
(2008) 12 GAU CK 0018
In the Gauhati High Court

Nova Trading Pvt. Ltd.

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 16-12-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) 3 GLT 515 : (2009) 23 VST 251

Hon'ble Judges : Amitava Roy, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Amitava Roy, J.—The extraordinary jurisdiction of this Court under Article 226 of the Constitution of India is sought to be invoked to set at naught the order dated December 20, 2007 passed by the Additional Commissioner of Taxes, Assam, Guwahati, in the revision petition filed by the petitioner u/s 36 of the Assam General Sales Tax Act, 1993 (hereafter referred to as, "the Act") assailing therein the seizure of its documents made by the Inspector of Taxes, Unit C, Guwahati, on July 10, 2003 as well as the order dated April 20, 2003 passed by the Superintendent of Taxes, Unit C, Guwahati, imposing a penalty of Rs. 2,14,735 u/s 23(1)(h) of the Act for alleged violation of Section 46 thereof. Incidentally annulment of the seizure and the imposition of penalty as above has also been prayed for in the instant proceeding, the revision petition having been dismissed by the order impugned.

2. I have heard Mr. G.K. Joshi, Senior Advocate assisted by Mr. R.K. Joshi, Advocate for the petitioner and Mr. D. Saikia, learned Standing Counsel, Finance Department for the respondents. The petition was heard on merits at the motion stage and the records having been produced on behalf of the Revenue, it is being disposed of finally by this order.

3. The factual foundation of the debate is provided by the pleaded averments in the petition. The petitioner has introduced itself to be a private limited company

incorporated under the Companies Act, 1956, with its branch office amongst others at Bharalumukh, Guwahati. It claims to be a registered dealer under the Act as well as the Assam Value Added Tax Act, 2003 carrying on business in soyabean refined oil. In course of the business, it receives the above commodity from its principal, M/s. Ruchi Soya Industries Private Limited, Mangliagaon, Indore (M.P.), on stock transfer basis for sale in the State of Assam as well as beyond, on the tatter's behalf. The stocks so received are entered in the books of account maintained regularly and the sales thereof are duly recorded in the sales registers. The petitioner has asserted that it files its monthly returns of turnover to the appropriate authorities under the Act and on completion of the assessment thereof, pays the tax due.

4. In the month of July, 2003, it imported two consignments of soyabean refined oil, viz., 4,944 tins covered under R.R. No. F 925921 dated July 2, 2003, July 3, 2003 and 7,416 tins covered under R.R. No. F. 925922 dated July 2, 2003/July 3, 2003 by way of stock transfer from M/s. Ruchi Soya Industries Pvt. Ltd., Mangliagaon, Indore (M.P.) totalling 12,360 tins. On July 9, 2003/July 10, 2003, the petitioner approached respondent No. 2, Inspector of Taxes, Unit C, Guwahati, for taking delivery of the above consignment from the railways, by filing application in form B in duplicate as required under the Act. However, on that day, the supporting challans available to it in respect of the consignment covered under the aforesaid two RRs were only for 11,124 tins. The number of tins in form B was thus mentioned to be 11,124. Respondent No. 2, upon processing form B did not grant permission. On the same date, the Superintendent of Taxes with other official staff visited the premises of the petitioner at Rukmini Gaon, Dispur, Guwahati, and pointing out the discrepancy in the number of tins referred to in the RRs and form B attributing the same to be a purposeful effort on its part to avoid the tax payable. The petitioner refuted the charge and produced, a copy of the challan No. Chek/30 dated July 3, 2003 covering 1,236 tins, Which had reached it meanwhile by fax and produced the same before the Superintendent of Taxes.

5. The above notwithstanding, respondent No. 2 issued notice u/s 44(1) of the above Act directing production of the books relating to transaction of taxable goods on July 10, 2003 and also effected seizure of its documents from its premises on the same date on the purported ground that it had concealed the actual quantity of imported goods leading to evasion of due taxes.

