

(2010) 09 KAR CK 0113
In the Karnataka High Court
Case No : Sales Tax Appeal No. 17 of 2009

Gopalakrishna Shetty

APPELLANT

Vs

Additional Commissioner of Commercial Taxes, Zone I

RESPONDENT

Date of Decision : 29-09-2010

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 12 (2), 18 B (4), 18 B (5), 28 AA (4)

Citation : (2011) 39 VST 239

Hon'ble Judges : Manjula Chellur, J;K. Govindarajulu, J

Bench : Division Bench

Advocate : G.K.V. Murthy and P.E. Umesh, for Global Law Inc, for the Appellant;
T.K. Vedamurthy, High Court Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Manjula Chellur, J.—On our direction, the learned Government Advocate placed before us the original file pertaining to the assessment of sales tax for the years 2001-02, 2002-03 of M/s. Vivek Petro Co. Pvt. Ltd. (for short, "M/s. Vivek Petro") and the same is perused.

2. The admitted facts in the present case are the Appellant is a transporter engaged in the business of transportation of goods. In the month of July 2002, the consignment belonging to a company by name M/s. Vivek Petro, a registered dealer under the Karnataka Sales Tax Act, 1957 transported consignment of a product called "naptha" from Mangalore. The contention of the Department was, the transit pass which was required to be taken by the driver or the person in-charge of the vehicle at the entry check-post after commencement of the transit was not handed over at the exit check-post. Therefore, a presumption, under Sub-section (4) of Section 28AA is available to hold that the consignment did not move out of the State but was sold within the State.

3. In the present case, the transit pass was issued by Kannur Check-post, Kannur, and the exit check-post was Attibele near Hosur. Admittedly, the goods

were to reach the destination outside the State of Karnataka, i.e., Pondicherry. On the basis of non-receipt of transit pass (TP) at Attibele exit within the prescribed time under the abovesaid provision, they not only imposed tax but also levied penalty on the goods transported. The contention of the Appellant/ Assessee was apart from the driver there was authorised representative of the consignor, i.e., Vivek Petro, Mangalore, who was in-charge of the goods from the commencement of the journey till it reached the destination and he was the one who took not only the transit pass but was entrusted with the duty of handing over the same at exit check-post. Therefore, the owner of the vehicle was not liable to pay either the tax or the penalty imposed. However, the order dated December 24, 2003 by the assessing officer goes to show that the said defence was not accepted and they proceeded to impose tax of Rs. 16,200 and another Rs. 16,200 as penalty. This was challenged before the appellate authority in KST Appeal No. 233/03-04.

4. The appellate authority in the present case after taking into consideration that the assessment on the return submitted by the owner of the goods, i.e., Vivek Petro, Mangalore, concluded that there was no evasion of any tax. Therefore, on assumption taxes cannot be levied in the light of the Assessee being able to establish the movement of goods outside the State and not sold within the State. According to the appellate authority, the order of assessment passed u/s 12(2) of the Act by the Assistant Commissioner of Commercial Taxes, Mangalore, indicates there was no evasion of any taxes and all the goods imported by M/s. Vivek Petro were the subject-matter of assessment and all the consignments which were to reach Pondicherry unit belonged to the very owner M/s. Vivek Petro but did in fact reach Pondicherry which was evident by the very endorsement of the Superintendent of Central Excise, Pondicherry dated September 9, 2003. It also refers to the release of goods, namely, naptha, in favour of the consignor and also letters issued by the Deputy Commercial Tax Officer of Pondicherry. The assessing authority had come to conclusion that all the entries effected by the consignor did move out of the State. Based on this finding, the appellate authority allowed the appeal in favour of the Appellant, setting aside the orders of the check-post officer dated December 24, 2003. The revisional authority took up the matter by way of suo motu revision and issued a show-cause notice to the Assessee calling upon him to explain the contents of the notice. The Assessee appeared before the revisional authority and submitted the explanation. However, the revisional authority found the order of the appellate authority as improper and prejudicial to the interest of the State revenue for the following reasons:

1. The Appellant is the owner of goods vehicle has obtained transit pass No. 0185187 dated June 22, 2002 for transportation of naptha from sales tax check-post, Kannur, but failed to surrender the transit pass at the exit check-post at Attibele on or before June 24, 2002. On enquiry through correspondence with CTO of Attibele Check-post the Commercial Tax Officer, Kannur ascertained that the records of check-post do not show passage of goods vehicle No.

KA.19A-3491 through check-post and the transit pass was also not surrendered and thereby contravened Section 18B(2) of the Karnataka Tax on Entry of Goods Act, 1979.

