
(2001) 08 GAU CK 0016
In the Gauhati High Court
Case No : Writ Appeal No. 2 of 2000

Satya Ranjan Saha

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 02-08-2001

Acts Referred:

Assam General Sales Tax Act, 1993 — Section 44(5), 46(2)
Assam General Sales Tax Rules, 1993 — Rule 10

Citation : (2001) 2 GLT 312

Hon'ble Judges : R.S. Mongia, Acting C.J.; A.K. Patnaik, J

Bench : Division Bench

Advocate : N.N. Saikia, J. Bora, G. Deka and G. Saikia, for the Appellant; A. Hazarika and B.J. Talukdar, for the Respondent

Judgement

R.S. Mongia, C.J. (Acting)

1. The question that calls for our determination in this case is :

Whether the Inspector of Taxes, Mangaldoi had the power under the Assam General Sales Tax Act, 1998, and the Rules made thereunder to impose penalty on the appellant vide orders dated 31.7.1997 and 10.2.1998?

2. Before we proceed further, the provisions of the Act and the Rules as these existed at the time when penalty was imposed may be noticed. Penalty was imposed on the appellant by the Inspector of Taxes u/s 44(5)(b) of the Assam General Sales Tax Act, 1993, (hereinafter called, "the Act"). It will be apposite to reproduce Section 44(1), 44(5)(a); 44(5)(b) and 44(5)(e) of the Act:-

"44(1). Subject to such rules as may be made by the State Government under this Act, any authority, appointed under subsection (1) of Section 3, may either before or after assessment, require any dealer to produce before it or him any accounts, registers or documents or to furnish any information relating to the financial transactions of the dealer, the profit derived from such transactions and the stock of goods produced: raised, processed, manufactured, bought, sold or

delivered by such dealer and the dealer shall comply with such requirement.

44(5)(a). Any authority referred to in Sub-section (1) shall have the power to enter into and search any office, shop, godown or any other place of business or any building or any place of the dealer, or of a Dalai or of an owner of a warehouse, or of a clearing, booking or forwarding agent, or of a person transporting goods or vessels or goods carrier and seize any goods which are found therein but not accounted for by the dealer or the Dalai, or the owner of the warehouse, or the clearing booking or forwarding agent, or the person transporting goods in his books, accounts, registers and other documents;

Provided that a list of all the goods seized under this sub-section shall be prepared by such officers and be signed by the officer, the dealer or the person incharge of goods or the person incharge of the premises, and not less than two witnesses.

44(5)(b). The authority referred to in Clause (a) shall, in a case where the dealer or the person incharge of goods as mentioned in Clause (a), fails to produce any evidence or satisfy the said authority regarding the proper accounting of goods, impose a penalty, after giving an opportunity of being heard in the prescribed manner to the dealer or such person which shall be equal to three times the amount of tax calculated on the value of such goods and the goods shall be released as soon as the penalty is paid.

44(5)(e). In case the penalty imposed under Clause (b) is not paid or the goods remain unclaimed for a period of fifteen days from the date of seizure, the goods so seized shall be sold by auction in the prescribed manner and the sale proceed shall be appropriated towards the amount of penalty imposed under clause (b); the balance of the sale-proceeds if any, shall be deposited in the Government Treasury and shall be refunded to the lawful claimant in the prescribed manner.

3. It will be seen from reading of Section 44(1) that it takes us to Section 3(1) of the Act which is in the following terms:

"3. Tax Authority. - (1) For carrying out the purpose of this Act, the State Government may by notification appoint a person to be the Commissioner of Taxes, together with such other persons to assist him as it thinks fit and may specify the area or areas over which they shall exercise jurisdiction."

4. At this stage, we may notice Section 3(3) of the Act as well:

"3(3). Subject to such restrictions and conditions as may be prescribed, the Commissioner may, by order in writing, delegate any of his powers under this Act to any person appointed to assist him under Sub-section (1)."

5. Under the Act, Rules had been framed known as the Assam General Sales Tax Rules, 1993. Rules 7, 8 and 10 are in the following terms:

"7. Taxing Authorities. - There shall be following taxing authorities to assist the Commissioner:

- (i) Additional Commissioner of Taxes
- (ii) Joint Commissioner of Taxes
- (iii) Deputy Commissioner of Taxes
- (iv) Assistant Commissioner of Taxes
- (v) Senior Superintendent of Taxes
- (VI) Superintendent of Taxes
- (vii) Inspector of Taxes
- (viii) Any other persons appointed as such by the State Government."

