(1990) 09 CAL CK 0009

In the Calcutta High Court

Case No : C.R. No. 18061 (W) of 1985

Positive Commercial Co. Ltd. and Another — APPELLANT

Vs

State of West Bengal and Others — RESPONDENT

Date of Decision : 04-09-1990

Acts Referred:

West Bengal Sales Tax Act, 1954 — Section 6, 7
West Bengal Sales Tax Rules, 1954 — Rule 15

Citation : (1991) 2 CALLT 96

Hon'ble Judges : Paritosh Kumar Mukherjee, J

Bench : Single Bench

Advocate : Sanjoy Bhattacharya and Chandrima Bhattacharya, for the Appellant;Samarendra Nath Dutta, for the Respondent

Final Decision : Allowed

Judgement

Paritosh Kumar Mukherjee, J.—This writ petition was moved on behalf of petitioners M/s. Positive Commercial Co. Ltd. & Anr., challenging, inter alia, the seizure made by the Respondents and imposition of penalty of Rs. 97,000/- in a proceeding u/s 7(2) of the West Bengal Sales Tax Act 1954 (hereinafter referred to as the said Act) by the Commercial Tax Officer, Asansol charge (being Respondent No. 3) which is annexure ''C to the present writ petition.

2. The penalty was imposed pursuant to the seizure made on October 22, 1985, by the Inspector of Commercial Taxes, Duburdih Check Post, Duburdih in terms of the show cause notice, whereby the petitioner company was charged for alleged transportation of the "notified commodities in contravention of the provisions of Section 6 of the said Act.

3. The short facts of the case are as follows :-

The petitioner No. 1 is a company incorporated under the Indian Companies Act 1956, having Registered Office at 6A, Saklat Place, Calcutta-71 and the petitioner company has its branch offices at 40, S. B. Gorai Road, Asansol as well as P-17, Mission Row Extension, Calcutta-13. Petitioner No. 1 company, inter alia, carries on business of purchasing different Television sets from different manufacturers and selling them to its dealers and stockists. The petitioner No. 1 company has started its business only from July 17, 1985, for the first time and the petitioner No. 2 is one of the Directors and Shareholders of the petitioner No. 1 company.

4. According to the petitioner No. 1 company, for the purpose of business as aforesaid, the petitioner No. 1 company had, to purchase. Television sets from different manufacturers from different parts of India. The said Television sets are transported by the said manufacturers by. road or by Railways, as the case may be. In case of transportation, being made by Railways, petitioner No. 1 company in its turn has to release the consignments from the Railway station, namely, Howrah station and in case of transportation being made by road, the petitioner company has to release the same from the Duburdih Check Post, Asansol.

5. "Television sets" have been declared by the Government of West Ben gat in exercise of its power u/s 25 of the said Act, as "notified commodities" with effect from April 1, 1978. The rate of tax leviable on the sale of Television sets was fixed at 9% from April 1, 1978 to March 31, 1979, 10% with effect from April 1, 1979, to March 31, 1984 and 15% from April 1, 1984.

6. The petitioner No. 1 company is a registered dealer, under the said Act, the Registration Certificate being CK/81/54B dated September 13, 1985. Prior to its obtaining the said Registration Certificate, petitioner company paid a sum of Rs. 6,20,634/- towards tax paid in advance against purchases to be made by its for resale of the Television sets. After obtaining the Registration Certificate, as aforesaid, the said sum of Rs. 6,20,634/- is being adjusted against the tax payable by the petitioner company.

7. According to the petitioners, they have filed monthly returns upto October 1985, within time. As a measure of check and for the purpose of detection of evasion of sales-tax, transportation of goods from one place to another is under the surveillance of the Commercial Tax Authorities. Amongst others, Rules 14 & 15 have been incorporated for the said purpose in the West Bengal Sales-tax Rules, 1954, (hereinafter referred to the said Rules) prohibiting the transportation from any railway station, steamer station, post office or air-port in West Bengal.

