
(2010) 09 GAU CK 0091
In the Gauhati High Court
Case No : Writ Petition (C) No. 363 of 2009

Smt. Niharbala Paul and Another

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 29-09-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Tripura Value Added Tax Act, 2004 — Section 2(8), 24(3), 25(4), 75A

Citation : (2011) 38 VST 65

Hon'ble Judges : Iqbal Ahmed Ansari, J

Bench : Single Bench

Advocate : A.K. Bhowmik, S. Ghosh, S.R. Dey, S. Ray, R. Dutta, B. Bhattacharjee and M. Choudhury, for the Appellant; T.D. Mazumder, for the Respondent

Judgement

I.A. Ansari, J.—Whether a dealer, within the meaning of Section 2(8) of the Tripura Value Added Tax Act, 2004 (in short, "the TVAT Act, 2004"), can be made liable to pay penalty for evasion of tax if the dealer has, within the financial year, paid all taxable dues within due time, but has committed error, while submitting return with regard to the taxable liability and did not file, thereafter, revised return within the prescribed period and if so, when such a penalty can be imposed on the dealer?

2. I have heard Mr. A.K. Bhowmik, learned senior counsel for the Petitioners, and Mr. T.D. Mazumder, learned Counsel appearing on behalf of the Respondents.

3. The material facts, leading to this writ petition may, in a nutshell, be set out as under:

(i) The Petitioners, as wholesalers of milk powder, biscuits, potato chips, sauce and squash, purchase products aforementioned from outside the. State of Tripura and bring the said products with the help of permits issued by the Respondents under the provisions of the TVAT Act. Having noticed some anomalies, while

scrutinizing the return furnished by the Petitioners for the financial year 2008-09, the Petitioners, as dealer, were asked by Respondent No. 4 to appear before him with all books of account and to show cause, if any, as to why penal action, under the provisions of TVAT Act, shall not be taken against them.

(ii) Pursuant to the notice, so issued, the Petitioners' representative appeared before Respondent No. 4 and produced the books of account. The return, submitted by the dealer, reflected that the dealer had made total purchase, during the financial year 2008-09, amounting to a sum of Rs. 2,13,94,256, but as per office record, the total purchases made by the dealer, during the said financial year, was, as noticed by Respondent No. 4, a sum of Rs. 2,30,675. Thus, on noticing that the purchases, made by the dealer, as per the return filed, differed from the actual purchases made, to the extent of Rs. 16,40,419, an order was made, on June 5, 2009, by Respondent No. 4 stating to the effect, inter alia, that the dealer had failed to reconcile the difference between what had been found from the books of account and what had been reflected in the return filed by the dealer. In his order, dated June 5, 2009, Respondent No. 4 further noted that he is satisfied that the dealer had deliberately reflected less purchases and sales with the intention to evade payment of due tax and such incorrect entries, in the return, being with the intention to evade payment of tax, attracted the penal provisions embodied in Section 75A of the TVAT Act. Notices were accordingly issued to the Petitioners, as dealer, directing to show cause as to why the short purchase of Rs. 16,40,490, as reflected from the return, be not subjected to tax and the penalty, as permissible u/s 75A of TVAT Act, be not realized from the dealer.

(iii) Pursuant to the notice of demand aforementioned, a representative of the Petitioners appeared with the explanation that the reflection of less purchase, in the return, was due to a mistake, though the books of account had correctly reflected the purchases made and this proved that there was no intention to suppress the purchases made nor was there any intention to evade tax. Respondent No. 4, however, concluded that the explanation, offered by the Petitioners' representative, was not acceptable inasmuch as there might be a mistake in filing return by a dealer, but the dealer, in the present case, having not submitted revised return showing correct figures, shall be held to have attempted to evade payment of tax. Yet another reason, recorded, for holding the Petitioners, as dealer, responsible for imposition of penalty u/s 75A, was that if the dealer had recorded all purchases, in his return correctly, then, the figures, embodied in the books of accounts, should have been reflected in the return, but the return did not tally with the books of account in the sense that the return showed less taxable return of the dealer than what actually was taxable return as per the books of account. Respondent No. 4 held, therefore, that the dealer must be held to have committed evasion of tax and is accordingly liable for imposition of penalty u/s 75A. By his order, dated June 5, 2009, aforementioned, Respondent No. 4, holding the dealer guilty of committing offence of evasion of tax, punishable u/s 75A, imposed penalty at 5 per cent on the tax default, the

amount of penalty, so imposed, being Rs. 2,72,207.

(iv) Based on the order, dated June 5, 2009, aforementioned, a notice was issued, on June 6, 2009, by Respondent No. 4 demanding payment of Rs. 2,72,207 as penalty. An appeal against the imposition of penalty was preferred by the Petitioners as dealer. By order, dated November 5, 2009, passed in Appeal Case No. 174/CH-II/2009, Respondent No. 2 has dismissed the appeal. While dismissing the appeal, Respondent No. 2 observed, in the order, dated November 5, 2009, aforementioned, that the dealer had made, in the return, furnished for the year 2008-09, several incorrect entries as regard sales and purchases made inasmuch as the entries did not completely tally with the books of account produced and no revised return was submitted in this regard and, hence, the dealer had been correctly held to have evaded payment of tax and the order, dated June 5, 2009 imposing penalty on the dealer u/s 75A, did not warrant interference.

