(2014) 03 GUJ CK 0007

In the Gujarat High Court

Case No : Tax Appeal No. 538 of 2013

Ramesh Steels APPELLANT

Vs

Commercial Tax Officer RESPONDENT

Date of Decision : 13-03-2014

Acts Referred:

Gujarat Value Added Tax Act, 2003 — Section 21, 21(7), 26, 27, 27(1)

Citation : (2014) 71 VST 538

Hon'ble Judges : Sonia Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Jaimin R. Dave, Advocate for the Appellant; Jaimin Gandhi, Additional Government Pleader, Advocate for the Respondent

Judgement

Sonia Gokani, J.—Challenging the order of the Gujarat Value Added Tax Tribunal, Ahmedabad ("Tribunal" for short) dated May 1, 2013, the present tax appeal is preferred. While admitting the tax appeal, following substantial questions of law were formulated:

(A) Whether, in the facts and circumstances of the case, the Tribunal has erred in law and facts in holding that the earlier order passed by the opponent was valid, in absence of the communication of the said order to the appellant, if at all any order was passed prior to February 17, 2009?

(B) Whether, in the facts and circumstances of the case, the Tribunal has erred in law in upholding the validity of the order for cancellation of the registration passed under section 27(1) of the Gujarat Value Added Tax Act, 2003 when the appellant herein had already withdrawn the application for cancellation of registration much prior to the communication of the order dated February 17, 2009 as well as much prior to the communication of the earlier order, if any, in cancelling the registration?

(C) Whether while passing the order under section 27(1) of the Gujarat Value Added Tax Act, 2003 cancelling the registration on the application submitted by the registered dealer, the said order is required to be communicated to the registered dealer and what will be the consequence of the non communication of the decision of cancellation of the registration passed under sub-section (3) of section 27 of the Act?

Tax appeal arises in the following factual background:

1.1 The appellant herein is a proprietary concern registered under the Gujarat Value Added Tax Act, 2003 ("the V.A.T. Act", for short) vide registration No. 24221800911 since December 17, 1991. From April 1, 2006, the appellant chose not to carry on the business, and therefore, on October 30, 2007, applied for cancellation of the registration with effect from the very date, which is October 30, 2007.

1.2 It is averred by the appellant that nothing was heard from the respondent in respect of such a request for cancellation of registration till July 1, 2008. In absence of any communication, the appellant entered into a business transaction on July 1, 2008 with a bona fide belief that the registration was not cancelled. A letter was addressed on July 2, 2008, inter alia, urging not to cancel the registration. Although no communication, according to the appellant was received, on having found on the website of the Department on January 26, 2008 that the status of the appellant was that of a registered concern, it was under a belief that the request made subsequently on July 2, 2008 came to be accepted.

1.3 New business in the name of Messrs. Shyam Metals since was started, an application was made on February 3, 2009 by the appellant for amendment of the registration certificate by incorporating the additional place of business. Yet another application was made on February 8, 2009 along the line through the mode of electronic mail.

1.4 On February 17, 2009, however, a communication was received from the respondent of cancellation of registration under section 27(1) of the V.A.T. Act with effect from October 30, 2007, which according to the appellant, was without taking into consideration the subsequent application moved for cancellation as also without availing of any opportunity of hearing at the time of such cancellation.

2. The appellant challenged such communication and act of cancellation by way of an appeal before the Deputy Commissioner of Commercial Tax and such appeal came to be dismissed on the ground that the order of, cancellation was passed prior to the appellant having moved any application for withdrawal of such cancellation.

3. Aggrieved by such order, the appellant preferred to approach the Tribunal. The Tribunal by a detailed order, chose to concur with the conclusion of the Deputy Commissioner of Commercial Tax--the first appellant authority. The Tribunal also was of the opinion that when the cancellation of registration was already made prior to the appellant moving for withdrawal of such application for cancellation,

mere reflection on the website would have not bearing on the case of the appellant.

4. Aggrieved the appellant, therefore, has preferred the present appeal raising aforementioned questions of law. Although substantial questions of law raised are three in number, all the three can be dealt with simultaneously as they raise a central issue as to what would be the effect of withdrawal of application seeking cancellation of registration before the order of cancellation passed on an application under section 27(1) of the Gujarat V.A.T. Act is communicated?

