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In the Gauhati High Court

Padmawati Supply Agencies — APPELLANT

Vs

State of Assam and Others — RESPONDENT

Date of Decision : 16-06-2006

Acts Referred:
Central Sales Tax Act, 1956 — Section 6, 6A, 7, 8

Citation : (2007) 7 VST 514

Hon'ble Judges : Brojendra Prasad Katakey, J

Bench : Single Bench

Final Decision : Allowed

Judgement

B.P. Katakey, J.—The writ petitioner, who is a registered dealer under the Assam General Sales Tax Act, 1993 (in short, "the 1993 Act") and the Central Sales Tax Act, 1956 (in short, "the 1956 Act"), by the present writ petition has challenged the action of the Commissioner of Taxes, Assam, directing the Superintendent of Taxes to realise security money on the truck load of iron scrap moved from places within the State of Assam and to places outside the State of Assam at the check gate.

2. The case of the petitioner is that it has entered into an agreement with M/s. Gaurav Metal Corporation and appointed the said firm as its consignment agent vide consignment agency agreement dated March 9, 1999 for ensuring smooth sales of non-ferrous metal scraps in wider market of Delhi and its adjoining areas/ regions. Pursuant to such agreement, the petitioner dispatched all types of non-ferrous scraps to other States by way of stock transfer otherwise than by way of sales and such scraps belonging to the petitioner are sold by the consignment agent. It is the further case of the petitioner that it remains the owner of the scrap until the same is sold by the agents which is sent to the consignment agent through the transporter in trucks.

3. According to the petitioner the Commissioner of Taxes initially, vide order dated February 4, 1995 directed the Superintendent of Taxes to realise security

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at the check gate at Rs. 20,000 per truck for non-ferrous scraps and therefore, vide general order dated May 5, 1995 directed all concerned to deposit the security money at different rates in respect of different materials in advance by bank draft before the vehicles are allowed to cross the check-post, which according to the petitioner are beyond the power of the Commissioner of Taxes, Assam. The contention of the petitioner is that the Commissioner of Taxes under the provision of the 1993 Act has no power and authority to direct deposit of such security, that too without following the procedure laid down for imposing such security. The petitioner, therefore has filed the present writ petition challenging such action on the part of the Commissioner of Taxes, Assam.

4. I have heard Mr. G. K. Joshi, learned Senior Counsel for the petitioner and Mr. K. N. Choudhury, learned Additional Advocate-General, Assam, on behalf of the respondents.

5. Mr. Joshi, the learned Senior Counsel of the petitioner referring to the agreement executed between the petitioner and M/s. Gaurav Metal Corporation, which has been annexed as annexure III to the writ petition, has submitted that the petitioner by the said agreement appointed the said firm as its consignment agent and sent non-ferrous metal scrap to the said agent for selling the product in other places outside Assam and therefore, it is in fact the stock transfer and not the sale and as such is not liable to pay tax. According to Mr. Joshi even if the petitioner is liable to pay taxes, the demand for security can be made by the assessing authority under the provision of Section 7(2A) and Section 7(3A) of the 1956 Act subject to fulfilment of the conditions stipulated therein. It has further been submitted that before requiring any dealer to furnish any security under the said provision of law an opportunity of being heard must be given to the dealer as required u/s 7(3B) of the 1956 Act. Referring to the statements made in the writ petition, the learned Counsel for the petitioner has submitted that all the conditions precedent for requiring to furnish security having not been present in case of the petitioner and no hearing having been given before requiring to furnish any security as required under such Sub-section (3B) of Section 7 of the 1956 Act, the action on the part of the Commissioner in directing to deposit security amounts by passing a general order is contrary to the provision of such Act. Mr. Joshi, learned Senior Counsel for the petitioner, has further submitted that the power to pass such order requiring to furnish security rests on the assessing authority only and such authority, before passing such order must give a reasonable opportunity to the dealer and thereafter for the reasons to be recorded, can pass an order directing the dealer to furnish any security. But in the instant case no such order was passed by the assessing authority and on the other hand the Commissioner by a general order, that too without issuance of any notice and without giving any reasons in passing such order, directed to deposit the security amount. The learned Senior Counsel, therefore, submits that the action on the part of the respondents may be declared as illegal. The learned Counsel in support of his contentions has placed reliance on two decisions of this Court, i.e., Lallamookh Tea Company (P) Ltd. v. Commissioner of Taxes reported

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in [1995] 98 STC 531 : [1993] 1 GLR 467 and Pradip Kumar Sarawgi & Sons (HUF) v. Commissioner of Taxes reported in [2004] 137 STC 318 : [2003] 3 GLR 225.

