

(2014) 03 AHC CK 0012

In the Allahabad High Court

Case No : Sales/Trade Tax Revision No. 267 of 2014

Modi Tyre Company Pvt. Ltd.

APPELLANT

Vs

The Commissioner

RESPONDENT

Date of Decision : 12-03-2014

Acts Referred:

Uttar Pradesh Value Added Tax Act, 2008 — Section 45, 48, 50, 50(1), 51

Citation : (2014) 3 ALJ 370 : (2014) 45 GST 39 : (2014) 74 VST 129

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Shubham Agrawal, Bharat Ji Agrawal and Parv Agrawal, Advocate for the Appellant

Judgement

Sudhir Agarwal, J.—In all these revisions, which have arisen from the orders of Tribunal, since common questions of law have been raised, pressed and argued, therefore, all are being decided by this common judgment. Heard Sri. Bharat Ji Agrawal, Senior Advocate, assisted by Sri. Shubham Agrawal, Advocate, learned counsel for the revisionist, learned Standing Counsel appearing for Revenue and perused the record.

2. Following three questions of law have been formulated by revisionist-assessee (hereinafter referred to as "assessee") which are required to be answered by this Court:

- i. Whether any penalty u/s 54(1)(14) of the U.P. Value Added Tax Act, 2008 (hereinafter referred to as "Act, 2008") can be levied on the basis of Column No. 6 of Form 38 being left blank, when goods were accompanied with Tax invoice, G.R. bearing Bill number and date, and the entries required to be made in the Form 38 could have been ascertained from the accompanying documents itself?
- ii. Whether penalty u/s 54(1)(14) of Act, 2008 can be imposed in "absence of intention to evade tax", in the teeth of law laid down by a Division Bench of this Court in Rama Pulses v. State of U.P. & others, VSTI 2009 B-1034?

iii. Whether penalty u/s 54(1)(14) of Act, 2008 can be imposed merely for non filling of Column No. 6 of Form 38?

iv. Whether leaving Column 6 of Form 38 can be said to be a contravention of Section 50 or Section 51 of the Act, 2008?

3. It is contended that goods were accompanied by tax invoice, G.R./Bilty of transporter and Form 38. Though, it is true that Column 6 in Form 38 was not filled in and left blank, but that was not fault on the part of assessee, for the reason that Form 38 was filled in, either by sender of goods or transporter himself and for their fault, assessee cannot be held responsible. It is further contended that goods and its description could have been verified with invoice and transporter's bilty, hence, there could not have any occasion for evasion of tax and this fact itself is sufficient to deny respondents any occasion to impose penalty upon assessee. It is lastly contended that mere non filling of Column 6 in Form 38 issued to the dealer will not justify imposition of penalty u/s 54(1)(14) of Act, 2008 at it cannot be construed as a violation of Section 50 or 51 of Act, 2008. Reliance is placed in this regard on several authorities of this Court and it is contended that these authorities were also cited before Tribunal but it has failed to look into those authorities and for this reason also Tribunal's judgment is liable to be set aside.

4. Learned Standing Counsel, on the contrary, submitted that Tribunal, in a detailed manner, has discussed modus operandi, in which Form 38 issued to assessee, could have been used repeatedly, in respect to various different transactions, if Column 6 is left blank, hence keeping Column 6 blank in Form 38, was a deliberate act on the part of assessee, and not a clerical mistake or indeliberate or unintentional error on the part of transporter or sender of goods and this being in contravention of Section 50/51 of Act, 2008, penalty has rightly been imposed upon assessee.

5. In order to appreciate rival submissions, it would be necessary to understand legislative intent and objective behind issuing Form 38, which has to be filled in and carried by transporter while importing goods in State of U.P.