(v) Aggrieved by the penalty, so imposed, the Petitioner has, now, put to challenge the assessment order, dated June 5, 2009, aforementioned, the demand notice, dated June 6, 2009, and the Appellate order, dated November 5, 2009, by filing this writ petition under Article 226 of the Constitution of India. The case of the Petitioners, as finally emerges from the averments made in their affidavit-in-reply, at para 5, read as under:

That with reference to the statements made in paragraphs 6 of the counter-affidavit, I say that the mistake were committed in the returns and it was due to bona fide, that the Respondents by making false statements have tried to project baseless imputations against the Petitioners out of a simple mistake. I say that as a matter of fact there is no scope on the part of the Petitioners to either suppress the transactions or to evade any tax. I say that the Petitioners are wholesalers of items, namely, milk power, biscuits and potato chips, and all their purchases of the said products are made from outside the State and are brought through permits issued by the Respondents under the provisions of the TVAT Act. I say that all the goods are entered into stock registers and are sold to retailers maintaining accounts and such accounts are audited by Chartered Accountant. I say that as per books of accounts of the petitioner's total sale for the financial, year 2008-09 amounted to Rs. 2,49,95,789 out of which total sale for which four per cent VAT is charged amounts to Rs. 95,33,613 and total sale for which 12.5 per cent VAT is charged amounts to Rs. 1,72,62,176. I say that accordingly, the tax payable for the sale for which four per cent VAT is charged is Rs. 3,81,346 and that for which 12.5 per cent VAT is charged is Rs. 21,57,924 and as such the Petitioners were required to pay in total VAT amounting to Rs. 25,39,271 which was duly paid by 12 monthly challans during the financial year.

I annex hereto a sale statement of the Petitioners for the financial year 2008-09 as per books of accounts showing the sale for which four per cent tax is leviable and the sale for which 12.5 per cent tax is leviable and also showing the payments and the said statement is marked as annexure 6.

I deny that there was any concealment of any purchase or any turnover at any stage. I say that a mistake on the part of the employee, Shri Sajal Dey, who due to mental agony made wrong statements in the returns by confusing one category of sale for the other category. I say that such wrong entries in the return was not deliberate inasmuch as by doing so the Petitioners had no scope to gain any benefit because of the fact that the Petitioners had paid due tax payable by the Petitioners month to month on the basis of actual sale as recorded in the books of accounts. I say that the fact is that sale was duly recorded in the books of accounts, due tax was paid by the Petitioner against the monthly sale as per law and as such the Revenue did not lose anything or suffer anyway. I say that as a matter of fact the mistakes committed in the return did not affect the revenue in any way and as such there cannot be any intentional or deliberate suppression or concealment. I further say that the wrong entries in the returns either in respect of purchase or in respect of sale had no adverse effect so far as payment of due value added tax is concerned. I say that it is an admitted position that there were some mistakes in some returns but the accounts maintained by the Petitioners having been correctly maintained and due tax having been paid the State did not suffer in any way.

4. From a careful reading of the averments made in para 5 of the affidavit-in-reply by the present Petitioners, what, in brief, emerges to be the case of the Petitioners is that the Petitioners are wholesaler/dealer in milk powder, biscuits, etc., and the sales, which the Petitioners make within the State of Tripura, are of products, which are brought from outside the State. The Petitioners also contend that the products, which they sell within the State of Tripura and which had been sold during the financial year 2008-09, were all products brought from outside the State of Tripura on the strength of permits issued by the Respondents under the provisions of the TVAT Act. These assertions of the Petitioners are not in dispute. The Petitioners further claim that all the goods, which they have brought to the State of Tripura and sold within the State of Tripura, are entered in their stock register and also reflected in their books of account, the total sale, for the financial year 2008-09, being of Rs. 2,49,95,789 and out of this total sale of Rs. 2,49,95,789, four per cent VAT is chargeable on their transactions of sales, which amount to a sum of Rs. 95,36,613 and 12.5 per cent VAT is chargeable on transaction of sales, amount to a sum of Rs. 1,72,62,176 and that the tax payable, on the sales, at four per cent VAT, is Rs. 3,81,346 and the tax payable, on the sales, at 12.5 per cent VAT, is Rs. 21,57,924 and, thus, the Petitioners were required to pay, in all, tax amounting to Rs. 25,39,271, which had been duly paid by 12 monthly challans during the said financial year. The fact that the total VAT amounting to Rs. 25,39,271 had been paid by 12 monthly challans, during the financial year 2008-09, is also not in dispute.

