(2013) 09 GUJ CK 0057

In the Gujarat High Court

Case No : Tax Appeal Nos. 799, 804 and 805 of 2013

Sima Metal Syndicate APPELLANT

Vs

State of Gujarat RESPONDENT

Date of Decision : 26-09-2013

Acts Referred:

Citation : (2014) 70 VST 231

Hon'ble Judges : Sonia Gokani, J;Mukesh R. Shah, J

Bench : Division Bench

Judgement

Sonia Gokani, J.—Notice. At our instance, the formal service of notice is waived by Mr. Jaymin Gandhi, learned Assistant Government Pleader, on behalf of the respondent-State. At the threshold both the sides have been heard finally and with consent of the parties, the matter is being disposed of finally. This group of three appeals preferred by the appellant-assessee for the assessment years 2003-04, 2004-05 and 2005-06 u/s 78 of the Gujarat Value Added Tax Act, 2003 (hereinafter referred to as "the Act") since contains identical questions on facts and in law, they are being decided by way of this common order.

2. The appellant is the sole proprietary firm, engaged in the business of selling and reselling of all kinds of ferrous and non-ferrous metal scrap in and outside the State of Gujarat. It is also registered as a dealer under the Gujarat Sales Tax Act, 1969 and under the Central Sales Tax Act, 1956.

3.1 For the assessment years 2003-04 and 2004-05 under SARAL Assessment Yojana, the returns were filed by the appellant-assessee and the assessment orders were passed by the assessing officer respectively on January 09, 2006 and March 14, 2006.

3.2 On March 10, 2006, the Assistant Commissioner of income tax (1), Enforcement Division-2 visited the place of business and residence of the appellant-assessee, during which they verified all the books of accounts and relevant material and thereafter, the authority seized the purchase bills'' file, sale bills'' file and other relevant material. The visiting officer showed some bills, delivery challans and transport receipts, regarding sale outside State of Gujarat, which were not found in the books of accounts maintained by the appellant-assessee. Despite the resistance, the appellant-assessee was directed to make payment of tax, interest and penalty with regard to those transactions which, according to the authorities, were not forming part of the regular books of accounts. Such materials were impounded and a statement of the appellant-assessee was also recorded. The attachment order u/s 48A of the Act also came to be passed attaching the residential and office premises as well as stock of the appellant-assessee herein along with the books of accounts.

3.3 For reassessment qua the assessment years 2003-04 and 2004-05, notices were issued and regular assessment for the assessment year 2005-06 was carried out. On detailed bipartiate hearing, the version of the appellant-assessee was not accepted and for different assessment years, different tax demands were raised against the appellant-assessee, the total of which came to Rs. 51,21,818.

3.4 This was challenged before the first appellate authority, which was not at all satisfied with the explanation put forth by the appellant-assessee about spot difference found at that time. Inter-State sale transactions were also found missing in the books of accounts and, therefore, it was concluded that the appellant-assessee indulged in inter-State sales without recording such transaction in the books of accounts and in absence of any details, it extensively recorded the reasons by closely examining the evidence collected and emphasized that the sale transactions entered into by the appellant-assessee did not tally with the sales'' bills, delivery challans and lorry receipts, etc., collected by the Department. There was a huge difference in the stock found and that which was recorded less in the books of accounts. Thus, having found the modus operandi questionable, it was concluded that this design was to avoid tax and to defraud the Revenue. By giving detailed reasons, the first appellate authority confirmed the order of assessing officer rendered at the time of assessment. Therefore, the matter travelled to the Tribunal. The Tribunal accordingly confirmed the order of first appellate authority in respect of tax demands and held the interest as consequential, whereas imposition of penalty was set aside in absence of any parameters for levying such penalty vide its order dated April 24, 2013.

3.5 The appellant-assessee aggrieved by such concurrent findings of all the three revenue authorities approached this court by way of these appeals raising the following questions of law:

(i) Whether, on the facts and in the circumstances of the case, when the appellant had denied to having entered into the alleged transaction, the Tribunal was justified in holding that the burden to prove the existence of such transaction is not on the Department?

