IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 7408 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE ANANT S. DAVE

and
HONOURABLE MR.JUSTICE BIREN VAISHNAV

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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PRAVIN NATVARLAL MODH
Versus
STATE OF GUJARAT

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Appearance:
MR MIHIR JOSHI, SENIOR ADVOCATE WITH MR DHAVAL SHAH(2354) for the PETITIONER(s) No. 1
MR CHINTAN DAVE, ASST GOVERNMENT PLEADER/PP(99) for the RESPONDENT(s) No. 1
RULE NOT RECD BACK(63) for the RESPONDENT(s) No. 1
RULE SERVED(64) for the RESPONDENT(s) No. 2,3

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CORAM: **HONOURABLE MR.JUSTICE ANANT S. DAVE**
and
HONOURABLE MR.JUSTICE BIREN VAISHNAV

Date : 14/09/2018

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE BIREN VAISHNAV)

1. The short issue involved in this petition was set out while issuing notice in the petition. The court had recorded the gist of the controversy involved in the petition. The order dated 03.05.2016 reads as under:

> "1. Mr. Mihir Joshi, Senior Advocate, learned counsel with Mr. Dhaval Shah, learned advocate for the petitioner invited the attention of the court to sub-section (2) of section 81 of the Gujarat Value Added Tax Act, 2003 (hereinafter referred to as the GVAT Act), to submit that the Commissioner is empowered to disqualify from attending before any authority in connection with any proceedings under the Act, any legal practitioner, Chartered Accountant, Cost Accountant or sales tax practitioner, provided the contingencies enumerated thereunder are satisfied. It was submitted that the petitioner initially was registered as a sales tax practitioner on 2nd July, 1977. However, thereafter, he had acquired the degree of LL.B. and was enrolled with the Bar Council of Gujarat on 10th August, 1983. It was submitted that the petitioner having been enrolled with the Bar Council of Gujarat, the certificate issued by the Commissioner registering him as a sales tax practitioner stood superseded and he thereafter was attending the proceedings under the GVAT Act as a legal practitioner as envisaged under clause (b) of sub-section (1) of section 81 of the GVAT Act and not as a sales tax practitioner as envisaged under clause (c) of sub-section (1) of section 81 of the GVAT Act. It was submitted that under sub-section (2) of section 81 of the GVAT Act, the Commissioner is empowered to disqualify a legal practitioner who is found guilty of misconduct in connection with any proceedings under the Act by an authority empowered to take disciplinary action against the members of the profession to which he belongs. It was submitted that therefore, it is the Bar Council of Gujarat which would be

empowered to take disciplinary action against the petitioner and not the Commissioner, inasmuch as, the petitioner no longer continues to be a sales tax practitioner as envisaged under clause (c) of sub-section (1) of section 81 of the GVAT Act. It was submitted that therefore, the impugned notice issued by the Commissioner is without authority of law.

2. Having regard to the submissions advanced by the learned counsel for the petitioner, **Issue Notice** returnable on 9th June, 2016. By way of ad-interim relief, the respondent is restrained from proceeding further pursuant to the impugned show cause notice dated April, 2016 (Annexure D to the petition).

Direct Service is permitted qua respondents No.2 and 3."

1.1 The present petition, therefore, challenges the show-cause notice No. GSL/VAT/CTP/2016-17/B/25 dated April 2016 issued by the Joint Commissioner of Commercial Tax (Gujarat State) – respondent no. 3 herein.

2. The facts in brief are as under:

2.1 The petitioner, a legal practitioner since August 1983 was initially holding a certificate as a Sales Tax Practitioner. Such a certificate was issued under the provisions of the Gujarat Sales Tax Act. The certificate was acquired on 02.07.1977. It is the case of the petitioner that under the Sales Tax Act or the Gujarat Value Added Tax Act, 2003 (hereinafter referred to as 'the Act'), the petitioner carried out various professional obligations. Briefly put, it is the case of the petitioner that:

(a) Under Section 21 of the Act, a dealer has to obtain a registration under the Act so as to enable him to carry on business. For obtaining such a certificate, he has to apply in a prescribed manner under Section 22 read with Rule 5 of the Gujarat Value Added Tax Rules, 2006. In his capacity as an advocate, the petitioner would attest the photographs which are affixed in Form 101, and assist the dealer in obtaining a registration certificate.

(b) After a dealer is registered, he is required to file returns as so stipulated under Section 29 of the Act. He has to furnish correct and complete returns of the goods and the transactions. Here too, the petitioner in his capacity as an advocate assists the dealer in preparing e-returns. However, his role is restricted to upload such data as furnished by the dealer.

(c) On filing such e-returns, if found that there is input tax credit which is unutilised the dealer can carry forward the same to get set off. A refund claim can be entertained by the Commissioner where it is the petitioner as an advocate who would appear on the basis of documents provided by the dealer. The Commercial Tax Officer would pass an appropriate order on such refund claims.

