

GAHC010133702022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/4790/2022

MIRC ELECTRONICS LIMITED
A COMPANY INCORPORATED UNDER THE PROVISIONS OF THE
COMPANIES ACT
1956 HAVING ITS HEAD OFFICE AT G-1
ONIDA HOUSE
MAHAKALI CAVES ROAD
MIDC NEAR PAPER BOX
ANDHERI EAST
MUMBAI-400099 AND IN THE INSTANT PROCEEDINGS REPRESENTED BY
SRI MAYUR CHANDAK
AUTHORIZED SIGNATORY OF THE COMPANY.

VERSUS

THE STATE OF ASSAM AND 2 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM
DEPARTMENT OF FINANCE AND TAXATION
DISPUR
GUWAHATI-781006.

2:THE PRINCIPAL COMMISSIONER OF STATE TAX
(EARLIER KNOWN AS COMMISSIONER OF TAXES)
KAR BHAWAN
DISPUR
GUWAHATI-781006.

3:THE DEPUTY COMMISSIONER OF STATE TAX
(EARLIER KNOWN AS ASSISTANT COMMISSIONER OF TAXES)
GUWAHATI
UINT-C
KAR BHAWAN
DISPUR
GUWAHATI-781006.

Advocate for : DR. A SARAF

Advocate for : SC

FINANCE AND TAXATION appearing for THE STATE OF ASSAM AND 2 ORS

**BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA**

ORDER

Date : 12.06.2024

Heard Dr. A Saraf, learned Senior Counsel assisted by Mr. P. K. Bora, learned counsel for the petitioners. Also heard Mr. B. Gogoi, learned Standing Counsel for the Finance & Taxation Department.

2. The challenge made in the writ petition is the order of re-assessment dated 05.03.2022 passed by the Assistant Commissioner of Taxes, Guwahati (Respondent No. 3) for the assessment year 2013 - 2014 under Section 40 of the Assam Value Added Tax Act, 2003 read with Section 9 of the Central Sales Tax Act, 1956 and Section 174 of the Assam Goods and Service Tax Act, 2017.

3. The facts of this case are that on 08.07.2021, the assessing authorities issued notice to the petitioner under Section 40 of the said Act, 2003 stating that they have reason to believe that the turnover of the petitioner's business assessable to tax for the assessment period from 2013 – 2014 has escaped assessment as the petitioner has failed to deposit VAT on transmission charge amounting to Rs. 1,42,14,585/- as the same was clearly part of the sale price and therefore proposed to re-assess the petitioner for the aforesaid period under Section 40 of the Assam Value Added Tax Act, 2003 read with Section 9 of the Central Sales Tax Act, 1956 and Section 174 of the Assam Goods and Service Tax Act, 2017.

- 4.** The petitioner was given an opportunity to show-cause by appearing person or through its representative on or before 17.07.2021.
- 5.** Thereafter the assessing authorities by order dated 05.03.2022 re-assessed the petitioner under Section 40 of the Act, 2003 and came to a finding that the petitioner is liable to pay Rs.3,32,48,936/- as penalty.
- 6.** Accordingly, notice of demand was issued on 05.03.2022 by the respondent No. 3 to the petitioner for making payment of Rs.3,32,48,936/-. The aforesaid re-assessment order and notice of demand are challenged before this Court.
- 7.** Dr. A. Saraf, learned Senior Counsel for the petitioner submits that though the re-assessment has been shown to have been completed under Section 40 of the Act, 2003 but in fact the same is under audit assessment under Section 36 of the Act, 2003 and since the assessment under Section 36 became barred by limitation, the assessing authority has shown the assessment to have been completed under Section 40 of the Act, 2003. He further submits that Section 39 of the Act, 2003 provides for that no assessment shall be completed after the expiry of five years from the end of the year to which the assessment relates and no assessment under Sections 34, 35, 36 or 37 of the Act, 2003 was completed by the assessing authority. He further submits that the powers under Section 40 is that of re-assessment and the condition precedent for exercise of such re-assessment is that a dealer must have been assessed under Sections 34, 35, 36 or 37 of the Act, 2003 for any year or part thereof. He further submits that in the present case, no assessment was made under Sections 34, 35, 36 and 37 of the Act, 2003 and therefore, the order of re-assessment under Section 40 is totally erroneous and illegal.
- 8.** Mr. B. Gogoi, learned Standing Counsel, Finance & Taxation Department

submits that the assessment for the period 2013 - 2014 was completed under Section 40 of the said Act, 2003 and notice before the assessment was issued to the petitioner in the requisite form. He further submits that the petitioner has cooperated with the assessing authorities and submitted requisite documents for verification. He further submits that after completion of verification, assessment was completed on 05.03.2022 under Section 40 of the said Act, 2003. He further submits that since the petitioner had filed audited balance sheet and Form 23, self-assessment under Section 35 of the Act was deemed completed before initiation of proceedings under Section 40.