6. Sections 50 and 51 of Act, 2008 deals with goods, where a person imports certain goods into the State of U.P., either by road or by rail or other mode of transportation. Section 50(1) and (2), which are relevant for the purpose of present case and Section 51 of Act, 2008 read as under:

50. Import of goods into the State by road against declaration-

(1) Any person (hereinafter in this section referred to as the importer) who intends to bring, import or otherwise receive, into the State from any place outside the State any goods other than the goods named and described in Schedule-I in such quantity or measure or of such value, as may be notified by the State Government in this behalf, in connection with business, shall obtain the prescribed form of declaration, in such manner as may be prescribed from the

assessing authority having jurisdiction over the area, where his principal place of business is situated or, in case there is no such place, where he ordinarily resides or shall download from official web site of the department in such manner as may be prescribed:

Provided that where the importer intends to bring, import or otherwise receive such goods otherwise than in connection with business, he may, at his option, in the like manner obtain the prescribed form of certificate.

(2)(a) where such goods are imported, brought or otherwise received into the state by registered dealer, he shall carry such declarations or documents as may be prescribed.

(b) where the goods are imported, brought or otherwise received into the state by a person otherwise than in connection with business, he may likewise carry such certificates and documents as may be prescribed.

51. Import of goods into the State by rail, air, post, river or rope way - (1)(a) Where any taxable goods are consigned by rail, air or post from a place outside the State for delivery to a dealer inside the State, the concerned authority shall not deliver the goods to the dealer or consignee unless he furnishes or causes to be furnished to such authority a declaration in prescribed form along with the other documents as may be prescribed.

(b) Where a taxable goods are consigned by river or rope way from a place outside the state for delivery to a dealer inside the State the receiving dealer shall not obtain or cause to be obtained delivery thereof unless he furnishes or causes to be furnished to such officer, as may be authorized in this behalf by the Commissioner, prescribed declaration and documents.

(c) After taking delivery, shall not carry goods away or cause the goods to be carried away from the railway station, air port, post office, steamer or terminal of rope way, as the case may be, unless a copy of the declaration and document as aforesaid is carried with goods:

Provided that where any courier service transports any goods by rail, river, air or post, such courier shall not obtain or cause to be obtained delivery thereof unless the dealer, importing goods, furnishes or causes to be furnished to such officer, as may be authorized in this behalf by the Commissioner, a declaration in the prescribed form referred to in clause (a) of sub-section (2) of section 50, in duplicate duly filled in and signed by him for endorsement by such officer. The courier service, after taking delivery of goods from rail, river, air or postal authority, shall carry such duplicate copy of form of declaration alongwith goods and shall deliver to the dealer alongwith goods.

(2) Where any taxable goods are brought into the State by rail, river or air as personal luggage, the person bringing them shall carry with him the prescribed form of declaration duly filled in and signed by the importer, and the importer shall submit the same for endorsement by the officer authorised under sub-

section (1) by the next working day.

(3) Where any person intends to bring, or receive into the State, from any place outside the State by rail, river, air or post any taxable goods otherwise than in connection with business and obtains the form of certificate prescribed under sub-section (2) of section 50, the provision of sub-section (1) and (2) shall mutatis-mutandis apply as if word "Certificate" is substituted for the word declaration used therein.

(4) Where an officer authorised under subsection (1) of section 45 or an officer referred to in sub-section (1) of section 48 or section 50 while making inspection or search finds any taxable goods, in respect of which declaration before the officer authorised under subsection (1) has not been made or goods being carried as personal luggage are not accompanied by the form of declaration referred to in clause (a) of sub-section (1) and where after giving reasonable opportunity of being heard to the person in charge of the goods at the time of inspection of goods or the owner of the goods, as the case may be, such officer (officer making inspection or search) is satisfied that such taxable goods are being imported in an attempt to evade payment of tax under this Act, he may, after recording such reasons, detain the goods.

(5) Provisions of sub-sections (3), (7), (8), (9) and (10) of section 48 shall mutatis mutandis apply to such detention of goods as they apply goods seized under that section.

(6) Notwithstanding anything contained in sections 50 and this section, the State Government may, in public interest and for sufficient reasons, relax the requirement of furnishing of declaration or certificate referred to in aforesaid sections to such extent as it may notify.