8. At this stage it is necessary for me to set out the said relevant provisions of Sections 6 & 7 from the said Act which are set out as follows :-

Restriction on movement:-"(1) No person shall transport from any railway station, steamer station, air-port, post office or any other place whether of similar nature or otherwise, notified in this behalf by the State Government, any consignment of (any notified commodity) exceeding such quantities and except in accordance with such conditions as may be prescribed. Such conditions shall be made with a view to ensuring that there is no evasion of the tax imposed by this Act. (2) The State Government may prescribe conditions for regulating transport of notified commodities from any place, other than those referred to in Sub-section (1) with a view to ensuring that there is no evasion of tax imposed by this Act."

Power to search (seize, impose penalty and dispose of seized notified commodities):-

"(1) The prescribed authority or any other officer who may be authorised by the State Government in this behalf may, for the purpose of veryfying whether notified "commodities are being or have been transported in contravention of the provisions of Section 6 and subject to such restrictions as may be prescribed,-

(i) (a) intercept, detain and search at any place notified u/s 6 or at any other place any road vehicle, or river craft or any load carried by a person, or

(b) search at any godown, warehouse or any other place in which according to his information such notified commodities transported in contravention of the provisions of Section 6 have been stored; and

(ii) seize any notified commodities referred to in Section 6-

(a) which, in the case referred to in Sub-clause (a) of Clause (i), he has reasons to believe are being transported in contravention of the provisions of Section 6 together with any container or other materials for the packing of such notified commodities, or

(b) together with any container or other materials for the packing of such notified commodities in the case referred to in Sub-clause (b) of Clause (i), where the. prescribed authority or any other officer who may be authorised by the State Government in this behalf has reasons to believe that such notified commodities stored in such godown, warehouse or place have been transported there in contravention of Section 6 or that there is no claimant for ownership or possession of such notified commodities stored in such godown, warehouse or place, and that such notified commodities have been transported there in contravention of the provisions of Section 6 :

(2) If any notified commodities are seized under Clause (ii) of Sub-section (1), the prescribed authority may, by an order in writing, impose upon the person from whom such notified commodities are seized or the owner of such seized notified commodities (when particulars of the owner are available) (or in the case of notified commodities for which there is no claimant, upon any person who subsequently claims the ownership or possession of such notified commodities) ; as the prescribed authority considers appropriate in the facts and circumstances of the case, after giving such person or owner, as the case may be, a reasonable opportunity of being heard, a penalty of a sum not exceeding twenty-five per cent of the value, determined by him in accordance with the Rules made under this Act, of such notified commodities transported, in contravention of the provisions of Section 6 :

Provided that a penalty under this Sub-section shall not be imposed in respect of the same fact for which a prosecution under Clause (b) of Sub-section (1) of Section 16 has been instituted.

(3) A penalty imposed under Sub-section (2) shall be paid by the person or the owner, as the case may be, into a Government Treasury or prescribed branch of the State Bank of India or the Reserve Bank of India by such date as may be specified by the prescribed authority in a notice issued for this purpose and the date so specified shall not be earlier than fifteen days from the day of service of the notice :

Provided that the prescribed authority may, for reasons to be recorded in writing, extend the date of payment of the penalty.

(4) The notified commodities seized under Clause (ii) of Sub-section (1) shall be released in the prescribed manner on payment of the penalty imposed under Sub-section (2).

(5) If the penalty is not paid by the date specified in the notice issued under Sub-section (3), the prescribed authority may, in such manner and subject to such restrictions and conditions as may be prescribed, sell the notified commodities seized under Clause (ii) of Sub-section (1) in open auction and remit the sale proceeds thereof to a Government Treasury.

(6) Notwithstanding anything contained in Sub-section (4), the appellate or revisional authority, pending final disposal of an appeal or application for revision against an order for imposition of penalty under Sub-section (2), or the prescribed authority, for reasons to be recorded in writing, may direct release of the notified commodities seized under Clause (ii) of Section (1) on such terms and conditions as he may consider fit and proper.

