

Court No. - 7

Case :- SALES/TRADE TAX REVISION No. - 41 of 2014

Revisionist :- M/S Aps Powertech India Pvt. Ltd. Lucknow Thru. Its M.D.

Opposite Party :- Commissioner Of Commercial Tax U.P. Lucknow

Counsel for Revisionist :- Pradeep Agrawal, Anand Dubey

Counsel for Opposite Party :- C.S.C.

Hon'ble Alok Mathur, J.

1. Heard Sri Anand Dubey, learned Standing Counsel for the revisionist as well as Sri Sanjay Sarin, learned Additional Chief Standing counsel for the respondents.

2. By means of this revision the revisionist has assailed the order dated 13.02.2014, passed by the Trade Tax Tribunal in the Second Appeal No.195 of 2012, whereby the appeal preferred by the revisionist has been dismissed and the order passed by the first Appellate Authority has been affirmed. This revision relates to assessment year 2010-11.

3. Brief facts giving rise to the present revision are that Vehicle No. UP 84C9459, was intercepted by the Mobile Squad Authority, Commercial Tax, Unit 1st Agra on 04.01.2011 and the dealer was found importing goods from outside the State and Form 38 had certain unfilled (blank) column, which gave rise to the apprehension of intention to evade tax. The Assessing Authority issued show cause notice to the revisionist/assessee for levying penalty under Section 54(1)(14) of the U.P. Value Added Tax Act, 2008 (hereinafter referred to as "the Act, 2008"). The assessee filed reply to the show cause notice. The Assessing Authority after considering the reply of the assessee, rejected the explanation and passed assessment order imposing penalty to the tune of Rs.4,55,485/- i.e. 40% of the value of the goods in question.

4. The assessee/revisionist aggrieved by the order of the Assessing Authority filed first appeal before the first appellate authority which was dismissed by order dated 13.02.2012. Aggrieved by the order passed by the first appellate authority the assessee preferred second appeal before the Trade Tax Tribunal, and the Tribunal by means of impugned order dismissed the appeal of the assessee. Hence this revision preferred by the assessee.

5. Learned Standing Counsel appearing for the respondent has submitted that the order of Tribunal is good in law as well as on facts. The column no. 6 of Form-38 was left blank deliberately

by the revisionist with intention to use the same again so as to evade tax. The learned counsel for the revenue has relied upon the judgment of the Apex Court in the case of M/s Guljag Industries Vs. Commercial Tax Officer, 2007 NTN (Vol. 35) 61, wherein the Apex Court has held that if relevant column of forms have not been filled while importing the goods the presumption is that there is intention to evade payment of tax as the said forms can be used again.

6. Heard learned counsel for the parties and perused the record.

7. The controversy involved in the present revision is in respect to the levy of penalty under Section 54(1)(14) of the Act, 2008 in contravention of the provisions of Section 50 of the Act, 2008. As per scheme of the Act, 2008 any person, who intends to bring, import or otherwise receive, into the State from any place outside the State any goods other than goods named, and described in schedule-I in such quantity or measure or of such value, as may be notified by the State Government in this behalf, in connection with business, shall either obtain the prescribed form of declaration, in such manner as may be prescribed, from the assessing authority having jurisdiction over the area, where this principal place of business is situated or in case there is no such place, where he ordinarily resides or shall download from official website of the department in the manner as may be prescribed under Rule 58 or 59.

8. The driver or other person incharge of vehicle carrying goods referred to in sub Section (1) of Section 50 of the Act, 2008 is required to carry the declaration form along with other relevant documents and if on inspection he is found to transport or attempting or abetting to transport any goods to which this section applies without being covered by proper and genuine documents then for reasons to be recorded and after giving opportunity of being heard he may order for detention of such goods. The declaration form for import may be obtained by registered dealer for import of goods either from his assessing authority or he may download it from the official website of the department in the manner prescribed by the Commissioner. The aforesaid declaration form for import is Form 38. The Form is required to be sent to the selling dealer or consignor of the other State in two copies.

