

(2017) 05 AHC CK 0008
In the Allahabad High Court
Case No : Writ Tax No. - 133 of 2016

M/S Ganesh Industries

APPELLANT

Vs

Addl. Commissioner, Grade-1, Commercial Tax

RESPONDENT

Date of Decision : 03-05-2017

Acts Referred:

Citation : (2017) 96 UPTC 597

Hon'ble Judges : Pankaj Mithal and Vinod Kumar Misra, JJ.

Bench : Division Bench

Advocate : Suyash Agarwal and R.R. Agrawal, Advocates, for the Petitioner; Shri C.B. Tripathi, C.S.C., U.K.Pandey, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

1. Heard Sri Rakesh Ranjan Agrawal, learned Senior Counsel, assisted by Sri Suyash Agarwal, learned counsel appearing for the petitioner and Sri C.B. Tripathi, learned Standing Counsel for the respondents.
2. The pleadings exchanged between the parties have also been perused.
3. The petitioner is carrying business of purchase and sale of non ferrous metal scraps, utensil etc. and is registered both under the U.P. Value Added Tax Act, 2008 (hereinafter referred to as the VAT Act) as well as the Central Sales Tax Act, 1956 (hereinafter referred to as the Sales Tax Act).
4. The petitioner was assessed under Section 9(2) of the Central Sales Tax Act vide order dated 21.05.2012 for the assessment year 2008-09 (Central). In the said assessment apart from other things the petitioner was exempted from tax in respect of consignment sale/stock transfer against Form-F.
5. One of the Form-F in connection with which tax exemption was granted was Form No.03Q-600527 which was said to have been issued to the petitioner by the consignee agent M/s Ram Badra Sales Agency, New Delhi.
6. The Additional Commissioner Commercial Tax vide the impugned order dated

24.09.2015 has granted permission under Section 29(7) of the VAT Act to the Assessing Authority to reassess the petitioner for the above assessment year.

7. Consequently a notice to participate in the reassessment proceedings has been issued by the assessing authority on 11.01.2016.

8. The above order granting permission to reopen the assessment and the consequential notice thereof are under challenge in the present petition.

9. The permission to reopen the assessment has been granted only for the reason that one of the Forms-F No.03Q-600527 issued by the consignee agent M/s Ram Badra Sales Agency, New Delhi was reported to be fake/furzi and was not issued by the department to the said consignee agent rather to some other dealer and as such the exemption of tax granted on its basis to the petitioner appears to have escaped assessment.

10. The argument is that the petitioner is a bona fide registered dealer and he has no role in the issuance of the said Form-F. The said Form-F is not fake/furzi. It is not the case of the department that it was not been issued by it. Both the consignee agent and the petitioner are registered dealers and there is no finding that they are in collusion. In such circumstances, even if the said Form-F is said to have been misused the entire responsibility would rest upon the consignee agent and the tax exemption granted to the petitioner would remain unaffected. The petitioner is not supposed to make a rowing enquiry with regard to the genuineness of the said Form and since he has acted bonafidely on its basis, it is not a case where any permission for reassessment could have been granted. Moreover, in granting the permission the objections of the petitioner have not been considered.

11. Sri C.B. Tripathi, learned Standing Counsel on the other hand contends that under Section 29(7) of the VAT Act, the Additional Commissioner is only supposed to grant permission for the reopening of the assessment if it is beyond the prescribed period of limitation. In granting such permission he may not necessarily look into each and every aspect of the objection in detail and mere recording of his satisfaction that it is a fit case for reassessment even is sufficient. The Assessing Authority was possessed of sufficient material in the form of letter of the Joint Commissioner Special Investigation Branch Commercial Tax for the formation of opinion as to the reason to believe for reassessment.

12. In short the controversy herein this petition is whether the Additional Commissioner is justified in granting permission under Section 29(7) of the VAT Act to the Assessing Authority to reassess the petitioner under the above facts and circumstances of the case.

13. Section 29(1) of the VAT Act authorises the Assessing Authority to assess or reassess a dealer to tax according to law if he has reason to believe that (i) whole or any part of the turnover of the dealer has escaped assessment; (ii) the dealer has been under assessed; (iii) has been assessed to tax at lower rate; and

(iv) that any deduction or exemptions have wrongly been allowed.

14. Sub-Section (3) of Section 29 of the VAT Act provides that the assessment or reassessment under Sub-Section (1) of Section 29 of the VAT Act shall not be made after the expiry of three years from the end of the relevant assessment year.