(7) "Notwithstanding anything contained in Sub-section (2) or Sub-section (5) the prescribed authority may, subject to such rules as may be made under this Act, where the notified commodities seized under Clause (ii) of Sub-section (1) are-

(a) of perishable nature, or

(b) required to be used by a specified date,

sell such commodities in open auction after the expiry of such period as he may consider fit and proper, if he is of opinion that such commodities may become unusable on detention, or destroy such commodities if they become unusable before the sale in open auction actually takes place.

(8) The proceeds of sale of the notified commodities referred to in Sub-section (5) or Sub-section (7) shall be applied in the prescribed manner for payment in the following order of priority-

(a) firstly, for incidental charges,, if any relating to auction sale,

(b) secondly, for expenses, if any, for storage or notified commodities seized under Clause (ii) of Sub-section (1),

(c) thirdly, for penalty imposed under Sub-section (2) : and

the balance, if any, shall be paid to the owner of the commodities if his particulars, are available or, if such particulars are not available, to the person from whom the commodities were seized under Clause (ii) of Sub-section (1), upon application within one year from the date of sale or within such further period as may be allowed by the prescribed authority for cause shown to his satisfaction.

(9) An amount of penalty imposed under Sub-section (2) which remains unpaid after the date specified in the notice issued under Sub-section (3) or which cannot be recovered in accordance with the provisions of Sub-section (5) or Sub-section (7) and Sub-section (8) shall be recoverable as an arrear of land revenue.

(10) The provisions of Sub-sections (2) to (9) shall apply to the notified commodities seized under this Section and lying in the custody of the prescribed authority on the date of coming into force of the West Bengal Taxation Laws (Amendment) Act, 1984.

9. Further, Rules 15 & 16 of the said Rules are also set out hereunder :-

(i) The State Government may set up check-post at various places for the purpose of regulating road transport and river or canal transport, and may define the boundaries of these check-posts, notify u/s 6 the area of the check-posts included within such boundaries and demarcate such boundaries by means of barriers, or otherwise;

(ii) No person shall transport across or beyond the notified area of check-post any consignment of cigarettes or of a notified commodity exceeding the quantity specified in Sub-rule (i) of Rule 14 by any road vehicle or by river-craft or other vessel or by any other means except in accordance with the following conditions, namely :

(a) Every such consignment shall be transported by or on behalf of a registered dealer.

(b) The registered dealer who transports, or on whose behalf any such consignment is being transported shall make an application in Form IV in triplicate to the appropriate Commercial Tax Officer (or Inspector) for a permit giving the particulars detailed in Rule 14, Sub-rule (ii), Clauses (a) to (d). The appropriate Commercial Tax Officer (or Inspector), if he is satisfied with regard to the bona fide of the application, shall issue a permit in Form IVA in triplicate, two copies of which shall be made over to the applicant, the third copy being retained as an office copy.

(c) Any person transporting any such consignment of cigarettes or of a notified commodity across or beyond the notified area of a check-post shall produce the copies of the permit in respect of that consignment before the officer-in-charge of the check-post, and the said officer shall only allow the movement of such, quantities of cigarettes or of the notified commodity mentioned in the aforesaid permit and conforming to the description given therein. He shall retain one copy of the permit and return the second copy on which he shall endorese the date on which the consignment was transported and shall sign, seal and date such endorsement.

Notwithstanding anything contained in Rules 14 & 15, (the prescribed authority, or any person appointed under Sub-section (2) of Section 3 to assist him and authorised by the prescribed authority in this behalf may) for good and sufficient reason authorise any person to transport any consignment of cigarettes or any notified commodity exceeding the quantity prescribed in Rule 14 from any railway station, steamer station, post office, or air-port in West Bengal notified u/ s 6, or across or beyond the area of check-post. (The prescribed authority or any person appointed under Sub-section (2) of Section 3 to assist him and authorised by the prescribed authority in this behalf, may or where the powers in this behalf are delegated under Sub-section (3) of Section 3 to any officer, such officer, may for good or sufficient reasons to be recorded in writing, demand u/s 6A from any person who is not a dealer registered under the Act, after giving such person an opportunity of being heard, reasonable security in the form of a guarantee for payment by a bank or in such other form as he deems fit and proper.

