

Constitutional Writ

PRESENT: The Hon'ble JUSTICE KALYAN JYOTI SENGUPTA

AND

The Hon'ble JUSTICE I.P. MUKERJI

W.P.T.T. NO. 13 OF 2009

CAL-COX SYNDICATE PVT. LTD.

Versus

COMMISSIONER OF COMMERCIAL TAXES,

WEST BENGAL & OTHERS.

Judgment on: 8th January 2010**Point:**

DISCRETION: Quasi-judicial authority whether required to exercise discretion judiciously – Instances of judicial discretion- Value Added Tax Act, 2003, Ss. 79 & 80(6).

Fact: Four transit declaration issued to petitioner company from the check post at the commencement of the transportation were not endorsed at the last check post in West Bengal. Show-cause notice was issued under Section 79 of the VAT Act and subsequently, the Sales Tax Officer imposed a penalty of Rs. 31663140/-. Petitioner Company preferred appeal before West Bengal Taxation Tribunal and the Ld. Tribunal reduced the penalty and imposed Rs. 6332625/-. Challenging the order of Ld. Tribunal the petitioner filed the instant application.

Held: If a statute prescribes a certain thing to be done, it has to be done; failure thereof results in contravention.

Paragraph – 12

In a fiscal statute the contravention would be complete the moment requirement of the statute is not fulfilled. Section 79 read with Section 80(6) of VAT Act says that in case of contravention penalty “not exceeding 25% of the market value of the goods” so imported is to be imposed. Therefore, amount of penalty sought to be imposed is variable and in some cases 1% penalty or any fraction of it may be imposed. While in some cases the maximum of 25% can be imposed. Hence, the award of penalty would necessarily warrant exercise of discretion. When a quasi-judicial authority is required to exercise discretion it has to be judiciously. Exercise of judicious discretion demands consideration of number of factors viz. presence of element of intention to contravene bad motive and past record of contravention. Legally acceptable valuation must be done considering relevant documents instead of mere oral declaration.

Paragraph – 12

Cases considered:

- A. Vol39Sales Tax Advices52 (Maple Exports Pvt. Ltd. Vs. Commercial Tax Officer, Central Section & Ors.)
- B. Vol.95Company Case101 (Bata India Ltd. Vs. Special Director, Enforcement Directorate)

For the petitioner : Mr. J.P. Khaitan,
Mr. Chandmal Ghorawat,
Mr. Anirban Chatterjee

For the respondents : Mrs. Seba Roy,
Ms. Soma Kar Ghsh

The Court:

1. This is an Article 226/227 proceeding against an order dated 1st April 2009 of the West Bengal Taxation Tribunal. By that order a penalty of Rs.63,32,625/- has been imposed on the writ petitioner, reducing the penalty of Rs.3,16,63,140/- imposed by the Sales Tax Officer by his order dated 9th January 2009.
2. The case arises out of the West Bengal Value Added Tax Act, 2003 (hereinafter the said Act) and the Rules framed thereunder. The issue is very short but quite important.
3. Short fact which led to filing of the present proceedings is stated hereunder:-
4. On 17th April 2006 Bokaro Steel Plant awarded a contract in favour of Inox Air Product Limited "Inox". The contract related to erection of a 1250 TPD Oxygen Plant at Bokaro Steel Plant which included importation of separate parts of a system or plant which when put together would constitute an air separation plant. The port of importation was to be Kolkata port.
5. It appears from the records that 'Inox' on 18th April 2006 subcontracted some of its obligations in favour of BOC India Limited, namely, transporting the imported plant from Kolkata to Bokaro Steel Plant. The entire Oxygen plant was imported in parts, packed into ten containers.

6. After arrival in Kolkata Port these containers had to be transported to Bokaro. The petitioner is a clearing and forwarding agent. Transportation of these goods was effected by mounting them into 11 trailers. In the process the petitioner became consignor and 'Inox' at Bokaro was the consignee of the goods, in the carriage of these goods by road by these eleven trailers from Kolkata to Bokaro.

