
(2013) 05 AHC CK 0072
In the Allahabad High Court
Case No : Writ Tax No. 1302 of 2011

Prakash Parcel Service Limited

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 31-05-2013

Acts Referred:

Citation : (2014) 2 ADJ 669 : (2014) 70 VST 262

Hon'ble Judges : Prakash Krishna, J;Manoj Kumar Gupta, J

Bench : Division Bench

Judgement

Prakash Krishna, J.—The petitioner, a transporter of goods was transporting a consignment of steel casting machines valued at about Rs. 79 lakhs booked at Ballabgarh, Faridabad, Haryana to BHEL, a Government of India Enterprises, Haridwar, State of Uttarakhand. The aforesaid consignment was intercepted on 5th of July, 2011 by the Assistant Commissioner, Mobile Squad, Commercial Tax, Noida, within the State of Uttar Pradesh on the ground that the aforesaid consignment was not accompanied with downloaded transit declaration form as prescribed by the Commissioner, Commercial Tax, U.P., vide its circular No. 552 dated 30th of July, 2009. A show-cause notice was issued to the petitioner which was replied. The reply was not found satisfactory. The Joint Commissioner, Commercial Tax, SIB, Noida upheld the seizure order and directed the release of the goods on furnishing the security to the extent of 15 per cent of the value of the goods in cash and 25 per cent in the form of bank guarantee by the order dated 15th of July, 2011. The matter was carried unsuccessfully before the Commercial Tax Tribunal, Noida. The case of the petitioner is that section 52 of the Uttar Pradesh Value Added Tax Act, 2008 (hereinafter referred to as "the Act") as it now exists, does not require the carrying of any such declaration form issued by the Commissioner, Commercial Tax, U.P. In other words, any such form prescribed by the Commissioner, Commercial Tax, U.P. is illegal as the Commissioner, Commercial Tax, U.P. is not authorized under the said Act or Rules to prescribe any such form. Such form could be prescribed by State Government through Rules and it could not delegate the power to the Commissioner. The

prescription of form by the Commissioner suffers with the vice of excess delegation of power by the State Government who being the delegatee cannot further delegate its power to the Commissioner, Commercial Tax, U.P.

2. By means of the above writ petition, the following reliefs have been sought for:

(i) to issue a writ, order or direction in the nature of certiorari, quashing rule 58 of the U.P. Value Added Tax Rules in so far as it authorized the Commissioner, Commercial Tax, U.P., Lucknow to prescribe documents and procedure in respect of transit of goods by road through the State.

(ii) to issue a writ, order or direction in the nature of certiorari, quashing the circular letter dated July 30, 2009 issued by the Commissioner, Commercial Tax, U.P., Lucknow (respondent No. 2) (annexure 2 to the writ petition).

(iii) to issue a writ, order or direction, in the nature of certiorari, quashing the order dated July 28, 2011 passed by respondent No. 3 in so far as it upheld the order of seizure of goods and directed furnishing of security for obtaining release of the goods.

(iv) to issue a writ, order or direction, in the nature of certiorari, quashing the order of seizure of goods dated July 12, 2011 passed by respondent No. 4 (annexure 5 to the writ petition).

(v) to issue a writ, order or direction, in the nature of mandamus directing respondent No. 4 to release the goods of the petitioner forthwith without furnishing any security in respect thereof.

(vi) to issue any other writ or order which this honourable court may deem fit and proper in the circumstances of the case.

And

(vii) to award the cost of the petition to the petitioner.

3. In the counter-affidavit, the prescription of form by the Commissioner, Commercial Tax, U.P., has been sought to be justified.

4. Heard Sri Kunwar Saxena along with Sri N.C. Gupta, learned counsel for the petitioner and Sri Vishnu Pratap, learned standing counsel for the respondents.

5. The learned counsel for the petitioner submitted that section 79 of the Act authorizes the State Government to make Rules to carry out the purposes of the Act. By laying emphasis on sub-section (2)(f) of section 79, the submission is that it is the State Government who is required to prescribe the form. The power having been delegated to the State Government to prescribe the form, the State Government could not further delegate its power to the Commissioner, Commercial Taxes and if there is any such delegation it suffers with the vice of the doctrine known as "delegatus non potest delegare". In the alternative remedy, he submitted that when a thing is required to be done in a particular manner it should be done in that manner only. Apart from the above, the

arguments on the merit of the case were also advanced.

6. On the basis of the respective arguments of the learned counsel for the parties, the following three points fall for our determination:

(1) Whether the Commissioner, Commercial Tax, U.P., has exceeded in its power to prescribe a transit declaration form which must accompany with the goods passing through the State of U.P. coming from and going outside the State of U.P., in view of the scheme of the Act? In other words, the prescription of such form by the Commissioner amounts to further delegation of power by the State Government, the delegatee, to the Commissioner.

(2) Whether the theory that when a thing is required to be done in a particular manner, should be done in that manner or not at all is attracted to the controversy on hand?

(3) Whether the impugned orders passed by the authorities below including the Commercial Tax Tribunal on merits is sustainable?