10. On October 19, 1985, a consignment of 143 Television sets, which " were purchased by the petitioner No. 1 company for re-sale was sent by M/s. Electronics Consortium (P) Ltd., D-13/4, Okhla Industrial Area, Phase-II, New Delhi-110 020 to the petitioner company by road through the Transport Agency namely, M/s. Transportation Corporation of India Ltd., of Mahatma Gandhi Road, Secunderabad, Andhra Pradesh. The said consignment arrived at Duburdih Check Post, Asansol, on October 22, 1985, and the seizure was made because of the alleged non-production of the sale-tax permit, though, according to the petitioner, the truck did not cross the "notified area" with the consignment.

11. According to the petitioners, before the seizure of the said goods, no time was given to the writ petitioners to obtain the Sales-tax permit. Moreover, the branch office of the petitioner company being at Asansol was closed for Durga Puja festival during the relevant period i.e. October 25, 1985, and, therefore, the attendance in the said office of the empoyees of the petitioner company was practically nil but one employee had attended only for urgent work. It is, further, the petitioners'' case that immediately on arrival of the said consignment an Inspector posted at the Duburdih Check Post demanded from the petitioner company''s Transport agent the "road permit" in Form No. IVA obtainable under Rule 15 of the said Rules of 1954, which could not be produced by the Transport agent, as according to the petitioners the Transport agent had no means to produce such "road permit" which could only be obtained from the Commercial Tax Officer, Chandni Chawk Charge, 15 Beliaghata Road, Calcutta.

12. According to the petitioners, the Transport man i.e. the driver of the truck reported the same immediately, to the petitioner company''s branch office at Asansol. The Branch office employees being Mr. Goutam Gorai and Mr. Ramayana Singh immediately saw the said Commercial Tax Officer and requested him to grant reasonable time and direct the Inspector at the check post not to seize the goods, considering the territorial distance from Asansol to Beliaghata Main Road where the said permit in Form No. IVA was to be obtained. The said Respondent No. 3'' did not consider the said request of the writ petitioners and seized 40 Television sets out of 143 Television sets. Copy of the seizure list has been annexed as Annexure ''A'' to the writ petition.

13. Further, according to the petitioners the relevant papers relating to the aforesaid consignment did not reach Asansol branch office from New Delhi by post till October 25, 1985, when after reopening, the aforesaid Sri Gorai and Sri Singh of the petitioner No. 1 company rushed to Calcutta to obtain the necessary Sales-tax permit for the aforesaid consignment but to their utter despair they came to know that the Sales-tax office was closed for the Durga Puja festival and it would reopen only on October 29, 1985. As soon as the Sales-tax Office reopened after the Durja Puja vacation on October 29, 1985, the petitioner No. 1 company obtained necessary Sales-tax permit and its representatives came to Asansol to release the goods on production of the said Sales-tax permit on October 30, 1985, but it was not allowed by the Respondents.

14. According to the petitioners, the seizure list was prepared by the Inspector, Commercial Taxes, Duburdih Check Post, being Respondent No. 5 mentioning that 40 Television sets out of 143 Television sets had been seized." The quantity of the seized commodities have been stated curiously enough to be 143 Television sets in the notice in Form No. VII-I issued by the Commercial Tax Officer being Respondent No. 3 which the petitioner pointed out before the said authority.

15. Further, according to the petitioner, in the seizure list although the Inspector being Respondent No. 5 had seized 40 Television sets out of 143 Television sets ; 40 Television sets out of 143 Television sets have been unloaded but in the impugned seizure list and there was overwriting and deletion. In the impugned show-cause notice issued, in terms of Rules 17A(2) as annexure ''B'' the petitioner company has been held liable for allegedly contravening provisions of Section 6 in respect of 143 Television sets and the penalty was imposed on the notional value of the said 143 Television sets at Rs. 3,88,000/- and penalty was imposed for Rs. 97,000/-in terms of Section 7(2) of the said Act.

