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(Judgment reserved on 19.12.2016)
(Judgment delivered on 09.01.2017)

Court No. - 28
Case :- SALES/TRADE TAX REVISION No. - 473 of 2016

Applicant :- The Commissioner,Commercial Tax, U.P. Lucknow
Opposite Party :- S/S. Sri Supreme Freight Carriers Pvt. Ltd.
Counsel for Applicant :- S.C.
Counsel for Opposite Party :- Suyash Agarwal

Hon'ble Surya Prakash Kesarwani,J.

1. Heard Sri B.K. Pandey, learned standing counsel for the applicant and Sri Suyash Agarwal, learned counsel for the respondents. This revision was admitted on 13.12.2016 on the questions of law.

Facts of the Case:-

2. Briefly stated facts of the present case are that on 03.10.2016 a Truck bearing Registration No.HR38G-5557 was intercepted on NH-28 by the Assistant Commissioner (Incharge) Commercial Tax, Mobile Squad Unit, Padrauna, Kushinagar. Statement of the driver of the truck was recorded who stated that the goods in the truck have been loaded from Ghaziabad. He stated that he has TDF No.D20160900493496, bilties of the respondent and bills and no other documents. He also stated that SUVIDHA number for transport of goods in the State of Bihar is not available with him.

3. Thereafter a show cause notice date 04.10.2016 under Section 48 of the U.P. VAT Act, 2008 (hereinafter referred to as “the Act”) fixing 09.10.2016 was issued by the aforesaid Mobile Squad authority on the grounds that the goods were loaded from Ghaziabad (U.P.) as evident from weighment slip, TIN numbers mentioned in the invoices accompanying the goods are invalid, consignors and consignees are

not bonafide, consignors and consignees are non-existent hence respondent cannot prove that from whom delivery of goods have been taken and to whom it is to be dilivered and from whom freight is to be received, when contacted on phone numbers mentioned in certain invoices accompanying bilties it came to light that purchasers and their place of business is in Deoria (U.P.) which proves that goods are to be unloaded in District Deoria and to evade tax goods are being transported under the cover of TDF.

4. The respondents submitted a reply dated 22.10.2016 wherein it was stated that they are transporter, they have a transshipment branch at U.P.-Delhi Border where the goods were collected and loaded for transportation, goods are accompanied with bills, bilties and the TDF-1. So far as doubts expressed about consignors is concerned, **it was stated that they being transporter have no right to collect any information of any kind about the consignors and whosoever books the goods takes bilty and on place of destination the person who produces bilty, the goods are delivered to him.** The goods do not relate to the State of U.P.

5. The reply submitted by the respondents was not found satisfactory. Consequently by order dated 25.10.2016, the goods (PARCHOON) valued at Rs.9,45,600/- were seized and cash security @ 40% being Rs.3,78,240/- was demanded for its release.

6. Aggrieved with the seizure order and demand of cash security, the respondents filed an application dated 11.11.2016 under the Proviso to Section 48(7) of the Act before the Joint Commissioner (SIB) Commercial Tax, Range-Gorakhpur which was rejected by a detailed order dated 18.11.2016.

7. Aggrieved with the aforesaid order, the respondent filed an Appeal No.641 of 2016 under Section 57 of the Act before the Member Commercial Tax Tribunal, Gorakhpur Bench, Gorakhpur which was

allowed by the impugned order of the Tribunal dated 29.11.2016 and the goods were directed to be released without security. Aggrieved with the aforesaid order, the applicants have filed the present revision.

Submissions:-

8. Sri B.K. Pandey submits that the entire activity of the respondent is fraudulent. The goods originated from Ghaziabad and the same were being transported under the cover of forged invoices bearing fictitious TIN numbers, showing non-existent consignees. Addresses of consignees have not been mentioned in any of the invoices except only one invoice of M/s Shakti Trading Company in favour of M/s Kumar Garments, and instead merely “MERWA” has been mentioned in the invoices. In some of the invoices found accompanying the goods, some mobile numbers were noted just below the name of the alleged consignees. The Mobile Squad Authority made a call on these mobile numbers, which revealed that the recipient of the goods are of district Deoria (Uttat Pradesh). He further submits that pursuant to the order dated 13.12.2016 passed by this Court, requiring the applicant to clarify with some evidence that the goods were for delivery at Deoria, an affidavit of compliance was filed on 16.12.2016, after serving a copy thereof upon the respondent. Annexure 2 of the supplementary affidavit dated 16.12.2016 is the information obtained from authorities of B.S.N.L., Padruana, Kushinagar and Office of the Branch Manager of Vodafone, Kasya, Kushinagar by which they informed that the mobile numbers in question are of Deoria. Full address of the person holding the mobile phone numbers, have also been given in these two letters. He submits that on random check, the consignee, M/s Kumar Garments, Hanuman Mandir, CC Road as shown in the alleged invoice no. 211 dated 28.09.2016 of Shakshi Trading Company, has been found to be a registered dealer in Sector-4 of the Commercial Tax Department, Deoria at the given address. A

