IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

VATAP No. 18 of 2019
Date of decision: 20.1.2020

M/s Siddhartha Bronze Products (P) Ltd., Gurgaon
.. Appellant

v.

State of Haryana and others
.. Respondents

CORAM: HON'BLE MR. JUSTICE AJAY TEWARI
HON'BLE MR. JUSTICE AVNEESH JHINGAN

Present: Mr. Rajiv Agnihotri, Advocate for the appellant.
Ms. Tanisha Peshawaria, Deputy Advocate General, Haryana.

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AVNEESH JHINGAN, J.

The appellant has filed two appeals bearing VATAP Nos. 18 and 48 of 2019 under Section 36 of the Haryana Value Added Tax Act, 2003 (for short, 'the Act') for assessment years 2004-05 and 2006-07. As similar issue is involved, both the appeals are being decided by common order. For the sake of convenience, facts from VATAP No. 18 of 2019 have been taken. Following substantial questions of law have been claimed:

"(a) Whether in the facts and circumstances of the case, Statutory notice in Form N-2 issued in the name of Gujarat is not illegal and makes the assessment bad abinitio, when the jurisdiction of the assessing authority is confined to the boundaries of the State only?

(b) Whether in the facts and circumstances of the case the reassessment and consequential penal proceedings are not barred by limitation?

(c) Whether in the facts and circumstances of the case, the proceeding for levy of penalty without statutory notice in Form are legal proceedings?

(d) Whether in the facts and circumstances of the case, when the record is seized by the Central Excise Authorities and no document available enabling the appellant to disclose its sale but the turnover is part of Balance Sheet, the turnover amounts to suppressed turnover and subject to penal action?

(e) Whether in the facts and circumstances of the case, when the turnover which is part of books of account but could not reflected in the returns because of record in possession of the Central Excise Authorities, penalty can be imposed for suppression of turnover when the proceedings are through bankers and buyer, availed and obtained input tax credit in the State itself?"

The facts are that the appellant is a Public Limited company and was registered under the Act as also under the Central Sales Tax Act, 1956. The dealer was engaged in non-ferrous metals having its sale office in Gurgaon. The quarterly returns were filed in two quarterly returns, nil turnover was declared. The assessment under Section 15(3) of the Act was finalised on 18.3.2008 on the turnover disclosed in the returns.

Aggrieved of the assessment order, appeal was filed. The 1st

Appellate Authority remanded the matter back to the Assessing Officer for fresh assessment by granting one more opportunity of being heard. The remand was given effect to vide order dated 4.9.2009. The department received information from some person that the appellant had conducted sales in 2nd and 3rd quarter of the said assessment year to the tune of ₹5,37,68,173/- and ₹5,10,70,645/- respectively, the tax for the same has been charged but nil returns were filed. Notice for re-assessment under Section 17 of the Act was issued and demand of ₹38,47,005/- was created. It was observed in the order that action for penalty under Section 38 of the Act will be taken separately. The order of re-assessment was accepted by the appellant and no appeal was filed. Notice dated 5.4.2011 was issued for penal action. No one appeared on behalf of the appellant and vide order dated 18.5.2011, penalty of ₹1,29,45,225/- was imposed under Section 38 of the Act. The appeal filed before the 1st Appellate Authority was dismissed on 10.1.2013. Further appeal filed before the Haryana Tax Tribunal, Chandigarh (for short, 'the Tribunal') also met the same fate. Aggrieved of the order dated 24.5.2018 passed by the Tribunal, the present appeal is filed.

While arguing the appeal, the only issue addressed is with regard to imposition and sustaining of penalty especially when the turnover could not be kept out of books of account.

The pin-pointed question to be considered is "whether in the facts and circumstances of the case the penalty for suppression of turnover can be sustained when the turnover was reflected in the books of account?"

In view of the discussion made in the later part of the judgment, the question is answered against the appellant.

Sections 15(1) to (3) and 38 of the Act are reproduced below:

"**15. Assessment of registered dealer**

(1) The returns furnished by a dealer shall be duly acknowledged in the manner prescribed, and where all the returns relating to an assessment year have been filed and are complete in material particulars, the dealer shall, subject to the provisions of sub-section (2), be deemed to have been assessed for that year:

PROVIDED that where the returns are not complete in material particulars, the dealer shall be given an opportunity to complete them.

(2) Subject to the rules which the State Government may frame for selection of cases for scrutiny in respect of dealers required to file returns under sub-section (2) of section 14, the assessing authority shall, in respect of each selected case, serve on the dealer concerned the prescribed notice in the prescribed manner requiring him, on a date and at a place specified therein, either to attend in person or to produce or to cause to be produced any evidence on which such dealer may rely in support of the returns filed by him relating to the said period under assessment (hereinafter referred to in this section as 'assessment period'):

PROVIDED that the assessment period covered by a notice referred to in the foregoing provision shall not exceed one year and such notice shall be served on the dealer before the expiry of one year from, the last date prescribed for filing the last return relating to the assessment period or, the actual date when any return relating to the assessment period has been filed last, whichever is later.

(3) On the day specified in the notice or as soon afterwards as may be, the assessing authority shall, after hearing such evidence as the dealer may produce and such other evidence as it may require on specified points, assess the amount of tax due from him:

PROVIDED that no order under this sub-section shall be passed after the expiry of three years from the close of the year to which the assessment relates.

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38. Failure to maintain correct accounts and to furnish correct returns.