16. It appears when the writ petition was moved before Manas Nath Roy J., (as vacation Judge) of this Court on December 13, 1985, His Lordship was pleased to issue a Rule and gave liberty to the petitioner to Apply for appropriate interim order after the re-opening of the Court before the appropriate Bench, whereupon Suhas Chandra Sen J., on January 10, 1985, granted interim order in the presence of Mr. S. N. Dutta learned Advocate, for the Sales-tax authorities upon

the petitioners furnishing security by way of bank guarantee to the satisfaction of the Respondent No. 6 for a sum of Rs. 97,000/- which has been furnished by the writ petitioners for return of the Television sets.

17. This writ petition has come up for final hearing before me on June 12, 1989 and hearing was concluded on July 3, 1990, and judgment was reserved.

18. Mr. Sanjoy Bhattacharya learned Advocate, appearing for the petitioners submitted the following facts for consideration of this Court.

19. Section 6 of the said Act imposes restriction on movement, if any, person transports from any railway station, steamer station, air-port, post office and any other place whether of similar nature or otherwise, "notified goods". According to Mr. Bhattacharya, Rules 14, 15 and 15A, quoted as aforesaid, have made it clear that a registered dealer shall, before transporting from any railway station, steamer station, airport, post office in West Bengal notified u/s 6 any consignment of cigarette or any "notified commodities" as the case may be despatched from any place outside West Bengal, produce for counter signature before the appropriate Commercial Tax Officer, or Inspector the Railway receipt, Bill of Lading, or other document required for the purpose of obtaining delivery of such consignment from the Public Carrier.

20. The said person has also to make a written declaration in Form IV in duplicate duly signed, to the appropriate Commercial Tax Officer or Inspector and shall furnish therein, inter alia the following particulars, namely, (a) the description, quantity and value of the cigarettes or the notified commodity to be so transported etc. This declaration in Form IV being endorsed on the back becomes permit for transporting the notified commodity into West Bengal.

21. Rule 15A also provides that the "Registered Dealer" referred to in Sub-rule (2) before transporting any consignment of "notified commodity", inter alia, from any place notified u/s 6, shall produce for counter signature before the Authority, Railway receipt etc. and he shall also furnish Form IVB duly filled up and signed by him in triplicate to the said Authority.

22. Section 7 of the said Act authorises the authorities to seize and impose penalty and dispose of seized "notified commodities" which, inter alia, prescribes as follows :-

1. The prescribed authority or any other Officer, who may be authorised by the State Government in this behalf may, for the purpose of verifying whether notified commodities are being or have been transported in contravention of the provisions of Section 6 and subject to such restrictions as may be prescribed-intercept, detain or seize any notified commodities referred to in Section 6.

2. If any notified commodities are seized under Sub-section (1) the prescribed authority may, by an order in writing, impose upon the person from whom such notified commodities are seized or the owner of such seized "notified commodities" after giving such person a reasonable opportunity of being heard a

penalty of a sum not exceeding 25% of the value determined by him.

23. According to Mr. Bhattacharya, in the present case 143 Television sets, which were being transported through Duburdih Check Post, which is notified area, without showing any paper to the authority concerned on October 22, 1985, at about 8-35 a.m., as the Lorry driver or anybody else could not produce any "permit" for such transport into West Bengal from outside and the check post authorities seized only "40" Television sets at about 5 p.m. on October 22, 1985. On the said date, i.e. on October 22, 1985, the Lorry was intercepted at about 8-35 a.m. but as the Lorry Driver could not produce any permit upto 5 p.m. when only 40 Television sets were seized. The invoice value of 143 Television sets were given in the penalty proceeding at Rs. 3,19,789.22 and according to Mr. Bhattacharya the Commercial Tax Officer in imposing penalty, was entitled to take into consideration the notional value of 40 Television sets, instead of 143 Television sets for which, no relevant permit, could be produced before Inspector or Commercial Tax Officer, Duburdhih Check Post.

