(2010) 04 BOM CK 0177

In the Bombay High Court

Case No : Writ Petition No. 5413 of 2008

Shree Venkateshwara Petro Chemicals Pvt. Ltd. and Another	APPELLANT
Vs	
The Assistant Commissioner of Sales Tax and Others	RESPONDENT

Date of Decision : 15-04-2010

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 147, 33, 33(2), 35, 35(I)
Bombay Sales Tax Rules, 1959 — Rule 22
Central Sales Tax (Bombay) Rules, 1957 — Rule 9A
Central Sales Tax Act, 1956 — Section 10, 3
Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 148

Citation : (2010) 3 BomCR 491 : (2010) 112 BOMLR 1644

Hon'ble Judges : V.C. Daga, J;K.K. Tated, J

Bench : Division Bench

Advocate : G.S. Jetly and P.S. Jetly, instructed by Ameet Gedam, for the Appellant; V.A. Sonpal, ''A'' Panel Counsel, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Tated, J.—Heard.

2. Perused the petition.

3. The Petitioners by this Writ Petition filed under Article 226 of the Constitution of India, are challenging two notices both dated 14.02.2008; one u/s 35 of the Bombay Sales Tax Act, 1959 and another under Rule 9A of the Central Sales Tax (Bombay) Rules, 1957 issued by the Assistant Commissioner of Sales Tax, Nashik for initiation of reassessment proceedings for the period from 01.04.1999 to 31.03.2000 on the following main grounds:

Reasons for reopening

(A) Concealment of the following sales for the period 1999-2000:

(a) Sale to M/s Venues Chem was for Rs. 54,72,946/whereas as per bank statement, the actual sale was for Rs. 1,18,00,000/.

(b) Sale to M/s Sainath Petro Pvt. Ltd. was for Rs. 1,83,52,863/whereas as per the bank statement, the actual sale was for Rs. 2,10,09,586/.

(c) Sale to M/s Siddhanath Ind. was for Rs. 54,93,575/whereas as per the bank statement, the actual sale was for Rs. 94,05,000/.

(B) Interstate movement: Vehicle numbers mentioned in the invoices for interstate movement were bogus.

(C) Following bogus C forms were filed by the Petitioners:

(a) M/s Laxmiputra Chemox Inds., Karnataka for Rs. 11,94,334/.

(b) M/s Gurudeo Chemox Inds., Karnataka for Rs. 11,07,474/.

(c) M/s Black Diamond Petrochemicals, Gujrat.

(d) M/s Abindo Paint Chem Inds., West Bengal for Rs. 54,09,369/.

(e) M/s Avon Petro Chemicals, Karnataka for Rs. 60,75,762/.

The factual background

4. The Petitioners in regular course of their business had purchased raw material for carrying out their manufacturing activities and availed Modvat credit on the same wherever applicable. They produced and sold final product on payment of excise duty. They filed quarterly sales invoices. The sales tax was paid wherever applicable.

5. As per the normal procedure, a dealer is required to file the returns as per provisions of the Rule 22 of the Bombay Sales Tax Rules, 1959 (in short ''Bombay Rules, 1959'') based on previous years liability. According to the Petitioners, during the assessment period i.e. between 01.04.1999 to 31.03.2000, the Petitioners were required to file annual returns. In the event tax liability exceeded Rs. 20,000/in a year, the Assessee was obliged to file monthly returns. Accordingly, the Petitioners had also filed the monthly returns under the Bombay Sales Tax Act, 1959 (in short ''BST Act, 1959''). It is the case of the Petitioners that during the period from 01.04.1999 to 31.03.2000 the Petitioners effected the sales in other states. They accepted and submitted C forms issued by their purchasers along with the returns. The assessments were finalized, completed and culminated in an assessment order. However, the Assistant Commissioner of Sales Tax issued the impugned notices to initiate the reassessment proceedings for the period 1999-2000. The Petitioners replied the said notices vide their reply dated 10.03.2008. They denied all allegations and called upon the Assistant Commissioner of Sales Tax to disclose reasons and documents in support of their impugned notices. It is the case of the Petitioners that inspite of the said request, the Department has failed to supply those documents to the Petitioners. Hence, this petition.

Submissions

6. Mr. Jetly, learned Counsel for the Petitioners raised the following contentions:

(a) That, the initiation of reassessment proceedings were barred by limitation;

(b) That, the burden lies on the Department to prove that C forms submitted by the Petitioners were bogus; and

(c) That, the Department failed to provide documentary proof though demanded by the Petitioners vide their letter dated 10.03.2008.