9. In Form 38 the name and address of the dealer to whom form is to be issued, description of goods, weight / measure, quantity, value in figure, value in words, bill / cash memo / Chalan / tax invoice number and date, name and address of seller / consignor and certain particulars of transporters / carrier, namely, service provider number, truck number, name and address of driver and

driving license number are to be filled up. Column no. 1 to 6 may be filled up only with the help of bill / cash memo / chalan / tax invoice. Recurring instances comes to light that column no. 2 to 6 is left blank due to which penalty under Section 54(1)(14) of the Act, 2008 is imposed by the assessing authority on the ground that non filling of this column facilitates tax evaders to evade tax by re-using the same form 38 for import of unaccounted goods. It is the case of the department that when entire informations in form XXXVIII are filled up with the help of the relevant bill / cash memo / chalan / tax invoice then there is no reason not to fill up column no. 2 to 6 i.e. bill / cash memo / chalan / tax invoice number and date. According to the department this clearly indicates import of goods to evade payment of tax which attracts penalty under Section 54(1)(14) of the Act, 2008 unless it is shown that even if details in column no. 2 to 6 have not been filled up yet there was no intention to evade payment of tax.

10. In the instant case it is admitted fact that the respondent had duly applied for and obtained Form 38 for import of goods and the Column 6 of the said Form was left blank on account of negligence of the revisionist. It is only on account of non filling of Column 6, penalty has been imposed upon the respondent. It has been submitted on behalf of the revisionist that there was no intention to evade tax and the driver of the vehicle carrying the goods was carrying all the relevant documents including the bill/challan/bilty etc. from which the details of goods being carried on the vehicle could have been verified by the officer concerned and therefore there was no occasion for the assessing officer to pass penalty order, inasmuch as there was no intention on the part of the assessee to evade tax.

11. Learned counsel for the revisionist has also produced a copy of Circular dated 03.02.2009, passed by the office of the Commissioner, Commercial Tax U.P., which has been addressed to all the Zonal Additional Commissioners/Additional Commissioners Grade-II etc. wherein it has been provided that in case vehicle importing goods is accompanied with Form 38 and the goods being carried tallies with the said Form 38 and also that in case any column in Form 38 remains unfilled, then the Officer inspecting the vehicle at the Check Post / Mobile Squad is under duty to fill up the blank Form in accordance with the other documents alongwith his signature and stamp and release the goods thereafter.

12. In the case of ***Jain Suddh Vanaspati Ltd. Vs. State of U.P., 1983 U.P.T.C. 198*** a Division Bench of this Court considered the similar provisions of the U.P. Sales Tax Act, 1948 and held in paragraphs 23, 29 as under :-

"23. The provision contained in Section 28-A as it stands after enactment of U.P. Act No. 33 of 1979 are materially different. It cannot be said that there is any assumption underlying therein that the goods to which the provision of Section 28-A applies have actually been sold inside the State and the section does not authorise the sales tax authorities either to seize the said goods or to penalise the importer thereof on any such assumption. Its present basis is the attempt to evade tax. The power to detain the goods and levy penalty in respect thereof cannot be exercised merely for the reason that the said goods were not accompanied by the requisite documents or that the documents accompanying them were false. This power can be exercised only if the goods detained are not accompanied by the requisite documents or that the documents accompanying them are false and if there is material before the detaining authority to indicate that the goods are being imported in an attempt to evade assessment or payment of tax due or likely to be due under the Act. The instant case, therefore, in our opinion, clearly falls outside the ratio of the case of *Check Post Officer v. K. P. Abdulla & Bros.* [1971] 27 STC 1 (SC) as decided by the Supreme Court.

29. The first question that arises for consideration is whether the expression "attempt to evade assessment or payment of tax due or likely to be due" can be said to be vague and whether the power conferred upon the Check Post Officer in this regard can be said to be arbitrary. In our opinion, the expression "attempt, to evade assessment or payment of tax due or likely to be due" cannot be said to be an expression conveying vague ideas. It is, in our opinion, an expression having a definite connotation. An attempt to evade assessment or payment of tax due or likely to be due can take place in so many different ways that it is not possible for any legislature to specify all such methods of evasion in the Act. The expression does not become vague merely because all the circumstances in which such an attempt to evade assessment or payment of tax due or likely to be due have not been enumerated therein."

