it may be observed that fresh reassessment order can be passed in accordance with law and only if the same is permissible under the law.

4. Having heard Shri Parikh, learned counsel appearing on behalf of the petitioner and Shri Gandhi, learned AGP appearing on behalf of the respondents and having gone through the impugned order passed by the AO, it appears that the reassessment order has been passed by the AO solely on the basis of show-cause notice issued by the Excise Department. It can be seen that the assessment which was previously concluded was reopened on the premise that during the excise raid, it was revealed that the petitioner had clandestinely removed goods without payment of excise duty. The Sales Tax Department, therefore, formed a belief that value of the goods + excise duty evaded and formed part of turnover of the assessee for the purpose of tax under the VAT Act. Identical question came to be considered by this Court in the case of Futura Ceramics (P.) Ltd. (supra) and a similar reassessment order which was passed on the basis of the show-cause notice issued by the Excise Department has been set aside by the Division Bench of this Court by observing as under:

It may be that the raid carried out by the Excise duty and the material collected during such proceedings culminating into issuance of a show cause notice for recovery of unpaid excise duty and penalty in a given case sufficient to re-open previously closed assessment. In this case, however, we are not called upon to judge this issue and would therefore not give any definite opinion. The question, however, is whether on a mere show cause issued by the Excise Department, the Sales Tax Department can make additions for the purpose of collecting tax under the Gujarat Value Added Tax Act without any further inquiry. If the Assistant Commissioner of Commercial Tax has utilized the material collected by the Excise Department; including the statements of the petitioner and other relevant witnesses and had come to an independent opinion that there was in fact evasion of excise duly by clandestine removal of goods, he would have been justified in making additions for the purpose of VAT Act. In the present case, however, no such exercise was undertaken. All that the Assessing Officer did was to rely on the show cause notice issued by the Excise Department. Nowhere did he conclude that there was a case of clandestine removal of goods without payment of tax under the VAT Act. Merely because the Excise Department issued a show cause notice, that cannot be a ground to presume and conclude that there was evasion of excise duty implying thereby that there was also evasion of tax under the VAT Act. It is not even the case of the Department that such show cause notice proceedings has culminated into any final order against the petitioner. We wonder what would happen to the order of re-assessment, if ultimately the

Excise Department were to drop the proceedings without levying any duty or penalty from the petitioner.

All in all, the Asstt. Commissioner has acted in a mechanical manner and passed final order of assessment merely on the premise that the Excise Department has issued a show cause notice alleging clandestine removal of the goods. Such order, therefore, cannot be sustained and is accordingly quashed. When the order is ex facie illegal and wholly untenable in law, mere availability of alternative remedy would not preclude us from interfering at this stage in a writ petition.

In view of the above decision of Division Bench of this Court, the impugned reassessment order deserves to be quashed and set aside. However liberty can be reserved in favour of the department to pass an order afresh in accordance with law and on merits after giving an opportunity to the petitioner and if permissible under the law now.

In view of the above and for the reasons stated above, petition succeeds. Impugned order passed by the Assistant Commercial Commissioner Tax - (2), Nadiad [Annexure-F to the petition] dated 31.03.2012 is hereby quashed and set aside. However, it is observed that the same shall not affect the proceedings under the Central Excise Act for which the show-cause notice has been issued. A liberty is also reserved in favour of the department to pass reassessment order afresh in accordance with law and on merits and after giving fullest opportunity to the petitioner and if permissible under the law now. Rule is made absolute to the aforesaid extent. In the facts and circumstances of the case, there shall be no order as to costs.