7. In support of the above submissions, Mr. Jetly submitted that the Petitioners did all transactions with their purchasers through the cheques and accepted all payments from their purchasers by cheques only. He further submitted that C forms submitted by the Petitioners with the Department were received by them from their purchasers. According to him, on making inquiry the Petitioners learnt that those purchasers were genuine. For that purpose the Petitioners filed the additional affidavit dated 22.03.2010. He further submitted that though the Petitioners called upon the Respondents by their letter dated 10.03.2008 for supplying the copies of letters sent by the Respondents to the various R.T.O. Offices, the Respondents failed to do so. He further submitted that in any case initiation of reassessment proceedings for the period 01.04.1999 to 31.03.2000 are barred by limitation.

8. The learned Counsel for the Petitioners further submitted that the Petitioners accepted the sale consideration by cheques alone from their various customers. All these facts could be seen from their bank statement. According to him, the burden is on the Respondents to prove that the C forms submitted by the Petitioners were bogus. The Respondents failed to produce any cogent evidence on record to show that C forms submitted by the Petitioners were bogus and that the vehicle numbers given in the sales invoices were also bogus. Therefore, it is not permissible in law to reopen the assessment for the assessment period 1999-2000, that too, just before the lapse of eight years.

9. Mr. Jetly, learned Counsel for the Petitioners submitted that it is well settled that expression ''reasons to believe'' contained in Section 35 of the BST Act, 1959 cannot be entirely subjective satisfaction of the officers concerned. There must be some material for formation of the belief. The Court can certainly examine whether there was any material at all in possession of the officers concerned and whether such material had any nexus with formation of the belief. Section 35 of the BST Act, 1959 has conferred the powers on the Commissioner to initiate the reassessment proceedings within eight years provided he has reason to believe that the dealer has concealed the sales or purchases or any other material particulars relating thereof or has knowingly furnished incorrect returns. The belief must be of officer who has been given the powers under the statute to initiate the reassessment proceedings. This power cannot be exercised mechanically merely because a direction has come from superior officer to

investigate about allegations against the dealer. In the present case, the authority has expressed the view that there was (1) concealment of sales, (2) inter State movement of goods and (3) bogus C forms, therefore, the reassessment proceedings were initiated. Mr. Jetly submitted that the opinion of authority was not according to law.

10. Mr. Jetly, learned Counsel for the Petitioners further submitted that the Petitioners have no control over the purchasers but they have relied upon the representations made by them. On the basis of the certificate produced, the Petitioners have satisfied themselves that the purchasers are registered dealers and the goods purchased are specified in their certificates. According to him, once the Petitioners are satisfied on two matters i.e. the representations made to them in the manner prescribed by the rules and the representations are recorded in declarations in Form C, the Petitioners are under no further obligation to see to the application of the goods for the purpose for which it was represented that the goods were intended to be used. If the purchasing dealer misapplies the goods, he incurs a penalty u/s 10 of the CST Act, 1956 and this penalty is incurred by the purchasing dealers and cannot be imposed on the Petitioners. Mr. Jetly further submitted that, the Petitioners were granted deduction/ concessional rate of tax in respect of inter State sales made by them because the goods were purchased for resale or for use as raw material in the manufacture of goods for sale and thus, intended use of the goods purchased was sought to be ensured by taking a declaration in the prescribed Form C from the purchasing dealer. However, if the declaration is found to be false or if the goods are utilized by the purchasing dealers for some other purpose contrary to the intention expressed by them in the declarations, the object and purpose of giving deduction/ concessional rate of tax may be defeated.

11. Mr. Jetly, learned Counsel for the Petitioners further submitted that the excise authority accepted the delivery challans of the Petitioners of the same vehicle numbers which were disputed by the Respondents. The Respondents are not concerned by which vehicles the goods were transported from one State to another but they are only concerned with C forms issued by the purchasers, therefore, the concerned officers misinterpreted the expression ''reasons to believe'' at the time of issuing the impugned notices dated 14.02.2008.