6. Though the petitioner approached the Superintendent of Taxes on July 11, 2003 and sought to convince her against the imputation of concealment or intentional evasion of taxes, the latter did not relent. As the railway rakes were expected to arrive on July 12, 2003 and it was incumbent on the petitioner to take delivery of the consignment in order to avoid demurrage charges for any delay, it implored respondent No, 3 for the necessary permission therefor. The petitioner has contended that the said Revenue authority insisted upon a written undertaking by it to the effect that the challan No. chek/30 dated July 3, 2003

covering 1,236 tins was not mentioned in the form B and that on receipt of the goods the same would be accounted for and that tax including penalty thereon would be paid by it. The said authority having spelt out the terms as above with the assurance that the RRs along with the permission in form B would be released to the petitioner on such an undertaking so as to enable it to receive the consignment from the railways, the petitioner submitted a petition dated July 11, 2003 incorporating the statements as suggested by respondent No. 3. According to the petitioner, even after the submission of the above petition, the RRs were not released for which it had to represent before the Deputy Commissioner of Tax, Government of Assam, on July 12, 2003 for redress and it was after great persuasion that respondent No. 3 on July 12, 2003 handed over the RRs along with the copy of, form B containing the permission for taking delivery of consignments from the railways. The petitioner has averred that it thereafter took release of the consignment from the railways by producing the RRS as well as form B and the same was duly entered in its stock accounts and delivered to the parties to whom it was intended to be sold.

7. The petitioner has further pleaded that as required it deposited tax to the tune of Rs. 4,54,751 vide D.D. No. 766739 dated August 9, 2003 on the basis of the sale value of the said goods as per the invoices raised on the purchasers. Respondent No. 3 however insisted for payment of further amount of Rs. 19,051 stated to be the difference made out from the tax calculated on the challan value plus freight charges of the aforesaid two consignments and the petitioner under compulsion did make the said payment also vide pay order No. 570667 dated September 4, 2003. In response to the letter dated August 18, 2003 demanding the aforementioned amount, the petitioner in its reply dated September 16, 2003, inter alia, rejected its assertion against evasion of tax as alleged and requested for release of its documents/accounts seized on July 10, 2003. Subsequent thereto, the petitioner was served with a notice dated September 18, 2003 issued by the Superintendent of Taxes, Unit C, requiring it to show cause against its proposed prosecution and imposition of penalty u/s 3 thereof. The petitioner appeared before the said authority thereafter from time to time and reiterated its contention against concealment of turnover and alleged intended evasion of tax. It was thereafter that the petitioner was served with a notice of demand by which penalty of an amount of Rs. 2,14,735 was imposed on it u/s 23(1)(h) of the Act.

8. Being aggrieved, the petitioner preferred a revision petition before the Commissioner of Taxes, Assam, u/s 36 of the Act on April 5, 2004 impugning the seizure of the documents as well as the order of penalty dated November 24, 2003. As in the meantime a scheme for expeditious settlement of disputes on one-time basis in respect of arrear of tax, penalty or interest and payment thereof under the various Acts_ including the Act had been formulated under the Assam Taxation (Settlement of Disputes) Act, 2000, the petitioner submitted an application on February 15, 2005 u/s 5 thereof before the designated authority, i.e., the Deputy Commissioner of Taxes, Zone-C, Guwahati, seeking relief. The

petitioner, however, eventually did not pursue its remedy with the said authority and participated in the hearing of the revision petition before respondent No. 4, Additional Commissioner of Taxes, Assam, wherein the Assistant Commissioner of Taxes, Unit C, Guwahati, represented the Revenue. It also submitted as required a written submission along with photocopies of the permission of the Superintendent of Taxes in form XIV under No. 33 dated July 30, 2003, railway receipt No. F-929538 dated July 22, 2003 challan/gate pass and invoice dated July 22, 2003.

