(2014) 10 GUJ CK 0048

In the Gujarat High Court

Case No : Special Civil Application Nos. 3541 to 3546 and 4264 and 4265 of 2014

Vishnubhai A. Patel APPELLANT

Vs

State of Gujarat and Others RESPONDENT

Date of Decision : 13-10-2014

Acts Referred:
Gujarat Sales Tax Act, 1969 — Section 21, 9(2)
Gujarat Value Added Tax Act, 2003 — Section 100, 100(2)(b), 16, 21, 23

Citation : (2015) 77 VST 515

Hon'ble Judges : V.M. Pancholi, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Tushar P. Hemani and Vaibhavi K. Parikh, Advocates for the Appellant; Jaimin Gandhi, Additional Government Pleader, Advocates for the Respondent

Judgement

Akil Abdul Hamid Kureshi, J.—These petitions arise out of common background. They have been heard together and would be disposed of by this common judgment. We may notice facts as emerging in Special Civil Application No. 3542 of 2014. The petitioner is a proprietary concern engaged in trading in different commodities such as, cumin seeds, oil seeds and pulses. For such purpose, the petitioner was granted registration on November 13, 1995 under the Gujarat Sales Tax Act, 1969 (hereinafter to be referred to as "the GST Act") as well as under the Central Sales Tax Act (hereinafter to be referred to as "the CST Act"). On the premise that the petitioner was involved in dubious sale transactions, the Deputy Sales Tax Commissioner, Mehsana issued a show-cause notice on March 31, 2012 calling upon the petitioner to show cause why in exercise of powers under section 75 read with section 100 of the Gujarat Value Added Tax Act, 2003 (hereinafter to be referred to as "the VAT Act") the registration be not cancelled ab initio. In such show-cause notice, it was alleged, inter alia, that during the inquiry at the business premises of the petitioner on January 6, 2011, several doubtful transactions by the petitioner were noticed. Certain documents were seized. From the documents, it was revealed that the petitioner had made purchases and sales with M/s. Parth Trading Company and M/s. Hari Traders both of Mehsana District. Bulk of the petitioner''s trading for the year 2007-08 of oil seeds was with these two traders. M/s. Parth Trading Company had manipulated its accounts and evaded sales tax liability. Similar circuitous transactions were also carried out by M/s. Hari Traders. The registration of M/s. Vishal Traders was cancelled ab initio and therefore, the tax credit for the purchases made from M/s. Vishal Traders would be liable to be disallowed. It was further alleged that the petitioner had been involved with the traders engaged in false billing and had thus, wrongly availed the tax credit. It was alleged that the petitioner had availed of input tax credit without payment of matching taxes and thereby caused loss to the Government revenue. It was on this basis that the Deputy Commissioner desired to cancel the registration of the petitioner from the very inception.

2. The petitioner replied to the show-cause notice under a communication dated April 17, 2012 and primarily took-up the stand that the petitioner has not committed any wrong. All the transactions entered into by the petitioner were genuine. The petitioner urged that, if M/s. Parth Trading Corporation has, for some reason, not paid taxes to the Government, the petitioner cannot be made liable for the same Inter alia on such grounds the petitioner opposed the show-cause notice.

3. Unconvinced by the petitioner''s, reply; the Deputy Commissioner passed his order in original on May 18, 2012 and, once again, quoting sections 75 and 100 of the VAT Act, ordered to cancel the registration of the petitioner ab initio. He relied on section 9(2) of the GST Act to likewise cancel the petitioner''s registration from the inception granted under the CST Act. In such order, he noted that the registration of M/s. Vishal Traders has been cancelled ab initio. On all purchases made from M/s. Vishal Traders therefore, tax credit would be liable to be disallowed. On the purchases made by the petitioner from said M/s. Vishal Traders, the seller, has not deposited, the tax with the Government. The petitioner had relied on an affidavit by the proprietor of M/s. Hari Traders. However, the authority noticed that for the sales made by M/s. Hari Traders to the petitioner during the year 2007-08 to 2010-11 proper weighing was not done. There was no evidence of receipt of the goods purchased. Thus, there was no evidence of actual physical movement of the goods. He was, therefore, of the opinion that such transactions were only on paper for which, bills were created.

