(2011) 04 GAU CK 0087

In the Gauhati High Court

Case No : Writ Petition (C) No. 8047 of 2004

K.D.C. Bonded Warehouse (P.) Ltd. — APPELLANT

Vs

State of Assam and Others — RESPONDENT

Date of Decision : 05-04-2011

Acts Referred:

Citation : (2011) 46 VST 292

Hon'ble Judges : Hrishikesh Roy, J

Bench : Single Bench

Advocate : A. Todi and Ms. D. Borgohain, for the Appellant; R. Dubey, for the Respondent

Final Decision : Allowed

Judgement

Hrishikesh Roy, J.—Heard Mr. A. Todi, learned counsel appearing for the petitioner. Mr. K. Dubey, the appointed counsel of the Finance Department represents the respondents. The petitioner-company is dealing in Indian Made Foreign Liquor (IMFL) and beer and for its business, it is registered under the Assam General Sales Tax Act, 1993 (hereinafter referred to as, "the AGST Act") and the Central Sales Tax Act, 1956 (hereinafter referred to as, "the CST Act"), with the Superintendent of Taxes, Unit-C, Guwahati. The petitioner has submitted its up to date returns under the AGST and CST Act and the assessment is complete under both the Acts for the previous years and the demanded tax has also been paid by the assessee.

2. The challenge here is to the order of the Superintendent of Taxes whereby additional security has been assessed against the dealer and proceeding is initiated u/s 7 of the Bengal Public Demand Recovery Act (hereinafter referred to as, "the Recovery Act") by the Bakijai Officer, to realize the assessed additional security of Rs. 3 lac, as a recoverable revenue of the State.

3. Mr. A. Todi, learned counsel, contends that at the time of registration of the petitioner, the then stipulated security was deposited and since the dealer has

always paid its tax on due time, there is no justification for demanding additional security from the petitioner.

4. The learned counsel submits that the assessment of additional security has to be preceded by affording a reasonable opportunity and upon reasons to be recorded in writing and without disclosing any reason to the affected dealer, it cannot be subjected to additional security.

5. Mr. Todi further submits that even assuming that some additional security can be levied, the amount cannot be arbitrarily fixed and the additional security cannot exceed the tax paid in the previous years or the tax anticipated to be payable, for the next year.

6. Referring to the nature of the IMFL business, the learned counsel points out that the liquor business is carried out under strict control and supervision of the Excise Department of the Government where there is little scope for tax evasion and in the absence of any allegation of misuse of statutory forms or delay in payment of tax, additional security cannot be realized from a law abiding assessee.

7. The learned counsel for the Finance Department Mr. R. Dubey on the other hand contends that the impugned action was preceded by a show-cause notice dated November 13, 2003, and therefore complaint cannot now be made that the assessee was not given an opportunity, before demand of additional security.

8. Section 15 of the AGST Act permits the assessing officer to demand additional security to satisfy the twin objective of (a) timely payment of tax and (b) for proper use and safe custody of furnished declaration or forms required to be furnished under sub-section (2) of section 10 of the AGST Act. That apart, deposit of additional security can be ordered only for reasons to be recorded in writing and that too after giving an opportunity of hearing to the affected dealer.

9. For ready reference, section 15(1)(a) and (b) of the AGST Act is extracted hereinbelow:

15. (1) Subject to any rule framed in this behalf the assessing officer may, as a condition of the grant of registration to a dealer or at any time after such grant, for reasons to be recorded in writing and giving the dealer an opportunity of being heard, require him to furnish in the prescribed manner and within the time specified by him such security or such additional security as may be considered necessary,--

(a) for the purpose and timely payment of the amount of any tax or other sum payable under this Act; or

(b) for the proper use and safe custody of any declaration furnished or any form prescribed under sub-section (2) of section 10 supplied under this Act.