9. It having transpired immediately thereafter that the aforementioned documents accompanying the written submissions were not relevant to the issue under adjudication and had been filed inadvertently, the petitioner on October 16, 2007 filed a petition pointing out the above and requested the revisional authority to ignore the same while deciding the lis. The petitioner further sought to explain that while taking delivery of the consignment of 12,360 tins from the railways after obtaining permission from respondent No. 2 in form B/form XIV, it negligently did not retain the photo-copies of the countersigned RRs as well as the said form for its records in its haste and concern to avoid demurrage charges. It, therefore, prayed for an order to call for the relevant records for necessary verification in this regard, they being essential to ascertain the correctness or otherwise of the charge of the contravention of Section 46 of the Act. The revisional authority, however, by the impugned order dismissed the revision petition.

10. The petitioner has contended that during the pendency of the revision proceeding, respondent No. 3 having forwarded an arrear certificate to respondent No. 5, the Certificate Officer (Taxation) for realization of the amount of penalty, it represented before the said authority for keeping the recovery proceedings in abeyance. The revision petition having been dismissed, the petitioner has also expressed an apprehension of the recovery proceeding being pursued to exact the amount of penalty imposed. Though the learned Counsel for the parties were heard on several dates spanning over a period of six weeks, the Revenue abstained from filing its counter and therefore its response on the pleaded facts is unavailable.

11. Mr. Joshi has argued that there being no contravention of Section 46 of the Act in any manner whatsoever, the undertaking dated July 11, 2003 submitted under compelling circumstances can by no means be construed to be an admission of infringement of the said statutory provision rendering it liable for the penalty imposed. According to the learned Senior Counsel, the said undertaking in absence of any real infraction of Section 46 being non est in law, the same does not tantamount to any waiver of the petitioner's right to legal redress. Mr. Joshi has emphatically urged that the concerned revenue authority having duly endorsed the RRs and permitted the delivery of the consignments on submission of form B by the petitioner, being satisfied against any anomaly or concealment of the particulars thereof following which the goods involved had

been released from the railways, the imposition of penalty is in arbitrary exercise of power. As in the facts and circumstances of the case the petitioner is not liable to pay any penalty, the demand thereof is wholly unauthorized, he urged. Mr. Joshi apart from maintaining that violation of Section 46 of the Act is an essential prerequisite for invocation of Section 23 thereof argued that the order imposing penalty is also vitiated by want of fairness, respondent No. 3 having acted upon the report dated July 10, 2003 of the Inspector of Taxes without affording any reasonable opportunity to the petitioner to represent against the same. The learned Senior Counsel contended that the revisional authority acted mechanically in passing the impugned order, it having failed to address itself to the grounds urged in the revision petition and the accompanying pleadings.

12. Mr. Saikia in reply has insisted that the instant petition is liable to be dismissed in limine, the petitioner not having exhausted the alternative remedy of appeal u/s 5A of the Act. According to the learned Counsel, the very fact that the petitioner had mentioned in form B a reduced number of tins of the commodity, it per se demonstrates noncompliance with the prescriptions of Section 46 of the Act and, therefore, the order of penalty cannot be faulted with. As by recording a lesser number of tins, the petitioner had visibly endeavoured to evade payment of the tax due, the impugned action is unassailable, he urged. While endorsing the impugned order of revisional authority, Mr. Saikia produced the relevant official records. He, however, admitted that the form B involved is not available therein.

13. The pleaded facts and the arguments advanced have been duly considered. Though u/s 5A of the Act, the order of the revisional authority is appealable before Assam Board of Revenue, having regard to the grounds of challenge, this Court is not inclined to outrightly reject the petition for non-exhaustion of the alternative remedy. The Revenue has sought to justify the seizure of the petitioner's records and the imposition of penalty as a fallout of the comprehended concealment of the particulars of the consignment of the soyabean oil with the ultimate objective of evasion of the tax due constituting contravention of Section 46 of the Act. The impugned order of penalty on the face of it reveals it to be for the transportation of the goods by the petitioner in contravention of Section 46 of the Act. The seizure of the petitioner's records as the memo dated July 10, 2003 divulges has been by invocation of Section 44(3) of the Act on the suspicion that the transportation of the goods involved was for likely evasion of tax. As the rival assertions center around Section 46, it would be expedient to refer thereto.

