(2004) 02 GUJ CK 0041

In the Gujarat High Court

Case No : Special Civil Application No. 8054 of 2003

Siddhartha Fertichem Pvt. Ltd. APPELLANT

Vs

Assistant Commissioner RESPONDENT

Date of Decision : 12-02-2004

Acts Referred:
Central Sales Tax Act, 1956 — Section 9(2)
Constitution of India, 1950 — Article 226
Gujarat Sales Tax Act, 1969 — Section 27, 27(6), 30AA, 30AA(1), 30AA(2)

Citation : (2004) 137 STC 58

Hon'ble Judges : M.S. Shah, J;A.M. Kapadia, J

Bench : Division Bench

Advocate : Shamsuddin Shaikh, for the Appellant; Siraj Gori, AGP for Respondent Nos. 1-2, for the Respondent

Final Decision : Allowed

Judgement

M.S. Shah, J.—In this petition under Article 226 of the Constitution, the petitioner has challenged the order dated 15.2.2002 passed by the Assistant Sales Tax Commissioner, Circle 38, Gandhidham-Kutch purported to have been passed in exercise of the powers under Sections 67 and 30AA of the Gujarat Sales Tax Act, 1969 and Section 9(2) of the Central Sales Tax Act, 1956 and the order dated 7.1.2003 of the Gujarat Sales Tax Tribunal dismissing Revision Application Nos.78 and 79 of 2002 against the said order of the Assistant Commissioner. By the impugned orders, the petitioner''s registration as a dealer under the Sales Tax Acts has been cancelled.

2. The petitioner was granted registration under the Gujarat Sales Tax Act and the consequential registration under the Central Sales Tax Act vide registration certificate dated 21.7.1998. The certificate indicated the petitioner''s address at Gandhidham and also the address of the petitioner''s registered office at New Delhi. Thereafter, the Assistant Commissioner of Sales Tax issued notice dated 3.11.2001 calling upon the petitioner to show cause why the sales tax

registration certificate granted to the petitioner under the Gujarat Sales Tax Act and the Central Sales Tax Act should not be cancelled w.e.f..26.1.2001. It appears that the notice could not be served at Gandhidham because of the aftermath of the earthquake at Gandhidham-Kutch but the petitioner was served with the notice at its New Delhi address. However, the petitioner did not appear in response to the notice and the Assistant Commissioner of Sales Tax passed the impugned order dated 15.2.2002 cancelling the registration of the petitioner under the Gujarat Sales Tax Act and under the Central Sales Tax Act w.e.f. 26.1.2001.

3. The order was passed under Sections 67 and 30AA of the Gujarat Sales Tax Act and u/s 9(2) of the Central Sales Tax Act, 1956 mainly on the following grounds:-

(i) The petitioner had not given its correct address at the time of registration in July 1998. The petitioner had given the address of Shop No.D-72, Mohan Market. However, the said premises were not allotted or let out to the petitioner as there was no such shop bearing No.D-72 in the Mohan Market. Subsequently, the petitioner had changed its place of business to Bhavsar Bhavan, Opposite Old Court, Gandhidham in 1998. The said building had collapsed at the time of earthquake which took place on 26.1.2001 and thereafter the petitioner''s place of business could not be located.

(ii) A copy of the invoice dated 16.2.2001 was traced at the Check Post under which the petitioner had sold crude sulphur valued at Rs.50,757/- to M/s. Jyoti Enterprise of Ahmedpura and the petitioner had thus made an inter-State sale liable to 4% sales tax and the goods were transported by Kandla Cargo Carrier on 16.2.2001. However, the petitioner did not pay sales tax on the said transaction.

The Assistant Sales Tax Commissioner, therefore, held that the petitioner was using his registration number for making inter-State sales without having any place of business at the address given in the registration certificate. It, therefore, appeared that the petitioner was evading payment of sales tax and the registration certificate was being misused.