4. The petitioner, thereupon, approached the Gujarat Value Added Tax Tribunal ("the Tribunal", for short) challenging the order dated May 18, 2012 passed by the Deputy Commissioner. The Tribunal, by the impugned judgment dated December 11, 2013, upheld the order of the Deputy Commissioner of cancellation of registration. However, the effect of such cancellation was given from the year 2006 presumably from the date of implementation of the VAT Act. Before the Tribunal, the petitioner had raised many contentions. One of them was that the Deputy Commissioner had no power under section 75 read with

section 100 under the VAT Act to take the registration under revision. The Tribunal came to the conclusion that the Deputy Commissioner had power under section 27(5) of the VAT Act to cancel such a registration and that mere mentioning of a wrong statutory provision would not vitiate the order. The petitioner''s several contentions with respect to the breach of natural justice were also turned down. It is this order of the Tribunal which the petitioner has challenged in this petition. With minor differences, facts in all petitions are similar.

5. The learned counsel Mr. Hemani for the petitioners raised the following contentions :

"(i) The Deputy Commissioner had no power to revise the order granting registration in exercise of power under section 75 read with section 100 of the VAT Act.

(ii) In any case, section 75 provided for a limitation beyond which no order could be revised. In the present case, initially registration was granted on November 13, 1995. The limitation of not passing any order of revision after 5 years therefore, was breached. He further submitted that even if the limitations were to be reckoned from the date the VAT Act came into force from the year 2006, then also the order of the Deputy Commissioner under purported exercise of powers under section 75 read with section 100 of the VAT Act was well beyond the period of limitation prescribed.

(iii) Counsel further submitted that the registration was granted to the petitioner under the GST Act. Such registration could not have been cancelled in exercise of any power under the VAT Act and particularly, under section 75 thereof. In this respect, the counsel would draw our attention to section 100 of the VAT Act providing for repeal and savings.

(iv) Counsel further submitted that the order passed by the Deputy Commissioner clearly referred to section 75 read with section 100 of the VAT Act. Such order could not have been saved with reference to section 27(5) of the Act as was done by the Tribunal.

(v) It was next contended that the petitioner had not indulged in any bogus billing activity. Merely because the registration of M/s. Vishal Traders was cancelled would not by itself mean that the petitioner''s transactions with such trader were bogus. If the trader has availed of tax credit erroneously, the same can be denied. However, cancellation of registration of a trader has far reaching consequences and can be resorted, to only in extreme situation envisaged under the statutory provisions.

(vi) It was contended that the order passed by the Deputy Commissioner suffered from gross violation of principle of natural justice. Without disclosing any material adverse to the petitioner the same was relied upon to come to a finding of fact that the petitioner was engaged in bogus billing transactions."

6. On the other hand, learned counsel Mr. Jajmin Gandhi for the Department

opposed the petitions contending that:

"(i) The Deputy Commissioner had ample powers, under section 27(5) of the VAT Act to cancel any registration for the illegal acts and omissions by a trader.

(ii) Mere wrong reference to section 75 read with, section 100 would not vitiate the order. If the power can be traced to correct statutory provisions, mere wrong reference to a section would not be fatal to the action itself.

(iii) The Deputy Commissioner had passed the order cancelling the registration after coming to conclusion that the petitioner had engaged in bogus billing activities. Such findings were Confirmed by the Tribunal and would not be open to re-appreciation in exercise of writ Jurisdiction by this court.

(iv) In support of his contention, learned Additional Government Pleader relied on the decision of the Supreme Court in case; of Deepak Agro Foods Vs. State of Rajasthan and Others, ."