Point No. 1

7. The court was taken through the various sections including the definition clauses and the rules framed thereunder of the Act. Reference was made to the following provisions:

S. 2(j) "document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used for the purpose of recording that matter and includes--

(i) an electronic document including data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche; and

(ii) such other document as may be notified by the State Government.

S. 52. Provision for goods passing through the State--When a vehicle coming from any place outside the State and bound for any other place outside the State and carrying goods referred to in sub-section (1) of section 50, passes through the State, the driver or other person in charge of such vehicle shall carry such documents as may be prescribed failing which it shall be presumed that the goods carried thereby are meant for sale within the State by the owner or person in charge of the vehicle.

S. 79. Power to make Rules.--

(1) The State Government may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for,--

- (a) all matters expressly required or allowed by this Act to be prescribed;
- (b) the registration of persons engaged in the sales or purchase of goods and the imposing of condition in respect of the sale for the purpose of enforcing the provisions of this Act;
- (c) the determination of the turnover for the purpose of assessment of tax under this Act;
- (d) compelling the submission of tax returns and the production of documents and enforcing the attendance of a person and examining them on oath or affirmation;
- (e) the appointment, duties and powers of the officers appointed for the purpose of enforcing the provisions of this Act;
- (f) generally regulating the procedure to be followed and the forms to be adopted in proceedings under this Act;
- (g) refunds of amounts deposited under sub-section (1) of section 40 or 41, the procedure for such refunds and the period within which they may be made;
- (h) the custody of the goods seized under this Act; and
- (i) the matters which are to be or may be prescribed.

(3) The power to make rules conferred by this section shall be subject to condition of the rules being made after previous publication for a period of not less than four weeks:

Provided that if the State Government is satisfied that circumstances exist which render it necessary for it to take immediate action, it may make any rule without such previous publication.

(4) All rules made under this section shall be published in the Gazette and upon such publication shall have effect immediately as if enacted in this Act.

R. 2(m) "form" means a form appended to these Rules.

R. 4. Authorities under the Act.--(1) Authorities mentioned in column (2) shall be under the superintendence and administrative control of the authorities mentioned in column (3) of the table below:

(2) The Settlement Commission, President of Tribunal and Commissioner shall have jurisdiction over whole of the State.

(3) The Chairman and members of the Settlement Commission shall exercise powers and perform the functions assigned to them u/s 65 of the Act and Rules framed thereunder.

(4) President and members of the Tribunal shall exercise the powers and perform the duties assigned to them u/s 57 and Rules framed thereunder.

(5) The Commissioner shall exercise the powers and perform the duties assigned to him under the Act and the Rules framed thereunder and shall have all powers exercisable by subordinate authorities other than the appellate authority u/s 55.

(6) The Commissioner may issue instructions consistent with the provisions of the Act and the Rules made thereunder to his subordinate officers, generally regulating the procedure to be followed in carrying out the provisions of the Act or the Rules made thereunder.

R. 77. Forms prescribed under the Rules--Notwithstanding anything to the contrary contained in these rules form prescribed under the Uttar Pradesh Trade Tax Rules, 1948 and mentioned in column (2) of the table, with suitable amendments on them, may be used in place of form prescribed under these rules and mentioned against each of them in column (3) of the table below till new form is substituted:

R. 78. Use of printout of forms available on the website.--(1) Dealers may, for use by them, take printouts of forms specified from time to time by the Commissioner from the website of the Commercial Tax Department of the Government of Uttar Pradesh.

(2) For taking printouts, A4 size paper will be used.

(3) Expression "website of the Commercial Tax Department of Government of Uttar Pradesh" refers the world wide web having domain "up.nic.in" and with address "http://comtax.up.nic.in".

8. The main thrust of the argument of the petitioner is that section 52 is a provision with regard to the goods passing through the State of U.P. It provides that when a vehicle coming from any place outside the State and bound for any other place outside the State carrying on the goods referable to section 52(1) passes through the State of U.P., the driver or the person in charge of such vehicle shall carry such documents as may be prescribed, failing which a rebuttal presumption that the goods carried thereby have been sold or meant for sale in the State of U.P. shall be available to the Department. The submission is that in the light of section 52 the State Government had issued a form No. XLIII. The said form is referable to rule 58(1) of the U.P. VAT Rules, 2008.

9. It is useful to point out that the present section 52 has been substituted by the U.P. Value Added Tax (Third Amendment) Act No. 22 of 2009 with effect from August 27, 2009. The unamended section 52 is reproduced below:

52. Issue of authorisation for transit of goods through the State.--When a vehicle coming from any place outside the State and bound for any other place outside the State, and carrying goods referred to in sub-section (1) of section 51, passes through the State, the driver or other person in-charge of such vehicle shall obtain in the prescribed manner an authorisation for transit of goods from the officer in-charge of the first check-post or barrier after his entry into the State and deliver it to the officer in-charge of the last check-post or barrier before his

exit from the State, failing which it shall be presumed that the goods carried thereby have been sold within the State by the owner or person in-charge of the vehicle:

Provided that the goods carried by such vehicle are, after their entry into the State, transported outside the State by any other vehicle or conveyance, the onus of proving that the goods have actually moved out of the State shall be on the owner or person in-charge of the vehicle.