After the order was served on the petitioner, the petitioner filed one revision application under the Gujarat Sales Tax Act and another revision application under the Central Sales Tax Act for challenging the above order dated 15.2.2002. After hearing both the sides, the Tribunal rejected the revision applications by its judgment dated 7.1.2003. The petitioner has, therefore, challenged the aforesaid order dated 15.2.2002 of the Assistant Sales Tax Commissioner and also the judgment of the Tribunal dismissing the revision applications.

4. Mr Shamsuddin Shaikh, learned counsel for the petitioner has submitted that the impugned order dated 15.2.2002 was passed by the Assistant Sales Tax Commissioner without jurisdiction and without any authority of law and also beyond the period of limitation and, therefore, the order is null and void-ab-initio

and, therefore, the petitioner is entitled to invoke the jurisdiction of this Court under Article 226 of the Constitution notwithstanding the alternative remedy of making an application for reference to this Court u/s 69 of the Gujarat Sales Tax Act.

Mr Shaikh has filed written submissions urging as under:-

(i) The powers of revision u/s 67 can be invoked within three years from the date on which the order was passed. Since the order granting registration was passed on 21.7.1998, the revisional powers could not have been exercised on or after 21.7.2001. The preamble to the impugned order at Annexure "A" indicates that the Assistant Sales Tax Commissioner (Enforcement) had submitted a letter dated 25.7.2001 and the Officers of the Flying Squad, Ahmedabad had submitted a report dated 27.7.2001 and the Sales Tax Officer, Gandhidham had submitted report dated 7.8.2001 regarding the petitioner''s place of business at Gandhidham and the show cause notice was issued by the Assistant Sales Tax Commissioner on 3.11.2001. Therefore, the Assistant Sales Tax Commissioner had not called for the record relating to grant of registration certificate before 21.7.2001. It is, therefore, submitted that the impugned order was passed beyond the three year period of limitation prescribed by Section 67. Therefore, the order deserves to be quashed and set aside.

(ii) It is further submitted that the Assistant Sales Tax Commissioner has passed the impugned order for cancellation of registration certificate purporting to exercise powers u/s 30AA mainly on the ground that the petitioner had not supplied the correct address at the time of registration and that the petitioner changed the place of business without informing the department. It is submitted that, however, Section 30AA of the Gujarat Sales Tax Act does not empower the authority to cancel the certificate of registration on any such ground and that Section 30AA lays down three contingencies in which the power of cancellation can be invoked. It is submitted that the only penalty for not informing the authority about the change of address is prescribed by Section 45(7) which is payment of penalty of a sum upto Rs.2000/- and, therefore, the drastic action of cancellation of registration could not have been resorted to.

(iii) As regards the allegation of defrauding the revenue by selling the goods to M/s. Jyoti Enterprise, Ahmedpura on 16.2.2001, Mr Shaikh has stated that the tax was already paid for the said transaction on 19.2.2001 as evidenced by the challan at Annexure "F" and, therefore, there was no intention to defraud the revenue. It is submitted that in any view of the matter, the powers under sub-section (1) of Section 30AA can be invoked only when a registered dealer had issued an invoice without entering into transaction of sale or purchase but since the petitioner had transacted the inter-State sale of goods, the allegation is without any basis.

Similarly, it is submitted that the provisions of sub-section (2) and (2A) of Section 30AA were also not applicable in the facts of the present case. It is, therefore, submitted that the impugned order is passed without the authority of law conferred by Section 30AA and, therefore also, the order is illegal and without jurisdiction.

5. On the other hand, Mr Gori, learned AGP for the respondent-authorities raised a preliminary contention that the petition under Article 226 was not maintainable as the petitioner had an equally efficacious remedy of moving this very Court by filing an application for reference.

On merits, it is submitted that since the petitioner was not found to be having his office at the place given in the application for certificate of registration, the authority was justified in revising the order granting the certificate of registration u/s 67 of the Act because the three year period would run from the date when the authority comes to know about the mistake. Alternatively, it is submitted that the authorities were justified in invoking the powers u/s 30AA because the petitioner had defrauded the revenue by carrying on sale transactions without payment of sales tax thereon.