15. Sub-Section (7) of the Section 29 of the VAT Act provides that where the Commissioner is satisfied that it is just and expedient on part of the Assessing Authority even beyond the period of three years aforesaid but before the expiry of eight years from the end of the relevant assessment year, he may authorise the Assessing Authority to reassess the assessee.

16. A bare reading of the provisions of Sub-Section (1), (3) and (7) of Section 29 of the VAT Act reveals that if the Assessing Authority has reason to believe that any of the four conditions as laid down therein are fulfilled, he may reassess the dealer to tax according to law after issuing notice to him provided this is done within three years from the end of the relevant assessment year. In case the reassessment is to be done after the above three years but within eight years of the expiry of the relevant assessment year, the Commissioner has to record his satisfaction for such reassessment. The authorisation of the Commissioner is therefore, necessary for reassessment after the expiry of the initial period of three years.

17. In other words, reassessment of the dealer can be done by the Assessing Authority if he has reason to believe that either of the four conditions as referred to above exists. This can be done by him within three years and thereafter subject to the maximum period of six years from the expiry of the relevant assessment year but with the approval/permission of the Commissioner. Therefore, in the cases for reassessment after the expiry of the initial three year period of limitation but before the expiry of six years before the end of the relevant assessment year two conditions are necessary to be satisfied. The first is that the Assessing Authority has reason to believe that any of the conditions specified under Section 29(1) of the VAT Act exist. Secondly, the recording of the satisfaction by the Commissioner that it is a fit case for reassessment.

18. In granting permission or authorisation to the Assessing Authority to reassess the dealer, the Commissioner does not act as an adjudicating authority and in effect does not exercise any judicial power in the strict sense. He only discharges the function of an administrative authority subject to his satisfaction on the basis of the reasons recorded by the Assessing Authority or otherwise that the case is fit enough for reassessment even though much time has elapsed.

19. In such a situation, no detailed or reasoned order is necessary while granting authorisation for reassessment but the order should reflect application of mind in recording the satisfaction for authorising reassessment.

20. It is important to point out that under the VAT Act the Assessing Authority

has no substantive power to review an order passed by him except to reassess the dealer. The reassessment of the dealer is in the form of a limited review subject to the conditions specified under Section 29 of the VAT Act. Thus, conceptually reassessment proceedings are not in the nature of a review and have to be undertaken and completed strictly in accordance with the tenor of the statute.

21. In *State of Uttar Pradesh and others v. Aryaverth Chawl Udyoug and others* [2016] 91 VST 1 (SC) the three Judges Bench of the Supreme Court recently dealt with the phrase "reason to believe" as appearing in Section 21(1) of U.P. Trade Tax Act, 1948 which is identical and *pari materia* with the phrase "reason to believe" appearing in Section 29(1) of the present Act.

22. The Supreme Court held that the expression "reason to believe" does not mean a purely subjective satisfaction on part of the Assessing Authority but satisfaction reached by the Assessing Authority on the basis of the facts or materials available before it and the material on which the opinion is so formed must not be arbitrary, irrational, vague, distant or irrelevant.

23. In the case at hand, the "reason to believe" that the income has escaped assessment has been based upon the letter dated 29.01.2015 of the Joint Commissioner Special Investigation Branch Commercial Tax which states that the petitioner was granted exemption in the assessment year 2008-09 on a sum of Rs.1,98,44,215/- of the consignment sale on the basis of Form- F No.03Q-600527. The said Form appears to be fictitious and bogus as no Form of that series was ever issued to the consignee agent M/s Ram Badra Sales Agency, New Delhi rather it was issued to another firm M/s Aamangalam Food and Beverages Ltd. Thus, the use of the said Form for seeking exemption of tax is not proper and as such the turnover of the assessee/petitioner appears to have escaped assessment requiring reassessment for the relevant year.

24. The recital to the above effect contained in the impugned order clearly reveals that there was some cogent and relevant material before the Assessing Authority having a direct nexus with the assessment of the assessee. It is on the basis of the aforesaid material that "reason to believe" was recorded by the Assessing Authority.

25. In view of the aforesaid material and the satisfaction recorded by the authority it cannot be said that it is not a case where "reason to believe" does not exist for reopening the assessment.

26. It has repeatedly laid down by the law courts that in granting permission or recording satisfaction as to the existence of "reason to believe" the sufficiency or insufficiency of the material on record is not within the realm of power of judicial review of this court.

27. Sri Agrawal has argued that the disputed Form-F is actually not fake and that the petitioner has no concern if it was issued by the department to some other

dealer and it has been used by the consignee agent inasmuch as there is no finding or even an allegation that the petitioner and the consignee agent are in collusion or that the petitioner has no role in the misuse of the said Form-F.