Explanation--For the purposes of this section, the hirer of the vehicle shall also be deemed to be the owner of the vehicle.

Word and figures "section 50" had been substituted in above by Act No. 11 of 2009, with effect from January 1, 2008 for "section 51".

10. On a comparative study of section 52 as it existed prior to 27th of August, 2009 after its substitution would show that the amendment in section 52 was necessitated due to the fact that the State Legislature took a decision to abolish the check-posts and barriers at the entry and exit points of the State of U.P.

11. The origin of the check-posts can be traced to the U.P. Sales Tax Act, 1948. Subsequently, it came to be known as the U.P. Trade Tax Act. The Act is successor of the U.P. Trade Tax Act and came to be enforced on 1st of January, 2008. Under the previous legislation i.e., that U.P. Sales Tax Act, the power of the State Legislature to establish entry check-post was subject-matter of challenge which came up for consideration before the apex court in the case of Sodhi Transport Co. and others Vs. State of U.P. and others, . In this case, the validity of the substituted section 28 of the U.P. Sales Tax Act providing for establishment of check-posts and barriers at the boundaries of State and also for inspection of the goods while in transit was challenged. Upholding the validity, the apex court held that section 28 authorises the State Government to establish check-posts and barriers if so desired with a view to prevent the evasion of tax or the other dues payable by a person under the provisions of the U.P. Sales Tax Act is valid as the provisions are just machinery provisions. They do not levy and charge by themselves. The relevant paragraph is 8 which is reproduced below (page 387 in 62 STC):

8. Now the impugned provisions are just machinery provisions. They do not levy any charge by themselves. They are enacted to ensure that there is no evasion of tax. As already observed, the Act is traceable to entry 54 in List II of the Seventh Schedule to the Constitution which reads thus: "54. Taxes on the sale or purchase of goods other than newspapers subject to the provisions of entry 92A of List I". It is well-settled that when the Legislature has the power to make a law with respect to any subject it has all the ancillary and incidental powers to make the law effective. Taxation laws usually consist of three parts--charging provisions, machinery provisions, and provisions providing for recovery of the tax. We may refer here to the observations of Lord Dunedin in *Whitney v. Commissioners of Inland Revenue* (1925) 10 Tax Cas 88 at 110. The learned

Lord said:

"My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable and the interpretation thereof by a court should be to secure that object unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay".

12. The apex court has held that the provisions for establishing the check-posts, barriers and inspection of goods in transit are machinery provisions. The aforesaid pronouncement of the apex court in explicit terms lays down that they are machinery provisions and their abolition will also be machinery provision. With the passage of time, the State Government thought it fit after the commencement of the Act to abolish these check-posts and barriers. This decision was taken on the general demand of the business community in the State of U.P. To streamline the tax administration in the State of U.P. the general demand of traders was given effect to by making necessary amendments in the Act. The existing section 52 as substituted by the Act No. 22 of 2009 has been enacted to deal with the situation as it may exist after the abolition of check-posts and barriers. It, now, no longer require the obtaining of transit form from the officer in charge of the entry check-post or barrier after entering in the State of U.P. and its surrender at the exit check-post or barrier. It can be downloaded from the website of Department, instead. The argument of the petitioner's counsel is that form No. 43 which was prescribed before the unamended section 52 prior to 27th of August 2009 still holds good notwithstanding the legislative change in section 52.

13. Now, we come to the main part of the argument of the petitioner's counsel with regard to the applicability of the phrase "*delegatus non potest delegare*" here. The submission is that the power to make Rules to carry out the purpose of the Act u/s 79 has been entrusted to the State Government. By making a reference to clause (f) of section 79(2), the submission is that it is the State Government who can prescribe the forms to be adopted in the proceeding under this Act and no one else. The power has been delegated under the aforesaid provisions to the State Government and therefore, the State Government cannot authorise the Commissioner to prescribe form even for carrying out the purposes of the Act. He has relied upon certain decisions to buttress his argument that a person to whom the power has been delegated cannot delegate the said power to some other person. Reference has been made to the following cases:

(1) *Bharat Sanchar Nigam Ltd. and Another Vs. BPL Mobile Cellular Ltd. and*

Others, .

(2) M. Chandru v. Member Secretary, Chennai Metropolitan Development Authority decided on 17th February, 2009 (para. 19)

(3) Sahni Silk Mills (P) Ltd. and Another Vs. Employees' State Insurance Corporation, , the relied upon paragraph 13 is reproduced below:

It cannot be disputed that by the impugned resolution dated February 28, 1976 the Corporation not only delegated its power u/s 85B(1) of the Act to the Director-General, but also left it to the Director-General to authorise any other officer to exercise the power u/s 85B(1). From section 94A it does not appear that Parliament vested power in the Corporation to delegate its power on any officer or authority subordinate to the Corporation, and also vested power in the Corporation to empower such officer or authority, to authorise any other officer to exercise the said power u/s 85B(1). If section 94A had a provision enabling the Corporation not only to delegate its power to any other officer or authority subordinate to the Corporation, but also to empower such officer or authority in its own turn to authorise any other officer to exercise that power, the resolution could have been sustained on the principle indicated in the cases Harishankar Bagla and Another Vs. The State of Madhya Pradesh, and The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others, . As such it has to be held that the part of the resolution dated February 28, 1976, which authorises the Director General to permit any other officer to exercise the power u/s 85B(1) of the Act is ultra vires section 94A.