12. On the other hand, Mr. Sonpal, learned ''A'' Panel Counsel on behalf of the Respondent submitted that at the time of issuing the impugned notices dated 14.02.2008 the concerned authority verified all the facts and record of the case and on the basis of that, came to the conclusion that the Petitioners submitted the bogus C forms and there is no transaction of inter State sale. He submitted that during verification of the investigation report and the assessment record for the period 01.04.1999 to 31.03.2000, the officer observed that there was concealment in the turnover of sale and also some of the declarations in the Form C which were produced by the Petitioners during the course of the said assessment were not issued by the concerned States. Hence, the same seemed

bogus and there was reason to believe for issuing the notices for reassessment. According to Mr. Sonpal, the authority also observed that the vehicle numbers mentioned on the invoices, after crosschecking with the respective Regional Transport Offices, were found to be numbers of the scooters, motorcycles, open delivery van etc. and were not numbers of the tankers. The Petitioners are dealing with the business of petroleum product and hence, for transportation of this product, only closed tankers are required. It cannot be transported without closed tankers. But the vehicle numbers mentioned in the invoices are of the bikes, open body trucks etc.. For these facts it clearly seems that the Petitioners knowingly furnished incorrect returns that the goods were not dispatched out of Maharashtra State. Therefore, after scrutinizing all these facts, there is strong reason to believe that the reassessment is must.

13. Mr. Sonpal further submitted that at the time of original assessment, the books of accounts produced by the Petitioners were verified by the then Assessing Authority and he passed the appropriate order. When the documents submitted at the time of original assessment were cross verified it was then noticed that there were irregularities in those documents and therefore, the impugned notices in Form No. 28 of the BST Act, 1959 and in Form No. VIB of the Central Rules were issued which were legal and within jurisdiction and as per the provisions of law to give the Petitioners reasonable opportunity of being heard before passing an appropriate order u/s 35 of the BST Act, 1959 and under Rule 9A of the Central Sales Tax (Bombay) Rules, 1957.

Per contra

14. Mr. Sonpal, the learned ''A'' Panel Counsel appearing on behalf of the Respondents submitted that in view of the provisions of Section 35 of the BST Act, 1959, the proceedings for reassessment could be initiated even after five years but before expiry of eight years, if it is found that there was disclosure of incorrect facts or fraud is committed by the Assessee. He submitted that in the present case the Petitioners submitted bogus C forms showing interstate sales and also vehicle numbers given in Challans were in respect of scooters, dumpers/ tipper, Mahindra Utility, etc. which were incapable of transporting the goods alleged to have been sold by the Petitioners to the traders from other States. The undermentioned chart in first three columns gives the vehicle numbers shown in the invoices whereas last but one column showing class of vehicles found out from RTO record by the Respondent:

15. Mr. Sonpal based on the above chart and information gathered there from submitted that sufficient material was available on record to justify reopening of the completed assessment. He further submitted that in respect of C forms the Sales Tax Officer addressed letters to the concerned authorities in other States and enquired with them about genuineness of those documents. In reply thereto, the authorities from the other States informed that those C forms were never issued by their officers and in some cases the parties were not in existence whereas in some cases, their sales tax registrations were cancelled. The

following is the chart showing the fake C forms on which reliance is placed by Mr. Sonpal:

16. Mr. Sonpal, thus, submitted that the petition is liable to be dismissed being devoid of merits.

17. The Respondents filed the additional affidavit dated 18.03.2010 annexing the various letters received from the authorities of other States and the letters issued by the R.T.O. showing that C forms relied upon by the Petitioners are bogus and the vehicle numbers stated on invoices are in respect of scooters and bikes. On the basis of these documents, Mr. Sonpal submitted that it was necessary to carry out investigation in respect of the Petitioners'' assessment for the financial year from 01.04.1999 to 31.03.2000 and therefore, there is no substance in the present petition and the same is liable to be dismissed.

Rejoinder

18. The Petitioners have also filed the rejoinder dated 25.03.2010 annexing some of the documents of the private parties from whom they received C forms to show that those parties were genuine. Relying on those documents, Mr. Jetly submitted that for the purpose of reopening the assessment, the limitation was of five years, however, in the present case the notices were issued in the year 2008 and therefore, the same was highly belated.