6. Having heard the learned counsel for the parties, we would first deal with the preliminary contention. It is true that ordinarily this Court is not to exercise its extraordinary discretionary jurisdiction under Article 226 of the Constitution when an equally efficacious alternative remedy is available. However, it is also equally well settled that the said rule is a rule of practice and the rule is to be invoked ordinarily but in cases where the order under challenge is on the face of it illegal or without jurisdiction, this Court would exercise its powers under Article 226 of the Constitution.

7. As will be indicated hereinafter, the impugned order dated 15.2.2002 passed by the Assistant Sales Tax Commissioner suffers from the bar of limitation in so far as the invocation of revisional powers u/s 67 of the Gujarat Sales Tax Act is concerned and the order also suffers from the vice of lack of authority under the provisions of Section 30AA.

Section 66 - Non appealable orders.

No appeal and no application for revision shall lie against, ...

67. Revision:

(1) Subject to the provisions of section 66 and to any rules which may be made in this behalf, -

(a) the Commissioner of his own motion within three years or an application made to him within one year from the date of any order passed by any officer appointed u/s 27 to assist him, may call for and examine the record of any such order and pass such order thereon as he thinks just and proper within twelve months from the date of service of notice for revision;

(b) ... .

Section 27(6) provides that the Commissioner may by general or special order delegate his powers to the Assistant Commissioners and Mr Gori states that such delegation orders are issued by the Commissioner. Accordingly, the Assistant Commissioner could call for the record of any order such as order granting certificate of registration within three years from the date of order passed by the Sales Tax Officer. Since the order granting registration was passed on 21.7.1998, the three year period would expire on 20.7.2001. The submission of the learned AGP that the three year period would run from the date on which any mistake is noticed cannot be accepted. The language of Section 67(1)(a) is very clear that the three year period has to be counted from the date of the order proposed to be revised. As per the date of the investigation reports and other letters referred to in the preamble to the impugned order, it appears that there is nothing to show that the Assistant Sales Tax Commissioner called for the record of the grant of certificate of registration before 21.7.2001. On the contrary, the investigation reports indicate that they were submitted after 21.7.2001. Hence the powers of revision u/s 67 could not have been invoked by the Assistant Commissioner after 21.7.2001.

8. It appears from the impugned order that what weighed with the revisional authority was the information that the petitioner had given incorrect address in his application for registration certificate and the subsequent change of address without informing the authorities.

We find considerable substance in the submission of Mr Shaikh for the petitioner that giving the incorrect address in the application for certificate of registration could have justified invocation of the revisional power but that was required to be done within the period of three years from the date of the order granting registration. It is true that the revisional order states that according to the department the petitioner had supplied nonexistent address and the authority has also invoked powers u/s 30AA. However, the provisions of Section 30AA provide for three contingencies which do not include any such ground for cancellation of registration. Of course, we cannot be oblivious of the fact that if the dealer has supplied such nonexistent address, the authorities would have the power of withdrawing the certificate but that can be withdrawn by revising the order u/s 67 for which the Legislature has already provided a period of as many as three years and, therefore, if the authorities chose not to make any investigation for such a long period of three years, it cannot be said that the Court is curtailing the powers of the authorities for taking action in such cases.

It is also necessary to bear in mind that it is the department''s case that after registration, the petitioner had changed its place of business to Bhavsar Bhawan in Gandhidham in 1998 itself, but the building collapsed during the earthquake on 26.1.2001. In the meantime, show cause notice for cancellation of registration was issued on 3.11.2001. It is but natural that the petitioner like any other party from outside the State would take some more time to go back to Gandhidham for restarting the business, as compared to the local residents who would have no other alternative but to take up reconstruction work at the earliest.

9. Failure to inform the authorities about the change of address would only justify invocation of the powers u/s 45(7) which reads as under:-

"45. Imposition of penalty in certain cases and bar to prosecution.

(1) to (6) ... ... (7) Whereever any person fails without sufficient cause to furnish any infirmation required by section 38, the Commissioner may, by an order in writing, impose upon the dealer by way of penalty a sum not exceeding two thousand rupees."