14. There appears to be no quarrel to the proposition that generally the person to whom some power has been delegated cannot sub-delegate it to others. But there are certain exceptions.

15. When the statute itself authorises an administrative authority to sub-delegate its power, there is no difficulty with regard to its validity since sub-delegation is within the term of statute itself. It is a case of express sub-delegation. The other is implied power to sub-delegate.

16. Justice C.K. Thakker in his book "Administrative Law" Second Edition at page No. 147 has dealt with the matter of "implied power" of sub delegation in para. 19.6 after noticing the divergent views on the subject.

17. On page 152, under the heading "20. Controls and safeguards" the author concludes the following:

From the aforesaid discussion, it is clearly established that delegated legislation has come to stay and ground reality of its existence and continuance in legal system cannot be ignored. At the same time, threats inherent in conferring wide powers on executive are equally grave. It is, therefore, of utmost importance that there should be proper control on exercise of legislative power by the executive. Such safeguards should operate at two levels:

1. when Legislature is delegating such power in favour of the executive; and
2. there should be "control mechanism" so that the power is not abused by the executive.

As to 1, we have seen in this lecture that before conferring legislative power on the executive, the Legislature must lay down policy and perform essential legislative functions. If it is not done, conferment of power will be bad. But even where delegation is legal and lawful, there should be "control mechanism" to ensure proper exercise of power by the executive. In the next lecture (lecture V), we will deal with the aspect of "controls and safeguards" so as to prevent administrative agencies from abusing this power.

18. In the light of above, the scheme of the Act and Rules framed thereunder, and the object to be achieved be examined. Section 79 of the Act confers power on the State Government to make the rules to carry out the purposes of the Act.

19. It was strenuously contended that the word "form" means as per rule 2(m) a form appended to these Rules. The form appended to the Rules can be prescribed by the State Government u/s 79(2)(f) alone. The word "prescribed" has been used in section 22 of the Act which relates to the provision for goods passing through the State. The word "prescribed" has not been defined under the Act or rule, therefore, the provisions of the U.P. General Causes Act will be applicable and according to it "prescribed" means either prescribed by the statute or rule.

20. On a careful reading of section 79 which gives power to make rules would show that it does not restrict the power of the State Government in any manner for making the rules with an object to carry out the purpose of the Act. Its sub-section (2) makes it clear that the rules relating to the powers mentioned therein are without prejudice to generality of the power of the State Government to make rules. They are only illustrative instances without prejudice to the generality of the power of State Government to make the Rules. More or less similar provisions came up for consideration before the apex court in Santosh Kumar Jain Vs. The State Union Of India (Intervener), . Paras 8 and 9 are relevant, and reproduced below:

8. It is manifest that sub-section (2) of section 3 confers no further or other powers on the Central Government than what are conferred under sub-section (1), for it is "an order made thereunder" that may provide for one or the other of the matters specifically enumerated in sub-section (2) which are only illustrative, as such enumeration is "without prejudice to the generality of the powers conferred by subsection (1)". Seizure of an article being thus shown to fall within the purview of sub-section (1), it must be competent for the Central Government or its delegate the Provincial Government, to make an order for seizure under that sub-section apart from and irrespective of the anticipated contravention of any other order as contemplated in clause (j) of sub-section (2). The order of December 5, 1947 must therefore, be held to be a valid order, notwithstanding

its reference to the order of September 27, 1947, as being about to be contravened. If the latter order was incomplete and inoperative and consequently there could be no question of its contravention, as contended for the appellant the reference to it in the order dated December 5, 1947, would be an immaterial redundancy and could not affect the validity of the latter order. The seizure of the company's sugar must therefore be regarded as duly authorised and lawful and the appellant by obstructing its removal committed an offence u/s 186 of the Indian Penal Code even on the stricter construction placed on that provision by the Calcutta High Court.