9. I have heard the submissions made at the Bar and have perused the materials available on record.

10. Before adverting to the contentions of the parties, it is pertinent to refer to the relevant provisions of the said Act, 2003:-

i) Section 29 of the ACT, 2003 provides that

“29. Periodical returns and payment of tax:

(1) Every registered dealer and every dealer liable to pay tax shall furnish a correct and complete tax return in such form for such period, by such dates and to such authority, as may be prescribed; Provided that different periods may be prescribed for different classes of dealers for the purpose of filing tax return.

(2) Every registered dealer and every dealer liable to pay tax shall furnish, in addition to the tax return, if any, furnished under sub- section (1), a correct and complete annual return in the prescribed form within such time as may be prescribed.

(3) If the Prescribed Authority has reason to believe that the turnover of sales or the turnover of purchases of any dealer has exceeded the taxable

limit as specified in sub-section (6) of section 7, so as to render him liable to pay tax under this Act for any year or part thereof, he may, by notice served in the prescribed manner, require such dealer to furnish tax return under sub-section (1) and an annual return under sub-section (2) as if he were a registered dealer.

(4) If any dealer having furnished a tax return or an annual return under this section, discovers any omission or any other error in the return so filed, he may without prejudice to the charge of any interest, furnish revised tax return or revised annual return, as the case may be, in the prescribed manner and within the prescribed time.

(5) Every dealer required to file return under this section shall pay the full amount of tax, interest and any other sum payable by him according to such return or the differential tax payable according to the revised return furnished, if any, and shall furnish along with the return or revised return, as the case may be, a receipt showing full payment of such amount into the Government account.

(6) Every return under this section shall be signed and verified-

(a) in case of an individual, by the individual himself, and where the individual is absent by some person duly authorized by him in this behalf;

(b) in the case of a Hindu Undivided family, by the Karta;

(c) in the case of a company or local authority, by the principal officer or Chief Executive or authorized signatory thereof;

(d) in the case of a firm, by any partner thereof not being a minor or by a manager;

(e) in the case of any other association, by the person competent to act on behalf of the association."

ii) *Section 35 of the ACT, 2003 provides that*

“35. Self assessment: (1) *the amount of tax due from a dealer liable to pay tax may be assessed separately for each year during which he is so liable;*

Provided that, the Commissioner may, subject to such conditions if any, as may be prescribed, assess the tax due from any dealer during a part of a year and the other provisions of this section shall be construed accordingly.

(2) If a dealer has filed all the tax returns and the annual return or revised returns in the prescribed manner and within the prescribed time and has paid the tax payable according to such returns or revised returns and also interest payable if any, the returns or revised returns so filed shall be accepted and his assessment shall be deemed to have been made for the purpose of subsection

(1) subject to adjustment of any arithmetical error apparent on the face of the said return;

Provided that the assessment under this sub-section of every such registered dealer who is required to furnish audit report under section 62 shall be deemed to have been made if such dealer has furnished the audit report along with the annual return.”

iii) *Section 39 of the ACT, 2003 provides that*

“39. No assessment after five years.- *no assessment under the foregoing provisions of this Act, shall be made after the expiry of five years from the end of the year to which the assessment relates:*

Provided that in case of offence under this Act for which proceedings for prosecution has been initiated, the limitation as specified in this sub-section shall not apply.”

iv) Section 40 of the ACT, 2003 provides that

“40. Turnover escaping assessment: (1) *Where after a dealer is assessed under section 34, 35, 36 or 37 of this Act for any year or part thereof, the Prescribed Authority has reason to believe that the whole or any part of the 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) been wrongly allowed any deduction therefrom; or

(e) been wrongly allowed any credit therein. The Prescribed Authority may, after giving the dealer a reasonable opportunity of being heard and after making such enquiries as he considers necessary, proceed to assess to the best of his judgment, the amount of tax due from the dealer in respect of such turnover, and the provisions of this Act shall, so far as may be, apply accordingly.

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

Pertinent also to refer to Rule 17 of Assam Value Added Tax Rules, 2005 (hereinafter referred to as said Rules, 2005).

