

GAHC010250422018



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

**Case No. : WP(C)/7740/2018**

JUPITER COKE INDUSTRIES  
A PARTNERSHIP FIRM REGISTERED UNDER THE INDIAN PARTNERSHIP  
ACT  
1932 AND HAVING ITS PRINCIPAL PLACE OF BUSINESS AT 1/1A BIPLAB  
ANUKAL CHANDRA STREET  
5-F ELECTRONIC CENTRE

KOLKATA - 700072 AND ITS INDUSTRIAL UNIT SITUATED AT BORSOJAI  
BELTOLA  
GUWAHATI -28 IN THE DIST.OF KAMRUP AND IN THE PRESENT  
PROCEEDINGS REP. BY ONE OF ITS PARTNER SRI NAVINKUMAR JAIN  
AGE ABOUT 45 YEARS.

VERSUS

THE STATE OF ASSAM AND 3 ORS.  
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM

DEPARTMENT OF FINANCE AND TAXATION  
ASSAM SECRETARIAT  
DISPUR  
GUWAHATI - 781006.

2:THE COMMISSIONER OF STATE TAXES

(EARLIER KNOWN AS THE COMMISSIONER OF TAXES) ASSAM  
KAR BHAWAN

DISPUR  
GUWAHATI - 781006.  
3:THE SUPERINTENDENT OF STATE TAXES

(EARLIER KNOWN AS THE SUPERINTENDENT OF TAXES)  
GUWAHATI  
UNIT-D.  
4: CERTIFICATE OFFICER (TAXATION)  
OF GUWAHATI RECOVERY

KAR BHAWAN  
DISPUR  
GUWAHATI.

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Advocate for : DR. ASHOK SARAF

Advocate for : SC

FINANCE AND TAXATION appearing for THE STATE OF ASSAM AND 3 ORS.

**BEFORE**  
**HON'BLE MR. JUSTICE KAUSHIK GOSWAMI**

|                              |                                                                                      |
|------------------------------|--------------------------------------------------------------------------------------|
| Advocates for the petitioner | : Dr. A. Saraf, Sr. Adv.,<br>Mr. N.N. Dutta.                                         |
| Advocate for the Respondents | : Mr. B. Choudhury, S.C,<br>Finance & Taxation<br>Department (Resp. Nos. 1<br>to 4.) |
| Date of Hearing              | : 20.04.2024.                                                                        |
| Date of Judgment             | : 20.04.2024.                                                                        |

**JUDGMENT & ORDER (ORAL)**

Heard Dr. A. Saraf, learned Senior Counsel assisted by Mr. N.N. Dutta, learned counsel for the petitioner. Also heard Mr. B. Choudhury, learned Standing Counsel for the Finance & Taxation Department i.e. respondent Nos. 1

to 4.

**2.** The challenge made in the writ petition is the impugned Order of Re-assessment dated 29.03.2018 passed by the Superintendent of Taxes for the assessment year 2010-2011 under Section 9 of the Assam Entry Tax Act, 2008 and Section 174 of the Assam GST Act, 2017 and the Notice of Demand issued in pursuant thereof as well as the Recovery Notices dated 09.08.2018 and 28.09.2018, issued by the Certificate Officer (Taxation) of Guwahati Recovery.

**3.** The facts of the case are that on 25.09.2017, the assessing authority issued notice to the petitioner under Section 35 of the Assam Value Added Tax Act, 2003 (*hereinafter referred to as the Act of 2003*) stating that the petitioner's turnover escaped assessment for the year 2010-2011 and accordingly, proposes to assess the petitioner's turnover for the period 2010-2011 to the best of assessing authority judgment under Section 40 of the Act. Thereafter, the assessing authority vide Order dated 29.03.2018 completed the re-assessment under Section 40 of the said Act and came to a finding that the petitioner is liable to pay Rs. 16,92,215.00.

**4.** Accordingly, Notice of Demand was issued on 31.03.2018 by the respondent authorities. Pursuant to the aforesaid Notice of Demand, Recovery Notices dated 09.08.2018 and 28.09.2018 were also issued from the Certificate Officer (Taxation) for recovery of the aforesaid amount.

**5.** The aforesaid re-assessment Order alongwith the Demand Notice and Recovery Notices are under challenge in the writ proceeding.

**6.** Pertinent to state that as per Section 9 of the Assam Entry Tax Act, 2008, the provision of Assam Value Added Tax Act including Section 34, 35, 36, 37, 39 and 40 shall mutatis mutandis apply to an importer in respect of entry tax levied and payable under this Act, as if those sections were mutatis mutandis incorporated in this Act and the rules framed and orders and notification issued under those sections were mutatis mutandis issued under the relevant sections so incorporated under this Act.