6. Mr. Choudhury, learned Additional Advocate-General appearing for the respondents, on the other hand, has submitted that it cannot be said that the authority has no power to ask the dealer to furnish security under the provision of the 1956 Act as well as under the 1993 Act. Such power to direct the dealer to furnish the security is also available under the provisions of the Assam Value Added Tax Act, 2003 (for short, "the 2003 Act"). According to learned Counsel, though this Court in the case of Pradip Kumar Sarawgi [2004] 137 STC 318 : [2003] 3 GLR 225, set aside the orders of the Commissioner of Taxes, dated February 4, 1995 and May 5, 1995 whereby direction was issued to deposit the security amount in advance by bank draft before the vehicles are allowed to cross the check gate, the power to ask the dealer to furnish the security has not been taken away, as under the provision of the such Act such power is available to the assessing authority. The learned Counsel has, however, contended that while passing any order directing a dealer to furnish security the same has to be passed as required under the provision of the relevant Act, i.e., by giving reason for passing such order and that too after hearing the dealer concerned. Referring to the arguments put forward by the learned Senior Counsel for the petitioner that the petitioner is not liable to pay any tax as they dispatch non-ferrous metal scraps through carriers to the consignment agent by way of stock transfer, otherwise than by way of sale, the learned Counsel for the respondent submits that the burden lies on the petitioner to prove that the same is not a sale but, in fact, a transfer of stocks to the consignment agent. The learned Senior Counsel, therefore, submits that the question whether dispatch made by the petitioner is stock transfer to the consignment agent or is a sale, is to be left open to be decided by the appropriate assessing authority subject to the satisfactory proof given by the petitioner.

7. Section 7 of the 1956 Act provides for registration of dealers which requires that dealer liable to pay tax under the said Act is to make an application for registration. Sub-section (2A) of Section 7 provides that where it appears necessary to the authority to whom an application is made under the Sub-section (1) or Sub-section (2) so to do for the proper realisation of the tax payable under the Act or for proper custody and use of the forms referred to in Clause (a) of the first proviso to Sub-section (2) of Section 6 or Sub-section (1) of Section 6A or Clause (a) of Sub-section (4) of Section 8, the authority may, by an order in writing and for reasons to be recorded therein, impose as a condition for the issue of a certificate of registration a requirement that the dealer shall furnish in the prescribed manner and within such time as may be specified in the order such security as may be so specified, for all or any of the said purposes.

8. In the instant case admittedly the petitioner has already been registered as dealer under the provision of the 1956 Act and at the time of registration of the

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petitioner, no such order or condition was imposed requiring the petitioner to furnish any security or imposing any conditions for issuance of such certificate, therefore, the provision of Sub-section (2A) of Section 7 is not attracted in the present case.

9. Sub-section (3A) of Section 7 of the 1956 Act, empowers the authority, granting a certificate of registration, to pass an order in writing and for reasons to be recorded therein, requiring the registered dealer to whom such certificate has been granted, to furnish within such time as may be specified in the order and in the prescribed manner, such security or, if the dealer has already furnished any security in pursuance of an order under Sub-section (3A) or Sub-section (2A), such additional security, as may be specified in the order for all or any of the purposes mentioned in the said sub-section. Sub-section (3B) provides that no dealer shall be required to furnish any security or additional security unless he has been given an opportunity of being heard. Sub-section (3BB) also provides that the amount of security which the dealer may be required to furnish under Sub-section (2A) or Sub-section (3A) or the aggregate of the amount of such security and the amount of additional security which he may be required to furnish under Sub-section (3A) by the authority shall not exceed--

(a) in the case of a dealer other than a dealer who has made an application, or who has been registered in pursuance of an application, under Sub-section (2), a sum equal to the tax payable under this Act, in accordance with the estimate of such authority, on the turnover of such dealer for the year in which such security or, as the case may be, additional security is required to be furnished; and

(b) in the case of a dealer who has made an application, or who has been registered in pursuance of an application, under Sub-section (2), a sum equal to the tax leviable under the Act, in accordance with the estimate of such authority on the sales to such dealer in the course of inter-State trade or commerce in the year in which such security or, as the case may be, additional security is required to be furnished, had such dealer been not registered under the Act.