(ii) Whether, in the present facts and circumstances, the Tribunal was justified in confirming the addition to the turnover on the grounds of it being not recorded in books of accounts whilst deleting the penalty by granting the benefit of doubt about the transactions existence to the appellant?

3. We have heard extensively Ms. Gargie Vyas, learned advocate appearing on behalf of M/s. Wadia Ghandy & Co. for the appellant-assessee, who vehemently and tenaciously made her submissions. It is urged by her that the first appellate authority has acted contrary to law by adding 100 per cent to the turnover without any basis by applying the best judgment concept when there is nothing on record as to how much of turnover was suppressed. It was incumbent upon the Department to verify and crosscheck the transactions to prove that the inter-State sale transactions indeed had taken place. She further urged that the Tribunal erred on facts and in law while confirming such order of the first appellate authority and therefore, there is perversity in such order and, therefore, the court needs to interfere. She further urged that unless the authority is directed to bring such proof on the record, it would be open for the authority to add any amount to the total turnover without substantiating the same with legally admissible proof.

4.1 She, however, fairly stated that it is not in dispute that the best judgment is permissible under the law when the authority finds absence of record, which is otherwise required to be maintained by the appellant-assessee, however, it is urged that no case is made out by the Revenue for exercise of such powers.

4. Per contra, the learned Assistant Government Pleader Mr. Jaymin Gandhi has urged that it is a gross case where the appellant-assessee has deliberately chosen not to maintain the books of accounts in the manner he is required to do under the statute. Extensively the first appellate authority has recorded irregularities and illegalities concerning this issue. He, therefore, urged that in such a situation the law permits the revenue authorities to make the best judgment assessment and additions and accordingly, levy the tax demands as well as the interest. He further urged that the order of deletion of penalty by the Tribunal is also not justifiable in the wake of gross facts. He further urged that no question of law arises in this case.

5. On thus hearing both the sides and on careful examination of the materials on record, we see no reason to interfere in these tax appeals, which deserve dismissal in limine for the reasons to be recorded hereinafter:

6.1 At the outset, a well-known principle is required to be ingeminated that unless the question of law is raised in any tax appeal, the court is not to entertain such appeal. The High Court should not entertain such tax appeal even if the court from the very materials on record may come to a different conclusion, that by itself is no ground to interfere with the orders of the first appellate authority and the Tribunal, unless, of course, perversity in the findings writs large from the record.

6.2 It will not be out of place to make a mention at this juncture that all the three revenue authorities have concurrently held against the appellant-assessee and in favour of the Revenue. On the materials collected during the course of the visit of the business and residential premises of the appellant-assessee, these authorities were ad idem on the premise that the manner in which the books of accounts are maintained by the appellant-assessee and the modus operandi adopted by it, revealed breach of provisions of law necessitating employment of the best judgment provision. When all the authorities on facts have concurrently held against the appellant-assessee and in favour of the Revenue, unless the appellant-assessee points out any perversity going to the root of the matter, this court is not to disturb such concurrent findings.

6.3 At this juncture, section 35 of the Gujarat Value Added Tax Act, 2003 requires reproduction, which speaks of the situation where the turnover of the assessee has escaped the assessment. It would be profitable to reproduce the provisions of section 35 of the Act as under:

35. Turnover escaping assessment.--(1) Where after a dealer has been assessed u/s 32, 33 or 34 for any year or part thereof, the Commissioner has reason to believe that the whole or any part of the taxable turnover of the dealer in respect of any period has,--

(a) escaped assessment; or

(b) been under-assessed; or

(c) been assessed at a rate lower than the rate at which it is assessable; or

(d) wrongly been allowed any deduction therefrom; or

(e) Wrongly been allowed any tax credit therein,

the Commissioner may serve a notice on the dealer and after giving the dealer an opportunity of being heard and making such inquiry as he considers necessary, proceed to determine to the best of his judgment, the amount of tax due from the dealer in respect of such turnover which comes to his notice subsequently, and the provisions of this Act shall, so far as may be, apply accordingly.