2. The first appellate authority has wrongly allowed the appeal in so far as levy of tax and penalty u/s 18B(4) and 18B(5) concerned which is against the judgment of the honourable Supreme Court of India in the case of Civil Appeal No. 3787 of 2006 Gopalakrishna Shetty v. State of Karnataka (2008) 13 VST 365 (SC) with C. A. Nos. 3788-3844 of 2006 dated July 25, 2007. In view of the judgment of the honourable Supreme Court, the facts prevalent in the case of the Assessee are as per the facts considered by the honourable Supreme Court, and therefore it is now proposed to set aside the appeal order in so far as the provisions of Section 18B(4) and (5) are concerned and to remit the matter of CPO for fresh consideration in the light of the above judgment.

Therefore it is hereby proposed to set aside the said appeal order and alternatively to remit the matter to the Check-post Officer, STCP, Kannur for fresh consideration in view of above-mentioned judgment.

However before doing so, you are hereby called upon to file your objections adducing evidences if any within seven days of receipt of this notice, failing which the proposals made in this notice will be confirmed.

The said notices were sent by registered post with acknowledgement due. They were served. There is no reply or communication. Consequently both opportunities to file objections and to appear in person to represent the case are not utilized. Revision proceeding is participatory. Consequently, the transporter and the goods vehicle owner has to appeal and communicate in regard to this case for any further opportunity also. As there is no participation at all the cases of revision are disposed of on merits. According to law as explained in this order there is no ground for withdrawing the notices.

There is no relevance according to law as explained as to the owner of goods, viz., Vivek Petro Chem Pvt. Ltd., Pondicherry is also a registered dealer in the State. This dealer has not disclosed himself with details as to his responsibility to account as per the provisions of the Karnataka Sales Tax and the Central Sales Tax Acts. Nevertheless this reason, it is the responsibility of the present owner of the goods vehicle to comply with Section 28AA(2) or in the alternative, with alternate evidences. This law is not complied with. The said burden is continuously on the owner of the present goods vehicle. Consequently the present orders of assessment and tax by the check-post authority are justified according to law.

5. The revision authority u/s 22A(1) of the Karnataka Sales Tax Act, 1957 and Section 15(2) of the Karnataka Tax on Entry of Goods Act, 1979 has wide powers in revising the appeal order. It may pass such order as the circumstances of the case justify. As per the detail analysis of facts and law, there is no case for remanding of the assessment u/s 28AA(4) with penalty u/s 28AA(5) due to

contravention of law in Section 28AA(1)(b) in terms of Section 28AA(2) of the Karnataka Sales Tax Act, 1957 and the related provisions, viz., 18B(1)(b) read with Section 18B(2) of the Karnataka Tax on Entry of Goods Act, 1979. Therefore, this case of revision is finally decided in the manner of revising the appeal order and setting aside the said order and accordingly restoring the orders of assessment and penalty of the check-post authority.

5. Ultimately the orders of the appellate authority were revised and set aside. The orders of assessment and penalty of the check-post authority were restored.

6. Section 28AA of the Karnataka Sales Tax Act reads as under:

28AA. Transit of goods by road through the State and issue of transit pass.--(1) Where a vehicle is carrying goods taxable under this Act,--

(a) from any place outside the State and bound for any place outside the State and passes through the State ; or

(b) and which goods are imported into the State from any place outside the country and such goods are being carried to any place outside the State,

the driver or any other person in-charge of such vehicle shall furnish the necessary information and obtained a transit pass in duplicate containing such particulars as may be prescribed, from the officer in-charge of the first check-post or barrier after his entry into the State or after movement has commenced from the State as the case may be, or from the officer empowered for the purposes of Sub-section (3) of Section 28A, upon interception of the goods vehicle after its entry into the State or after movement has commenced, as the case may be.

(2) The driver or the person in-charge of the vehicle shall deliver within the stipulated time a copy of the transit pass obtained under Sub-section (1) to the officer in-charge at the last check-post or barrier before his exit from the State.

(3) If, for any reason, the goods carried in a goods vehicle are, after entry into the State, (or after commencement of movement, as the case may be,) not moved out of the State within the time stipulated in the transit pass, the owner of the goods vehicle shall furnish to the officer empowered in this behalf the reasons for such delay and other particulars, if any, thereof and such officer shall after due enquiry extend the time of exit by suitably amending the transit pass:

Provided that where the goods carried by a vehicle are, after their entry into the State, (or after commencement of movement, as the case may be,) transported outside the State by any other vehicle or conveyance, the onus of proving that the goods have actually moved out of the State shall be on the owner of the vehicle who originally brought the goods into the State.

(4) If the driver or any other person in-charge of the vehicle does not comply with Sub-section (2), it shall be presumed that the goods carried thereby have been sold within the State by the owner of the vehicle and shall, notwithstanding

anything contained in Sub-section (5) of Section 5, be assessed to tax by the officer empowered in this behalf in the prescribed manner.