28. To buttress his argument Sri Agrawal has placed reliance upon 1994 U.P.T.C. 130 M/s Bharat Iron Stores v. Commissioner of Sales Tax wherein a learned Single Judge of this court has held that where sales are made against Form 3-A in the absence of finding that there was any negligence on part of the assessee in accepting the Form or that he had not acted in a bona fide manner, he cannot be denied the benefit of Form 3-A under the U.P. Sales Tax Act, 1948.

29. A Single Judge of this court in 1995 U.P.T.C.-4 M/s Indra Steels Private Ltd. Ghaziabad v. Commissioner of Sales Tax held that a dealer cannot be burdened with the liability to find out that the party issuing Form 3-A was not authorised to issue it unless the Form itself is shown to be fake/Furzi or there is any collusion between the two dealers.

30. In [2013] 59 VST 1 (Delhi) Milk Food Ltd. v. Commissioner, VAT and others a division Bench of Delhi High Court has formed an opinion that a dealer cannot be said to have any control over the another dealer and that any action neglect or fraud on part of one such registered dealer cannot result in penalising the other innocent dealer in the absence of any fraud or deception or misrepresentation or even collusion on his part.

31. In M/s Star Paper Mills Ltd. Saharanpur v. Commissioner of Sales Tax 2004 U.P.T.C. 317 while dealing with Form 3-B issued under U.P. Trade Tax Act, 1948, a Division Bench of this court observed that where it was not the case of the department that the Form was not printed by the department and was forged or that there was collusion between the parties issuing and using it, the benefit of the said Form as claimed by the assessee cannot be denied to him.

32. All the aforesaid decisions are only to the effect that the assessee dealer may not be responsible for any neglect, misconduct or fraud in the use of the disputed Form-F and that if he had bonafidely used the same on being issued by the consignee agent and the department does not dispute the genuineness of the same except for the fact that it was issued to some other party and could not have been utilised by the consignee agent, it only establishes that the petitioner may not be denied the benefit/exemption which has been granted to it in the matter of assessment of tax on the basis of the said Form-F.

33. The aforesaid decisions however, are in not way helpful to the petitioner to dislodge the permission which has been granted by the Additional Commissioner to reopen the assessment against him inasmuch the said permission has been granted on the recorded satisfaction that it is a fit case for reopening even after the expiry of the limitation and that there exist "reason to believe" for such reassessment. The aforesaid decisions if at all may be of some significance during the assessment or reassessment proceedings and on their basis the tax exemption granted to the petitioner may not necessarily be refused. This is not

the stage to comment upon the admissibility of the tax exemption to the petitioner on the basis of the aforesaid Form-F which certainly is within the domain of the Assessing Authority.

34. In view of what has been said above, we do not consider it to be a fit case where the permission granted by the impugned order dated 11.01.2016 by the Additional Commissioner under Section 29(7) of the VAT Act can be said to be arbitrary, unreasonable or without jurisdiction.

35. In regard to the submission that the objections of the petitioner were not considered before granting the permission it is trite to mention here that the petitioner was given notice on 14.09.2015 to submit his explanation. The explanation was submitted by the petitioner and he was heard through counsel as well.

36. The petitioner in the explanation accepted that on enquiry regarding the disputed Form-F it had come to its knowledge that there may be some irregularity in using the said Form but that is solely attributable to the consignee agent. Therefore, the petitioner has even lodged a first information report against him for the misuse of the said Form if any.

37. The moment the petitioner on his own verification lodges an FIR against consignee agent regarding the use of the disputed Form-F, it is apparent that to some extent the petitioner is also convinced that there is some illegality or misuse in the utilization of the said Form-F.

38. In these circumstances, the necessity to reassess the petitioner if any turnover of the petitioner has escaped assessment or if any wrong tax exemption in respect of the consignment covered by the aforesaid Form-F cannot be ruled out.

39. The very fact that the objections of the petitioner have been so considered, the argument of Sri Agrawal that the permission has been granted without referring or considering the objections of the petitioner is not tenable in law.

40. Accordingly, we are of the opinion that it is not a fit case for interference in exercise of writ jurisdiction and we leave it open to the petitioner to raise issues with regard to its bonafidy and the grant of tax exemption against the aforesaid Form-F etc. before the Assessing Authority and it is expected that irrespective of the permission granted by the Additional Commissioner to reopen the assessment, the Assessing Authority would consider the correctness of the exemption granted to the petitioner in accordance with law without being influenced by any of the findings recorded by the Additional Commissioner.

41. The petition is dismissed with the above observation.