copy of information downloaded from the departmental website in this regard has been filed as Annexure 3 to the affidavit. He further submits that at the time of checking of the packet of goods relating to bilty no.13672, it was found that it is mentioned on the packet itself that the goods are to be delivered at Deoria. He submits that the facts on record, clearly indicate fraudulent conduct of the respondent which shows intent to deceive the department to evade payment of tax by accompanying with the goods fake and fictitious papers and making a false declaration in the transit declaration form, so as to give colour to the transaction in question as a transaction from outside the State of U.P. to outside the State of U.P. He submits that the tribunal has committed gross error in setting aside the order demanding cash security and, therefore, the order of the tribunal deserves to be set aside. He submits that exemplary cost deserves to be imposed on the respondent who has played fraud not only upon the authorities and the tribunal, but also upon this Court. He submits that despite service of the supplementary affidavit, the respondent could not courage to deny the facts stated therein. He also drawn attention of the Court to paragraph 6 of the notice at page 36 of the revision and submits that despite specific mention of facts with regard to mobile numbers mentioned in the invoices indicating intended unloading of the goods at Deoria, the respondent has not submitted any specific reply at any stage including his reply dated 22.10.2016 filed before the Mobile Squad Authority, a copy of which has been filed Annexure No. 6 to the revision.

9. Sri Suyash Agarwal, learned counsel for the respondent submits that the respondent is a transporter and has collected goods of various dealers of Delhi at Ghaziabad for transportation from Delhi to “MERWA”. He admits that in the invoices, only the name of the consignee and the place as “MERWA” was mentioned, but states that

in the transit declaration form, the place of destination has been mentioned "Mairwa, Siwan, Bihar". He submits that since the goods were being transported by the respondent from outside the State of U.P. to outside the State of U.P. and therefore, the authorities under the U.P. VAT Act, have no jurisdiction to interfere with the movement of goods or to seize the goods and demand security. In support of his submissions, he refers to the provisions of Section 52 of the Act and relied the decisions of this Court in the case of **Madhya Bharat Transport Carrier Vs. C.T.T., 2006 UPTC 967 (ALD) (DB) Saiya Transport Pvt Ltd Vs. State of U.P., 2013 NTN (Vol.53) 232 Dev Nandini Trading Co. Vs. C.C.T., 2012 NTN (Vol.49) 19 New Indore Delhi Road Lines Vs. C.T.T., 2007 NTN (Vol.33) 376 C.T.T. Vs. Vikram Tewari, Delhi, 2012 NTN (Vol.49) 22 C.C.T. Vs. Panchkanya Road Carriers**, and the judgment of the Hon'ble Supreme Court in the case of **Mohinder Singh Gill Vs. Chief Election Commissioner, New Delhi AIR 1979 SC 851** (para 8). He further submits that the judgment in the case of **Om Logistics Ltd. Vs. C.C.T. in STR 326 of 2011**, has no application on the facts of the present case. He submits that merely on the basis of information in the matter of M/s Kumar Garments and certain information with regard to mobile numbers as filed along with supplementary affidavit, no adverse inference can be drawn with respect to the entire goods. He submits that the information obtained in the matter of M/s Kumar Garments was not part of show cause notice. Lastly he submits that costs may not be imposed as suggested by the learned standing counsel.

10. On a question put to him whether the respondent disputes the correctness of the information with regard to mobile numbers and M/s Kumar Garments filed alongwith supplementary affidavit, he submits that the respondent can not reply it.

Relevant Provisions:

U.P. VAT Act, 2008:-

Section 46. ***Power of search, inspection and seizure in case of a person other than dealer:-***

Where a person carries on any activity ancillary or incidental to or in connection with business of a dealer*, any officer authorized under sub-section (1) of section 45, for the purpose of investigation into tax liability of a dealer, subject to provision of sub-section (11) of section 45, may exercise powers under subsection (1) to sub-section (10) of the said section.*

EXPLANATION- For the purposes of this section, following persons shall be deemed to carry on activities ancillary or incidental to or in connection with the business of a dealer:
(i) broker or canvassing agent who acts as mediator between purchaser and seller of goods; or
(ii) ***transporter or any other carrier or a forwarding agent of goods; or***
(iii) person who fabricates or manufactures any goods for a dealer; or
(iv) person who takes delivery of goods or who dispatches goods on behalf of a dealer; or
(v) ***person who holds in custody any goods belonging to a dealer; or***
(vi) ***person who handles goods of a dealer in any other capacity.***

Section 48. ***Power to seize goods.-***

(1) An officer authorised under sub-section (1) of section 45 shall have the powers to seize any goods -

(i) which are found in a dealer's place of business, vehicle, vessel or any other building or place; or

(ii) which, such officer has reason to believe to belong to the dealer and which are found in any place of business, vehicle, vessel or any other building or place, but are not account for by the dealer in his accounts, registers or other documents maintained in the ordinary course of his business.

(iii) which are found in any place of business, vehicle, vessel or any other building or place, and such goods are accompanied by any tax invoice or sale invoice or any other document pertaining to value of goods, as the case may be, containing value of goods undervalued to the extent more than fifty percent of the value of goods prevalent at the relevant time in the local market area where the said transaction had taken place, with intention to evade payment of tax:

PROVIDED that a list of all the goods seized under this sub-section shall be prepared by such officer and be signed by the officer and not less than two witnesses.