7. Whether the Deputy Commissioner had power under, section 75 read with section 100 of the VAT Act to cancel registration far the acts of the trader subsequent to the registration and whether such registration could be cancelled when it was initially granted under the GST Act, are some of the interesting questions which we would have examined. However, the learned Additional Government Pleader took a firm stand that the Deputy Commissioner did not exercise power under section 75 read with section 100 of the VAT Act but under section 27(5) of the said Act. In view of this unequivocal stand of the learned Additional Government Pleader which is also otherwise borne out from the affidavit-in-reply filed by the respondents, the controversy has got considerably narrowed down. The issues which survive for our consideration therefore are :

"(i) Whether the Deputy Commissioner had power under section 27(5) of the VAT Act to. cancel the registration which was initially granted under the GST Act?;

(ii) Whether the order passed by the Deputy Commissioner can be saved on the ground that there was a mere error of referring to a statutory provision and the power to pass the order can be traced to a correct provision?; and

(iii) Whether there was breach of natural justice in passing such order?"

8. We may attempt to answer the questions presently. We may recall that the registrations were granted to the petitioner when the GST Act was operative. With effect from April 1, 2006 the VAT Act was introduced repealing the GST Act. Section 21 thereof pertains to registration by a dealer. Sub-section (1) thereof provides that no dealer shall, while being liable to pay tax under the said Act, carry on business as a dealer unless he possesses the valid certificate of registration, as provided under the Act. Section 23 of the VAT Act pertains to deemed registration and provides that every dealer registered as on the appointed day under any of the earlier laws or under the Central Act shall be deemed to be registered under section 21. Section 27 of the VAT Act pertains to

suspension or cancellation of registration and provides various situations where a registration of a dealer either be, cancelled or suspended. We are concerned with sub-section (5) thereof. Relevant portion of which reads as under :

"27(5) If a dealer--

(a)...

(b) knowingly furnishes incomplete or incorrect particulars in his returns [with a view to evade tax];

(c) and (d)...

(e) holds or accepts or furnishes or causes to be furnished a declaration, which he knows or has reason to believe to be false;

(f) to (h)--

(i) without entering into a transaction of sale issues to another dealer tax invoice, retail invoice, bill or cash memorandum, with intention to defraud the Government revenue; (or)

the Commissioner may at any time, for reasons to be recorded in writing, and after giving the dealer an opportunity of being heard, cancel his certificate of registration from such date as may be specified by him.

(j) who has been found evading tax on account of variation in physical stock compared with his regular books of account;"

9. Section 75 of the VAT Act pertains to revision. It empowers the Commissioner on his own motion or on application made to him to call for and examine the record of any order passed by an officer appointed under section 16 to assist him and pass such order as he thinks fit and proper. This exercise of power for calling of the record and passing final order, however, come with time frames. Section 75 reads as under :

"75. Revision.--(1) Subject to the provisions, of section 74 and to any rules made thereunder :

(a) The Commissioner of his own motion within three years or on an application made to him within one year from the date of any order passed by any officer appointed under section 16 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 five years from the date of the said order of the officer appointed under section 16 to assist him.)

(b) The Tribunal, on application made to it against an order of the Commissioner (not being an order passed under sub-section (2) of section 73 in second appeal or under clause (a) in revision on an application) within four months from the date of the communication of the order may call for and examine the record of any such order, and pass such order thereon as it thinks just and proper.

(2) Where an appeal lies under section 73 and no appeal has been filed, no proceedings in revision under this section shall be entertained upon application :

Provided that the proceedings in revision may be entertained upon an application where the applicant satisfies the Commissioner that he had sufficient cause for not preferring an appeal against the order in respect of which an application for revision is made.

(3) No order shall be passed under this section which adversely affects any person, unless such person has been given reasonable opportunity of being heard.

(4) Where the Commissioner or the Tribunal rejects any application for revision under this section, the Commissioner or, as the case may be, the Tribunal shall record the reasons for such rejection."

10. Section 100 of the VAT Act pertains to repeal and savings. In addition to repealing the GST Act and other connected statutes it is provided that such repeal shall not affect the previous operation of the said Acts or any right, title, obligation or liability already acquired, accrued or incurred thereunder. Sub-section (2) of section 100 provides for special savings. Clause (b) thereof pertains to registration certificate issued under the GST Act and in force immediately before the appointed day. Relevant portion of section 100(2)(b) reads as under :

"100. Repeal and savings.