5. On issuance of notice, the respondent appeared and filed affidavit-in-reply wherein it is contended, inter alia, that the appellant ceased to carry out the business from April 1, 2006. The application moved on October 30, 2007 for cancellation should be deemed to have been accepted. The application moved subsequently had no bearing inasmuch as the earlier application was already given effect. It is further contended that section 27(3) of the V.A.T. Act would not require to provide any opportunity of hearing for passing an order of cancellation and even if application for cancellation is subsequent, the cancellation of registration would be effective from the date of discontinuation of the business. It is also the contention on the part of the respondent that surrendering of the registration certificate was a must along with an application, as per the provision of law and that therefore, any subsequent transaction on the part of the appellant is contrary to law as he would not be possessing the certificate of registration.

5.1 Affidavit-in-rejoinder is also filed by the respondent challenging these contentions.

6. We have heard learned counsel Shri J.R. Dave appearing for the appellant who has fervently argued before us that there is no order cancelling the registration of the appellant prior to his request for withdrawal of the same. The reference of the order passed by the respondent of cancellation is undated. He had been fair enough to submit that there is a requirement under sub-section (8) of section 27 for surrendering the certificate of registration granted to the appellant along with application for cancellation of registration. The same was, however, not done and when the website of the respondent-Department had reflected the status of the appellant as that of a registered concern, on getting the business, he chose to withdraw his application for cancellation. No opportunity of hearing had been granted at any stage. He, therefore, urged that the action of the respondent ought to have been held contrary to law by both the authorities and urged for indulgence on the part of the court.

7. Per contra, learned Additional Government Pleader Shri Jaimin Gandhi strenuously urged before us that the law does not require any need for grant of opportunity of hearing when the appellant himself had chosen to make an application. It is also incumbent upon him to also surrender the certificate of registration and he could not have entered into any kind of transaction

thereafter. According to him, the website, if advertently had not changed his status, that would not mean that the order which was passed earlier was not in fact passed. He, however, fairly admitted that such order is undated.

8. Having thus heard both the sides and having considered the material on record, at the outset, we notice that the appellant herein continued to hold the registration from December 17, 1991 and he carried on his business all along. On October 30, 2007, he applied for cancellation of registration without surrendering the certificate of registration in the prescribed form, as provided under sub-rule (1) of rule 10 of the Gujarat Value Added Tax Rules, 2006 ("the Rules" hereinafter). In a standard format, an application for cancellation of registration was made making a request for cancellation on account of his discontinuance of business from September 30, 2007. This application moved under sub-section (8) of section 27 requires the respondent-authorities to cancel the registration. It would be profitable to reproduce, at this stage, the provisions of section 27, which reads thus:

27. Suspension or cancellation of registration.--(1) Where--

(a) any business, in respect of which a certificate of registration has been issued to a dealer under this Act is discontinued;

(b) in the case of transfer of whole business by a dealer, the transferee already hold a certificate of registration under this Act;

(c) an incorporated body has been wound up or it otherwise ceases to exist;

(d) the owner of a proprietorship business dies leaving no successor to carry on the business;

(e) in case of a firm or association of persons, it is dissolved; or

(ee) a dealer changes his place of business situated within the jurisdiction of one authority to a different place falling under the jurisdiction of another authority.

Explanation.--For the purpose of this clause, the ''authority'' means the authority prescribed under sub-section (3) of section 21;

(f) a dealer has ceased to be liable to pay tax under this Act,--the Commissioner may cancel the certificate of registration of such dealer or the transferor, as the case may be, from such date, as may be specified by him.

(2) A registered dealer, whose certificate of registration is liable to be cancelled under sub-section (1), may apply for cancellation of his registration to the prescribed authority, in the manner and within the time prescribed.

(3) On receipt of such application from the dealer, if the registering authority is satisfied that the dealer fulfils the conditions specified in sub-section (1), he shall cancel the registration of such dealer.

(4) The certificate of registration shall be deemed to be inoperative--

(a) in case of clause (a) or (b) of sub-section (1), with effect from the date of discontinuance or, as the case may be, transfer of the business;

(b) in case of clause (c), (d), (e) or (f) of sub-section (1), from the date which the dealer''s liability to pay tax has ceased,

notwithstanding the fact that the order of cancellation is passed or not or that the particulars of the dealer regarding cancellation are published as required under sub-section (11), or not.