(Emphasis added)

7. Sub-section (1) of Section 50 requires such person (hereinafter referred to as "importer") to obtain prescribed form of declaration from Assessing Authority within whose jurisdiction he is carrying on his business or where his principal place of business is situated or, where he ordinarily resides, if has no informed place of business etc. Such prescribed form of declaration can also be downloaded from official web site of the department in the manner prescribed. This declaration form will apply to import of goods other than the goods named and described in Schedule-I in such quantity of measure or of such value, as may be notified by the State Government. Sub-section (2) provides that if importer is a registered dealer, he shall carry such declarations or documents as may be prescribed.

8. Rule 54 of U.P. Value Added Tax Rules, 2008 (hereinafter referred to as "Rules, 2008") provides that owner, driver or any other person-in-charge of the vehicle or vessel shall carry with him the documents mentioned in Clause (i) and (ii) thereof, when importing goods referred to in sub-section (1) of Section 50.

9. Clause (i) and (ii) of Rule 54(1)(a) of Rules, 2008 read as under:

(i) form of declaration for import in Form XXXVIII or certificate in Form XXXIX hereinafter in these rules referred to as declaration or certificate, as the case may be, in duplicate, duly filled and signed by the purchaser and seller of the goods or where goods are transferred otherwise than by way of sale, by consignor & consignee of the goods with status and address;

(ii) Cash memo, bill, invoice or challan;

(Emphasis added)

10. Form 38, therefore, which has to be carried by driver of the vehicle/Importer of the goods, is required to be "duly filled" in and signed by purchaser and seller of goods or, as the case may be, by consignor and consignee.

11. Rule 56 talks of declaration forms in respect to goods referred in sub-section 1 of Section 50 of Act, 2008, which shall be sent to the selling dealer or consignor of other State by the importer. The importer has to send two copies of declaration obtained by him under sub-rule (4) or downloaded from official website of the department. The form therefore, has to be issued or obtained by importer. Sub-rule (6) thereof requires registered dealer, who has to send original and duplicate portions of the form to the selling dealer or consignor of the other State after filling in all the required details. It reads as under:

Rule 56. Issue and submission of declaration forms and matters incidental thereto-(1)A registered dealer desirous of importing or receiving into the State from any place outside the State, goods notified under or referred to in sub-section (1) of section 50 in excess of the quantity, measure or value specified thereunder, shall send to the selling dealer or consignor of the other State two copies of the declaration obtained by him under sub-rule (4) or downloaded from official website of the department.

..

(6) The registered dealer shall send the original and duplicate portions of the form to the selling dealer or consignor of the other State after filling in all the required particulars and signing it.

(Emphasis added)

12. Sections 50 and 51 of Act, 2008, read with Rules, as noted above, as the case may be, require that importer/transporter not only should possess a declaration form, as prescribed, but also other documents as prescribed. The statute further requires that declaration form must be duly filled in and signed by concerned parties. Whenever requisite documents or declaration form are not found in the manner, as contemplated u/s 50 and 51, as the case may be, it would be in contravention of Sections 50 and 51. In order to be a contravention, non observance of a provision is sufficient. Whether such contravention is technical, clerical or such which may be condoned and may not attract a penal

provision, is a different thing but to suggest that though requirement of statute has not been observed yet it can be said that there is no contravention, is an argument which is per se in the teeth of the statute and cannot be accepted. A declaration form, if not duly filled in, it does not satisfy requirement of statute and therefore, it is a contravention thereof. The mere fact that other documents are there would not mitigate the requirement of statute about a duly filled in declaration form and signed by the parties. However, this by itself may not be sufficient to attract penalty provision u/s 54 of Act, 2008, as will be discussed herein below, including as to what other requirement of statute is for attracting penalty provisions.

13. Then there is a procedure for maintaining accounts, details of the form issued and subsequently received by Assessing Authority. Section 54 of Act, 2008 talks of penalties in certain cases. Here, in the case in hand, we are concerned with Clause 14 thereof which reads as under:

14. A penalty, therefore, can be leviable upon a dealer if he imports any goods in contravention of provision u/s 50 or 51 of Act, 2008 with a view to evade payment of tax on sale of such goods or goods manufactured, processed or packed by using such goods or transports or attempts to transport any taxable goods in contravention of any provision of Act, 2008.