10. But a perusal of the show-cause notice issued to the assessee reveals that, no reasons were recorded in the notice by the assessing officer while making the

impugned demand for furnishing additional security. Even in the assessment order, reasons are conspicuous by their absence.

11. In the present case, the reply given by the assessee that it is regularly paying its dues and no tax remains unpaid, was not at all considered by the assessing officer, although additional security can be realized only for the purpose of ensuring timely payment of tax or for safe custody of the declaration or forms furnished by the assessee. But conspicuously, neither in the show-cause notice nor in the assessment order, any default of the assessee was indicated, to justify demand of additional security. In this circumstances, it has to be declared that the impugned demand of additional security is unlawful, as the pre-conditions u/s 15(1)(a) and (b) are not satisfied in the present case.

12. That apart, it must also be noted that the amount of Rs. 3 lac has been arbitrarily stipulated as additional security although under rule 24 of the Assam General Sales Tax Rules, 1993 (hereinafter referred to as, "the AGST Rules"), it is clearly prescribed that additional security cannot exceed the anticipated tax or the tax paid in the previous years. The tax liability of the assessee in this case, never exceeded Rs. 20,000 in the previous years and therefore the stipulated amount of Rs. 3 lac, has no nexus with the objective prescribed u/s 15 of the AGST Act and is far in excess of the additional security, realizable under rule 24(1) of the AGST Rules.

13. For ready reference rule 24(1) of the AGST Rules is extracted herein-below:

24. (1) Where the assessing officer is of the opinion that a dealer who has been registered or has applied for registration or for renewal of registration should furnish security or additional security for the proper payment of tax payable by him, the said officer may direct him in writing to furnish within such time as may be specified by such officer, security for an amount not exceeding the amount equivalent to tax anticipated to be payable in a year or paid in any previous year. For the purpose of determining the amount of security, the assessing officer shall take into account the taxable turnover of the dealer, if any, at the time of such determination, the nature of goods dealt in by him and such other factors as may in the opinion of the said officer assist him in making a proper determination:

Provided that the assessing officer shall have power to demand at any time additional security if he has reason to believe that the security fixed was too low, or for any other reasons to be recorded in writing.

14. When the petitioner was initially registered as a dealer under the AGST Act, the security was already recovered and considering the word "may" in sub-section (1) of section 15 of the AGST Act, only a discretionary power to demand additional security is given to the assessing officer. This discretionary power cannot be whimsically exercised and the discretion so vested, must be exercised reasonably and to meet the twin objective(s) under sub-clauses (a) and (b) of section 15(1) of the AGST Act and additional security cannot be demanded on the ipse dixit of the assessing officer.

15. For demanding additional security, the assessing officer must satisfy itself that the revenue needs to be safeguarded for timely realization of tax and/or for proper custody and use of the forms issued to the assessee. Cogent materials must also be available for deriving such satisfaction and the materials must be relevant to show the assessee to be defaulting in timely payment of tax or misuse of the forms. But for an unblemished dealer who deposits his tax on time and there is no adverse records of any misuse of forms, additional security cannot be demanded on the whims of the assessing officer. When additional security is demanded of a dealer who has no adverse record of default, it is an abuse of discretionary power conferred u/s 15(1) of the AGST Act.

16. The authority in the present case has demanded additional security without recording any reasons for such demand and therefore such show-cause notice can hardly satisfy the requirement of giving a reasonable opportunity to the dealer, as prescribed u/s 15(1) of the AGST Act. When reasons for the proposed action is not disclosed, what reply can be expected to be given by dealer. Opportunity to show cause cannot be an empty formality and in my view, the non-disclosure of reasons vitiates the impugned order and the subsequent recovery proceeding, since they neither satisfy the statutory requirement of the AGST Act and the Rules nor the principles of natural justice. For the foregoing reasons, the impugned demand of additional security and the consequent recovery proceeding under the Bengal Public Demand Recovery Act are interfered with and quashed. The case stands allowed accordingly without any order of cost.