(5) If a dealer--

(a) has failed to file three consecutive returns under this Act;

(b) knowingly furnishes incomplete or incorrect particulars in his return with a view to evade tax;

(c) has failed to pay the tax due for three consecutive tax period from him under the provisions of this Act;

(d) having issued tax invoice or retail invoices, has failed to account for the said invoices in his books of account;

(e) holds or accepts or furnishes or causes to be furnished a declaration, which he knows or has reason to believe to be false;

(g) has been convicted of an offence under this Act or under the earlier law;

(h) discontinues his business and has failed to furnish information regarding such discontinuing;

(i) without entering into a transaction of sale issues to another dealer tax invoice, retail invoice, bill or cash memorandum, with the intention to defraud the Government revenue; (or)

the Commissioner may at any time, for reasons to be recorded in writing and after giving the dealer an opportunity of being heard, cancel his certificate of registration from such date as may be specified by him;

(j) who has been found evading tax on account of variation in physical stock compared with his regular books of account.

(5A) (1) If a dealer,--

(a) has failed to inform changes as required under sub-section (1) of section 26;

(b) has failed to furnish return under section 29;

(c) has failed to pay tax under section 30;

(d) has failed to file declaration or intimate the changes as required under section 65 or 66; or

(e) has failed to produce the books of account required under section 67, the Commissioner may, at any time, for reasons to be recorded in writing and after giving the dealer an opportunity of being heard, suspend his certificate of registration from such date not earlier than the date of order of suspension, as may be specified by him in the order.

(2) where a dealer, whose certificate of registration is suspended for the failure of any of the requirements specified in sub-section (1), fulfils the requirements, the Commissioner shall, by an order in writing, withdraw the suspension order from such date as may be specified therein.

(3) the dealer whose certificate of registration is suspended under sub-section (1) shall not be entitled to claim input-tax credit during the period of suspension of registration.

(6) Every person whose registration is cancelled under sub-section (5) shall pay in respect of every taxable goods held as stock on the date of cancellation an amount equal to the tax that would be payable in respect of the goods if the goods were sold at fair market price on that date or the total tax credit previously claimed in respect of such goods, whichever is higher.

(7) If an order of suspension or cancellation passed under this section is set aside as a result of an appeal or other proceedings under this Act, the certificate of registration of the dealer shall be restored and he shall be deemed to be treated as if his registration was not suspended or cancelled.

(8) Every dealer who applies for cancellation of registration shall surrender with his application the certificate of registration granted to him and every dealer whose registration is cancelled otherwise than on the basis of his application shall surrender the certificate of registration within seven days from the date of communication to him of the order of cancellation:

Provided that if a dealer is unable to surrender the certificate of registration on account of loss, destruction or defacement of such certificate, such dealer shall intimate the registering authority accordingly within seven days from the date of communication of order of cancellation of registration.

(9) If a dealer--

(a) fails without sufficient cause to comply with the provisions of sub-section (2); or

(b) fails to surrender his certificate of registration as provided in sub-section (8),

the Commissioner may, by an order in writing and after giving the dealer an opportunity of being heard, direct that the dealer shall pay, by way of penalty, a sum equal to rupees one hundred for every day of default.

(10) Suspension or cancellation of a certificate of registration shall not affect the liability of any dealer to pay tax, penalty or interest due for any period till the date of such suspension or cancellation and which has remained unpaid or is

assessed thereafter.

(11) The Commissioner shall publish in the manner as may be prescribed the particulars or dealers whose certificate of registration has been suspended or cancelled under the provisions of this Act.

9. We notice that these provisions provide for suspension or cancellation of registration. Sub-section (3) of section 27 provides that on receipt of such application for cancellation, if the registration authority is satisfied that all conditions specified in sub-section (1) gets satisfied, the registration of such dealer requires to be cancelled.

9.1 Sub-section (5) of section 27 authorizes the Commissioner to cancel the certificate of registration on any of the grounds provided under sub-section (1) of section 27. The Commissioner in such circumstances avails of an opportunity to the dealer of being heard and cancels certificate of registration from such date as may be specified by him.

9.2 Sub-section (7) of section 21 also provides that in the event of any business in respect of which certificate of registration had been issued has been discontinued or transferred, the dealer, if applies in the prescribed manner for cancellation of registration, the prescribed authority shall cancel the registration with effect from such date as he may fix in accordance with the Rules.

10. Thus, in case of a registered dealer, there are different modes specified by the statute by which the cancellation can be effected. Business in respect of which certification of registration has been issued to a dealer discontinues, the Commissioner may cancel certificate of registration of such dealer from such date as may be prescribed by the authority. On account of discontinuance of his business, a registered dealer may make an application for cancellation of his registration under sub-section (1) of section 27 of the Act. In such circumstances, the registering authority, if is satisfied that the dealer fulfils the conditions specified in sub-section (1) of section 27, it may cancel the registration of the dealer. The dealer can also apply in a prescribed manner for cancellation (under rule 10) and under section 21(7) as mentioned above. In the event of non-communication of discontinuation of his business or the registered dealer having failed to furnish information regarding such discontinuation, the Commissioner may at any time, for the reasons recorded and on affording opportunity to the dealer may cancel his certificate of registration from such date as may be specified.