(2)(a) all rules, regulations, orders, notifications, forms and notices issued under the said Act and in force immediately before the appointed day shall continue to have effect for the purposes of the levy, assessment, reassessment, collection, refund or set off of any tax, or the granting of a drawback in respect thereof or the imposition of any penalty, which levy, assessment, reassessment, collection, refund, set off, drawback or penalty relates to any period before the appointed day or for any other purpose whatsoever connected with or incidental to any of the purposes aforesaid."

11. From the above statutory provisions, it can be seen that under section 27(5) of the VAT Act the Commissioner has ample power to cancel any registration of a dealer on any other grounds mentioned in clauses (a) to (j) thereof. Clause (b) pertains to a situation where a dealer knowingly furnishes incomplete or incorrect particulars in his return with a view to evade tax. Clause (e) would apply in cases where a dealer holds or accepts or furnishes or causes to be furnished a declaration, which he knows or has reason to believe to be false. Clause (i) would apply where a dealer without entering into a transaction of sale issues to another dealer tax invoice, retail invoice, etc., with intention to defraud the Government revenue. Under such circumstances, the Commissioner may, at any time, for reasons to be recorded in writing and after giving a dealer an opportunity of being heard cancel his certificate of registration from said date as he may

specify. Few things thus clearly emerge. Under section 27(5) of the VAT Act, the Commissioner has power if the grounds specified in clauses (a) to (j) thereof are established, to cancel registration of a dealer at any time. He must, however, grant opportunity of hearing to the dealer and record his reasons for passing the order. Such order would carry the effective date from which the registration would be cancelled.

12. Merely because, the petitioner enjoyed registration granted under the GST Act initially, would not limit the power of the Commissioner to cancel the same under section 27(5) of the VAT Act. As already noted, for a dealer to do business, registration under section 21 of the VAT Act is compulsory. However, as per section 23, every dealer who had been granted registration on the appointed date under any earlier law would be deemed to be registered under section 21. By virtue of section 21 read with section 23 of the VAT Act therefore, the petitioner''s earlier registration under the GST Act would automatically be converted into the deemed registration under the VAT Act. Insofar as section 27(5) of the VAT Act is concerned, it makes no distinction when it comes to cancellation of a registration whether it is granted under the VAT Act under section 21 or is deemed to have been so registered under section 21 read with section 23 of the VAT Act.

13. For added force the Legislature has provided in clause (b) of sub-section (2) of section 100 any registration certificate under the GST Act and in force immediately before the appointed day shall be deemed to be the registration certificate issued under the VAT Act and accordingly, such registration certificate shall be valid and effectual under the new Act VAT Act until such certificate is issued substituted, suspended or cancelled under the provisions of the said Act. Whatever doubtful if at all, therefore, there may have been with respect to the power of the Commissioner to cancel such registration by virtue of combined effect of section 21, 23 and 27(5) of the VAT Act, would simply evaporate by virtue of the provisions contained in clause (b) of sub-section (2) of section 100 of the VAT Act. In unequivocal terms it provides that the registration under the GST Act would be registration under the VAT Act and that the same would continue only till it is substituted, suspended or cancelled under the VAT Act. Under the provisions of the VAT Act, the Commissioner and the Deputy Commissioner in delegated exercise of powers of the Commissioner therefore, had ample power to consider cancellation of the registration of the petitioner if it was found that any of the grounds mentioned in section 27(5) of the VAT Act existed.

14. This brings us to the second question. We may recall the show-cause notice itself conveyed to the petitioner that for alleged acts and omissions of circuitous transaction of mere billing entries without actual sale and purchase of goods the petitioner''s registration was liable to be cancelled under section 75 read with section 100 of the VAT Act. The Deputy Commissioner eventually passed his order-in-original directing ab initio cancellation of such registration referring to

section 75 read with section 100 of the VAT Act. As noted, in view of the firm stand of the respondents that the order was, in fact, one under section 27(5) of the VAT Act and not under section 75 thereof, the very question of permissibility of passing such an order under section 75 of the Act would become one of academic interest. Nevertheless, we would have to briefly touch on the contour of the Commissioner''s powers under section 75 to be able to judge whether the impugned order passed by the Deputy Commissioner can be saved by reference to the statutory provisions entirely different from one referred to in the impugned order.