**7.** It is the specific case of the petitioner that though the re-assessment has been completed in the purported exercise of power under Section 40 of the Act of 2003 read with Section 174 of the Assam Goods and Service Tax Act, 2017, but Section 40 of the Act of 2003 could not have been invoked inasmuch as, the said powers can be invoked only when the dealer have been assessed under Sections 34, 35, 36 and 37 of the Act of 2003.

**8.** It is the further case of the petitioner that no assessment whatsoever was completed by the assessing authority under Sections 34, 35, 36 & 37 of the Act of 2003.

**9.** It is submitted at the bar that the issue involved in this writ proceedings is covered by the Judgment and Order dated 02.04.2024 passed by this Court in ***Assam Gas Company Ltd Vs. State of Assam & 2 Others*** in ***WP(C) No. 5858 of 2018.***

**10.** Heard the submissions made at the bar and I have perused the materials available on record.

**11.** It appears that as per Rule 17(5)(a), annual return in Form-14 is required to be submitted within two months after the close of the year to which return relates. However, as per Section 17(5)(b) 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 is to be submitted within 7 months from the end of the month to which the return relates.

**12.** In the present case, the petitioner is liable to produce the Certificate of Audit by the Chartered Accountant and therefore, the annual return for the assessment year 2010-2011 is to be submitted before 31.10.2011.

**13.** Details of submission of monthly returns for the year 2010-2011 under the Act of 2003 on different dates as provided in the writ petition, is extracted hereunder for ready reference:-

| Sl. No. | Month      | Tax Paid (Rs.) | Date of Submission                                      |
|---------|------------|----------------|---------------------------------------------------------|
| 1       | April 2010 | Nil            | 11.08.2010                                              |
| 2       | May 2010   | Nil            | 11.08.2010                                              |
| 3       | June 2010  | 31,332/-       | 11.08.2010<br>Revised return submitted<br>on 23.03.2011 |
| 4       | July 2010  | 40,286/-       | 11.08.2010                                              |

|    |                |          |                                        |
|----|----------------|----------|----------------------------------------|
|    |                |          | Revised return submitted on 23.03.2011 |
| 5  | August 2010    | Nil      | 16.09.2010                             |
| 6  | September 2010 | Nil      | 26.10.2010                             |
| 7  | October 2010   | Nil      | 18.11.2010                             |
| 8  | November 2010  | Nil      | 23.12.2010                             |
| 9  | December 2010  | 1,87,067 | 04.02.2011                             |
| 10 | January 2011   | Nil      | 18.02.2011                             |
| 11 | February 2011  | Nil      | 23.03.2011                             |
| 12 | March 2011     | 44,177/- | 28.03.2011                             |

**14.** It appears that the petitioner thereafter submitted its annual return for the year 2010-2011 on 11.11.2011, which is enclosed collectively as Annexure-II (Page 62-62B to the writ petition).

Evidently, neither the monthly return nor the annual return were submitted within the time stipulated. Therefore, Section 35 of the said Act of 2003 is not applicable.

**15.** Thus, evidently, no assessment whatsoever was completed by the assessing authority under Sections 34, 35, 36 and 37 of the Act of 2003.

**16.** The decision of this Court in *Assam Gas Company Ltd Vs. State of*

**Assam & 2 Others (Supra)** squarely covers the issue at hand.

**17.** Paragraphs 26 and 27 of the said Act of 2003 is reproduced herein below for ready reference:-

*“26. 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.*

*27. 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 re-assessment subject of course to the fulfillment of the other two conditions stipulated therein. The 'existence of assessment' is a condition precedent for making a re-assessment under Section 40 of the Act, 2003 and if such condition precedent exist, the assessing authorities had no jurisdiction to make the re-assessment. 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 re-assessment stipulated under Section 40 of the said Act.”*

**18.** Evidently, there was no assessment. As such, the very initiation of proceeding under Section 40 of the Act of 2003 is absolutely illegal, without jurisdiction and not tenable in law.

**19.** Pertinently, Mr. B. Choudhury, learned Standing Counsel Finance & Taxation Department also courteously and benignly submitted that the present case is covered by the decision of this Court in ***Assam Gas Company Ltd Vs. State of Assam & 2 Others (Supra)***.

**20.** In view of the aforesaid concession made by the learned Standing Counsel, this Court is of the considered view that the present writ petition can be disposed of in terms of the aforesaid decision of this Court in ***Assam Gas Company Ltd Vs. State of Assam & 2 Others (Supra)***.

**21.** Resultantly, the impugned Order of Re-assessment dated 29.03.2018 and the Notice of Demand alongwith the Recovery Notices dated 09.08.2018 and 28.09.2018 are set aside and quashed.

**22.** The present writ petition stands allowed and disposed of.

**JUDGE**

**Comparing Assistant**