19. Mr. Jetly, with respect to the details of the vehicles are concerned, submitted that some vehicle numbers were accepted by the Excise Department at the time of payment of excise duty and therefore, the Respondents could not reopen the same issue for reassessment. In support of his various submissions, he relied on the following judgments:

Consideration

20. Having heard the rival parties and after going through all these authorities and the additional affidavit filed by the Petitioners, it is not necessary to deal with each and every authority cited at the Bar since the legal position with respect to the law relating to reassessment is fairly settled and therefore, the case in hand is being decided on the peculiar facts of the case emerging from the record. The facts emerging from the record prima facie show that the vehicle numbers given by the Petitioners on their invoices mostly relates to the scooters and bikes. In the teeth of this clinching material relating to the vehicles, it is clear that it is not possible for anybody to transport the goods on the two wheeler bikes from one State to another. The impugned notices for reassessment for the period 01.04.1999 to 31.03.2000 are based on some material information gathered by the Department, which cannot be brushed aside. There appears to be some substance in the allegations made by the Department in the impugned notices and those allegations are required to be investigated. Even one potent ground supported by prima facie material is sufficient to conclude prima facie suppression of correct information or disclosure of wrong information by the

Assessee, assuming Assessee to be right with respect to the nature of C forms are concerned. Needless to mention that sufficiency of the material is not required to be looked into. Some strong prima facie material is sufficient to reopen assessment.

21. The Apex Court, in the matter of Income Tax Officer v. Mewalal Dwarka Prasad reported in 1989 (176) ITR 529 held that if the notice issued u/s 148 of the Income Tax Act is found to be good in respect of one item, it cannot be quashed under Article 226 of the Constitution of India on the ground that it may not be valid in respect of some other items. The said ratio holds good even in this case.

22. In the present case, the notice issued by the Assistant Commissioner of Sales Tax dated 14.02.2008 in respect of reassessment is combined notice which includes element of submitting false C forms, concealment of sale and providing bogus numbers of vehicles on Challans. The chart produced herein above in respect of vehicle numbers itself prima facie; shows that the goods were transported on scooters, bikes, small tempo etc. which is impossible considering the nature and quantity of goods and that they were required to be transported from one State to another. Therefore, the notice issued for reassessment cannot be said to be without any material. Sufficiency of the material cannot be gone into the writ jurisdiction of this Court. As such, impugned notices cannot be quashed and set aside.

23. So far as the contention raised by Mr. Jetly relating to the limitation u/s 35 of the BST Act, 1959 for reopening the assessment is concerned, it is necessary to turn to the said section:

35.Re-assessment of turnover escaping assessment under assessed, etc.-

(1) [if, after a dealer has been assessed u/s 33 or u/s 4 or u/s 41, for any year or part thereof, the Commissioner has reason to believe that any turnover of sales or turnover of purchases of any goods has in respect of that year or part thereof escaped assessment, or has been under-assessed or assessed at a lower rate, or that any deduction has been wrongly made or any draw-back, set-off or refund has been wrongly granted then the Commissioner may,-

[***]

(b) Where he has reason to believe that the dealer has concealed such sales or purchases or any material particulars relating thereto, or has knowingly furnished incorrect returns at any time within eight years, and

(c) in any case, at any time within five years, [of the end of the year, after giving the dealer a reasonable opportunity of being heard, may proceed to assess or re-assess, to the best of his judgment, the amount of tax due from such dealer :]

Provided that, the amount of tax shall be assessed at the rates at which it would have been assessed had there been no under assessment or escapement, but after making deductions (if any) permitted from time to time by or under this Act.:

Provided further that, where in respect of such turnover an order has already been passed in appeal or revision under this Act [***]. the Commissioner shall make a report to the appropriate appellate or revising authority under this Act, which shall thereupon after giving the dealer concerned a reasonable opportunity of being heard, pass such order as it deems fit.

["(IA) If, after assessment of a dealer is made u/s 33, except under Sub-section (2) thereof, in respect of any period, it is found that the total amount of tax paid with returns is less than eighty per cent of the tax so assessed and if the dealer has been assessed under Sub-section(2) of Section 33 in respect of any of the five periods immediately preceding the said period, then the Commissioner may at any time, within one year of the date of passing of the assessment order in which it has been found that the tax paid with returns is less than eighty per cent of the tax assessed, after giving the dealer a reasonable opportunity of being heard, proceed to assess or reassess, to the best of his judgement, the amount of tax due from such dealer, in respect of the period or periods, as the case may be, for which the dealer has been assessed under Sub-section (2) of Section 33."]

(2) Nothing in Sub-section [(I) or (IA)] shall apply to any proceeding (including any notice issued) u/s 57 or 62.

(3) Nothing in Section 57 or 62 shall affect a proceeding under this section.