(2) ***Where any officer referred to in sub-section (1) has reason to believe that the goods found in any vehicle, vessel, building or place are not traced to any bonafide dealer*** *or documents issued by a bonafide dealer with respect to accompanying goods contains wrong particulars or that it is doubtful if such goods are properly accounted for by any dealer in his accounts, registers or other documents, maintained in the ordinary course of his business,* ***he shall have power to seize such goods, and the remaining***

provisions of this section shall mutatis mutandis apply in relation to such seizure.

(3) An officer seizing the goods under sub-section (1) shall take all the measures necessary for their safe custody and forward the list, referred to in the proviso to sub-section (1), along with other documents relating to the seizure to the assessing authority concerned.

(4) The said assessing authority shall serve on the dealer or, as the case may be, the person in charge of the goods at the time of seizure (hereinafter in this section referred to as the person in charge) a notice in writing requiring him to show cause, why a penalty should not be imposed.

(5) If such authority, after taking into consideration the explanation, if any, of the dealer or, as the case may be, the person in charge and after giving him an opportunity of being heard, is satisfied that the said goods were omitted from being shown in the accounts, registers and other documents referred to in sub-section (1) or not traced to any bonafide dealer or not properly accounted for by any dealer or the documents issued by a bonafide dealer with respect to the accompanying goods contained wrong particulars or the goods are undervalued to the extent of more than fifty percent of the value of goods prevalent at the relevant time in the local market area where the said transaction had taken place, with intention to evade payment of tax, it shall pass an order imposing a penalty not exceeding forty per cent of the value of such goods, as he deems fit.

(6) A copy of the order imposing penalty under sub-section (5) shall be served on the dealer or, as the case may be, the person in charge.

(7) ***The officer seizing the goods shall serve on the dealer or, as the case may be, the person in charge an order in writing mentioning the fact of such seizure and indicating the amount, not exceeding such amount as would be sufficient to cover the penalty likely to be imposed, on deposit whereof in cash, the goods so seized may be released in favour of the dealer or, as the case may be, the person in charge:***

PROVIDED that the Commissioner or such other officer, not below the rank of a Deputy Commissioner, as may be authorised in this behalf by the Commissioner, may, for sufficient reasons to be recorded in writing, direct that the goods be released without any deposit or on depositing such lesser amount, or furnishing security in such form other than cash or indemnity bond, as he may deem fit:

PROVIDED FURTHER that in case of a person, who is not a registered dealer and against whom penalty order referred to in sub-section (7) has been passed, filing of return by such person and assessment of tax on him may not be necessary.

(8) The penalty or such part thereof as remains after adjustment of any amount deposited under sub-section (7) shall be deposited in the prescribed manner within thirty days of the date of service of the copy of the order imposing the penalty. In default, the assessing authority shall cause the goods to be sold in such manner as may be prescribed and apply the sale proceeds thereof towards the penalty imposed, and subject to the provisions of section 40, refund the balance, if any, to the dealer or, as the case may be, to the person-incharge.

(9) Where the officer seizing the goods, before forwarding the list and other documents referred to in sub-section (3), or the assessing authority at any time thereafter, is of the opinion that the goods are subject to speedy and natural decay or where the tax assessed or penalty imposed, as the case may be, is not deposited in accordance with the provisions of this

Act, the officer seizing the goods or the assessing authority, as the case may be, may, without prejudice to any other action that may be taken in accordance with other provisions of this Act, cause the goods to be sold by public auction in the prescribed manner. The sale proceeds of such goods shall be adjusted towards the expenses of tax assessed or penalty imposed. The balance, if any, shall be refunded to the dealer or, as the case may be, the person in-charge in accordance with the provisions of sub-section (8).

(10) If the amount deposited under sub-section (7) is more than the amount of penalty imposed under sub-section (5), the excess amount so deposited shall be refunded to the dealer or, as the case may be, the person in-charge by the authority with whom it was so deposited, in accordance with the provisions of section 40."

(Emphasis supplied by me)

Section 52. ***Provision for goods passing through the state.-***

When a vehicle coming from any place outside the State and bound for any other place outside the State carrying goods referred to in sub-section (1) of section 50, passes through the State, the driver or other person in charge of such vehicle shall carry such documents as may be prescribed failing which it shall be presumed that the goods carried thereby are meant for sale within the State by the owner or person in charge of the vehicle.

U.P. VAT RULES, 2008:

*"**Rule 58. The transit of goods by road through the State.--***

The driver or person-in-charge of a vehicle carrying goods referred to in sub-section (1) of section 50, coming from a place outside the State and destined for a place outside the State, passes through the State, the driver or person-incharge of a vehicle shall carry such documents and follow such procedures as may be determined by general or special order issued by the Commissioner from time to time, failing which it shall be presumed that the goods carried thereby are meant for sale within the State by the owner or person-in-charge of the vehicle.

Rule 59. Import or receipt of goods by rail, river or air and matters incidental thereto. *(1) A registered dealer or a person other than a registered dealer desirous of importing or receiving into the State (from any place outside the State) by post, rail, river or air, any goods, notified under sub-section (1) of section 50, in excess of quantity, measure or value specified thereunder, shall submit for endorsement the original and duplicate portions of the declaration or certificate as the case may be duly filled in and signed by him to the assessing authority within whose territorial jurisdiction he carries on business or, if he does not carry on business, ordinarily resides.*

(2) The assessing authority to whom a declaration or certificate is submitted for endorsement shall, after satisfying himself about their correctness and completeness, sign and stamp with his official seal, retain the original portion of the declaration or the certificate and return to the registered dealer or the person other than the registered dealer, as the case may be, the duplicate portion thereof after endorsing thereon a receipt for the retained original portion. The assessing authority may, in his discretion,

direct the dealer or the person concerned to furnish copies of bill or cash memorandum or challan or invoice received by him from the selling dealer or the consignor of the other State for verification of the contents of the declaration or the certificate.