9. The view we have expressed above receives support from the decision of the Privy Council in AIR 1945 156 (Privy Council) . Section 2(1) of the Defence of India Act, 1939, as amended by section 2 of the Defence of India (Amendment) Act, 1940, empowered the Central Government to make rules for securing the defence of British India, the public safety, the maintenance of public order, etc., and sub-section (2) enacted "without prejudice to the generality of the powers conferred by sub-section (1), the rules may provide for all or any of the following matters..." Among such matters was the detention of any person "reasonably suspected" of having acted, etc., in a manner prejudicial to the public safety, etc., (clause (x)). Rule 26 of the Rules made under the section, however, authorised the Government to detain a person "if it is satisfied" that it was necessary to detain him with a view to prevent him from acting prejudicially... The Federal Court held in AIR 1943 75 (Federal Court) that this rule was ultra vires as it went beyond the scope of clause (x) in that it left it to the satisfaction of the Government to decide whether or not it was necessary to detain a person. The decision was reversed and Lord Thankerton, delivering the judgment of the Board, observed:

In the opinion of their Lordships, the function of sub-section (2) is merely an illustrative one; the rule-making power is conferred by sub-section (1), and "the rules" which are referred to in the opening sentence of sub-section (2) are the rules which are authorised by and made under sub-section (1); the provisions of sub-section (2) not restrictive of sub-section (1), as, indeed is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-section (1)". There can be no doubt--as the learned judge himself appears to have thought--that the general language of sub-section (1) amply justifies the terms of rule 26, and avoids any of the criticisms which the learned Judge expressed in relation to sub-section (2).

21. Clause (f) on which much emphasis was laid that it is State Government which may prescribe "form", does not support the argument of the petitioner. It says that the State Government may adopt the procedure to be followed and the forms to be adopted in the proceedings under the Act. The rule 77 already reproduced above, would show that certain pre-existing forms under the U.P. Trade Tax Rules, 1948 such as form I, and other forms mentioned in column-I have been adopted with necessary modification under the present Act as

mentioned in column-II. Rule 77 is referable to section 79(2)(f) of the Act.

22. Rule 58 is the relevant rule which deal with the transit of goods by a route through the State. It provides that when the goods is being passed through the State of U.P. on a vehicle, the driver or person in charge of the vehicle shall carry such documents and follow such procedure as may be determined by general or special order issued by the Commissioner. This rule has been made by the State Government. The said rule envisages power of Commissioner to prescribe such documents and procedure as may be determined by the Commissioner. The word "document" is a comprehensive word as defined in section 2(j) of the Act to include also an electronic document including data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.

23. The Commissioner, Commercial Tax, in exercise of its power u/s 50/52 read with rule 58 issued a circular in contemplation of proposed abolition of check-posts and barrier by superseding earlier circulars on the subject. Paragraph 5 is the relevant paragraph which is reproduced below:

24. The above-quoted paragraph states that the vehicles carrying goods passing through the State of U.P. shall carry a form which can be downloaded from the website of the Department. The said form shall be valid for a period of four days. The petitioner's submission is that the Commissioner in view of form No. 43 prescribed by the State Government could not have prescribed any other form and prescribing of any other form amounts to sub-delegation of power by the State Government. The argument is attractive but has no legs to stand. It needs analysis of the two forms, i.e., one form No. 43 as prescribed by the State Government and the one that has been required by the Commissioner under rule 52 of the Rules. Copies of these forms, on the request of the court, were handed over for the purposes of comparison, by the learned counsel for the parties. An examination of these two forms, would show that in substance there is marked similarity in them on material facts. Though the desired information in these forms may not be in the same order. Both the documents require vehicle number, type of vehicle, engine number, chassis number, name and addresses of the owner of vehicle and transporter, name of originating company, last check-post, total number of bilitys, bills, items, value of goods, particular of goods, weight of goods, etc.

25. Except that form No. 43 is in English and the form prescribed by the Commissioner is in Devnagari script there is no major difference. The difference which could be pointed out is that with regard to the minor details such as PAN number, phone number of transporter company, carrier, driver's licence number, type of vehicle, etc.

26. The additional information required in the Commissioner's form and not in form No. 43 is with regard to the detail of route through which the vehicle transporting the goods will travel. Information with regard to the name of two

places in the middle of the route is required to be furnished in the form prescribed by the Commissioner. In totality, the material informations for the purposes of the Act sought in the aforesaid two forms are common. Taking the argument of the petitioner's counsel on its face value that form No. 43 prescribed by the State Government is still prevalent (though we have great doubt), a vehicle owner has to carry one of either two forms which will serve the purpose of the Act.

27. Rule 4 enumerates the authorities and superintendence and control on them. Its sub-rule (6) empowers the Commissioner to issue instructions consistent with the provisions of the Act and the Rules made thereunder to his subordinate officers to carry out the provisions of the Act or the Rules made thereunder. The action of the Commissioner to prescribe the form to be carried by a driver of the transport vehicle carrying the goods can also be justified with reference to rule 4(6) of the Rules.

28. The Commissioner is under direct control of the State Government. The power cannot be abused by the Commissioner and for all practical purposes by prescribing the form, the Commissioner has taken a step to prevent tax evasion, that is all.

29. The majority judgment of the apex court in the case of *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, in the observation of Justice Bachawat J. in para. 36 in the backdrop of the above discussion is relevant (page 666 in 36 Comp Cas):

36. But the maxim "*delegatus non potest delegare*" must not be pushed too far. The maxim does not embody a rule of law. It indicates a rule of construction of a statute or other instrument conferring an authority. *Prima facie*, a discretion conferred by a statute on any authority is intended to be exercised by that authority and by no other. But the intention may be negated by any contrary indications in the language, scope or object of the statute. The construction that would best achieve the purpose and object of the statute should be adopted.