“17. Submission of returns under Section 29.- (1) *Every registered dealer or any dealer liable to pay tax whose turnover of taxable goods in any assessment year exceeds Rupees 3 (three) lakhs, shall furnish to the Prescribed Authority, a tax return for each month in Form-13 within the next twenty one days of the succeeding month.*

Explanation - For the purpose of this sub-rule, the due date for submission of the tax return, for a particular month shall be the twenty first day of the following month.

(2) Every registered dealer or any dealer liable to pay tax under the Act, other than a dealer referred to in sub-rule (1), shall furnish to the Prescribed Authority, a tax return for each quarter in Form-13 within twenty one days of the succeeding month from the date of expiry of each quarter. Explanation For the purpose of this sub-rule, the due date for submission of the quarterly tax return for a particular quarter shall be the twenty first day of the month following the quarter.

(2A) Notwithstanding anything contained in sub-rule (1) or sub-rule (2) of this rule, every registered dealer who is a holder or a holder in due course of Certificate of Entitlement under the Assam Industries (Tax Remission) Scheme, 2005 shall furnish to the Prescribed Authority periodic tax return in the manner laid down in such Scheme; Amendment: Sub-rule (2A) has been inserted vide notification No. FTX.29/ 2003/25 dated 4-11-2006 w.e.f. 14-11-2006.

(2B) Notwithstanding anything contained in sub-rule (1) or sub-rule (2) of this rule, every registered dealer who is permitted to avail any scheme of composition of any tax liability within the meaning of section 20 of the principal Act shall furnish to the Prescribed Authority periodic tax return or statement of the quantity of goods imported in the manner laid down in such scheme."

Amendment: Sub-rule (2B) has been inserted vide notificaiton No. FTX.29/ 2003/25 dated 4-11-2006 w.e.f. 14-11-2006.

(3) The tax return shall be accompanied by a receipt from the Designated Bank, a crossed cheque or a crossed demand draft for the full amount of tax payable on his taxable turnover during the month or the quarter to which

the return relates.

Explanation - For the purpose of Explanation 2 to clause (b) of subsection (1) of Section 10, the challans for payment of tax received by a bonded warehouse from a retail licence holder or by a excise warehouse from a retail vendor, shall also form part of the full amount of tax payable on the taxable turnover of such bond or warehouse for the month to which the tax return relates.

(4) If the amount paid by a dealer along with the tax return under sub-rule (1) or (2) or (2A) or (2B), is less than the amount of tax payable by him, the Prescribed Authority shall serve a notice of demand and the dealer shall pay the sum demanded in the said notice within the time and in manner specified in the notice.

Amendment: In between the existing numeral "(2)" and the punctuation mark ",", the words and bracket "or (2A) or (2B)" have been inserted vide notification No. FTX.29/2003/25 dated 4-11-2006 w.e.f. 14-11- 2006.

(5)(a) Every dealer as mentioned in sub-rule (1) and sub-rule (2) in addition to the tax returns furnished, shall submit an annual return in Form-14 within two months after the close of the year to which the return relates;

(5)(b) Every dealer as mentioned in sub-rule (2A) and sub-rule (2B) in addition to the tax returns or statements of quantity of goods imported furnished shall submit an annual return or statement of quantity of goods imported in the Form or Format as may be laid down in the applicable tax remission scheme or composition scheme:

Provided that in case of a dealer who is liable to produce a certificate of Audit of Accounts by a Chartered Accountant under section 62, the annual return shall be submitted within seven months from the end of the year to which the return relates.

Amendment: Sub-rule (5) has been substituted vide notification No.

FTX.29/2003/25 dated 4-11-2006 w.e.f. 14-11-2006. Prior to its substitution, it read as under:

"(5) Every dealer as mentioned in sub-rule (1) and sub-rule (2) in addition to the tax returns furnished, shall submit an annual return in Form-14 within two months after the close of the year to which the return relates:

Provided that in case of a dealer who is liable to produce a Certificate of Audit of Accounts by a Chartered Accountant under section 62, the annual return shall be submitted within seven months from the end of the year to which the return relates."

(6) Every registered dealer who submit a return under sub-rule (5) shall, except when tax has been paid in advance in full with the tax returns furnished, submit along with the annual return a receipt from a Designated Bank, crossed cheque or crossed demand draft in favour of the Prescribed Authority for the full amount of tax payable for the year, half year or a quarter, as the case may be, on the basis of the return after deducting therefrom the advance taxes, if any, already paid for the year, half year or the quarter, as the case may be.