13. Learned counsel for the revisionist has placed reliance on the judgment passed by this Court in the case of ***I.C.I. India Limited Vs. Commissioner of Sales Tax, (2003) 134 STC 286 (All)***, wherein in similar circumstances the Court has held as under :-

"13. In the present case, dealer's books of account was accepted. Tribunal recorded the finding to this effect. Admittedly, bill and built were produced at the time of the checking at the check-post and form XXXI had also been submitted along with bill and built. The purpose of form XXXI

is, to bring to the notice of the department about the import of the goods so that the imported goods may not be escaped from consideration at the time of assessment. Merely because some off the columns of form XXXI were not filled which was merely a procedural defect it cannot be said that the provisions of Section 28-A has not been complied. No finding whatsoever has been recorded by any of the authority that there was any attempt on the part of the applicant to evade the tax. Inasmuch as goods were not for resale and were not liable to tax in the hands of the applicant it cannot be said that there was any violation of Section 28-A. In the circumstances, the penalty under Section 15-A(1)(0) is not sustainable.

14. In the result, the revision is allowed. The order of Tribunal dated September 3, 1990 is set aside and the penalty under Section 15-A(1)(o) is quashed."

14. Learned Single Judge of this High Court in Sales/Trade Tax Revision No. 441 of 2014 - The Commissioner, Commercial Tax, U.P., Lko Vs. S/S Dabur India Ltd. 22 Site-4, Ind. Area Sahibabad and other connected revisions (decided on 25.09.2014), wherein similar controversy is involved, has taken same view in respect to unfilled Form-38.

15. Learned Standing Counsel for the respondent has placed reliance on the judgment of Apex Court in the case of **M/s Guljag Industries (supra)**, whereby he has invited attention of this Court towards the observations made by the Apex Court in para 22 of the judgment, wherein it has been recorded as under :

"22. Section 78(2) is a mandatory provision. If the declaration Form 18A/18C does not support the goods in movement because it is left blank then in that event Section 78(5) provides for imposition of monetary penalty for non-compliance. Default or failure to comply with Section 78(2) is the failure/default of statutory civil obligation and proceedings under Section 78(5) is neither criminal nor quasi-criminal in nature. The penalty is for statutory offence. Therefore, there is no question of proving of intention or of mens rea as the same is excluded from the category of essential element for imposing penalty."

16. Perusal sub Section 6 of Section 28A itself indicates that penalty can be imposed only after giving opportunity of being heard that the goods were being so transported in an attempt to evade payment of tax due or likely to be due under the Act and therefore mens rea becomes essential ingredient, and therefore the facts in the case of **M/s M/s Guljag Industries (supra)** are distinguishable in respect to the provisions of the Act, 2008

applicable in the State of Uttar Pradesh.

17. Non-filling up of column no. 6 i.e. not mentioning of bill / cash memo / chalan / invoice number may lead to an inference that in case of non-checking of goods the declaration form may be re-used for importing goods of same quantity, weight and value to evade payment of tax but it cannot be the sole ground to impose penalty under Section 54(1)(14) of the Act, 2008. Satisfaction has to be recorded after giving opportunity to the dealer / person and after considering all the relevant materials / evidences on record that there was an intention to evade payment of tax. The guilty mind is necessary to be established to impose penalty under Section 54(1)(14) of the Act, 2008.

18. In the present case also the vehicle was accompanied by Form 38 and all other documents were being carried along with other documents and only due to human error column would remain unfilled. It was the duty of the Officer managing the Check Post who after discovering that some column of Form 38 found unfilled should have filled the same himself in the light of Circular dated 03.02.2009 and should have allowed the vehicle to proceed alongwith the goods. It is undisputed that the goods transported were the same which were mentioned in the various documents (bill/builty/challan etc.) carried by the driver of the vehicle.

19. The judgment passed by this Court in the case of ***I.C.I. India Limited*** (supra) has clearly spelt out the law in this regard and a circular issued by the Revenue clearly indicates that the Officer managing the check post after verifying the goods on the basis of other documents available at that point of time and have filled up the blank column of Form 38 and there was no occasion for imposing penalty, as has been done by the Assessing Officer.

20. In the light of above, this Court finds no merit in the contention raised by learned Standing Counsel appearing on behalf of the revenue. The revision is accordingly **allowed**.

21. The impugned order dated 13.02.2014, passed by the Tribunal is hereby quashed. In case, any penalty is deposited by the revisionist that shall be refunded to him in accordance with law.

(Alok Mathur, J.)

Order Date :- 1.8.2024

RKM.