(d) As a Sales Tax practitioner or an advocate, the accounts have to be audited by a specified authority. Section 63 provides that such accounts are to be audited and the specified authority who carries out such audit can be a Chartered Accountant or a legal practitioner or a sales tax practitioner.

In other words, the petitioner carries out his professional duty under the Act as a legal practitioner in order to facilitate a dealer based on the feedback that he gets from such dealer. In discharge of his professional duties, certain dealers who are dealing in the business of trading of cigarettes, approached the petitioner for obtaining registrations under the provisions of the Act, filing periodic returns, and for appearing before the authorities in refund proceedings and to get their accounts audited. In discharge of his professional obligation, the petitioner worked and appeared before various authorities.

2.2 The subject matter of the present show cause notice pertains to a case where the registered dealers purchased duty paid cigarettes from distributors of ITC Ltd. and Godfrey Philips Ltd. located in the State of Gujarat and sold them outside Gujarat in the course of interstate sale. As the amount of input tax credit on purchased goods was lying unutilized, the petitioner's clients approached the petitioner for filing refund claims of an unutilized amount of input tax credit shown in balance in e-returns. Online application for refund was made and an opportunity for personal hearing was granted where the petitioner appeared for the clients on their behalf and after satisfaction the respondent provisionally sanctioned refund claims.

2.3 Since the authorities had doubts regarding the veracity of these transactions inasmuch as they were under the impression that the dealers may not have sold the goods in the course of interstate sale, investigation was initiated against the dealers. In course of investigation, statements of the dealers were recorded and in such statements there was no hint that the petitioner had connived with the dealers in the questionable transactions.

2.4 By the impugned show-cause notice the respondent no. 3 in exercise of powers under Section 81(2) of the Act of 2003 interalia alleged that while the petitioner was enrolled as a Sales Tax Practitioner under Section 81(1) of the Act, he committed several irregularities and connived in defrauding the government revenue. According to the authorities, in respect of several dealers, when the petitioner was representing them as a legal practitioner, he had connived with the proprietors and had therefore committed misconduct which entailed disqualification under Section 81(2) of the Tax Act. The show-cause notice therefore suggested that on the basis of the allegations, the petitioner was to show cause as to why he should not be disqualified from practicing as per the provisions of Section 81(2) of the Act. For our benefit Section 81 of the Act of 2003 is reproduced as under:

> **“81. Appearance before any authority in proceedings**
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> (1) Any person, who is entitled or required to attend before any authority in connection with any proceedings under this Act, may attend,-
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> > (a) by a person authorized by him in writing in this behalf, being a relative or a person regularly employed by him; or
> >
> > (b) by a legal practitioner or Chartered Accountant or Cost Accountant who is not disqualified by or under sub- section (2); or
> >
> > (c) by a sales tax practitioner who possesses

the prescribed qualifications and is entered in the list, which the Commissioner shall maintain in that behalf, and who is not disqualified by or under sub-section (2).

(2) The Commissioner may, by order in writing and for reasons to be recorded therein, disqualify for such period as is stated in the order from attending before any such authority, any legal practitioner, Chartered Accountant, Cost Accountant or sales tax practitioner-

(a) Who has been removed or dismissed from Government service; or

(b) Who being a legal practitioner or Chartered Accountant or Cost Accountant is found guilty of misconduct in connection with any proceedings under this Act by an authority empowered to take disciplinary action against the members of the profession to which he belongs; or

(c) Who being a sales tax practitioner is found guilty of such misconduct by the Commissioner.

(3) No order of disqualification shall be made in respect of any particular person unless he has been given a reasonable opportunity of being heard.

(4) Any person against whom an order of disqualification is made under this section may, within one month of the date of communication of such order, appeal to the State Government and the State Government may pass such order in appeal as it may think fit.

(5) The order of the Commissioner shall not take effect until one month of the making thereof or when an appeal is preferred, until the appeal is decided.

(6) The Commissioner may at any time suo-motu on an application made to him in this behalf, revoke any order made against any person under sub-section (2) and thereupon such person shall cease to be disqualified."

2.5 As is evident from the order dated 03.05.2016 passed by this Court, the basic challenge to the show-cause notice is that such a notice could not have been issued to the petitioner when the petitioner was acting as a legal practitioner, having acquired a degree of LLB and being enrolled with the Bar Council of Gujarat on 10.08.1983.

3. Mr. Mihir Joshi, learned Senior advocate appearing with Mr. Dhaval Shah, learned advocate on behalf of the petitioner submitted that once having been enrolled with the Bar Council of Gujarat, the certificate issued by the Commissioner registering him as a Sales Tax Practitioner stood superseded, since on acquiring a certificate of enrollment with the Bar Council of Gujarat, he was attending the proceedings under the VAT Act as a legal practitioner as envisaged under clause (b) of sub-section 1 of Section 81 of the Act. According to Mr. Joshi, under sub-section (2) of Section 81 of the Act, the Commissioner is empowered to disqualify a legal practitioner who is found guilty of misconduct in connection with any proceedings under the Act <u>by an authority empowered to take disciplinary action against the members of the profession to which he belongs</u>. In other words, it is only the Bar Council of Gujarat which could have taken disciplinary action and not the Commissioner.