24. According to Mr. Bhattacharya, admittedly no permit could be produced on October 22, 1985, in respect of the notified commodities (TV. sets) which were transported through Duburdih Check Post, but on November 2, 1985, the learned Advocate Mr. Souren Mitra appeared pursuant to the service of show cause notice and the penalty proceeding was heard, but the Commercial Tax Officer, Duburdih Check Post, estimated the profit and freight upon the invoice value of Rs. 3,19,789.22 in respect of the value of the entire 143 Television sets transported into West Bengal and imposed penalty, in terms of Section 7 for Rs. 97,000/- i.e. 25% of the sale value of the Television sets. According to Mr. Bhattacharya, on November 2, 1985, the learned Advocate for the petitioners submitted a "permit" obtained admittedly on application after seizure, but the said permit was of no value according to the authorities, in terms of the scheme of the Act and the Rules.

25. Mr. Bhattacharya, submitted that although it is stated in the seizure list that the Respondent No. 5 Inspector, Commercial Tax, Duburdih Check Post, had reasons to believe that the commodities described in the seizure list being transported in contravention of the provision of Section 6 of the West Bengal Tax Act 1954, together with any container or other materials for packing of such commodities by road, the said contention is not true. The contravention of Section 6 of the said ,Act will take place, according to him, in terms of Rule 15(ii)(c) of the West Bengal Sales Tax Rules 1954, when any person transporting any such consignment across or beyond the notified area of a check post. According to Rule 15 (ii) of the said Rules, no person shall transport across* or beyond the said area of a check post. Rule 16 of the said Rules provides a positive power in the prescribed authority, for good and sufficient reasons to allow any person to transport any notified goods across or beyond the area of a check post.

26. According to Mr. Bhattacharya, in view of the aforesaid, the actual position is that unless the truck goes across or cross beyond the notified area of the check

post, the contravention of Section 6 of the Act cannot be said to have taken place, within the meaning of Section 7(1) (ii) of the said Act, as Section 6 only restricts the movement of any consignment of any notified commodities from such notified area of the check post or any other place, except in accordance with the conditions prescribed under any other Rules.

27. Thus, according to Mr. Bhattacharya, the seizure was without jurisdiction since the Inspector, Commercial Taxes being Respondent No. 5 could not have the reasons to believe that the petitioners had contravened the provisions of Section 6 of the said Act, as wrongly alleged, in the, seizure-list.

28. According to Mr. Bhattacharya, no material has been disclosed: either in the seizure list or in the affidavit in opposition, which could go to show that contravention as alleged, has been committed by the petitioners. Reasons to believe, must not be a pretended reasons, but must be a bona fide reasons.

29. In support of these reasons, Mr. Bhattacharya placed reliance on the judgment of the Supreme Court in the case of the The Check Post Officer and Others Vs. K.P. Abdulla and Bros.,

30. In the said case the Hon''ble Supreme Court struck down a similar power provided u/s 42(3) of the Madras General Sales Tax Act 1959, as ultra vires, the provision of Entry 54 list II of the Seventh Schedule of the Constitution. Section 42(3) of the said Madras General Sales Tax Act 1959, is as follows:-

"42(3) The officer in charge of the check post or barrier, or the officer empowered as aforesaid shall have power to seize and confiscate any goods which were under transport by any vehicle or boat and are not covered by-

(i) a bill of sale or delivery note,

(ii) a goods Vehicle Record, Trip Sheet or a Log Book, as the case- may be, and

(iii) such other documents as may be prescribed Under Sections 43 & 44:

Provided that before ordering confiscation the officer shall give the person affected an opportunity of being heard and make an inquiry in the prescribed manner;

Provided further that the officer ordering the confiscation shall give the person affected option to pay in lieu of confiscation-

(a) in cases where the goods are taxable under this Act, in addition to the tax recoverable, a sum of money not exceeding one thousand rupees or double the amount of tax recoverable whichever is greater;: and

(b) in other cases, a sum of money not exceeding one thousand rupees.