24. Bare reading of Section 35(1)(b) of the BST Act, 1959 shows that the Authority can reopen the assessment within eight years if (1) concealment of sales or purchases (2) concealment of any material particulars relating thereto and (3) knowingly furnishing of incorrect returns by the Assessee. In the present case, it is the case of the Respondents that the Petitioner assessee had given wrong description of vehicles on their invoices as pointed out herein above and by those vehicles it is impossible to transport those goods from one place to another. Thus, u/s 35 of the BST Act, 1959 the Assessing Authority has power to reopen the assessment within eight years as has been prima facie rightly done in the present case. In the present case the notice issued by the Authority is dated 14.02.2008 for reassessment for the period from 01.04.1999 to 31.03.2000 and the same is within eight years as prescribed u/s 35 of the BST Act, 1959.

25. So far the submission made by Mr. Jetly that the Assessing Authority did not apply his mind independently is concerned, it appears that the vehicle numbers given by the Petitioners on invoices were reported to be in respect of scooters, bikes, open delivery van, etc.. If this be so, the petroleum product cannot be transported from one place to another in such types of vehicles. One of the necessary ingredient for interState sale as mentioned in Section 3(a) of the CST Act, 1956 is the movement of goods from one State to another. In other words, the movement should be direct result of terms of the contract between two parties having their place of business within the same State or in another State.

In the present case, if the material brought to the notice of the Assessing Authority is to be relied upon then it is rather not possible to move the goods from one State to another. On the basis of documents on record only the Assessing Authority could have had reason to believe that incorrect information was submitted with the return by the Petitioner Assessee. The Apex Court, in the matter of Income Tax Officer, Jodhpur v. Purushottam Das Bangur and Anr. reported in CDJ 1997 SC 1595 held that on the basis of information contained in the letter produced by the parties, the officer has reason to believe that the Assessee must have supplied incorrect information or produced incorrect documents. Paragraphs Nos. 10 and 11 of the said judgment read thus:

10. The High Court has proceeded on the basis that the said letter of Shri Bagai did not contain any information and that there was neither evidence of manipulation nor evidence or collusive transactions referred to in the letter and that no inquiries were made by the Income Tax Officer after the receipt of the letter so as to constitute information. We are unable to agree with the said view of the High Court. The contents of paragraph 2 of the letter of Shri Bagai refer to the statement containing financial information regarding Maharaja Shree Umaid Mills Ltd. which was annexed to the letter of Shri Bagai. The said statement contained information derived from the Bombay Stock Exchange Directory about the financial condition of Maharaja Shree Umaid Mills Ltd. during the period 1965-70 which indicated that during this period the Company has prospered and that the book value per equity share had risen from Rs. 318.55 for the year ending 31.12.1965 to Rs. 401 for the year ending 31.12.1970, the earning per share rose from Rs. 8.37 per share to Rs. 44 per share and that dividend percentage had also risen from 2% to 10% for the same period.

11. On the basis of the information contained in the letter of Shri Bagai and the documents annexed to it, the Income Tax Officer could have had REASON TO BELIEVE that the fair market value of the shares was far more than the sale price and the market quotations from Calcutta Stock Association shown by the assessee at the time of original assessment were manipulated once and as a result income chargeable to Tax had escaped assessment. It could not be said that the information that was contained in paragraph 2 of the later of Shri Bagai was not definite information and it could not be acted upon by the Income Tax Officer for taking action u/s 147(b) of the Act.

26. In view of the above facts and circumstances, we have no hesitation to accept the submissions made by Mr. Sonpal appearing on behalf of the Respondent/Revenue that the Respondent had reason to believe that the Petitioners knowingly furnished incorrect information to the authority for the assessment period 01.04.1999 to 31.03.2000.

27. So far as the contention raised by the Petitioners that the Respondent failed to produce the necessary documents as per letter dated 10.03.2008 is concerned, the same has become academic since all these material particulars are now made available to the Petitioners.

28. In the present case though the Petitioners produced on record some of the documents along with their affidavit dated 25.03.2010 showing that C forms issued by their purchasers are of the genuine parties, but failed to produce any document to show that by which vehicle the goods were transported from their factory because the chart given in the foregoing paragraph prima facie shows that the vehicle numbers mentioned on invoices were in respect of the two wheeler bikes.

29. For the reasons stated herein above, we do not find any substance in the present Writ Petition and the same is dismissed. Rule is discharged with no order as to costs.