(2) No order shall be made under sub-section (1) after the expiry of five years from the end of the year in respect of which or part of which the tax is assessable.

6.4 This provision can be exercised by the Commissioner if he has a reason to believe that the whole or any part of the turnover of a dealer has escaped the assessment or he has been under-assessed or such assessment was at a lower rate than prescribed under the law, even when the deductions or credit wrongly allowed, the Commissioner on offering an opportunity and after necessary inquiry can determine to the best of his judgment the amount of tax due from the dealer. Such a best judgment determined is permissible before the expiry of five years from the end of the year in respect of which or part of which the tax is assessable. Therefore, by all means, it is within the powers of the Commissioner to issue a notice to the appellant-assessee within a period of five years and on due inquiry and availing of requisite opportunity, he can determine the amount of tax due from such a dealer in respect of such turnover, which comes to his notice subsequently.

6.5 It is nobody''s case that the exercise of jurisdiction is fallacious nor is it the case of violation or breach of principles of natural justice. Principally the contention reiteratively raised by the learned counsel for the appellant-assessee is of addition of 100 per cent in respect of turnover which the Revenue believed to have escaped the assessment without providing basis for such inclusion.

6.6 We are of the opinion that though the outer cap is absent in the provision itself, so as to strike down the same on the ground of illegally made best judgment determination, the said contention of adding of 100 per cent of the total turnover has no merit at all and that again cannot give rise to any substantial question of law.

6.7 As could be noticed by the detailed reasonings given by the first appellate authority, it has recorded extensively that in absence of inter-State sale transaction in the books of accounts, no bills were found, no such transactions were found in the books of accounts and yet, they have been found to be carried out in fact. It also further appears that there was a remarkable difference in the stock actually found and the one recorded in the books of accounts. It was further noted that the sale transactions were not tallying with the lorry receipts, sales bills and delivery challans collected by the Department at the time of visit to the residential and business premises of the appellant-assessee, where the numbers were handwritten and were not printed serially. No satisfactory reasons and explanation had come forth when the inquiry was made and that eventually led the authority to conclude that with a view to avoid the payment of tax there was a suppression all around.

6.8 In such eventuality when the Commissioner had reason to believe that whole or any part of the taxable turnover of the dealer in respect of the period in question had escaped assessment or had been under-assessed, by exercise of powers given under the statute, he determined the amount of tax to the best of his judgment and added 100 per cent of such turnover, within a statutory period of five years as prescribed under the law and, therefore, we find neither any error on facts nor in law giving rise to any substantial question of law for us to indulge in any of these tax appeals.

6.9 Insofar as the decisions of the apex court relied upon by the learned counsel for the appellant (i) in the case of State of Kerala Vs. C. Velukutty, as well as (ii) in the case of Brij Bhushan Lal Parduman Kumar Vs. Commissioner of Income Tax , Haryana Himachal Pradesh and New Delhi III, are concerned, it transpires that both these decisions talk about best judgment assessment, respectively, under the Sales Tax Act and income tax Act. All along the emphasis made in these authorities is of making an honest and fair estimate of income and ensure not to assess capriciously. Such assessment is also expected to have reasonable nexus to material available and circumstances of the case. In the instant case, addition on best judgment assessment cannot be held capricious as it appears to be based on substantive material on record. There is bound to be some guess work and estimate in exercise of such powers, however, we are supported by the decision rendered by this court in the case of Sanjay Oilcake Industries Vs. Commissioner of Income Tax, holding that whether an estimate should be a particular sum or at a different sum cannot be an issue of law.

Resultantly, all the tax appeals fail for having failed to raise any substantial question of law and are, accordingly, dismissed. Notice is discharged in each appeal. There shall, however, be no order as to costs.