10. It is, therefore apparent from the said provisions of 1956 Act that the authority granting the certificate for registration, for the purposes mentioned in the said provision, can in appropriate case pass an order in writing and by giving reasons thereof, requiring the dealer to furnish security or additional security. But such order must contain reasons for passing the same. The order directing to furnish security or additional security cannot be passed without affording the dealers an opportunity of being heard and the amount of security or additional security to be furnished also cannot be an arbitrary amount.

11. In the instant case the petitioner has made a categorical statement in the writ petition that no opportunity of hearing was afforded to it before passing any order directing it to furnish the security as required under Sub-section (3B) of Section 7 of the 1956 Act. The said statement of fact has not been denied by the

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respondents in their affidavit-in-opposition. However, the respondents have denied that there was stock transfer only and no sale was effected. Moreover, the impugned orders dated February 4, 1995 as well as May 5, 1995 issued by the Commissioner of Taxes, Assam do not reveal any reason why such security deposit is directed to be made. Under the provision of Sub-section (3A) of the Section 7 of the Act such recording of reason is must.

12. The respondents have not been able to demonstrate either in their affidavit-in-opposition or by producing the record that the notices were issued to the petitioner before passing the order and also the reasons for passing the order were recorded. It appears from the order passed by the Commissioner that those were general in nature and not in respect of individual dealers. The provision of the 1956 Act, as discussed above, does not contemplate passing of a general order. The order requiring furnishing of security is required to be passed in case of individual dealer by recording reasons and that too after giving the dealer an opportunity of being heard, which has not been done in the instant case.

13. A single Bench of this Court in Pradip Kumar Sarawgi [2004] 137 STC 318 : [2003] 3 GLR 225, has already quashed and set aside the orders of Commissioner of Taxes dated February 4, 1995 and May 5, 1995 by prohibiting the authority from demanding and collecting any security deposit on the strength of such orders at the check-post, under the provision of the 1956 Act as well as the 1993 Act.

14. Another single Bench of this Court in Lallamookh Tea Company [1995] 98 STC 531 : [1993] 1 GLR 467, has also held that notice demanding furnishing of security or additional security under the provision of the 1993 Act or the 1956 Act should disclose the reasons and the ground with material facts on the basis of which the competent authority is prima facie satisfied that for proper realisation of tax payable and for proper custody and use of the form referred in the said provision, furnishing security/additional security by the assessee has become necessary.

15. In the instant case as the notice was admittedly not issued before passing the order directing deposit of security, the question whether the assessing authority in the notice should disclose its prima facie satisfaction giving materials in support thereof, has not been gone into.

16. It is evident from the provision of the 2003 Act, by which the 1993 Act was repealed, that power to direct furnishing of security is also available to the assessing authority but such order has to be passed by recording the reasons and giving the dealer an opportunity of being heard and subject to fulfilment of conditions imposed by the said provision.

17. In view of the aforesaid discussion, I am in complete agreement with the decision in Pradip Kumar Sarawgi''s case [2004] 137 STC 318 (Gau) : [2003] 3 GLR 225 and of the view that the orders passed by the Commissioner of Taxes, Assam on February 4,1995 and May 5,1995 are bad in law being contrary to the

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provisions contained in the 1956 Act as well as the 1993 Act. Therefore, the respondents are restrained from demanding any security or additional security from the petitioner in terms of the said orders. However, the amount which has already been realised from the petitioner as security deposit, shall be subject to final assessment to be made under the relative provisions of law. This order will also not preclude the concerned authority in passing the appropriate order requiring the petitioner to furnish security, subject to compliance with requirement of law and upon hearing the petitioner. It is also open to the assessing authority to ascertain as to whether the transportation of non-ferrous scraps by the petitioner to M/s. Gaurav Metal Corporation or to any other party is by way of stock transfer otherwise than by way of sale.

18. The writ petition is accordingly allowed to the extent indicated above. No costs.

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