Section 38 reads as under:-

38. Information to be furnished regarding changes in business etc.

If any dealer liable to pay tax under this Act, -

(a) transfers his business, in whole or in part, by sale, lease, leave or licence, hire or in any other manner whatsoever, or otherwise disposes of his business or any part thereof, or effects or knows of any other change in the ownership of the business, or

(b) discontinues his business or, changes the place thereof or opens a new place of business, or

(c), (d) ... ...

Hence the authorities could not have passed any order cancelling certificate of registration on the ground of failure to furnish the change in address.

10. As far as invocation of the powers under of Section 30AA is concerned, subsection (1) thereof reads as under:-

30AA. Cancellation of certificate of registration in certain circumstances.

(1) Where a Registered dealer without entering into a transaction of sale issues to another Registered dealer a bill or cash memorandum with the intention to defraud the Government revenue or with the intention that the Government may be defrauded of its revenue, the Commissioner may, after making such inquiry as he thinks fit and giving a reasonable opportunity of being heard, cancel the certificate of registration of the Registered dealer issuing of accepting such bill or cash memorandum either prospectively or retrospectively from such date as the Commissioner may, having regard to the circumstances of the case, fix :

Provided that ... ...

The learned AGP submitted that the petitioner had defrauded the Government revenue or intended to defraud the Government of its revenue by carrying on transactions without carrying on business from the place which was indicated in the certificate of registration.

11. As far as the place of business and change of address issues are concerned, the same are already dealt with hereinabove, but it appears to us that the impugned order does not indicate as to how the provisions of sub-section (1) of Section 30AA could have been invoked in the facts of this case. Sub-section (1) is to be invoked where a Registered dealer without entering into a transaction of sale issues to another Registered dealer a bill or cash memorandum with the intention to defraud the Government revenue or with the intention that the Government may be defrauded of its revenue. Now, the Assistant Commissioner has referred to inter-State sale of goods by the petitioner on 16.2.2001. Since the authority itself admits that the petitioner entered into a transaction of sale, the provisions of sub-section (1) cannot be invoked. If there is failure to pay tax on any transaction of sale, the authorities may invoke such powers as are available to them under the other provisions of the Act but certainly the provisions of sub-section (1) of Section 30AA are not available to the authority where a Registered dealer has entered into any transaction of sale.

12. As far as the other provisions of Section 30AA are concerned, sub-section (2) thereof refers to failure of the registered dealer to furnish return or declaration for three or more consecutive periods. It appears that according to the authority, the petitioner had filed return but the dispute is raised about disclosure of a sale transaction in such return and, therefore, sub-section (2) also could not have been invoked on the basis of the facts mentioned in the impugned order.

Similarly, sub-section (2A) of Section 30AA refers to failure to pay tax as per declaration or return within the time prescribed for three or more consecutive periods; the impugned order does not indicate that the petitioner has not paid tax as per the returns for three or more consecutive periods.

13. In view of the above discussion, it appears to us that since the authority has not been able to justify its order under any of the provisions of Section 30AA, the impugned order is without any authority of law and deserves to be quashed and set aside.

14. We would, however, hasten to add that Section 30AA does not prescribe any period of limitation for invoking the powers thereunder, unlike Section 67 of the Act and, therefore, if the respondent-authorities have any material on the basis of which the powers of cancellation u/s 30AA may be invoked against the petitioner, this judgment shall not come in the way of the authorities exercising their legitimate powers u/s 30AA. We may, however, not be understood to have expressed any opinion either way whether or not invocation of the powers u/s 30AA would be justified against the petitioner because no material is brought to our notice from the impugned order which could justify invocation of the powers u/s 30AA.

15. Hence, subject to the aforesaid observations, this petition is allowed. The impugned order dated 15.2.2002 at Annexure "A" to the petition and the order dated 7.1.2003 of the Gujarat Sales Tax Tribunal in Revision Application Nos.78

and 79 of 2002 are quashed and set aside.

Rule is made absolute to the aforesaid extent with no order as to costs.