30. It has been laid down that the maxim "*delegatus non potest delegare*" does not embody a rule of law. It will depend upon the construction of statute and the intention to show whether a discretion conferred by a statute on any authority is intended to be exercised by that authority and no other. On invocation of language of the apex court, the construction that would best achieve the purpose and object of the statute should be adopted, we find that the form in dispute is to curb the tax evasion and not more than that. It does not cause any tax burden or financial burden on a dealer. The driver or incharge of the vehicle is required to get down loaded the document in the shape of the form and after filling up the blanks by supplying requisite information which are with him but spread over, in a consolidated form, shall carry the document. In view of the *Sodhi Transport Co. and others Vs. State of U.P. and others*, , it is crystal clear that the provision relating to necessary documents to be carried by a driver of the vehicle passing

through the State of U.P. is a machinery provision. It does not charge on the subject. It is enacted to insure and keep a watch on a person who has brought the goods inside the State and intended to take it outside the State of U.P., enter the State of U.P. actually for taking them out. If he carries such form while passing through the State of U.P., then, there would not be any liability at all. The practical side is that such a person/driver/incharge of the vehicle would also be in a better position to prove that the goods carried by him are not liable to be taxed in the State of U.P. In that sense, such a provision is beneficial to honest transporters as well as to the Department to check tax evasion.

31. There are cases to the effect that power to sub-delegate may be drawn by implication. The Government may sub-delegate to sub-authorities the statutory power, even though the statute in question may not expressly authorize it to do so. In *Uttar Pradesh State Electricity Board Vs. Abdul Sakoor Hashmi and Others*, , the Board made regulation laying down the mode of appointments to various posts under the Board an appointing disciplinary authorities thereof, etc. It was held that the power could be delegated by regulation as under the statute the Board had been given the power to make regulations for any matter arising out of the Board's function under the statute. Here, the court read the power of sub-delegation by implication.

32. An interesting case where the Supreme Court read the power to sub-delegate by implication is *State of Uttar Pradesh Vs. Batuk Deo Pati Tripathi and Another*, . Here the High Court of Allahabad by rules purported to be framed under article 225 of the Constitution constituted an administrative committee consisting of a few judges of the court to exercise control over subordinate judiciary under article 235. For a discussion on article 235, see Jain, *Indian Constitutional Law* (1978). The question was whether this delegation to the administrative committee was permissible since article 235 contemplated control by the entire court and not a smaller body of judges acting as the administrative committee. The court found that no such rules could be framed under article 225, but it still upheld the procedure adopted by the High Court. According to the court, the very nature of the control vested in the High Court under article 235 makes it imperative that rules must be framed to make the exercise of control feasible, convenient and effective, that is, to prescribe the manner in which control is to be exercised. The court stated that "... the power of control over the subordinate courts which is vested in the High Courts comprises such numerous matters, often involving consideration of details of the minutest nature, that if the whole High Court is required to consider every one of those matters, the exercise of control instead of becoming effective will tend to cause delay and confusion in the administration of justice in the State of Uttar Pradesh Vs. Batuk Deo Pati Tripathi and Another, " In justifying its conclusion, the court even took recourse to artificial logic by saying that the administrative committee was a mere instrumentality through which the entire court acts for more convenient transaction of its business, and thus no delegation was involved.

33. In a few other cases a somewhat similar problem has arisen in a different context. Under the Essential Supplies (Temporary Powers) Act, 1946, the Central Government was authorised to delegate its powers under the Act to the provincial Governments (now called the State Governments). Could a provincial Government further sub-delegate its delegated powers to subordinate authorities? The problem is explained thus. The Central Government conferred power on the provincial Governments to make orders pertaining to foodstuffs u/s 3(1) of the Act. Under this authorization, the provincial Government issued an order of general applicability and therein gave some powers to subordinate authorities.

34. In *J.K. Industries Ltd. and Another Vs. Union of India (UOI) and Others*, , it has been held that a subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into account the vital facts which expressly or by necessary implications are required to be taken into account by the statute or the Constitution.

35. As discussed above, rule 48 is in the nature of machinery provision and its aim and object is to prevent the evasion of tax and is a valid piece of legislation. Time and again, the apex court has laid down in such matters, a greater latitude is given to the Legislature and the inference by the court is minimal.

36. It is settled law that a distinction has to be made by courts while interpreting the provisions of a taxing statute between charging provisions which impose the charge to tax and machinery provisions which provide the machinery for the quantification of the tax and the levying and collection of the tax so imposed. While charging provisions are construed strictly, machinery sections are not generally subject to a rigorous construction. The courts are expected to construe the machinery sections in such a manner that a charge to tax is not defeated. It is the duty of the court while interpreting the machinery provisions of a taxing statute to give effect to its manifest purpose having a full view of it. Wherever the intention to impose liability is clear the courts ought to have no hesitation in giving a common sense interpretation to the machinery sections so that the charge does not fail (*Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others*, , *Liquor Enterprises Vs. The Commercial Tax Officer, Circle III, Hyderabad*,).