(3) The concerned authority of rail, air, or post shall not deliver the consignment to the dealer or person concerned unless the declaration or certificate dully endorsed as aforesaid, is furnished before him.

(4) The provisions in rule 54,and rule 56, except sub-rules (1), (6), (8) and (11) thereof and of rule 57 except subrule (1) and (6) thereof shall mutatis mutandis, apply in regard to the declaration or certificate, as the case maybe, referred to in sub-rule (1).

(5) The commissioner may from time to time issue instructions with regard to the procedure to be followed regarding taking of delivery of goods and submission of declaration or certificate."

Section 165 of Indian Evidence Act

"165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing: and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the Judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the questions were asked or the documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases herein- before excepted."

11. Considering the submissions of learned counsels for the parties and the questions, **following questions of law are formulated** under Section 58(2) of the Act for answer in this revision:-

(i) Whether under the facts and circumstances of the case, seizure of goods and demand of cash security for its release under Section 48 of the U.P. VAT Act, 2008 is valid?

(ii) Whether Delhi – U.P. Border area of District Ghaziabad is "no-man's land"?

(iii) Whether transporters are strangers to the transaction of sale and purchase and totally ignorant about the consignors and consignees?

(iv) Whether fraudulent transportation of goods and colourable devices used to give impression of transportation of goods from outside the State of U.P. to outside the State of U.P. shall fall under Section 52 or would be a case falling under Section 48 of the U.P. VAT Act, 2008?

Discussion and Findings:-

Question No. (i) Whether under the facts and circumstances of the case, seizure of goods and demand of cash security for its release under Section 48 of the U.P. VAT Act, 2008 is valid?

12. Undisputedly, the goods originated for transportation from Ghaziabad and the same were being transported under the cover of forged invoices bearing fictitious TIN numbers, showing non-existent consignees. Addresses of consignees have not been mentioned in any of the invoices except only one invoice of M/s Shakti Trading Company in favour of M/s Kumar Garments, and instead merely “MERWA” has been mentioned in the invoices. In some of the invoices found accompanying the goods, mobile numbers were noted just below the name of the alleged consignees. The Mobile Squad Authority made a call on these mobile numbers, which revealed that the recipient of the goods are of district Deoria (Uttat Pradesh). Despite specific mention of facts with regard to mobile numbers mentioned in the invoices indicating intended unloading of the goods at Deoria, the respondent has not submitted any specific reply at any stage including his reply dated 22.10.2016 filed before the Mobile Squad Authority. Respondent also declined to answer even before this court as noted in the order

dated 19.12.2016. By order dated 13.12.2016, this Court directed the applicant to clarify with some evidence that the goods were for delivery at Deoria. Thereupon, an affidavit of compliance was filed on 16.12.2016 by the applicants, after serving a copy thereof upon the respondent. Informations contained in the affidavit have not been denied by the respondents even after being asked by the court as evident from the order dated 19.12.2016. Annexure 2 of the supplementary affidavit dated 16.12.2016 are the letters of authorities of B.S.N.L., Padruana, Kushinagar and Office of the Branch Manager of Vodafone, Kasya, Kushinagar by which they informed that the mobile numbers in question (as mentioned in the invoices) are of Deoria. Full address of the person holding the mobile phone numbers, have also been given in these two letters, which are of Deoria (U.P.). It was also found that the consignee, M/s Kumar Garments, Hanuman Mandir, CC Road as shown in the alleged invoice no. 211 dated 28.09.2016 of Shakshi Trading Company is a registered dealer in Sector-4 of the Commercial Tax Department, Deoria. At the time of checking of the packet of goods relating to bilty no.13672, it was found that it is mentioned on the packet that the goods are to be delivered at Deoria. These evidences clearly indicate fraudulent conduct of the respondent with intent to deceive the department to evade payment of tax by accompanying with the goods fake and fictitious papers and making a false declaration in the transit declaration form, so as to give colour to the transportation of goods from Ghaziabad for sale within the State of U.P. as transportation from outside the State of U.P. to outside the State of U.P. Thus, the tribunal has committed gross error in setting aside the seizure order demanding cash security. Therefore, the order of the tribunal cannot be sustained. Findings recorded by the Tribunal that the goods were being transported under valid documents from Delhi to Bihar are perverse.

13. **The respondents are well aware of the real owners of the goods but they have suppressed the information and did not allow the real owners/ consignors or consignees to come forward.** Specific queries were made by the Mobile Squad Authority based on documentary evidences regarding the invoices accompanying the goods to be fake, TIN numbers mentioned therein to be fictitious, intended unloading of goods at Deoria for sale and the alleged consignors to be non-existent, yet none of the alleged consignors/ owners of goods came forward nor the respondents disclosed identity of real consignors/ owners and consignees of the goods nor replied the queries made by the Mobile Squad Authority. In fact, the respondents have not only consciously suppressed material facts but also fraudulently acted to get the goods released merely on their baseless stand that the goods were being transported from outside the State of U.P. to outside the State of U.P.