15. The two relevant charging incidents u/s 54(1)(14) of Act, 2008 are that; firstly, there must be contravention of provisions u/s 50 or 51 and Secondly, such contravention must be with a view to evade payment of tax of sale of such goods or goods manufactured, processed or packed by using such goods etc.

16. Mere contravention of Section 50 or 51 but without any intention to evade tax, therefore, would not attract penalty. This is what has been held by this Court in various authorities relied on by the learned Senior Counsel appearing for assessee. A Division Bench of this Court in *M/s. Rama Pulses v. State of U.P. and others*, 2009 VSTI B 1034 : 2009 NTN (41) 189 has held that under Act, 2008, before imposing penalty, authority concerned has to record a finding either on the basis of material before it or produced by the dealer or any other person or the Department, which may include incomplete form 38 that there was an intention to evade payment of tax. This is what has been followed in subsequent decisions also.

17. The importance of Column 6 of Form 38 has been examined in *Multitex Filtration Engineering Ltd. v. C.C.T.*, 2009 NTN (Vol. 40) 389 : (2009 (6) ALJ 39), where this Court has observed, "According to me, mentioning of challan, bill and Invoice numbers in the declaration form is very material. By filling column No. 6 and mentioning invoice, bill or challan numbers the declaration form can be correlated with the goods covered by invoice or challan. ... Perusal of the said form reveals that all Columns have been filled except column No. 6. When the applicant was filling all the columns, there cannot be any possible reason why he has left filling column No. 6. This appears to be deliberate. ... Non-filling of

column No. 6 i.e. non-mentioning of challan number or invoice number may lead to an inference that in case of non checking of the goods, the said declaration form may be used for any other consignment of a similar quantity, quality, weight and value." It is in these facts and circumstances, the Assessing Officer has also found that Form-38 in question was not signed by Consignor and it shows that it was not filled in by Consignor, but by Assessee itself, who left Column 6 blank deliberately. Assessing Authority from the discussion made in the impugned order, some of which are referred to hereinabove, formed an opinion that turnover of sale or purchase or both declared by Dealer is not worthy of credence and thereby assumed jurisdiction for making provisional assessment and has passed the order appealed before First Appellate Authority. This decision has also been referred to and followed in M/s JSW Steel Ltd. v. Commissioner, Commercial Tax, 2014 UPTC 277.

18. In the present case, Tribunal has given its reasons to demonstrate as to how there could have been evasion of tax and therefore, keeping column 6 of Form 38 blank, intention on the part of importer to evade tax had to be inferred. The findings recorded by the Tribunal in this regard reads as under:

(Vernacular matter omitted.....Ed.)

The appellant trader has, nowhere in his reply, put forth any fact helpful to him, on the basis of which it can be ascertained that Form - 38 cannot be used again. The goods being imported are not such that may have anything like batch number or engine number and as against which number no other material may be manufactured. Non-entry in column-6 of Form - 38 for nine times in a year, reflects the trader's intention of tax evasion. If the entries of column - 6 had been left blank in one Form - 38 or so, it could have been taken as mistake; but on scrutiny column - 6 was found blank in nine instances. In addition to these, there may be some other instances too, which may not have been scrutinized by the Flying Squad Officer. In such a circumstance, the trader's act of leaving column - 6 of Form - 38 blank, proves his intention of tax evasion.

(English Translation by the Court)

19. This Court enquired from learned counsel for the assessee that the goods, which have been imported, did not contain such identification so as to distinguish the goods of one lot from others. If one Form 38 is successfully used in respect to certain goods imported without checking, the same Form 38 cannot be used in respect to another lot of goods imported by the assessee since column 6 was blank and whether such repeated use of Form 38 is possible or not, I did not get any satisfactory categorical reply at all.

20. Though Sri. Agarwal contended that invoice and bilty of transporter contain various details, therefore, it would not be probable to use same Form 38 repeatedly but on deeper scrutiny, could not totally exclude possibility of such repeated use. He, however, submit that if in future certain goods are imported by using Form 38 again, that would not justify penalty on the goods seized on the

earlier occasion.