3.1 Mr. Joshi invited our attention to various returns filed by the dealers, which form part of the annexures to the show-cause notice to suggest that the petitioner had signed such returns showing his enrollment membership number G/595/1983 which would clearly suggest that he was rendering such service as a legal practitioner. In Mr. Joshi's submission therefore the show cause notice was without any authority and without any jurisdiction and therefore deserved to be quashed and set aside.

4. Mr. Chintan Dave, learned Assistant Government Pleader has supported the authority's stand in issuing the show cause notice. He has drawn our attention to the affidavit-in-reply and contended that though the petitioner acquired a licence to practice from the Bar Council of Gujarat on 10.08.1983, his enrollment as a Sales Tax Practitioner is not cancelled and therefore the Commissioner is entitled to take action against the petitioner.

4.1 Mr. Dave further argued that the petition is premature inasmuch as it challenges the show-cause notice and therefore unless and until a reply is filed and action is taken pursuant to the notice ,this Court, in exercise of powers under Article 226 of the Constitution of India ought not to have set aside the same.

5. Having considered the submissions of learned advocates appearing on behalf of the respective parties, reading of Section 81 of the Act suggests that a person who is entitled or required to attend before any authority in connection with any proceedings under the Act can be of three categories namely (I) a person can be authorised in writing to appear before such authority (II) a Legal Practitioner or a Chartered Accountant or a Cost Accountant or (III) a Sales Tax Practitioner who possesses the prescribed qualification entered in the list.

6. From the facts on hand, what is evident is that on

getting a degree in Bachelor of Commerce, the petitioner applied for appearing as a tax practitioner in accordance with Rule 59 of the Gujarat Value Added Tax Rules, 2006. The petitioner was granted such certificate by the authorities on 02.07.1977. The petitioner enrolled himself as an advocate with the Bar Council of Gujarat and got a certificate to practice as an advocate on 10.08.1983. In other words, the petitioner acquired a professional qualification under the Advocates Act 1961 as a legal practitioner as defined under the Act. The term "advocate" and "legal practitioner" as defined under Section 2 of The Advocates Act, 1961 is as under:

> "2 (a) "advocate" means an advocate entered in any roll under the provisions of this Act;
> (i) "Legal practitioner" means and advocate [or vakil] or any High Court, a pleader, mukhtar or revenue agent;"

7. Reading the two together would indicate that the term legal practitioner would include an advocate. Reading of Section 81(1) of the Act therefore makes it clear that an individual can appear before an authority in either of the capacities including one being a sales tax practitioner or a legal practitioner. The annexures to the show cause notice clearly suggest that the petitioner appeared before such authorities in the capacity of a legal practitioner and not as a sales tax practitioner. Sub-section 81(2) of the Act provides that whenever a legal practitioner or any other professional namely a Chartered Accountant or a Cost Accountant is found guilty of misconduct with any proceeding under the VAT Act, the authority empowered to take disciplinary action is the

authority to which the members of the profession belong to. (emphasis supplied). Admittedly, the petitioner is a legal practitioner and therefore the domain to conduct any investigation or issue a show cause notice would be that of the State Bar Council. Section 35 of the Advocates Act 1961 clearly provides that it is the State Bar Council which has the power to take disciplinary proceedings for any professional and/or any other misconduct against an advocate.

9. It is therefore evident that a sales tax practitioner and a legal practitioner are distinct individual professionals and it is in this context that a segregation is made in Section 81(1) of the Act authorising each individual to appear in his respective capacity. Therefore, if a legal practitioner is to be proceeded against for any misconduct under the proceedings under the VAT Act, sub-section (2) of Section 81 of the Act makes it clear that such disciplinary proceedings have to be taken by the authority to which the member of such profession belongs to. Clearly, in the facts of the present case, it is the Bar Council of Gujarat which has the domain to initiate and conduct any proceedings for misconduct alleged to have been done by the petitioner. Once, the petitioner acquired the certificate of a legal practitioner by obtaining a licence on 10.08.1983, such a qualification supersedes the certificate of a sales tax practitioner and cloak of being a legal practitioner takes over and the petitioner loses his identity of a sales tax practitioner. The case therefore does not fall within clause (c) of sub-section (1) of Section 81 of the Act. The notice, therefore, to initiate proceedings is clearly without jurisdiction. The contention of the Assistant Government Pleader Shri Dave, that the petition is premature is therefore

is negated.

10. Accordingly, the impugned show cause notice deserves to be quashed and set aside and is quashed and set aside. The petition is allowed. Rule is made absolute.

(ANANT S. DAVE, J)

(BIREN VAISHNAV, J)

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