5. In the backdrop of the above case, which the Petitioners have set up, it is extremely important to note that on a pointed query made by this Court, it could not be disputed, on behalf of the Respondents, that the books of account clearly and correctly reflected the sales and purchases made by the dealer. There is also

no mistake in the books of account as far as the taxable liability of the dealer is concerned inasmuch as all the goods, which are exigible to VAT at four per cent, have been correctly reflected at the said rate in the books of account and, similarly, those transactions, which are taxable at 12.5 per cent, have also been correctly reflected in the books of account.

6. Notwithstanding the correctly recorded entries in the books of account, the dealer has, however, while filing the return, during the months of May, 2008, August, 2008 and March, 2009, shown taxable liability at four per cent in respect of goods, which were, otherwise, liable to be taxed at 12.5 per cent. At the time of hearing before the assessing authority, it was, admittedly, pointed out, on behalf of the dealer, that there were some incorrect entries in the return filed by the dealer inasmuch as some of the goods, which were taxable at 12.5 per cent VAT, were shown to be taxable at four per cent. Notwithstanding such mistakes, what is, however, of paramount importance to note is that the tax was nevertheless paid on those items at 12.5 per cent.

7. Thus, there was no loss of revenue suffered by the State. Neither the assessment order nor the Appellate order indicates that there was loss of revenue suffered by the State. In fact, the assessment order as well as the Appellate order do not show that any of the transactions of sales had been concealed, while maintaining the books of account or while paying the tax. The mistake, if any, was in the entries recorded in the return filed.

8. What has been pointed out by the Respondents, while imposing the penalty, is that the revised return was not filed correcting the mistake, if any, in the return, which the dealer had earlier filed. If a dealer fails to file a revised return within the prescribed period as mentioned by Sub-section (3) of Section 24 of the TVAT Act, he has the liability to pay penalty as laid down in Section 25(4)(c) of the TVAT Act provided that the failure to file the revised return within the prescribed period is without any sufficient cause.

9. In the case at hand, there was, admittedly, no notice issued to the dealer to show cause as to why penalty, as provided in Section 25(4)(c), be not imposed for failure to furnish the revised return within the period as prescribed by Sub-section (3) of Section 24. Without serving any such notice on the Petitioners as dealer and without giving the Petitioners, as dealer, any opportunity to show cause as to whether there was or there was not any "sufficient cause" in their failure to furnish revised return within the prescribed period, no imposition of penalty, for failure to file revised return, was possible u/s 25(4)(c).

10. As far as Section 75A is concerned, this Section reads as under:

75A. Notwithstanding anything contained elsewhere in the Act, if the Commissioner, in course of any proceeding under this Act is satisfied that any dealer has evaded in any way the liability to pay tax, he may direct that such dealer shall pay by way of penalty in addition to the tax payable by him, a sum not exceeding one and half times of that amount but which shall not be less than

ten per cent of that amount:

Provided that no order under this Section shall be made unless the dealer has been heard or has been given a reasonable opportunity of being heard.

11. From a careful reading of Section 75A , it becomes clear that penalty may be imposed, in addition to the tax payable by a dealer, if the Commissioner is satisfied that any dealer has evaded, in any way, the liability to pay tax. Thus, mere failure to pay tax cannot be penalised u/s 75A. Besides the failure to pay tax as may be payable by a dealer, there must also be materials to show that such failure was deliberate or there must be some such material on record, which can give rise to a reasonable inference that the dealer has deliberately not paid or has evaded payment of taxable liability.

12. Penalty can be imposed only on evasion of tax. Mere failure to give correct return cannot, in the absence of any other material, be treated to be an act of evasion of tax. Penalty cannot be, ordinarily, imposed unless the dealer is shown to have deliberately or with guilty mind made entries in his books of account and/or made incorrect entries in the return. When penalty is imposable on failure to perform a statutory obligation, the question as to whether penalty shall be imposed or not has to be determined by taking into account all relevant factors.

13. In the present case, when the admitted position is that the books of account were correctly maintained and all the tax, payable by dealer, in the present case, had been paid by the dealer, the mere fact that there were incorrect entries in the return filed by the dealer and that the revised return had not been filed within the prescribed period, no inference could have been drawn, in the complete absence of any other material, that the dealer had evaded taxable liability, particularly, when tax, which fell due, was paid by 12 monthly returns. Mere failure to submit correct return or correct revised return, within the prescribed period, cannot be equated with evasion of tax attracting penal provisions of Section 75A, especially, when the dealer had, admittedly, paid his taxable liability within the due period and the State had not suffered any loss of Revenue.

14. Because of what have been discussed and pointed out above, this Court is of the considered view that the imposition of penalty, in the present case, suffers from complete non-application of mind. The tax imposed and the demand made are ex facie illegal and cannot be sustained.

15. In the result, and for the reasons discussed above, this writ petition succeeds. The impugned order of assessment, dated June 5, 2009, the impugned demand notice, dated June 6, 2009, and the Appellate order, dated November 5, 2009, are hereby set aside and quashed.