21. I find no substance in the above explanation. In order to attract penalty u/s 54 of Act, 2008, what required is, only, an intention on the part of importer to evade payment of tax and not actual evasion of tax. If there is non compliance of any requirement of Sections 50 and 51 read with rules framed thereunder, one ingredient to attract penal provision would stand satisfied and as soon as second ingredient is also satisfied, imposition of penalty would answer requirement of statute.

22. Counsel for the assessee did not bring any authority before this Court wherein Assessing Authority as well as appellate authorities have concurrently accorded the finding about intention on the part of assessee to evade tax by keeping certain column in Form 38 blank and still this Court has held imposition of penalty unjust or illegal.

23. Now I come to the authorities cited at the bar, in favour of Assessee. In (2013) 63 VST 483 . Hon"ble Dr. Satish Chandra, J. considered the matter where mobile checking squad found a vehicle transporting certain goods carrying a declaration form pertaining to import of such goods but such form was blank. Assessing Authority, on mere ground that declaration form was blank, imposed penalty, which was confirmed by first appellate authority but Tribunal reversed their decision imposing penalty. This Court noticed that Truck was intercepted on 2nd August, 2008. It commenced its journey from Andhra Pradesh to U.P. on 27.7.2008 but while in transit, and could reach U.P. border; w.e.f. 1.8.2008, the check-posts in U.P. were abolished. Till then, there was a practice that declaration form pertaining to import used to be carried by truck driver and at the check post, with the help of officer of Tax department, declaration form used to be filled in. The truck driver, in the case in hand, was carrying declaration form as per practice, as prevailed on the date, he commenced journey from Andhra Pradesh i.e. on 27.07.2008, but being totally unaware that with effect from 1.8.2008 check post in U.P. have been abolished, when he reached U.P. Border, finds no assistance from anyone to fill in declaration from; and in his own wisdom, he continued his journey towards destination. Immediately, on 2.8.2008 itself, the vehicle was intercepted by checking team of Trade Tax Department. In these peculiar facts and circumstances, the Court found that except declaration form, all the documents were in order; and mere was no concealment of sale of goods, the blank form was available with truck driver but due to interregnum change in the circumstances, which were beyond his control, the form could not be duly filled in for which he was not at all responsible. There was neither any mala fide intention nor any concealment on the part of assessee. In view of these very findings of fact recorded by Tribunal, it find imposition of penalty unjust and accordingly set aside the same. This order was confirmed by this Court by dismissing revision preferred by Revenue. I do not find as to how this judgment would help assessee in this case for the reason that, firstly, this judgment is founded on its own peculiar facts and secondly, when Tribunal found, as a matter

of fact, that there was no intention to evade tax, penalty could not have been imposed. It was thus rightly set aside.

24. In Commissioner of Commercial Tax Lko. v. Jagrani Marketing Pvt. Ltd. Lko., 2013 NTN (Vol. 51) 12, the flying-squad when intercepted a truck loaded with 194 pieces of carton found that amongst the documents available with the Transporter, Form 38 had its column 6 blank and merely on that basis, Assessing Authority levied penalty, which was upheld by first appellate authority but cancelled by the Tribunal in second appeal, hence, the Revenue came in revision. The Court noted that penalty was imposed only for leaving column 6 of Form 38 blank and the close scrutiny shows that space in column 6 being insufficient, information required thereto was printed by a computer and pasted on the back side of form 38. On verification, the said information was found in order. In these circumstances, this Court found that there was no justification for imposition of penalty and upheld Tribunal's order.