10.1 At this stage, reference to sub-section (4) of section 27 is needed, which is a deeming provision and provides as to when the certification of registration becomes inoperative. In case of operation of clause (a) or (b) of sub-section (1) of Section 27, the certificate of registration shall be deemed to be inoperative with effect from the date of discontinuation of business in respect of which registration is made or transfer of whole of business to transferee, as the case may be. This provision would have bearing when the person conducts his business, despite his application having been made for cancellation on account of discontinuance of his business or transfer of his business. In the event of any proceedings being initiated qua him in this respect, he may have to face the legal liability as the Legislature has provided that the cancellation of the registration is deemed to be inoperative.

10.2 On the basis of legal provisions discussed hereinabove, reverting to the facts of the instant case, the appellant-dealer in the instant case, on discontinuation of his business, had approached the authority for cancellation of his registration by way of his communication dated 30th October, 2007. As provided under the statute, on his fulfilling the condition as provided under sub-section (1) of section 27, the cancellation of registration of such dealer at the hands of registration authority shall take place. There is nothing to indicate that any order of cancellation of the registration was passed pursuant to such application made by the petitioner. His subsequent communication dated July 2, 2008 seeking withdrawal of his earlier application for cancellation of registration on account of his having received certain business reached to the concerned authority. We notice, as mentioned hereinbefore, that in the interregnum period, no order of cancellation was passed on his application dated October 30, 2007. Although, it is contended by the respondent-authority that such order was passed, the order passed on the first communication was undated. Neither from the material on the record nor from the affidavit-in-reply, the respondent could satisfy us of passing of such order before the application for withdrawal of the earlier application for cancellation of registration reached to the authority. Admittedly, there has been no communication of such undated order of cancellation and the said order is communicated on February 27, 2009 where the cancellation had been made effective from September 30, 2007, a month prior to the date of the application which is the date of discontinuation of business of the appellant.

10.3 It is also apparent from the pleadings as also from the submissions made by both the sides that the official website of the respondent continued to reflect the status of the appellant as a registered dealer. Assuming that such reflection on the website may not have a bearing on the case of the appellant for such registration as the appellant as a dealer himself had applied for cancellation of the registration due to discontinuance of business and such information on the website of the Department is for the safeguarding the interest of the third parties. In absence of any material on record to indicate that pursuant to the first application under section 27(1) of the appellant, any cancellation order in fact had been made by the concerned authority, we are of the firm opinion that before such order of cancellation had been passed when due communication of subsequent withdrawal of his earlier application has been effected, such subsequent cancellation by way of an order impugned dated February 17, 2009 deserves indulgence from this court and the Tribunal certainly erred in holding that even in absence of communication of undated order, such order was valid. Whether in fact undated order was passed prior to February 17, 2009 itself is a serious question mark and therefore, the Tribunal also erred in upholding validity of order of cancellation passed under subsection (1) of section 27 of V.A.T. Act when withdrawal was much prior to February 17, 2009.

11. We notice that in the event of the dealer himself applying for cancellation of registration under sub-section (2) of section 27 of the V.A.T. Act, there is no explicit provision for availing of an opportunity of hearing to the dealer as he himself is the applicant volunteering for such cancellation, nor is there any express provision for communicating such order. As averred in the instant case, the reflection of the status of the present dealer as a registered dealer on January 26, 2008 was on account of the official website not being updated. Such updation if not regularly done, confusion and disputes are found to consequently follow. To avert these factual disputes the communication of the order of cancellation of certificate of registration must be done, even if such cancellation is made pursuant to the application made by the dealer himself. We may refer to sub-section (11) of section 27 of the V.A.T. Act at this stage which makes it incumbent upon the Commissioner to publish in the manner prescribed, status of the dealer when certificate of registration has been cancelled under the provisions of this Act.

12. Resultantly, all the questions raised in this tax appeal are answered in favour of the appellant and against the Department. The order of the Tribunal dated May 1, 2013 is set aside so also consequential order dated February 17, 2009 cancelling the registration of the petitioner.

12.1 It is being clarified at this stage that for the purpose of constituting the reactivation of the registration, the date of application for withdrawal of earlier application of cancellation shall be given an effect to.

Appeal stands disposed of accordingly with no order as to costs.