14. **In view of the above discussion, prima facie I have no difficulty to hold that the goods in question originated for transportation from Ghaziabad, were being carried by the respondent in a fraudulent manner under the cover of bogus invoices with fictitious TIN numbers printed thereon. Respondents downloaded TDF-1 by submitting false information, suppressing material information, identity and particulars of real owners of the goods, so as to give it colour of transportation of the goods from outside the State of Uttar Pradesh to outside the State of Uttar Pradesh under Section 52 of the Act, with intent to evade tax under the Act. Under the circumstances, seizure of the goods under Section 48 of the Act and demand of cash security by the Mobil Squad Authority for release of the goods, does not suffer from any illegality.**

Question No.(ii) Whether Delhi – U.P. Border area of District Ghaziabad is "no-man's land"?

15. The stand taken by the respondents that certain border area of District Ghaziabad is a "no man's land", has no substance. Article 1(2) of the Constitution of India, provides that the States and the territories thereof shall be specified in the First Schedule. It is undisputed that District Ghaziabad is within the territory of State of U.P. Neither the Constitution of India nor any Statute provides for Delhi-U.P. Border area of District Ghaziabad to be "no man's land". The circular of the Commissioner Sales Tax dated 31.01.1987 was issued in view of Establishment of Check Posts under the U.P. Sales Tax Act, 1948. Section 49 of the U.P. VAT Act provides for establishment of check-posts and barriers but this provision has been omitted w.e.f. 27.08.2009 by the U.P. VAT (III Amendment) Act, 2009, (U.P. Act No.23 of 2009) published in the notification dated 27.08.2009. In the case of **Om Logistic Ltd. Vs. Commissioner of Commercial Tax, 2016 NTN (V.61) 250 (All.)**, this court held that the power to apprehend, inspect and seize goods is exercisable throughout the length and breadth of the State. If that power exists and exercisable statutorily throughout the State, surely a circular of the Commissioner cannot eclipse the same. That apart, in exercise of powers conferred under Section 52 of the Act read with Rule 58 of the Rules, the Commissioner of Commercial Tax has issued a circular dated 03.09.2013 providing for the procedure for vehicles passing through the State which person incharge of the vehicle is bound to follow. Paragraph-6 of the aforesaid circular dated 03.09.2013 provides as under:

> "**पारगमन घोषणापत्र TDF-1** को प्रश्नगत वाहन के माल सहित प्रदेश की **सीमा में प्रवेश के पूर्व ही भरना अनिवार्य होगा** तथा प्रदेश के बाहर से प्रदेश में होते हुए प्रदेश के बाहर जाने वाले माल के साथ माल से सम्बन्धित प्रपत्रों तथा बिल/बिल्टी आदि के अतिरिक्त इस पारगमन घोषणपत्र TDF-1 को भी रखना अनिवार्य होगा।"

16. The circular dated 31.01.1987 has been heavily relied by the

respondents on the basis of certain judgments of this court contending that the area of Chikambarpur, Ghaziabad is a "no man's land" as per the circular. It is relevant to note that even the said circular has been cancelled by the Commissioner of Commercial Tax by circular dated 29.08.2016, which is reproduced below:

"कम्प्यूटर परिपत्र सं0 1617028 दिनांक 29.08.2016

संख्या–विधि–4(1)/सामान्य निर्देश/16–17/1351/वाणिज्य कर

कार्यालय कमिश्नर वाणिज्य कर, उत्तर प्रदेश

(विधि अनुभाग)

लखनऊ : दिनांक : 26 अगस्त, 2016

समस्त जोनल एडीशनल कमिश्नर/एडीशनल कमिश्नर ग्रेट–2 (वि0अनु0शा0)

समस्त ज्वाइन्ट कमिश्नर (कार्यपालक)/(वि0अनु0शा0) वाणिज्य कर, उत्तर प्रदेश।

विषय :–सर्व श्री ओम लौजिस्टिक लि0 बनाम किमश्नर वाणिज्य कर (टी0टी0आर0 सं0 : 326/2011) 2016 NTN (Vol. 61) 250 (All.) में माननीय उच्च न्यायालय द्वारा दिये गये निर्णय के संदर्भ में।

सर्व श्री ओम लौजिस्टिक लि0 बनाम कमिश्नर वाणिज्य कर (टी0टी0आर0 सं0 : 326/2001) के वाद में याची द्वारा अभिग्रहण की कार्यवाही को निम्न दो बिन्दुओं पर चुनौती दी गयी थी :–

(1) कमिश्नर, व्यापार कर द्वारा परिपत्र दिनांक 31.01.1987 के संदर्भ में याची का कथन था कि माल गोदाम में पहुंचने से पूर्व "no mans land" में होने के कारण माल का अभिग्रहण नहीं किया जा सकता।

(2) ''कारण बताओ नोटिस'' के उत्तर में फार्म 38 दाखिल कर दिये जाने के आधार पर अभिग्रहण की कार्यवाही अपेक्षित नहीं थी।