15. As noted, section 75 of the VAT Act is a revisional power of the Commissioner and the Tribunal. In particular, it authorizes the Commissioner on his own motion or on an application made to him within the time specified, to call for the record and proceedings of an order passed by an officer appointed under section 16 and to pass such order thereon as he thinks just and proper after five years from the date of the order passed by such officer. Sub-section (2) of section 75 provides that where an appeal lies under section 73 and no appeal has been filed, no proceedings in revision under this section shall be entertained upon an application except where the Commissioner is satisfied that the applicant had sufficient cause for not preferring appeal against the order under revision. Sub-section (3) of section 75 provides that no order shall be passed under the said section unless a person who is likely to be adversely affected has been granted reasonable opportunity of being heard.

16. In essence, therefore, section 75 clothes the Commissioner with revisional powers. Such power could be exercised either suo motu within three years or on an application made by any party within one year from the date of order under revision. The revision is not to be permitted on a missed opportunity of filing appeal. It is hugely doubtful whether such powers could be exercised to revise an order of registration granted to a dealer for his acts and omissions post the date of registration. An order passed by an authority below could be revised for well known grounds and parameters such as impropriety, illegality or procedural defects or the likes. Such order could not be revised because of subsequent acts or omissions of the dealer which had no connection with the competent authority granting registration.

17. On the other hand, powers under section 27(5) of the VAT Act are very wide. They could be exercised upon any of the grounds mentioned in the different clauses under the said sub-section being established for the reasons to be recorded by the Commissioner. Under such circumstances, the Commissioner would be authorized to cancel registration. The effective date of cancellation would be provided by the Commissioner. There is thus, vast difference between the powers enjoyed by the Commissioner under section 75 of the VAT Act as against those under section 27 and, in particular, sub-section (5) thereof. One is the power of revision of an order of subordinate officer, the other is of cancellation of registration for established acts or omissions by a registered

dealer. From the beginning the Deputy Commissioner proceeded to assume powers under section 75. At no point of time he resorted to his powers under section 25 of the VAT Act. Right from the issuance of show-cause notice till the very last word in his order of cancelling the registration, he addressed the entire issue as one being under section 75 of the VAT Act. In the show-cause notice itself he referred to section 75 read with section 100. In the impugned order, he made detailed reference to what according to him were the petitioner''s acts and omissions in sale and purchase of different commodities. He eventually concluded that on account of such acts and omissions, the petitioner''s registration was liable to be cancelled ab initio. Here again, he exercised power under section 75 and cancelled the registration from the inception as if he was revising the order of granting registration to the petitioner. In our opinion, this order cannot be saved by referring to another statutory provision. Our reasons are as under :

"(i) From the beginning, i.e., from issuance of the show-cause notice till the final order of adjudication, the Deputy Commissioner referred to and relied upon only section 75 read with section 100 of the VAT Act.

(ii) There is a vast difference of nature of powers enjoyed by the Deputy Commissioner and the jurisdiction he exercised under section 75 of the VAT Act as against that under section 27 of the said Act. Both statutory powers have different purview, are enacted with different purpose and would operate in different fields.''

