(2007) 02 AHC CK 0167

In the Allahabad High Court

The Commissioner, Trade Tax — APPELLANT

Vs

S/s Vikram Tewari — RESPONDENT

Date of Decision : 22-02-2007

Acts Referred:

Citation : (2007) 02 AHC CK 0167

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Rajes Kumar, J.—Present revision u/s 11 of U.P. Trade Tax Act (hereinafter referred to as "Act") is directed against the order of Tribunal dated 16.05.2005 relating to the assessment year 2002-03.

2. Brief facts of the case are that the opposite party is the owner of vehice No. HR-38-G/8444. Opposite party obtained transit pass No. 1001 from the Kotwan check post on 23.08.2002 in respect of the goods loaded in the truck for the transportation of the goods from Delhi to Kolkata. On 25.08.2002 the aforesaid vehicle was checked by Trade fax Officer, Mobile Squad at Kanpur while it was entering inside the Transport Nagar. It appears that in the statement, driver stated that the goods had to be delivered at the godown of Fazal Mahmood situated at Transport Nagar, Kanpur. On the inspection of the cabin of the driver, one lorry challan and 13 loose parchas were found, which related to the 140 pcs. goods loaded in the vehicle, which reveals that the goods were to be delivered at Kanpur. On the basis of the statement of the driver and lorry challan and 13 loose parchas, show cause notice was issued u/s 28-A of the Act on the ground that the goods were being imported on the garb of transit pass while it were to be delivered at Kanpur. In reply to the show cause notice, it was stated that the goods were loaded at Delhi and meant for Kolkata. Trade Tux Officer, Mobil Squad, however, seized the goods on 03.09.2002 and on the value of Rs. 13,49,564/- demanded the security at Rs. 5,39,826/-, being 40% of the value of the goods. Matter went to the Tribunal Tribunal vide order dated 06 11 2002

allowed the appeal in part and directed for the release of the goods on the deposit of the amount of tax and further directed to allow the vehicle to go outside the State of U.P.

3. Against the order of the Tribunal, Commissioner of Trade Tax filed Trade Tax Revision No. 798 of 2002 before this Court. This Court vide order dated 28.01.2005 passed the interim order directing the opposite party to furnish the security of the balance amount in the form of other than cash or bank guarantee in addition to the security demanded by the Tribunal and also directed to comply with the direction given by the Tribunal in its order dated 12.11.2002. It appears that on furnishing of Security, goods have been released on 23.04.2004 and the said transit pass was surrendered at Naubatpur check post on 17.05.2004. It appears that before release of the goods, penalty proceedings u/s 15-A(1)(o) of the Act was initiated and vide order dated 28.01.2003 a sum of Rs. 5,39,826/- was levied towards penalty.

4. Penalty was levied mainly on the ground that on the inspection of the vehicle on 25,08.2002 one lorry challan and 13 loose parchas were found from the cabin of the driver, which reveals that the goods had to be delivered at Kanpur. The statement of the driver also establishes that the goods had to be delivered at Kanpur. On enquiry, Delhi party and the consignee of Kolkata were found forged and non-existence. On the earlier occasion also, it was found that the good against the transit pass was unloaded at Kanpur and after unloading, different goods were tried to be transported; in some of the goods Chotu Tiwari, Kanpur was found written. On the basis of the above material it has been held that the goods were imported inside the State of U.P. for the delivery of the goods at Kanpur on the garb of the transit pass.

5. Being aggrieved by the penalty order, opposite party filed appeal befor he Joint Commissioner (Appeals), which has been dismissed vide order dated 14.07.2003. Against the order of the Joint Commissioner (Appeals), opposite party filed second appeal before the Tribunal. It appears that by the time appeal came up for hearing before the Tribunal, goods have been released on 23.04.2004 on furnishing of security and the transit pass was surrendered at the Naubatpur check post on 17.05.2004. Therefore, opposite party contended before the Tribunal that the goods in respect of which transit pass was issued at the entry check post had gone outside the State of U.P. and have not been sold inside the State of U.P. Therefore, the provisions of Section 28-A of the Act was not applicable and the penalty u/s 15-A(1)(o) of the Act could not be sustainable. Tribunal accepted the plea of the opposite party and quashed the penalty u/s 15-A(1)(o) of the Act. Tribunal held that the goods in respect of which transit pass was issued had gone outside the State of U.P. and the transit pass had been surrendered at the exit check post. Therefore, penalty u/s 15-A(1)(o) of the Act was not justified.

6. Heard learned Counsel for the parties.

7. Learned Standing Counsel submitted that the validity of the penalty u/s I5-A(1)(o) of the Act has to be judged on the basis of the facts existed at the time of seizure of the goods and not on the basis of the subsequent events. He submitted that the seizure was made on the ground that the goods loaded in the vehicle were intended for import inside the State of U.P. and for the delivery of the goods at Kanpur, which was established by the statement of the driver and transport voucher and parchas found from the cabin of the truck. He submitted that the opposite party intended to import the goods inside the State of U.P. and to sell the goods at Kanpur on the garb of the transit pass and when he was caught at Kanpur he had no option except to take away the goods outside the State of U.P. and to surrender the transit pass at the exit check post. He submitted that if the goods would not have been checked at Kanpur, same would have been delivered and sold at Kanpur and, thereafter, either opposite party would have manipulated the endorsement of the transit pass or would have run away. Thus, Tribunal has erred in deleting the penalty.

