
(2004) 07 PAT CK 0030
In the Patna High Court
Case No : Tax Case No. 2 of 1990

Glindia Ltd.

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 08-07-2004

Acts Referred:

Bihar Finance Act, 1981 — Section 46(4), 9

Citation : (2004) 3 BLJR 2312 : (2004) 4 PLJR 744 : (2006) 146 STC 199

Hon'ble Judges : S.N. Hussain, J;Nagendra Rai, J

Bench : Division Bench

Advocate : S.K.P. Sinha, for the Appellant; R.K. Dutta and Purnendu Singh, for the Respondent

Judgement

Nagendra Rai and S.N. Hussain, JJ.—The Commercial Taxes Tribunal, Bihar, Patna has made a reference u/s 48 of the Bihar Finance Act, 1981 with regard to an order dated 28.1.1989 passed in Revision case No. PT-30/88 arising out of the assessment of sales tax made on the petitioner by order dated 9.2.1983 u/s 17(2) of the Act, for the period 1978-79.

2. Admittedly, the petitioner was registered under the Bihar Sales Tax Act, and the assessment order was passed u/s 17 (2) of the Act, for the aforesaid period by the Deputy Commissioner of Commercial Taxes, Patna Special Circle, Patna.- Before the Assessing authority the applicant claimed exemption from payment of sales tax in course of export to Nepal for Rs. 41,68,042.29 and filed customs certificates of Nepal. After verification, the Assessing Officer allowed the claim. There was excess payment by the petitioner and as such he made a claim for refund of Rs. 53,899.88. Under the relevant provision, the matter was sent by the Deputy Commissioner of Commercial Taxes, Patna to the Joint Commissioner of Commercial Taxes, for counter signing. The Joint Commissioner wanted to look into the custom certificates but he did not find them on the assessment record nor the same were made available to him on demand and thereafter in exercise of suo motu power u/s 46(4) of the Act, he set aside the assessment order and

remanded the matter to the Assessing Officer to decide the issue on admissibility of the claim afresh by order dated 12.10.1987. The applicant filed revision before the Commercial Taxes Tribunal, Bihar, Patna consisting of the Chairman and another member, The Chairman upheld the remand order whereas the Member of the Tribunal quashed the order of the Joint Commissioner of Commercial Taxes. However, the revision application was dismissed in accordance with the provisions contained in Rule 33(8) (a) of the Bihar Sales Tax Rules, 1983. The applicant, thereafter, filed a reference u/s 48, of the Act, before the Tribunal and after hearing the parties, the Tribunal by order dated 8.9.89 referred the following questions of law to this Court.

"(1) Whether on the facts and circumstances in the case, the Commercial Taxes Tribunal is correct in justifying the order of remand by the Joint Commissioner of Commercial Taxes (Adm), Central Division, Patna passed u/s 46(4) of the Bihar Finance Act, 1981 (Part I)?

"(2) Whether the matter of refund which was before the J.C.C.T (Adm) and who instead of countersigning the refund payment order abruptly set aside the assessment order against which Revision No. PP30/88 came up for hearing before the Tribunal, is and as prayed for by the petitioner was also not the matter to be decided by the Tribunal?"

3. Learned counsel for the parties at the very outset submitted that the Tribunal has not framed the questions of law correctly. So far question of law No. 1 is concerned that does not raise any question of law which is to be answered by this court. So far question No. 2 is concerned, it is submitted that the same should be refrained with a view to bring out the real issue between the parties.

4. After hearing the learned counsel for the parties, we find that the real issue between parties is as to whether the Joint Commissioner of Commercial Taxes before whom the matter of refund was pending for counter signing was justified in law in interfering with the assessment order in exercise of suo motu power u/s 46 (4) of the Act. Accordingly, the question of law is reframed as under.

"Whether the Joint Commissioner of Commercial Taxes, before whom the matter was pending for counter signing for refund matter can suo motu exercise the power u/s 46(4) of the Act, and pass order of remand?"

5. There is no controversy about the factual matters. Admittedly the order of assessment was passed and the claim of exemption from payment of sales tax with regard to export of goods made to the Nepal was allowed by the Assessing Officer. With regard to excess payment, a prayer for refund was made and that was sent to the Joint Commissioner of Commercial Taxes for counter signing and at this stage he exercised the suo motu power u/s 46(4) of the Act, and remanded the matter for fresh consideration.

6. Section 46(4) of the Act, runs as follows;

"46(4). The Commissioner may, on his own motion call for and examine the

records of any proceeding in which any order has been passed by any other authority appointed u/s 9, for the purpose of satisfying himself as to the legality or propriety of such order and may, after examining the record and making or causing to be made such enquiry as he may deem necessary, pass such order as he thinks proper."

7. The said section gives suo motu power to the Commissioner to call for and examine the records of any proceeding in which any order has been passed by any other authority appointed u/s 9 for the purpose of satisfying himself as to the legality or propriety of such order and after examining the record and in inquiry, if any made, pass appropriate order. According to sub-section (5) of Section 46 of the Act, an opportunity of hearing is required to be given to the affected person.

8. The question for consideration is whether the Commissioner can exercise this power while exercising another jurisdiction in the matter of refund.

9. The wording of Sub-section (4) of Section 46 of the Act, is very wide and the Commissioner may exercise of suo motu power when the matter comes to his notice either by filing petition by any party or on his own motion or suo motu. The fact that the records were available before the Commissioner in other capacity does not prevent him from exercising the power under sub-section (4) of Section 46 of the Act.

10. A similar provision is there contained u/s 397 of the Code of Criminal Procedure which vests power in the High Court or any Sessions Judge to call for the records to exercise the power of revision for the purpose of satisfying itself as to the correctness, legality or propriety of any finding. Interpreting the said provision, the Apex court in the case of *Municipal Corporation of Delhi v. Girdharilal Sapru and Ors.*, reported in AIR 1981 Supreme Court 1169, in paragraph 5 held that Section 397 of the Code of Criminal Procedure enables the High Court to exercise power of revision suo motu and when the attention of the High Court was drawn to a clear illegality the High Court could not have rejected petition as time barred thereby perpetuating the illegality and miscarriage of justice.

11. In our view, once it comes to the knowledge of the Commissioner from any source about any illegality with regard to any order passed by any other authority appointed u/s 9, the Commissioner may exercise power of suo motu u/s 46(4) of the Act and pass appropriate order.

12. In our view, in exercise of power u/s 46(4) of the Act, the Commissioner has power to satisfy himself as to the legality or propriety of the assessment order even though the matter was pending before him for counter signing of the refund matter.

13. Accordingly, the answer to the question is decided against the assessee.

14. The reference is answered, accordingly.