14. The said provision which imposes restriction on the movement of goods in Sub-section (1) thereof ordains that no person shall transport or authorize the transport of from any railway station, steamer station, airport, post office or any other place, whether of a similar nature or otherwise notified in this behalf by the State Government, any consignment of such goods as may be specified by the State Government from time to time by notification in the Official Gazette

exceeding such quantities and except in accordance with such conditions as may be specified therein with a view to ensure that there is no evasion of any tax payable under this Act. There is thus a statutory interdiction on the transport of any consignment of goods specified by the State Government in excess of such quantities and except in accordance with such conditions as may be prescribed in a notification issued by it and published in the official gazette. The restrictions mandated are with the avowed objective to provide against evasion of tax payable under the Act.

15. In exercise of the powers conferred by the above statutory provision, the State Government had issued a Notification No. FTX-60/93/Pt./45 dated December 13, 1993 which, inter alia, enjoins that a registered dealer before taking delivery of or transporting from any place of delivery referred to therein and despatched from any place outside Assam, produce for countersignature before the assessing officer or Inspector of Taxes, the railway receipt, bill of lading or other document required for the purpose of obtaining delivery of such consignment from the carrier. Thereby the said dealer is required simultaneously to make over to the assessing officer a written declaration in form B annexed therewith in duplicate and duly signed. The assessing officer and the Inspector of Taxes, on being satisfied about the correctness of the statements made and particulars contained in the declaration in form B would countersign the railway receipt, bill of lading and other documents and the date of counter-signature of the aforesaid document and endorse the official seal thereon. The notification requires that one copy of the declaration would have to be returned to the dealer and the other copy retained by the officer concerned. Form B mentions the description of the consignment, the quantity, weight and the value thereof. The dealer is also required to disclose the invoice number as well as the value or air-note number. The said form also contains an undertaking by the dealer to duly account for the disposal of the goods involved when imported and to pay tax according to the provision of the Act and the Rules made thereunder.

16. Section 46(1) and the notification referred to hereinabove when read in conjunction proclaim a scheme whereunder the dealer to validly transport any consignment of goods specified by the State Government has to essentially comply with the requirements enumerated therefor. Not only the dealer is therefore legally obliged to disclose correctly in form B the descriptions of the consignment mentioning clearly the quantity, weight and the value thereof, the consignor invoice No. with the date as well as the railway receipt or the value of lading as well as the air-note number are also to be revealed. Additionally the railway receipt, bill of lading and other documents necessary for obtaining delivery of consignment have to be produced before the assessing officer or Inspector of Taxes for his countersignature and the aforementioned Revenue authorities would counter-sign the said documents and endorse the declaration with the number of railway receipts, bill of lading or other documents and the date of countersignature with the official seal on being satisfied about the correctness of the statements and the particulars made in form B. The eventual

objective of the exercise being to guarantee against evasion of tax payable under the Act, logically a strict and meticulous compliance of the prescribed essentialities needs to be insisted upon. The rigour of compliance of the legal mandate noticed hereinabove notwithstanding, the primary burden of demonstrating any infraction thereof is on the Revenue to sustain any action on the basis thereof. The petition/undertaking dated July 11, 2003, submitted by the petitioner before the Superintendent of Taxes, Unit C, Guwahati, per se in the estimate of this Court does not amount to an admission on its part of any contravention of Section 46 of the Act. The petitioner instead, in its reply dated September 16, 2003 to the notice dated August 18, 2003 of the said authority requiring it to deposit a total amount of Rs. 4,73,802 (Rs. 4,54,751 + Rs. 19,051), had in categorical terms refuted the charge of evasion of tax. Its assurance to pay tax including penalty in the petition dated July 11, 2003 therefore cannot be construed to be an unqualified acceptance of its liability to that effect on admission of violation of Section 46 by it.