8. Learned Counsel for the opposite party submitted that the goods were not found unloaded or in the process of unloading at Kanpur. He submitted that the Trade Tax Officer, Mobile Squad checked the vehicle along with the goods while the goods were in transit from Delhi to Kolkata. He submitted that there may be so many reasons for going to Transport Nagar in transit but by this fact it can not be inferred that the goods would not be transported to Kolkata and would be sold at Kanpur He submitted that the surrender of transit pass at the exit check post was only possible alter the verification of the goods and in case of nonsurrender of the transit pass, opposite party would be liable for the assessment as well as penalty but before the such situation arose, goods were illegally detained and seized. He submitted that the inference that the goods were to be delivered at Kanpur is based on presumption and such presumption can not be drawn unless the time for surrendering the transit pass expires. He submitted that in the present case, the time for surrendering the transit pass was upto 28.08.2002 and the opposite party was denied the opportunity to surrender the said transit pass at the exit check post by 28.08.2002. He submitted that it was open to the transporter or the driver of the vehicle to deal with the goods in any manner in respect of which transit pass was obtained before the expiry of the period specified in the transit pass for surrender and it was not open to the check post officer to detain the vehicle and goods during the said period. He submitted that since the transit pass had been surrendered at the exit check post the question of raising any presumption of it being sold inside the State of U.P. did not arise.

9. Having heard learned Counsel for the parties, I have perused the order of the Tribunal and the authorities below.

10. Section 28-A of the Act is a machinery section introduced to check the evasion of the tax as incidental power to levy the tax. Section 28-B of the Act came up for consideration before the Apex Court in the case of Sodhi Transport Company and Anr., etc. v. State of U.P. and Anr., etc. reported in 1986 UPTC 721

Apex Court held that Section 28-B of the Act is a machinery section and not a charging section. It is introduced to check the evasion of tax as incidental power to levy the lax II raises presumption of sale of goods inside the Slate of U.P in case transit pass is not surrendered. Apex court further held that the presumption is rebuttable and can be rebutted by adducing the evidences. This Court in the case of Madhya Bharat Transport Carrier, Gwalior v. Commissioner of Trade Tax reported in 2003 UPTC 1218 Commissioner of Trade Tax, U.P., Lucknow v. S/s Sagir Khan and Zahir Khan, Rampur reported in 2005 NTN 28 129 Murliwala Agrotech Limited v. Commissioner of Trade Tax, U.P., Lucknow reported in 2005 NTN 28 198 held that for the purpose of Section 28-B of the Act, the genuineness of the consignor and consignee are wholly irrelevant. It has held that u/s 28-B of the Act the liability to obtain the transit pass and to surrender is on the owner of the vehicle or the vehicle incharge and in case of non-surrender of transit pass, the owner of the vehicle or vehicle incharge are liable to tax and penalty. Merely because the driver chooses a different route than the normal route for the transportation of the goods, adverse inference can not be drawn

11. In the present case on the basis of the statement of the driver, one lorry challan and 13 loose parchas relating to 140 pcs of goods, inference could be drawn that the goods were likely to be delivered at Kanpur. It may be presumed that the driver had intent to deliver the goods at Kanpur and had imported the goods from Delhi on the garb of transit pass but once transit pass is issued and the period of surrender is not expired and the goods is not found delivered or disposed of finally either by way of sale or otherwise, no action can be taken merely on the presumption. In the present case vehicle was checked at Kanpur when it was loaded with the goods and the goods were not found unloaded or delivered to any party. The period for the surrender of the transit pass was not expired, therefore, inference that the goods would be delivered at Kanpur was mere presumption, which stood rebutted by surrendering the said transit pass at the exit check post relating to the same goods on 17.05.2004 in regard to which there is no factual dispute. Thus, on the background of the aforesaid facts and law the order of the Tribunal deleting the penalty u/s 15-A(1)(o) of the Act can not be said to be erroneous.

12. However, before parting with the case, let us consider a situation that if the driver had obtained transit pass at the entry check post in respect of the goods loaded in the vehicle having an intention to deliver/sell the goods inside the State of U.P. on the garb of the transit pass, he can adopt such situation at the risk of the levy of tax and penalty in case of non-surrender of the transit pass. No owner of the vehicle or transporter can afford to invite the liability of tax and the penalty which is quite substantial by selling the goods inside the State of U.P. and non-surrendering the transit pass at the exit check post. The driver of the transport company can only adopt such a situation when he has hope to get the such transit pass endorsed at the exit check post by collusion/manipulation in the absence of goods. Thus, need is to tighten the departmental machinery at the level of the check post to avoid the collusion/manipulation at the check post. It

came to the notice of the court in some of the cases where penalty u/s 15-A(1)(o) of the Act has been levied and the tax has been assessed on the ground that the transit pass/Form-34 have been got passed by collusion and manipulation with the check post officers and staff and despite the enquiry being ordered, no serious action has been taken. If the officer sitting at the top would not be able to take proper step to check the manipulation and in case of detection of such manipulation, serious action would not be taken the process of evasion would continue and for that the departmental officers are only be held responsible and none-else

13. For the reasons slated above, revision fails and is accordingly.