प्रथम बिन्दु के संबंध में माननीय उच्च न्यायालय द्वारा प्रश्नगत निर्णय में विस्तार से विचार किया गया तथा यह अभिमत व्यक्त किया गया कि कमिश्नर, वाणिज्य कर द्वारा जारी प्रश्नगत परिपत्र दिनांक 31.01.1987 किसी भी प्रकार से वाणिज्य कर विभाग के अधिकारियों को उत्तर प्रदेश राज्य की सीमा के अन्दर माल के अभिग्रहण से नहीं रोकता है। माननीय न्यायालय द्वारा यह भी अभिमत व्यक्त किया गया है कि उत्तर प्रदेश मूल्य संवर्धित कर अधिनियम 2008 में ऐसा कोई प्राविधान नहीं है जिसके आधार पर कमिश्नर, वाणिज्य कर को यह अधिकार प्राप्त हो कि वे अपने अधीनस्थ अधिकारियों को उत्तर प्रदेश राज्य के समस्त भू–भाग के अन्तर्गत माल को रोकने, जांच करने और उनका अभिग्रहण करने का अधिकार है तथा यह शक्तियॉ अधिनियम द्वारा प्रदत्त होने पर कमिश्नर वाणिज्य कर के परिपत्र द्वारा उन्हें बाधित नहीं किया जा सकता।

माननीय उच्च न्यायालय के उक्त निर्णय से यह स्वतः स्पष्ट है कि

कमिश्नर वाणिज्य कर के उक्त परिपत्र संख्या विधि–1–(2)–(सी–7)–86–87–3332/मुख्यालय दिनांक 31.01.1987 द्वारा किसी प्रकार से उत्तर प्रदेश के भू–भाग के अन्दर किसी भी स्थान पर जांच/अभिग्रहण की कार्यवाही से रोका नहीं गया है। तथा प्रदेश के भू–भाग के अन्तर्गत किसी भी क्षेत्र में धारा–45 एवं 45 के अन्तर्गत प्रदत्त अधिकारों द्वारा माल की जांच/अभिग्रहण की कार्यवाही की जा सकती है। **वैसे भी प्रश्नगत परिपत्र तत्समय कार्यरत जॉच चौकियों की भौगोलिक स्थिति के कारण हो रहे करापवंचन की प्रभावी जांच हेतु जारी किया गया तथा वर्तमान में जॉच चौकियॉ समाप्त हो जाने के कारण प्रश्नगत परिपत्र स्वतः निष्प्रयोज्य हो जाता हैं एवं तद्नुसार निरस्त किया जाता है।** माननीय उच्च न्यायालय के प्रश्नगत निर्णय की प्रति इस पत्र के साथ इस निर्देश के साथ संलग्न कर प्रेषित की जा रही हैं कि माननीय न्यायालय के उक्त निर्णय से अधीनस्थ अधिकारियों को अवगत कराते हुए उपरोक्तानुसार कार्यवाही करना सुनिश्चित करें।

उक्त निर्देशों का कड़ाई से अनुपालन किया जाना सुनिश्चित किया जाये।

संलग्नक : See 2016 NTN (Vol.61) 250 (All.)

(मुकेश कुमार मेश्राम)
कमिश्नर वाणिज्य कर,
उत्तर प्रदेश।"

17. **Thus, the circular dated 31.01.1987 is non-existent. That apart, it has no relevance in view of the facts found and the constitutional provisions mentioned above. Delhi – U.P. Border area of District Ghaziabad is not "no man's land" rather it is part of District Ghaziabad (U.P.).**

<u>Question No. (iii) Whether transporters are strangers to the transaction of sale and purchase and totally ignorant about the consignors and consignees?</u>

18. Before the authorities and the Tribunal, the respondents took the stand that they being transporter have no right to obtain information of any kind about any businessman rather the business of transportation is based on practical formula that whosoever books the goods for a place of destination, he takes bilti and on the place of destination the goods are delivered to the person who produces bilti. Before the Tribunal the respondents pleaded that they do not enquire

whether the consignors and consignees are in existence or not. The stand so taken has no substance in view of the observations of Hon'ble Supreme Court in the case of **A.B.C. (India) Ltd. Vs. State of Assam and another (2005) 6 SCC 424** (para-22) as under:

> *"22. **In our view, transporters are not strangers to the sale or purchase of goods, to the contrary are part and parcel and are directly involved in storing the goods purchased or sold by dealers, and in many cases such transactions are fictitiously carried on in false names and addresses besides false classifications vis-a-vis transportation of such goods in and outside the State making themselves party to the episode of such fictitious transactions for the sole purpose of evasion of tax by the dealers purchasing and selling such goods.**"*

19. The activity of transporter or any other carrier, forwarding agent, person who holds any goods belonging to a dealer and person who handles goods of a dealer in any other capacity; have also been statutorily recognised under section 46 of the Act to be an activity ancillary or incidental to or in connection with business of a dealer.

20. In the case of **Gill Sandhu Haryana Transport Co. Vs. State of Rajsthan, (1991) 10 RT JS 335 (paras 6, 7),** a Division Bench of Rajsthan High Court observed that where a transporter is stopped and it is found that consignee is fictitious and the goods are seized, it is not likely to effect the right of the transporter. In that eventuality, the consignor or the consignee should come forward and assign reasons for their concealing the real identity. The law does not help those who are torch bearers of dishonest persons.