31. The Supreme Court held that the said power to confiscate the goods and to levy penalty in lieu of confiscation, when in respect of goods found in the vehicle the driver of the vehicle is not carrying with him the documents mentioned

therein as not a power which is "ancillary" or incidental to the power to tax, the sale of goods.

32. The words of the Statute "reason to believe" are construed, as per judicial interpretation.

33. In the case of Income Tax Officer, I-Ward, Dist. VI, Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, besides in many other cases, the Hon''ble Supreme Court construed the said statutory expression, at page 446 of the report, as follows :-

"The expression" reason to believe does not mean a purely subjective satisfaction on the part of the Income Tax Officer. The reason must be held in good faith. It cannot be merely a pretence. It is open to the court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant for the purpose of the Section".

"... the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief."

34. Mr. Bhattacharya, therefore, submitted that the order of penalty imposed by an order dated November 2, 1985, after holding a purported proceeding for imposition of such penalty, on November 2, 1985, was without jurisdiction for the aforesaid reasons, as the petitioner had not contravened the provisions of Section 6 by crossing the border.

35. Moreover, according to Mr. Bhattacharya, the imposition of penalty being a quasi-criminal Act, the onus is on the Respondents to prove that the truck in a question had in fact crossed the border or beyond the notified area without any road permit, with the notified commodities or any other container or any other material, which onus the Respondent No. 5 had not discharged.

36. According to Mr. Bhattacharya, the penalty for Rs. 97,000/- was arbitrarily determined on the basis of the estimated Gross Profit at the rate of 20% thereon and imposed the maximum penalty of 25% in respect of 143 Television sets, although ''40 Television sets have been seized which was the highest limit fixed, under the law.

37. In concluding his submissions, Mr. Bhattacharya submitted that entire seizure notice and the penalty proceeding was conducted with closed mind and without recording any satisfaction that the petitioner had crossed the notified area, without "road permit".

38. According to Mr. Bhattacharya, therefore, firstly this Court has to decide whether seizure was made without jurisdiction, as there was no reason to believe duly recorded by the officer concerned. Secondly, the condition precedent for exercising authority being not present, exercise of jurisdiction was not permitted. Thirdly, no ingredient of the offence has been recorded in the order imposing

penalty by order dated November 2, 1985, and no opportunity was given. The authority has not also taken into consideration the actual value of the 40 Television Sets, which have been seized and not 143'' Television sets.

39. Mr. S. N. Dutta, appearing for the Commercial Tax Authorities submitted, and pointed out that his Court will have to decide firstly, as to whether the petitioner could not produce the permit as required, to be produced before crossing the Check Post. Secondly, whether any offence has been committed in terms of provisions of Section 6 of the said Act by attempting to and by crossing the Check Post on the relevant date. Thirdly, whether the quantum of penalty of Rs. 97,000/- in respect of 40 Television sets were justified or not.

40. Mr. Dutta in support of his contention that penalty can be imposed for simple violation of the provisions has placed reliance on a judgment of the Supreme Court in the Case of "Shiv Dutt Rai Fathe Chand v. Union of India and Anr., reported in 53 Sales Tax Cases page 289. It appears that the Supreme Court in the said case applying the test laid down in the case of Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra, held that the levy of penalty under the local General Sales Tax Act for delay or default in payment of tax due under the Central Sales Tax Act was not permissible in the absence of any provision in the Central Act for imposition of penalty for delay or default in payment of due thereunder. Consequently in 1976 Parliament by an Amending Act amended Section 9 by introducing therein Sub-section (2A) which reads as follows :-