(5) If the owner of the vehicle having obtained the transit pass as provided under Sub-section (1) fails to deliver the same as provided under Sub-section (2), he shall be liable to pay by way of penalty a sum not exceeding double the amount of tax leviable on the goods transported.

(6) The amount of tax and the penalty levied under this Section shall be recovered in the prescribed manner.

(7) Where the owner of the vehicle who is assessed to tax under Sub-section (4), is carrying, after such assessment, any goods taxable under this Act in a goods vehicle from any place outside the State and bound for any other place outside the State and is passing through the State, the prescribed authority may demand from such owner an amount equivalent to two times the tax leviable on such goods under this Act as security.

(8) The prescribed authority after being satisfied that the goods carried in the goods vehicle in respect of which the security amount under Sub-section (7) was collected, has passed through the State, shall refund such security amount to the owner.

(9) The prescribed authority may by an order adjust the whole or any part of security amount towards any amount of tax or penalty payable under this section by such owner.

Explanation.--In case where a vehicle owned by a person is hired for transportation of goods by some other person including a transporting or any other similar agency, both the persons shall for the purposes of this section, be deemed to be the owner of the vehicle, and shall be jointly and severally liable to pay any amount of tax or penalty payable.

7. Presumption under Sub-section (4) of Section 28AA of the Act undisputedly is a rebuttable presumption. Rebuttable presumption would mean the person against whom the impugned order came to be passed by the check-post officer must be able to satisfy the authorities that there was no evasion of payment of tax. If the intention of the Legislature were to be that irrespective of payment of tax on the goods in question, rebuttable presumption was available to the Assessee, then whether those goods were subjected to payment of tax or not would be irrelevant. In view of the fact that rebuttable evidence was allowed to be brought on record by the party in question, it would be open for him to establish that in fact transit pass was handed over at exit check-post or that the goods in question did move out of the State. Therefore, presumption of sale within the State would not be available to the Revenue.

8. In the present case, the contention of the Appellant consistently was to the effect that along with the driver of the vehicle, the owner of the goods also travelled because the consignor and the consignee were one and the same.

Therefore, the entire formalities at the check-post were looked after by the representative of the goods. Hence, the driver who normally would be illiterate would not know the details. Apparently in this case, the goods had to move from Mangalore to Pondicherry which is outside the State. Sub-section (2) of Section 28AA contemplates that the goods imported by the owner if moved out of the State, he has to obtain transit pass, i.e., the driver or the person in-charge of the vehicle. The presumption under Sub-section (4) as already stated is a rebuttable presumption and the Appellant relies upon the order of the assessment of the consignor or the consignee of the goods.

9. It is also not disputed by the Revenue that in view of the notice sent by the check-post officer pertaining to M/s. Vivek Petro, investigation was made with regard to the accounts of M/s. Vivek Petro and even intelligence wing of the Revenue also made a thorough investigation both at Mangalore and Pondicherry, so far as the business of M/s. Vivek Petro. The material that was placed before the assessing officer at the time of final order of assessment indicates whatever goods that were imported, i.e., a product called "naptha" was in fact sent to Pondicherry and was accounted at Pondicherry. It was even certified by the Central Excise Department at Pondicherry. It is also noted that whatever duty that was payable to the Central Excise Department was also paid and these are the findings of the assessing authority. When once the assessing authority who took up the assessment process as a part of the investigation into the missing of/ or non-accounting of transit passes at exit check-post, so far as M/s. Vivek Petro is concerned, it was satisfied that all the goods that were imported which were meant to be sent to Pondicherry did reach Pondicherry and not even a single incident where the revenue was able to establish that it was sold within the State. He was justified in saying that the Assessee, i.e., M/s. Vivek Petro had accounted all the goods that were imported by them and nothing escaped from the tax. In that view of the matter, when once by way of rebuttal evidence, the Appellant relies upon the assessment order pertaining to M/s. Vivek Petro, in the absence of the Department establishing that the consignment in question did not move outside the State, revisional authority was not justified in setting aside the orders of the appellate authority. As a matter of fact, the revisional authority did not even refer to what was the rebuttable evidence relied upon by the owner of the vehicle and whether the order of the assessing authority had reached finality or not.

10. On the other hand, the learned Government Advocate is fair enough to bring to our notice that the order of assessment pertaining to M/s. Vivek Petro was the subject-matter of suo motu revision u/s 21, but the revisional authority confirmed the said order of assessment of the assessing officer. When once the order of assessment of M/s. Vivek Petro has reached finality, it would not be open to the Department to say that the presumption under Sub-section (4) of Section 28AA is still available and the same is not rebutted. In view of the above discussion and reasoning, we are of the opinion, the appeal deserves to be allowed.

11. Accordingly, the appeal is allowed setting aside the order of the revisional authority dated October 25, 2008. If any amount has been recovered from the Appellant either towards tax or penalty, the same shall be refunded within three months from the date of receipt of a copy of the order.