21. **In view of the above, it cannot be said that transporters are strangers to the transaction of purchases and sales and totally ignorant about the consignors and consignees. In cases like the present case where transactions have been fictitiously carried on in false names and addresses, bogus invoices with fictitious TIN numbers printed therein and TDF-1 is downloaded on the basis of false particulars and forged papers by a**

transporter then he makes himself party to the episode of fictitious transaction with sole purpose of evasion of tax by undisclosed non-bonafide dealers. By seizure of goods in such cases transporter is not affected if he is really a transporter. Therefore, instead of being torch bearer of dishonest persons, he should allow the real consignors or consignees to come forward and assign reasons for concealing their real identity. The action of the departmental authorities in such cases to unearth evasion of tax is one of their fundamental duties under the Act.

Question No. (iv) Whether fraudulent transportation of goods and colourable devices used to give impression of transportation of goods from outside the State of U.P. to outside the State of U.P. shall fall under Section 52 or would be a case falling under Section 48 of the U.P. VAT Act, 2008?

22. In the case of **Vodafone International Holdings BV Vs. Union of India and another, (2012) 6 SCC 613** (paras 323, 331) Hon'ble Supreme Court considered the effect of adoption of colourable devices and held as under:

> *"323. McDowell has emphatically spoken on the principle of Tax Planning. Ranganath Mishra, J. on his and on behalf of three other Judges, after referring to the observations of S.C. Shah, J. in CIT v. A. Raman and Co. AIR 1968 SC 49, CIT v. B. M. Kharwar (1969) 1 SCR 651, the judgments in Bank of Chettinad Ltd. v. CIT, (1940) 8 ITR 522, Jiyajeerao Cotton Mills Ltd. v. CIT, Bombay AIR 1959 SC 270; CIT v. Vadilal Lallubhai (1973) 3 SCC 17 and the views expressed by Viscount Simon in Latilla v. IRC, (1943) AC 377 : 25 TC 107 (HL) stated as follows:*
> *(McDowell and Co. Ltd. V. CTO, (1985) 3 SCC 230, SCC pp.254-55, para 45)*
>
> *"45. Tax planning may be legitimate provided it is within the framework of law.* ***Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges."***
>
> *331. Reddy, J., we have already indicated, himself has stated that he is entirely agreeing with Mishra, J. and has only supplemented what Mishra, J. has stated on tax avoidance, therefore, we have to go by what Mishra, J. has*

> *spoken on tax avoidance. Reddy, J. has depreciated (sic deprecated) the practice of setting up of tax avoidance projects, in our view, rightly because the same is/was the situation in England and Ramsay (W.T.) Ltd. v. IRC, 1982 AC 300 and other judgments had depreciated the tax avoidance schemes. In our view, the ratio of the judgment is what is spoken by Mishra, J. for himself and on behalf of three other judges, on which Reddy, J. has agreed. Reddy, J. has clearly stated that he is only supplementing what Mishra, J. has said on Tax avoidance."*
>
> *(Emphasis supplied by me)*

23. In the case of **United India Insurance Company Ltd. V. B.Rajendra Singh and others, JT 2000(3)SC.151**, considering the consequences of fraud, Hon'ble Supreme Court held in paragraph 3 as under :

> *"**Fraud and justice never dwell together**". (Frans et jus nunquam cohabitant) is a pristine maxim which has never lost its temper overall these centuries. Lord Denning observed in a language without equivocation that "**no judgement of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for fraud unravels everything**"(Lazarus Estate Ltd. V. Beasley 1956(1)QB 702).*
>
> (Emphasis supplied by me)

24. In the case of **Ram Chandra Singh Vs. Savitri Devi and others, 2003(8) SCC 319**, Hon'ble Supreme Court defined fraud and considered the effect of fraud and misrepresentation and held in paragraphs 15, 16, 17, 18, 25 and 37 as under :

> *"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. **Fraud as is well-known vitiates every solemn act.** Fraud and justice never dwells together.*
>
> *16. **Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.***
>
> *17. **It is also well settled that misrepresentation itself amounts to fraud.** Indeed, innocent misrepresentation may also give reason to claim relief against fraud.*
>
> *18.**A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood.** It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the*

representations proceeded may not have been bad.

25. ***Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res-judicata.***

37. It will bear repetition to state that any order obtained by practising fraud on court is also non-est in the eyes of law."

(Emphasis supplied by me)

25. In the case of **S.P. ChengalVaraya Naidu (dead) by L.Rs Vs. Jagannath (dead) by L.Rs and others, AIR 1994 SC 853**, the Hon'ble Supreme Court held in para 7 as under :

"7. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. ***The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.****"*

(Emphasis supplied by me)

26. In the case of **Jainendra Singh Vs. State of U.P., 2012 (8) SCC 748**, Hon'ble Supreme Court considered the fact of appointment obtained by fraud and held in para 29.1 to 29.10 as under :

"29.1 ***Fraudulently obtained orders of appointment could be legitimately treated as voidable at the option of the employer or could be recalled by the employer and in such cases merely because the respondent employee has continued in service for a number of years, on the basis of such fraudulently obtained***

employment, cannot get any equity in his favour or any estoppel against the employer.