If a Dealer has maintained false or incorrect accounts or documents with a view to suppressing his sales, purchases, imports into State, exports out of State, or stocks, of goods, or has concealed any particulars in respect thereof or has furnished to or produced before any authority under this Act or the rules made thereunder any account, return, document or information which is false or incorrect in any material particular, such authority may, after affording such dealer a reasonable opportunity of being heard, direct him to pay by way of penalty, in addition to the tax to which he is assessed or is liable to be assessed, a sum thrice the amount of tax which would have been avoided had such account, return, document or information, as the case may be, been accepted as true and correct."

Learned counsel for the appellant argued that the goods in question were received by way of stock transfer against 'F' form from Gujarat and statutory forms ST-38 were issued. The goods were sold to M/s Jindal Stainless Steels Ltd. for which ST-38 forms were issued and even C-4 certificates were given by the appellant so that the purchaser can claim input tax credit. The contention is that the sales could not be kept out of books of account and there was no question of suppression. It is further argued that Mr. Ram Tirath who was authorised to file the returns, played mischief and did not disclose the turnover of two quarters in the returns, hence no case for penalty under Section 38 of the Act is made out. Argument is buttressed by stating that there was no malafide intention of concealment of sales in the quarterly returns.

The contentions made are not well-founded. In order to appreciate the effect of not showing the sales in two quarterly returns, scheme of the Act with regard to assessment needs to be gone into.

From Section 15(1) of the Act, it is evident that it is not in all the cases that assessment is framed. The return filed which is duly acknowledged subject to the provisions of sub-section (2) of Section 15 of the Act is deemed to have been assessed for the year. In case the return filed is incomplete as per the proviso, an opportunity is provided to complete the same. As per sub-section (2) of Section 15 of the Act, the Government has to frame rules for selection of cases for scrutiny. It is only in the selected cases that prescribed notice is issued to the assessee to produce or to cause to be produced any evidence to support the returns filed. Meaning thereby, in case the return of the assessee does not fall within the scrutiny criteria, filing of the return would be considered as deemed assessment.

In the present case, inspite of the fact that the assessment was finalised under Section 15(3) of the Act, the turnover as shown in the returns was assessed. The appellant filed an appeal and the matter was remanded back even thereafter the suppressed turnover was never brought to the notice of the Assessing Officer, rather the returns filed were pressed upon. The facts dislodge the argument raised.

It was as a result of information given by a person connected with the business that the sales made by the appellant in 2nd and 3rd quarter saw the light of day. It would be pertinent to note at this stage that it is not disputed by the appellant that tax was duly charged from the purchaser but not deposited.

Section 38 of the Act envisages imposition of penalty where a return furnished is false or incorrect in any material particular. In the case in hand, the appellant had successfully suppressed the turnover not only in the returns but also in proceedings under Section 15(3) of the Act and the tax charged was illegally retained by the appellant. In such event, even if the transaction was disclosed in the books of account it will be of no benefit. Moreover, Section 38 of the Act is worded in a manner that it applies not only to maintaining false or incorrect account but also to filing incorrect or false returns, which the appellant did in the present case.

The contention of the appellant that mischief was committed by authorised representative-Mr. Ram Tirath has rightly been rejected by the Tribunal by stating that no benefit could have been derived by Mr. Ram

Tirath by suppressing the sales in question and filing false returns. The saving of tax, if any, was to the appellant.

There is another aspect of the matter. The appellant is a public limited company. It is hard to believe that one authorised representative filed the return without the same being verified. Even if for the sake of argument, there was a mistake, the same was bound to be highlighted during the assessment proceedings.

At this stage, we may deal with the authorities relied upon by learned counsel for the appellant. Reliance on **Sree Krishna Electricals v. State of Tamil Nadu and another, (2009) 11 SCC 687** does not enhance the case of the appellant. In that case, the appellant was assessed to tax on the sale of wet grinders, the plea of the appellant that he was selling its parts only, same was rejected. In those set of facts it was held that it was not a case for levy of penalty as the sales were shown but the claim of sale parts instead wet grinder was rejected.

In **M/s Anantharam Veerasinghaiah & Co. v. C.I.T., Andhra Pradesh, 1980 SCC (Tax) 274**, it was held that burden lies on the revenue to establish that the disputed amount represents income and the assessee has consciously concealed the particulars of income or deliberately furnished inaccurate particulars. The judgment is of no help. The conduct of the appellant is evident from the fact that the tax charged by the appellant was retained, nil returns for two quarters were filed, the turnover was not disclosed even in the course of assessment and it was only on the basis of a complaint received that suppressed turnover could be taxed.

In **M/s Hindustan Steel Ltd. v. State of Orissa, 1969(2) SCC 627**, the Supreme Court held that penalty cannot be imposed merely on failure to carry out statutory obligation. It is a quasi-criminal proceeding and unless the party has acted deliberately in defiance of law or guilty of conduct contumacious or dishonest, the penalty should not be imposed. The conduct of the appellant in the present case is discussed above. Not only the turnover was suppressed but the appellant was benefitted by retaining the tax charged from the purchaser.

The sustaining of penalty by the Tribunal warrants no interference.

The appeals are dismissed.

(AVNEESH JHINGAN)
JUDGE

(AJAY TEWARI)
JUDGE

20.1.2020
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Whether speaking/reasoned: Yes/No
Whether reportable: Yes/No