"(2A) All the provisions relating to offence and penalties (including provisions relating to penalties in lieu of prosecution for an offence or in addition to the penalties or punishment for an offence but excluding the provisions relating to matters provided for in Section 10 and 10A) of the General Sales Tax law of each State shall, with necessary modifications apply in relation to the assessment, re-assessment, collection and the enforcement of payment of any tax required to be collected under this Act in such State or in relation to any process connected with such assessment, re-assessment, collection or enforcement of payment as if the tax under this Act were a tax under such sales tax law". The amending Act of 1976 also contained, inter alia, a validating provision declaring that the provisions ''of Section 9 as amended would have effect and should be deemed always to have had effect in relation, to the period commencing from January 5, 1957, as if the Section also provided that all provisions relating to penalties of the General Sales Tax law of each State, with necessary modifications applied in relation to the assessment, re-assessment, collection and enforcement of payment any tax required to be collected under the Central Sales Tax Act. The petitioners filed writ petition in the Supreme Court challenging the validity of Sub-section (2A) inserted in Section 9 of the Central Sales Tax and the validating provisions contained in Section 9 of the amending Act of 1976 on the following grounds :

(1) that the introduction of Sub-section (2A) did not have the effect of making the provisions relating to penalties leviable under the General Sales Tax laws of

the States applicable to the proceeding under the Act; (2) that Parliament could not adopt the provisions relating to penalties in the General Sales Tax laws of the States for enforcing the charge under the Act, as such a course would amount to an abdication of its essential legislative function by Parliament; (3) that the provision giving retrospective effect to Sub-section (2A) and the provision validating all the penalties levied prior to the coming into force of the amending Act were violative of Article 20(1) of the Constitution ; and (4) that the levy of penalties with retrospective effect was also violative of Article 19(1)(f) and (g) of the Constitution.

41. In the said case, dismissing the writ petition, the Supreme Court held that there was no lacuna in the language of Sub-section (2A) of Section 9 of the Central Sales Tax Act which made the provisions relating to penalties under the General Sales Tax laws of the respective States inapplicable to proceeding under the Act.

42. After considering the respective admissions of the parties, I am of the view, that since the writ petitioners'' consignment has not crossed the border of the Check Post, on the relevant date, i.e. on October 22, 1985, no offence has been committed by the petitioners at the relevant time and seizure made by Inspector, Commercial Tax being Respondent No. 3, of 40 Television sets, out of 143'' Television sets was made without jurisdiction.

43. Further, I am of the view, that the impugned seizure itself was made without jurisdiction, as no offence has been committed, the assessment of penalty of Rs. 97,000/- by the Commercial Tax Officer, Asansol charge, being Respondent No. 3, was also arbitrary, inasmuch as, the said Authority has taken into consideration the market value of 143 Television sets, although 40 Television sets have been actually seized by the authorities, as per admitted pleadings.

44. Lastly, I am of the view, the decisions cited by Mr. Dutta in the case of Shiv Dutt Rai Fathe Chand v. Union of India & Anr., reported in 53 Sales Tax Cases, page 289 and in the case of Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra, cannot be attracted in the facts of the present case, as in the said two cases, the subject matter of decision was levy of penalty under the local General Sales Tax Act, for delay and default in payment of taxes due under the Central Sales Tax Act, which is not the facts before us, in the present case.

45. In conclusion, this Court is of the view that unless any consignment "by transport crosses the border or passes beyond the Check post, no offence is stated to have been committed, in terms of Rule 15 (ii) of the said Rules, and accordingly it cannot be said that there was any contravention of the provision of Section 6 of the said Act.

46. In the result, the writ petition is entitled to succeed.

47. The impugned seizure of Television sets as per annexure ''A'' as well as imposition of penalty made by the Commercial Tax Officer, Asansol charge,

Duburdih Check Post, Duburdih, by order dated November 2, 1985, are accordingly set aside by issue of writ in the nature of Certiorari.

48. The writ petitioners are accordingly discharged from the bank guarantee.

There will be no order as to cost.