29.2 Verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable to the post under the State and on account of his antecedents the appointing authority if find not desirable to appoint a person to a disciplined force can it be said to be unwarranted.

29.3 ***When appointment was procured by a person on the basis of forged documents, it would amount to misrepresentation and fraud on the employer and, therefore, it would create no equity in his favour or any estoppel against the employer while resorting to termination without holding any inquiry.***

29.4 A candidate having suppressed material information and/or giving false information cannot claim right to continue in service and the employer, having regard to the nature of employment as well as other aspects, has the discretion to terminate his services.

29.5 Purpose of calling for information regarding involvement in any criminal case or detention or conviction is for the purpose of verification of the character/antecedents at the time of recruitment and suppression of such material information will have clear bearing on the character and antecedents of the candidate in relation to his continuity in service.

29.6 The person who suppressed the material information and/or gives false information cannot claim any right for appointment or continuity in service.

29.7 The standard expected of a person intended to serve in uniformed service is quite distinct from other services and, therefore, any deliberate statement or omission regarding a vital information can be seriously viewed and the ultimate decision of the appointing authority cannot be faulted.

29.8 An employee on probation can be discharged from service or may be refused employment on the ground of suppression of material information or making false statement relating to his involvement in the criminal case, conviction or detention, even if ultimately he was acquitted of the said case, inasmuch as such a situation would make a person undesirable or unsuitable for the post.

29.9 An employee in the uniformed service pre-supposes a higher level of integrity as such a person is expected to uphold the law and on the contrary such a service born in deceit and subterfuge cannot be tolerated.

29.10The authorities entrusted with the responsibility of

> *appointing Constables, are under duty to verify the antecedents of a candidate to find out whether he is suitable for the post of a Constable and so long as the candidate has not been acquitted in the criminal case, he cannot be held to be suitable for appointment to the post of Constable."*

(Emphasis supplied by me)

27. Similar principles with regard to fraud have been laid down by Hon'ble Supreme Court in the case of **JT 2005(6) SC 391, para 7 to 15, JT 2007(4) SC 186, para 19 to 39, JT 2009(9) SC 365, para 22 and 23, JT 2008 (3) SC 452, para 12.3 to 15, JT 2009(5) SC 278, para 13 to 18 and 28 and JT 2008(8) SC 57**.

28. Facts of the present case as noted above, leave no manner of doubt that the alleged invoices accompanying the goods are fake, the TIN numbers printed therein are fictitious, the alleged consignors are non-existent, the goods were to be unloaded/ delivered at Deoria (U.P.) and identity of real owners of the goods have been concealed by the respondents with the only motive to evade tax under the Act or to help undisclosed persons/ non-bonafide dealers to evade tax. It is a clear case of fraud, misrepresentation and suppression of facts by the respondents. **This court cannot act to protect perpetuation of legal fraud. The courts are obliged to do justice. Fraud and justice never dwell together (*Frans Et Jus Nunquam Cohabitant*). This maxim has never lost its temper over all the centuries. The courts are not meant to permit dishonesty even on technical pleas. Dishonesty cannot be permitted to bear the fruit and benefit to the persons who played fraud or misrepresented or suppressed facts and in such circumstances, the court should not allow perpetuation of fraud by entertaining the technical pleas. The very foundation of the case of the respondent is based on falsehood and fraud. The respondents have suppressed material facts and**

did not disclose it despite being repeatedly asked by the Mobile Squad Authority. Even they abstained to answer the queries made by the court as afore-noted. They have not disclosed the real person/ owner of the goods in question. Wrong has been clearly committed and, therefore, the respondents cannot be allowed to take advantage of their own wrong on the basis of technical pleas so as to frustrate the law. Once a transportation of goods under the cover of Section 52 of the Act is shown to be fraudulent, sham, bogus, circuitous or a device designed to evade tax under the Act, the statutory authorities under the Act and the court can always examine the substance of the transaction because the legislature never intends to guard fraud. No authority or court may recognise such transportation or transaction on the basis of the provisions of Section 52 of the Act. Law is manifestation of principles of justice, equity and good conscience. Hence section 52 of the Act cannot be interpreted and understood in a manner so as to encourage tax evaders and to discourage those who abide by law. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges. No doubt, when a person transports goods from outside the State of U.P. to outside the State of U.P. in terms of Section 52 of the Act and Rule 58 of the Rules, the authorities under the Act have no power to seize the goods and demand security for release thereof but where, as in the present case, the transaction is sham, not genuine and make-believe and originated from a place within the State of U.P. or intended to be sold within the State of U.P. with intent to evade tax then it would be a case falling under Section 48 of the Act. Provisions of Sections 48 & 52 of the Act, have to be considered in a manner so as to hold that it serves to seek a reasonable result. Protection of Section 52 of the Act cannot be extended for

evasion of tax under the Act, to perpetuate fraud or to do something indirectly which cannot be done directly.

29. The judgments relied by the respondents, have no relevance on the facts of the present case and are distinguishable.

30. In view of the above discussion, the revision succeeds and is allowed. The impugned order of the Tribunal is set aside and the questions of law are answered in favour of the applicants and against the respondents. It is clarified that penalty proceeding shall be concluded by the competent authority without being influenced by any of the observations made in this judgment.

Order Date :- 09.01.2017
NLY