"8. Subject to the provisions of the Act and the rules made thereunder, the Commissioner may, by notification in the Official gazette, delegate the powers to be exercised by above classes of officers and shall, by like notification, specify the area in which powers are to be exercised by each of the above classes of officers.

Provided that the Commissioner shall not delegate his powers under

Sub-section (1) of Section 36 to any officer below the rank of a Deputy Commissioner of Taxes."

" 10. The power to call for return, to make assessment to cancel or rectify them, to impose a penalty, to compound offences and to order maintenance of accounts shall not be delegated to any officers below the rank of a Superintendent."

6. It may be observed here that on 22.9.1998, Rule 10 of the Rules (supra) was amended by insertion of a proviso which reads as under:

"Provided that the power to impose penalty under clause (b) of Sub-section (5) of Section 44 and under Clause (c) of Sub-section (2) of Section 46 may be delegated to an Inspector also."

Before we advert to the argument of the learned counsel for the parties, it may be observed here that the State Government had issued a notification No. FTX-60/93/Pt./34 dated 3.9.1993 u/s 3(1) of the Act wherein apart from other officers one of the officers mentioned to assist the Commissioner was Inspector of Taxes, Mangaldoi Unit. This is at item-86 of the notification. Another notification No. CTS/3/92/15 dated 2.7.1993 was also issued u/s 3(3) of the Act whereby the powers of the Commissioner under sections 42, 43, 44, 46 and 47 were delegated on various officers which also included the Inspector of Taxes, Mangaldoi Unit, the same is mentioned at Item-40 of the notification. Purportedly exercising the power under the aforesaid two notifications, the Inspector of Taxes concerned, Mangaldoi had passed the impugned orders of penalty on 31.7.1997 and 10.2.1998 as observed above. The learned Single Judge before whom the imposition of penalty was challenged was of the view that since the amendment

to Rule 10 by insertion of proviso on 22.9.1998 had been brought on the statute book which was only clarificatory and explanatory in nature, the imposition of penalty by the Inspector of Taxes, Mangaldoi could not be challenged on the ground that it was without jurisdiction. In other words, it was held by the learned Single Judge that the said Inspector of Taxes had the requisite power u/s 44 of the Act read with Rule 8 of the Rules. The argument of the learned counsel for the writ petitioner, appellant herein, that the amendment to Rule 10 of the Rules could not be made applicable retrospectively was not accepted and negatived. The amendment was held to be explanatory or clarificatory.

7. We have heard learned counsel for the parties.

8. Penally u/s 44(5)(b) of the Act can be imposed by authority referred to in clause (a) of Sub-section (5) of Section 44. Sub-section 5(a) of Section 44 in turn refers to Sub-section (1) of Section 44 to Identify the authority who can impose penalty, etc. Sub-Section (1) of Section 44 starts with the words subject to such rules as may be made by the State Government under this Act, any authority, appointed under Sub-section (1) of Section 3 may either before or after assessment, etc. impose penalty. Section 44(1) of the Act takes us to Sub-section (1) of Section 3. Section 3(1) of the Act in turn provides that for carrying out the purpose of this Act, the State Government may by notification appoint a person to be the Commissioner of Taxes together with such other persons to assist him in a particular area or areas. No doubt Section 44(1) provides that any person so notified u/s 3(1) of the Act may impose penalty, etc. yet it starts with the words subject to such rules as may be made by the State Government in other words, the power u/s 44(1) is to be exercised by those persons who may be mentioned in the notification issued u/s 3(1) of the Act but out of such persons only those who are not debarred under the Rules, as Section 44(1) starts with the words "subject to rules". Rule 10 of the Rules (supra) prior to amendment specifically provided that the power to call for turn, to make assessment, to cancel or rectify or to impose penalty, etc. etc. shall not be delegated to any officer below the rank of a Superintendent. In other words, any person below the rank of a Superintendent has been debarred from doing anything mentioned in Rule 10 which includes imposition of penalty. Consequently notification dated 3.9.1993 issued u/s 3(1) of the Act cannot clothe any person below the rank of a Superintendent to do anything mentioned in Section 44(5)(b) of the Act read with Rule 10 of the Rules.