37. The machinery provisions should be interpreted liberally and generously so long as the principal object of the provision is not frustrated (*Fertilizer Corporation of India Ltd. Vs. State of Bihar*,).

38. In *Frankfurter in Morey Vs. Doud*, (1957) 354 US 457 , Mr. Justice Frankfurter, the renowned judge of the U.S. Supreme Court observed:

In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The Legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct... the uncertainty, the liability to error, the

bewildering conflict of the experts, and the number of times the judges have been overruled by events all these show that self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.

39. In the same decision justice Frankfurter also observed:

The court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; "that exact wisdom and nice adoption of remedy are not always possible" and that "judgment is largely a prophecy based on meager and uninterpreted experience". Every legislation, particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There maybe crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid...

40. In *The Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Girish Kumar Navalakha and Others*, , the Supreme Court observed (page 405 in 45 Comp Cas):

... It would seem that in fiscal and regulatory matters the court not only entertains a greater presumption of constitutionality but also places the burden on the party challenging its validity to show that it has no reasonable basis for making the classification...

41. It must be remembered that all legislation or delegated legislation (such as the kind we are examining), particularly in fiscal matters, is essentially ad hoc and experimental. Since fiscal matters now a days are extremely complicated the court should ordinarily defer to the opinion of the experts and give the State wide latitude in devising ways and means in imposing and collecting taxes.

42. As Justice Frankfurter of the U.S. Supreme Court observed in *American Federation of Labour v. American Sash and Door Co.*, (1949) 335 U.S. 538 :

Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic Government. Most laws dealing with social and economic problems are matters of trial and error. That which, before trial, appears to be demonstrably bad may belie prophecy in actual operation... But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests. Hence rather than exercise judicial review courts should ordinarily allow Legislatures to correct their own mistakes wherever possible.

43. Similarly in his dissenting judgment in *New State Ice Co. v. Liebmann*,

(1932) 285 U.S. 262 Mr. Justice Brandies, the renowned judge of the U.S. Supreme Court, observed that the Government must be left free to engage in social experiments. Progress in the social sciences, even as in the physical sciences, depends on "a process of trial and error" and courts must not interfere with necessary experiments. Justice Brandeis also observed:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. (see also "The Legacy of Holmes and Brandeis" by Samuel Konefsky).

44. In P.T.R. Exports (Madras) Pvt. Ltd. and others Vs. Union of India and others, , the Supreme Court observed:

... The power to lay policy by executive decisions or by legislation includes power to withdraw the same unless in the former case, it is by mala fide exercise of power or the decision or action taken is in abuse of power... The court leaves the authority to decide its full range of choice within the executive or legislative power. In matters of economic policy, it is a settled law that the court gives a large leeway to the executive and the Legislature... Government would take diverse factors for formulating the policy... in the overall larger interest of the economy of the country...

... When the Government is satisfied that change in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down new policy...

45. As observed by the Supreme Court in Mohd. Hanif Quareshi and Others Vs. The State of Bihar, , the court must presume that the Legislature (or its delegate) understands and correctly appreciates the needs of its own people. The court should therefore exercise self-restraint in such matters.

46. In R.K. Garg and Others Vs. Union of India (UOI) and Others, , a Constitution Bench of the Supreme Court observed (page 255 in 133 ITR):

Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been said by no less a person than Holmes, J., that the Legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the Legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Frankfurter in Morey Vs. Doud, (1957) 354 US 457 , where Frankfurter, J., said in his inimitable style:

In the utilities, tax and economic regulation cases, there are good reasons for

judicial self-restraint if not judicial deference to legislative judgment. The Legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the Judges have been overruled by events--all these show that self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.

47. In *Prag Ice and Oil Mills and Another Vs. Union of India (UOI)*, , the Supreme Court observed:

... We do not think that it is the function of this court or of any court to sit in judgment over such matters of economic policy as must necessarily be left to the Government of the day to decide. Many of them, as a measure of price fixation must necessarily be, are matters of prediction of ultimate results on which even experts can seriously err and doubtless differ. Courts can certainly not be expected to decide them without even the aid of experts.

48. In *M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others*, , the Supreme Court observed:

Judicial review is not concerned with matters of economic policy. The court does not substitute its judgment for that of the Legislature or its agents as to matters within the province of either. The court does not supplant the "feel of the experts" by its own views...

49. In *Delhi Cloth and General Mills Co. Ltd. and Others Vs. Union of India (UOI) and Others*, , the Supreme Court observed (page 696 in 54 Comp Cas):

... Even at the cost of repetition, it can be stated with confidence that the rules which prescribed conditions subject to which deposits can be invited and accepted to operate to extend a measure of protection against the notorious abuses of economic power by the corporate sector, to the detriment of depositors/investors, a segment of the society which can be appropriately described as weaker in relation to the mighty corporation... In a welfare State, it is the constitutional obligation of the State to protect socially and economically weaker segments of the society against the exploitation by Corporations...