(7) Where any dealer other than a registered dealer liable to pay tax fails to submit the return under sub-section (3) of Section 29 the Prescribed Authority shall serve on such a dealer a notice in Form-15 requiring him to furnish such return within such date as may be specified in the notice.

(8) In case of discovery of any omission or any other error in the tax return or annual return filed, the dealer may furnish a revised tax return or the revised annual return, as the case may be, within a period of six months from the due date of submission of tax return or annual return, as the case may be :

Provided that, no revised tax return or revised annual return shall be entertained if the case has been taken up for audit assessment and notice to

that effect has already been served on the dealer.

(9) Omitted. Amendment: Sub-rule (9) has been omitted vide notificaiton No. FTX.29/ 2003/25 dated 4-11-2006 w.e.f. 14-11-2006. Prior to its omission, it read as under:

"(9) A dealer, opting for composition scheme under Section 20, shall be liable to pay tax quarterly. Such dealer shall make the payment by challan into a Designated Bank within twenty one days of the succeeding month from the date of expiry of each quarter."

11. Section 29 of the Act, 2003 provides that every dealer has to furnish periodical returns within the prescribed time. Rule 17 of the said Rules, 2005 provides that such return for each month has to be filed within the next 21 days of the succeeding month.

12. Section 35 of the said Act, 2003 deals with self-assessment and sub section 2 of the said Section provides that the assessment shall be deemed to have been completed if the dealer has filed all the tax returns and annual returns or revised returns in the prescribed manner and within the prescribed time and has paid the tax payable according to such returns or revised returns and also interest payable, if any. In the present case, monthly returns were required to be filed by 21st day of the following month according to the explanation of sub rule 1 of Rule 17 of the said Rules, 2005. Pertinent to extract paragraph 4 of the writ petition, wherein the petitioner has given the date of submission of monthly returns for the year 2013 -2014, which is extracted hereunder for ready reference:-

"4. That the petitioner begs to state that the petitioner submitted its return of turnover under the CST Act, 1956 for the assessment year 2013-2014 as per the details given below:-

<i>Acknowledgement No.</i>	<i>Form Name</i>	<i>Period Form</i>	<i>Period to</i>	<i>Original/ Revised</i>	<i>Acknowledgement Date</i>	<i>Due Date</i>
4302438	CST III	01/04/2 013	30/04/2 013	Original	13/06/2013	21/05/2 013
4448551	CST III	01/05/2 013	31/05/2 013	Original	08/07/2013	21/06/2 013
4597288	CST III	01/06/2 013	30/06/2 013	Original	07/08/2013	21/07/2 013
4789603	CST III	01/07/2 013	31/07/2 013	Original	25/09/2013	21/08/2 013
4797708	CST III	01/08/2 013	31/08/2 013	Original	27/09/2013	21/09/2 013
4957103	CST III	01/09/2 013	30/09/2 013	Original	15/11/2013	21/10/2 013
5032986	CST III	01/10/2 013	31/10/2 013	Original	04/12/2013	21/11/2 013
5161029	CST III	01/11/2 013	30/11/2 013	Original	10/01/2014	21/12/2 013
GWC 3760341	CST III	01/12/2 013	31/12/2 013	Original	03/02/2014	21/01/2 014
7596611	CST III	01/01/2 014	31/01/2 014	Original	16/01/2016	21/02/2 014
5450860	CST III	01/02/2 014	28/02/2 014	Original	19/04/2014	21/03/2 014
5498219	CST III	01/03/2 014	31/03/2 014	Original	05/05/2014	21/04/2 014

13. It is thus evident that the monthly returns for the annual year 2013 - 2014 was not submitted within the 21st day of the succeeding month, in other words, it was not submitted within the time prescribed under 17 (1) of the said Rules,

2005, which is within next 21 days of the succeeding months.

14. Reference is made to the decisions of the Division Bench of this Court in the case of *Indian Oil Corporation Limited Vs. State of Assam & Others* reported in (2013) 60 VST 185 Gau, wherein it has been held that when the time limit for completion for assessment has been indicated and after expiry of the said period no assessment can be made.

15. Reference is also made to the decision of the Division Bench of this Court in the case of *Indian Oil Corporation Limit Vs. State of Assam* in WP(C) No. 4745 of 2009, wherein it has been held that after expiry of the prescribed period of assessment, no assessment can be made.

16. Reference is made to the decision of the Apex Court in the case of *Shyam Das Vs. Regional Assistant Commissioner Of Sales Tax Nagar* reported in 1964 vol. 4 SCR at page 436, wherein the Apex Court held that unless return is filed within the time limit, there cannot be an assessment.