9. Now coming to the notification dated 2.7.1993 issued u/s 3(3) of the Act, to which reference has been made above, we are of the view that such a notification has again to be subject to such restrictions and conditions as may be prescribed as is clear from the reading of Section 3(3) (supra). The words subject to such restrictions and conditions as may be prescribed in Section 3(3) mean as prescribed by the Rules. Word "prescribed" has been defined u/s 2(27) of the Act to mean prescribed under the Rules. Any such notification must not be against any Rule made under the Act. Rule 10 specifically bars any delegation

below the rank of a Superintendent. Inspector of Taxes is below the rank of a Superintendent and, therefore, such delegation could not have been made to an Inspector under the notification issued u/s 3(3) of the Act. Consequently, the notifications dated 2.7.1993 issued u/s 3(3) of the Act so far as it delegated power to the Inspector of Taxes was ultra vires Rule 10 if the Rules prior to the amendment of Rule 10, i.e. prior to 22.9.1998. Consequently, any action u/s 44(5) (b) by an authority below the rank of a Superintendent prior to 22.9.1998 would be without jurisdiction and illegal.

10. We may deal with the argument of the learned counsel for the respondents, as was accepted by the learned Single Judge, regarding application of Rule 8. Reading of Rule 8 (already quoted above) goes to show that the same is again subject to the rules, meaning thereby that giving of power to the persons mentioned in Rule 7 would be subject to the rules and if there is any bar somewhere in the Rules that power cannot be given to a person who is barred. As observed above, Rule 10 specifically bars delegation or exercise of the power of imposition of penalty by an officer below the rank of a Superintendent. Rule 8 may come into play for delegating for the exercise of power by any person mentioned in Rule 7, including Inspector of Taxes, where there is no bar in the Act or the Rules for the Inspector to exercise that power. Rules 8 and 10 have to be read harmoniously.

11. So far as the question of amendment to Rule 10 by insertion of proviso on 22.9.1998 is concerned, to our mind it was to get over the problem like the one that had arisen in this case. However, the amendment of Rule 10 on 22.9.1998 by insertion of proviso enabling delegation of power u/s 44(5)(b) and Section 46(2)(c) of the Act to an Inspector of Taxes also would not validate the orders passed by an Inspector prior to amendment, i.e. 22.9.1998. The amendment is prospective in nature. It cannot clothe the Inspector with the powers u/s 44(5) (b) retrospectively. Any order passed by an Inspector of Taxes after 22.9.1998 may not be held to be without jurisdiction. We are not opining in this case as to whether there should be fresh notification to clothe an Inspector with the powers u/s 44(5)(b) after the amendment to Rule 10. To our mind the amendment is not clarificatory and explanatory in nature and cannot apply retrospectively to the imposition of penalty imposed by an Inspector of Taxes.

12. For the view we have taken, with respect to the learned Single Judge, we cannot agree with him. For the foregoing reasons, we allow this appeal, set aside the judgment of the learned Single Judge, allow the writ petition and quash the impugned orders dated 31.7.1997 and 10.2.1998 imposing penalty passed by the Inspector of Taxes, Mangaldoi.

13. It may be observed here that by an interim order of this court dated 9.6.2000 passed in the writ appeal, it was, inter alia, observed as under:

"Considering this as well as the fact that articles seized are perishable, it would be just and proper to release the seized properties in favour of the appellant on

his executing bank guarantee for Rs. 3,22,200."

We are told by the learned counsel for the appellant that the appellant did not furnish the bank guarantee. Linger the provisions of Section 44(5)(e), if the penalty amount is not paid it is to be realized from the seized articles. Since penalty has been quashed, the seized articles have to be released. In these circumstances, we hereby order that if the seized articles are still in possession of the Department, the same be returned to the appellant and if the articles had already put to auction then the auction money so realized be refunded to the appellant. Let these directions be carried out within 15 days of the receipt of a copy of this judgment from this court or a certified copy thereof from the appellant whichever is earlier.

14. As a matter of abundant caution we may observe that we are not expressing any view on the point regarding the tax assessment which the appellant may raise as and when assessment is initiated or made.