(iii) In view of such vast difference in the nature of the powers, this would not be a case of mere wrong reference to the statutory provision. This would be a case where the very foundation of the powers exercised was wrong. We are not unmindful of the line of the judicial pronouncements that an order passed by an authority would not be vitiated on mere reference to a wrong statutory provision: If the power can be traced to a provision under the statute, mere wrong reference of a section would not be fatal. However, in the present case/the Deputy Commissioner exercised powers under a provision which was simply not available to him. He put the petitioner to notice why the order of registration not be cancelled under the revisional powers. He turned down the petitioner''s opposition and proceeded to cancel the registration by exercising revisional powers. As already recorded, the order of registration could not have been revised for subsequent misconduct of the dealer and, if at all it could be cancelled. The Deputy Commissioner thus put the petitioner to notice on completely wrong track. He, thereafter, passed the order also exercising the power which was not available to him. He now cannot defend the action by arguing that he was mistaken about the source of the powers but the powers, in fact, exist and that therefore, his order be left intact. As noted, the nature of powers enjoyed by the Deputy Commissioner under section 75 was of a revisional nature whereas under section 27 for passing original order ordering cancelling of registration already granted for subsequent action of the registered dealer."

18. Before passing any order under section 27 of the VAT Act as provided under rule 10(3) of the Gujarat Value Added Tax Rules ("the Rules", for short) notice in form 104 was required to be issued. We are prepared to proceed on the basis that issuance of the notice in the prescribed pro forma was directory and not mandatory. In other words, if the dealer had sufficient notice of the ground on which his registration was required to be cancelled along with the proposal to cancel such registration under section 27 of the VAT Act, the same may be taken as substantial compliance of the rule and mere omission to adhere to the printed format of the form may not be fatal. However, before any action could be taken under section 27(5), the dealer was entitled to a notice detailing reasons why the registration would be liable to be cancelled and that the same would be as provided under section 27 of the VAT, Act. Form 104 itself comes to a title "Notice for suspension/cancellation of certificate of registration under sub-section (5) of section 27 of the Gujarat Value Added Tax Act, 2003".

19. Principles of natural justice are not empty formalities. They are required to put a person likely to be visited with adverse order to notice why a proposed action not be taken for prima facie grounds indicated in the notice. When the very notice suggested exercise of powers under section 75 which was for taking the order of subordinate officer under revision for appropriate reasons to be recorded, it would be in gross violation of principle of natural justice then to permit the authority to pass final order under entirely different provision which clothed the authority with vastly different powers. The error committed by the Deputy Commissioner does not end here. He, in fact, passed his final order under purported exercise of power under section 75. Even while passing of the order he was not aware that the registration should or could be cancelled under section 27(5) of the VAT Act and not be revised under section 75 thereof.

20. For all such reasons, the order of the Deputy Commissioner could not be saved. In other words, the order cannot be viewed as mere reference to a wrong statutory provision tracing the power of cancellation. It was rather a situation where the authority passed an order assuming jurisdiction under a wrong provision exercising powers of entirely different nature which powers were not available to him for revising the order of registration. Such order cannot be saved or cured by an affidavit suggesting that he intended to pass the order under section 27(5) and there was a mere wrong reference to section 75 read with section 100 of the VAT Act.

21. In view of such conclusion, we need not make any declaration of the third and the last question, viz., whether there was any breach of natural justice in the conclusion arrived by the Deputy Commissioner. If there was any material which he relied upon without sharing with the petitioner surely it would amount to denying the petitioner a reasonable opportunity of hearing. We, however, see no reason to conclude this issue.

22. We would be striking down the order of the Deputy Commissioner as partially confirmed by the Tribunal on the ground of exercise of jurisdiction not permissible to him which also resulted into violation of principle of natural justice. It is by now well settled that, if an administrative action suffers from a defect of breach, of principle of natural justice, the action need not be terminated for all times to come and could be proceeded further from the stage where such defect is noticed. In the present case, however, we have noticed the defect from the inception, i.e., the issuance of the show-cause notice itself. We therefore, clarify that quashing of the order by the Deputy Commissioner is not on merits and, therefore, would not prevent him for initiating fresh or independent action for cancellation of registration of the petitioners or any of them if otherwise grounds are available and such action is permissible in law. With the last aspect, we should not be seen to have expressed any opinion in this order. With the above observations all the petitions are allowed. Orders passed by the Deputy Commissioner challenged in the petitions as partially confirmed by the Tribunal are quashed. All the petitions are allowed and disposed of accordingly.