50. It must be remembered that certain matters are by their nature such as best be left to experts in the field. This court does not have the technical and administrative expertise in this respect.

51. In the words of Chief Justice Neely:

I have very few illusions about my own limitations as a judge. I am not an accountant, electrical engineer, financier, banker, stockbroker or system management analyst. It is the height of folly to expect Judges intelligently to review a 5000 page record addressing the intricacies of a public utility operation. It is not the function of a Judge to act as a super board, or with the zeal of a

pedantic school master substituting its judgment for that of the administrator.

52. The upshot of the above discussion is that we do not find any merit on the above submission of the learned counsel for the petitioner. Rule 58 of the Rules framed under the Act, having regard to the history of the legislation, its object and purpose to be achieved, is a valid view of legislation.

Point No. 2

53. Strong reliance was placed upon a Division Bench judgment of this court in *Technical Construction Company v. Trade Tax Officer, Sector-I* (2006) UPTC 1378. It was a case for refund of the payment of excess amount of tax along with interest. The refund of excess amount of tax was withheld by the Department simply on the ground that the certificate of tax deducted at source has not been furnished by the petitioner in the prescribed form. The court took the view that at the first place there is no form prescribed under the U.P. Act or the U.P. Rules for filing of a certificate of tax deducted at source. Some certificates were prescribed by the Commissioner. In that connection the court observed that it is well-settled that if an act is required to be done in a particular manner, then, that act has to be performed in that manner alone and not in any other manner. The form prescribed by the Commissioner was ignored as it was not prescribed under the U.P. Act or the Rules and it was held that the claim of refund of excess tax cannot be denied on that ground alone. The said decision is not applicable to the facts of the case and is distinguishable. In the case on hand, rule 58 itself empowers the Commissioner to determine the documents which a driver of a vehicle should carry with while passing through the State of U.P. carrying the taxable goods. The State Government had also prescribed similar form being form No. 43 as per unamended section 52 of the Act. The power of Commissioner in the case on hand prescribing the document is referable to rule 58 read with section 52. We are, therefore, unable to agree with the aforesaid submission of the learned counsel for the petitioner.

Point No. 3

54. On the merits of the case, the learned counsel for the petitioner submitted that except the downloaded form prescribed by the Commissioner the goods were moving along with all necessary documents. The Department has neither raised nor doubted the genuineness of other documents which were being carried by the driver of the vehicle at the time of interception of the goods. The goods were booked at Ballabgarh, Faridabad (State of Haryana) to BHEL, a Government of India Enterprises. The details of the consignor and consignee were not found to be incorrect. The goods were not meant for consumption, use or sale by the public at large. The submission is that there was no intention to evade the payment of tax in the State of U.P.

55. A perusal of the impugned order would show that the goods were intercepted and security for their release was demanded only on the ground that it did not accompany with the downloaded transit pass.

56. Except the above default everything was found in order. Reliance has been placed on certain decisions, namely, *Castrol India Limited v. Commissioner of Commercial Tax* (2014) 2 VST-OL 522 (All) : (2012) Tax Law Diary-130, *Balaji Timbers and Paints v. Commissioner of Commercial Tax* (2010) 43 NTN 521, and certain other unreported judgments to show that presumption of sale stands rebutted. The learned standing counsel, on the other hand, could not point out anything to the contrary. Even in the case of *Sodhi Transport Co. and others Vs. State of U.P. and others*, as also in the circular issued by the Commissioner it has been laid down that a rebuttable presumption in absence of necessary documents to be drawn against a person. The apex court in the case of *Sodhi Transport Co. and others Vs. State of U.P. and others*, has examined this issue in depth and laid down that the presumption is rebuttable presumption. This court in the case of the above relied upon decisions has gone to the extent that if the transit form is furnished subsequently, after the interception of the vehicle, the seizure order becomes bad. The appellate authority fixed 15 per cent cash security and bank guarantee to be given for 25 per cent of the value of the goods as a condition for releasing the goods. This order was modified by this court while passing an interim order by providing that if the petitioner gives the bank guarantee for remaining 15 per cent of the amount also, the goods shall be released in its favour. In absence of any finding by any of the authorities below, that there was an intention to evade the payment of tax, the irresistible conclusion is that the seizure order is bad. On the merits, we are in agreement with the submission of the learned counsel for the petitioner, therefore, the seizure order cannot be allowed to stand and is hereby set aside. Resultantly, the bank guarantee furnished by the petitioner, if any, stands discharged and the cash amount, if any, deposited by the petitioner as security is liable to be refunded forthwith preferably within a period of one month. The point is decided accordingly.

Conclusion

57. In view of the above discussion, we do not find any merit on the point Nos. 1 and 2 but hold that the seizure order is bad. In the result, the writ petition succeeds and is allowed. The impugned order dated July 28, 2011 passed by the Commercial Tax Tribunal and the seizure order dated July 12, 2011 and all the other consequential orders are hereby quashed. No order as to costs.