17. It is submitted by the learned Counsel appearing for the assessing authorities that the self-assessment under Section 35 of the said Act, 2003 was deemed to have been completed as the petitioner filed audited balance sheet and form 23 and therefore, the proceedings under Section 40 was initiated. As stated earlier, the petitioner having not filed the tax returns and annual returns or revised returns within the prescribed time stipulated under Rule 17 of the said Rules, 2005, no self-assessment can be made under law. Therefore, the assessing authorities could not have deemed self-assessment under Section 35 to have been completed. As such, the said submission of the Ld. Counsel appearing for the assessing authorities is totally fallacious.

18. Section 34, 36 and Section 37 of the said Act, 2003 admittedly is not

applicable in the present case.

19. Section 39 of the said Act, 2003 provides that no assessment shall be completed after the expiry of five years from the end of the year to which the assessment relates and as evident from the above, in the present case, no assessment under section 34, 35, 36 or 37 of the Act, 2003 was completed by the assessing authorities. Therefore, assessment for the year 2013 – 2014 ought to have been completed within 5 years from the end of the year in respect of which the assessment relates. In terms of Section 39 of the said Act, 2003, assessment for the assessment year 2013 – 2014 got barred by limitation on 31.3.2019. Since, the time limit for completion of assessment as in terms of Section 39 of the Act expired on 31.03.2019, it appears that the assessing authority did not complete assessment within the prescribed time period. However, assessment was initiated under Section 40 of the Act without completion of assessment under Sections 34, 35, 36 or 37 of the Act, 2003. Section 40 of the Act, 2003 dealing with turnover escaping assessment provides that for invoking the powers under Section 40 of the Act, a dealer must have been assessed under Section 34, 35, 36 or 37 of the Act, 2003 for any year or part thereof.

20. Since in the facts of the instant case, no self assessment can be deemed under Section 35 of the Act, 2003 re-assessment under Section 40 of the said Act, 2003 could not have been made under the provisions of the said Act.

21. Section 40 of the Act, 2003, dealing with turnover escaping assessment provides that whenever a dealer is assessed under the said provision, three preconditions are to be fulfilled;

- i. Firstly, a dealer must have been assessed under section 34, 35, 36 or 37

of the act for any year or part thereof.

ii. Secondly, the assessing authority must have reason to believe that the whole or any part of the turnover of the dealer in respect of any period has escaped assessment or has been under assessed or has been assessed at a rate lower than the rate at which it is accessible or has been wrongly allowed and deduction therefrom or has been wrongly allowed credit therein.

iii. Thirdly, if the prescribed authority has such reasons to believe then the prescribed authority has to give reasonable opportunity of being heard, and after making enquiries, proceed to assess to the best of his judgment, the amount of tax due from the dealer in respect of such turnover.

22. It is abundantly clear from the above reading of the said provision that in order to re-assess under Section 40 of the Act, 2003, there has to be firstly an assessment in law. It is only after an assessment is made, the assessing authorities has jurisdiction to exercise powers of reassessment subject off course to the fulfillment of the other two conditions stipulated therein. The 'existence of assessment' is a condition precedent for making a reassessment under Section 40 of the Act, 2003 and if such condition precedent exist, the assessing authorities had no jurisdiction to make the reassessment. As such, without assessment under section 34, 35, 36 or 37 of the Act, 2003, the respondent authorities could not have resorted to the provisions of the reassessment stipulated under Section 40 of the said Act.

23. Reference is made in this regard to the decision of the Apex Court in the case of *Ghanshyamdas Vs Regional Assistant Commissioner of Sales Tax, Nagpur and others* reported in (1964) 51 ITR 557(SC) and the decision of the

Division Bench of this Court in the case of *Radheshayam Goyal & Sons Vs State of Assam & Ors.* in *W.P(C) No. 4652/2015*.

24. In the present case, there was no assessment under section 35 of the Act, 2003, made during the prescribed period. Therefore, no assessment can be deemed to have been made in law.

25. In view of the above, the said order of re-assessment having been completed without any assessment made under section 35 of the Act, 2003, the order of reassessment dated 05.03.2022 is absolutely illegal and without jurisdiction.

26. As such, the very initiation of proceedings under section 40 of the Act, 2003 is absolutely illegal, without jurisdiction and not tenable in law.

27. Accordingly, the impugned Order of re-assessment dated 05.03.2022 and the Notice of Demand dated 05.03.2022 are set aside and quashed.

28. The present writ petition stands allowed and disposed of.

JUDGE

Comparing Assistant