17. The order of penalty on a plain reading reveals that the same is based on reports dated July 10, 2003 and August 16, 2003 of the Inspector of Taxes affirming contravention of Section 46 of the Act by the petitioner as well as its admission to that effect in its undertaking/petition dated July 10, 2003 referred to hereinabove, promising to deposit the tax and penalty for the said commission. The petitioner has, inter alia, contended before the revisional authority, violation of the principles of natural justice, it not having been issued a copy of the verification(s) report of the seizing officer before imposing the penalty on the basis thereof. Section 23 of the Act authorizes imposition of penalty in various contingencies as catalogued in Sub-section (1) thereof after offering to the dealer a reasonable opportunity of being heard. In the above view of the matter, it was incumbent on the part of the assessing officer to furnish a copy of the verification report(s) to the petitioner before relying on the same in passing the impugned order of penalty. Moreover, in the comprehension of this Court, respondent No. 3 erred in law in construing the undertaking/representation of the petitioner to be an admission of contravention of Section 46 of the Act and acceptance of its liability to pay penalty in addition to the tax realizable.

18. A reading of the impugned order dated December 20, 2007 discloses that the documents seized included the RRs evincing 12,360 tins of soyabean refined oil as well as form B, which showed 11,124 tins. The revisional authority also took note of the delivery permit issued by the Superintendent of Taxes, Guwahati, Unit C on July 20, 2003 recording 1,236 tins under R/R No. F 925, 938 which do not relate to the undeclared goods and the documents seized. This was in spite of the petitioner's application dated October 16, 2007 in the revision proceeding admitting its inadvertent mistake the producing these documents with a request to the revisional authority to omit the same from consideration in course of the adjudication. The reference of these documents by the revisional authority, to say the least, demonstrates its failure to refer to the application dated October

16, 2007 of the petitioner. The petitioner's plea that on the date of submission of the declaration form all supporting documents to cover 1,236 tins were not available with it and that the invoice check/30 dated July 3, 2003 accounted for the entire consignment of the said number of tins had in fact been produced before the Superintendent of Taxes on July 9, 2003/July 10, 2003 and that following the undertaking insisted upon by the said authority, the RRs and form B were duly counter-signed which enabled it to take delivery of the entire consignment, did not receive any consideration of the revisional authority. It instead concluded that the petitioner had failed to include the supporting documents or materials, which led to establish that 1,236 tins of soyabean refined oil were taken delivery of by it without following the prescribed procedure as per the provisions of the Act. The revisional authority also did not consider the petitioner's plea of the violation of the principles of natural justice for not having been furnished with a copy of the verification report(s) in assailing the impugned order of penalty.

19. The records produced before this Court also do not contain either the documents/records seized from the petitioner on July 10, 2003 or the railway receipts or the form B in question. In fact, the learned Standing Counsel for the Revenue in course of the arguments conceded that the form B involved is presently untraceable. The observation of the revisional authority that the seized exhibits included the RRs is not borne out by the records produced before this Court. As it is, it has been contended on behalf of the petitioner that the RRs could not have been seized as the same along with the copy of form B duly countersigned by the concerned Revenue authority have been produced before the railway authority for release of the consignment. Be that as it may, the records do not contain any material to support the findings recorded by the revisional authority.

20. In the normal course of things the petition ought to have been allowed without any reservation. However, as the question of revenue is involved, founded on the allegation of contravention of Section 46, the rigidity of the prescriptions whereof has already been noticed, it is considered expedient to remand the issue to the Commissioner of Taxes, Assam, for a fresh disposal thereof on the merits after affording due opportunity of hearing to the parties. Ordered accordingly. This mode of disposal is also called for as the materials produced before this Court are grossly inadequate to appropriately adjudicate the questions involved on a threadbare scrutiny of all relevant facts and documents to provide a quietus to the lingering controversy. The Commissioner of Taxes, Assam, would complete the exercise ordered within a period of one month from the date of receipt of a certified copy of this order. The recovery proceeding initiated against the petitioner would remain stayed till the disposal of the matter as directed. The impugned order dated October 20, 2007 stands quashed. The petition is allowed in the above terms. No costs.