25. Then comes another decision in M/s. Sharda Exports v. Commissioner, Commercial Tax, U.P., VSTI 2013 (Vol. 18) B 1060 rendered by Hon'ble Pankaj Mithal, J. Paras 5, 6 and 7 of judgment, if read together, show that there was import of seven bundles of leather in the State of U.P., without proper import Declaration Form, hence penalty was imposed by Assessing Authority and it was confirmed by first and second appellate authorities. The assessee-revisionist brought to the notice of this Court that penalty was imposed only for the reason that proper entries in relation to invoice/bill number and its date were not made in Import Declaration Form, though these documents were accompanying goods. The Court said that in absence of any finding about intention on the part of assessee to evade payment of tax, imposition of penalty was not justified. It is in fact requirement of Section 54(1)(14) of Act, 2008. However, while doing so, the Court observed that entries required to be made in the Declaration Form could have been ascertained from the accompanying documents. There was no finding recorded by authorities below that there was any intention on the part of assessee to evade tax, therefore, imposition of penalty was found unjustified. Same is the view taken in Commissioner of Commercial Tax v. S/s Dabur India Ltd., VSTI 2013 (Vol. 18) B 1011, wherein also only on account of Column 6 of Form 38 having been found blank, penalty was imposed. In this case first appellate authority itself found that imposition of tax was not justified and that was concurred by the Tribunal. This Court declined to interfere with the said view taken by the two appellate authorities observing that mere omission/keeping column 6 of Form-38 blank was nothing but it was in the nature of clerical mistake for which penalty as such would not be attracted unless a further finding is recorded that there is an intention to evade payment of tax. In Commissioner, Commercial Tax v. Manglam Cement Ltd., 2013 NTN (Vol. 51) 18, penalty was imposed by Assessing Authority, since column 6 of Form 38 lacked date of bill/invoice. The first appellate authority itself deleted penalty holding that mere fact that column was blank would not justify imposition of penalty unless there is an intention to evade tax on the part of the importer.

26. In Commissioner, Commercial Tax, v. Shipra Engineering Works Pvt. Ltd., 2013 NTN (Vol. 51) 171, the Tribunal itself deleted penalty and this Court declined to interfere therewith.

27. Similarly in Commissioner, Commercial Tax, v. Sudarshan Spare Parts and Service Centre, 2013 NTN (Vol. 51)-156, the Tribunal while deleting penalty, recorded a finding that there was no intention on the part of assessee to evade tax and hence this Court did not interfere.

28. In Meerut Food Industries v. Commissioner, Commercial Tax, 2013 NTN (Vol. 52) 161, the Court clearly recorded the stand of Revenue itself that there was no intention to evade tax on the part of dealer and it was not their case at all as is evident from the following:

It is not the case of the revenue that there was intention to evade tax on the entire consignment or that apart from the above 33 bags of yellow peas the remaining consignment suffered from any discrepancy which may entail imposition of penalty.

29. In Commissioner, Commercial Tax v. G.K. Binding Wires Ltd., 2013 NTN (Vol. 52) 236, again the Tribunal while deleting penalty, recorded a finding that there was no intention to evade tax, hence, this Court dismissed revision preferred by the Revenue.

30. To the same effect are the decisions in Commissioner of Commercial Tax, Lucknow v. M/s. Sai. Construction and Builders, VSTI 2013 (Vol. 18) B 952, Commissioner, Commercial Tax v. U.P. Food Company, 2013 NTN (Vol. 52) 42, Commissioner Trade Tax, U.P. Lucknow v. Nehru Steel, 2012 NTN (Vol. 49) 144; Commissioner, Commercial Tax v. S.R.G. Mercantile Pvt. Ltd., 2012 NTN (Vol. 50) 353 and Pepsico India Holdings Ltd. Vs. Commissioner of Trade Tax, .

31. In fact all the decisions cited at the bar in support of the assessee are where the fact finding authorities i.e. appellate authorities themselves found no justification for imposing tax since there was no finding about intention of evasion of tax on the part of importer and thus orders were upheld by this Court.

32. In the present case, declaration form was not "duly filled" in, as required specifically in Sections 50 and 51 as also Rule 56(1) and, therefore, there was contravention of provision of Section 50(1) of Act, 2008. The Assessing Authority has recorded a finding that by keeping column 6 of Form 38 blank, such declaration form can be repeatedly used for successive import so as to evade payment of tax. This finding has been reiterated and confirmed by first appellate authority as also second appellate authority. These are all concurrent findings of fact and satisfy requirement of Section 54(1)(14) of Act, 2008 so as to justify imposition of penalty. It is not a case where merely on the basis that column 6 of Form 38 was blank, penalty was imposed. Therefore, I do not find any error on the part of authorities concerned in imposing penalty upon assessee.

33. All the questions of law, therefore, as formulated, are answered against

assessee and in favour of Revenue. Accordingly, the revisions lack merits and are dismissed.