7. In the instant case, it was noticed by the authorities that four such transit declarations issued to the petitioner from the check post at the commencement of the transportation that is TD No. 1082, 1083, 1085 and 1086 were not endorsed at the last check post in West Bengal i.e. Duburdih check post before exit of the vehicle. Accordingly, a show cause notice was issued under Section 79 of the said Act, dated 30th September 2008, since the goods had been used and not available for seizure.

8. An adjudication was held further to the show cause notice and by his order dated 9th January 2009, the Sales Tax Officer imposed a penalty of Rs.3,16,63,140/- being 25% of the declared value of goods by the writ petitioner which according to him was about 12 crores as mentioned at page 3 of the order. Violation of the statute was more or less admitted by the petitioner. It appears that the only defence taken before the first authority was unintentional violating in as much as the drivers of the trailers, being ignorant persons did not know the statutory requirement mentioned above.

9. Against the order of the Sales Tax Officer, the petitioner preferred appeal before the West Bengal Taxation Tribunal where a similar defence was sought to be advanced.

10. The tribunal after narration of facts held **“that the applicant was thoroughly negligent in the matter of compliance of statutory obligations. We, therefore, do not find any reason to interfere with regard to the initiation of penalty proceedings. Though admittedly goods were received by Bokaro Steel Plant, unexplained violation of the statutory provision cannot be totally ignored. Recurring incidence of such negligence and unexplained violation should be discouraged. However, considering the facts and circumstances, we are of the view that**

quantum of penalty should be kept at minimum. We reduce the quantum of penalty of Rs.63,32,625/- being 5% of the value estimated by STO/CS.

The petitioner thus, stands disposed of. No order as to costs.”

11. We have gone through all the materials on record. We find that the issue regarding valuation of the goods was not properly raised before the Tribunal As such it was not dealt with by the learned Tribunal. Besides plea of unintentional violation though raised was not considered, at all. These two issues were extremely relevant for the purpose of determination of the appeal before the tribunal as discussed below. Before us correctness of the valuation of the goods in all respects has been raised.

12. We are of the view that if a statute prescribes a certain thing to be done, it has to be done; failure thereof results in contravention. In a fiscal statute as this, the contravention would be complete the moment requirement of the statute is not fulfilled. Sometimes, element of intention to contravene statutory provision is a factor that needs to be considered. Absence of intention with other surrounding relevant facts may become relevant for determining the amount of penalty sought to be imposed. Section 79 read with Section 80 sub-Section 6 of VAT Act says that in case of contravention penalty “not exceeding 25 % of the market value of the goods” so imported is to be imposed. Therefore, amount of penalty sought to be imposed is variable and in some cases 1% penalty or any fraction of it may be imposed while in some cases the maximum of 25% can be imposed. Hence, the award of penalty would necessarily warrant exercise of discretion. When a quasi judicial authority is required to exercise discretion it has to do it judiciously. Now, in our considered opinion exercise of judicious discretion demands consideration of number of factors viz. presence of element of intention to contravene, bad motive and past record of contravention. Considerable support for this view may be found in **Maple Exports Private Ltd. – vs – Commercial Tax Officer, Central Section & Others, reported in Vol. 39, Sales Tax Advices, page 52, Bata India Ltd. – vs – Special Director, Enforcement Directorate, reported in Vol. 95, Company Cases, page 101.**

In the order under appeal, we could not trace any cogent reason in support of the finding.

13. We find that the goods have been valued by the adjudicating officer relying merely on oral declaration made by the petitioner. We are of the view that legally acceptable valuation must be done considering relevant document viz. valuation done by the customs authority in case of imported goods and invoices, bill of seller or supplier in case of indigenous goods. The learned Tribunal had no occasion to do so.

14. For the above reasons, we set aside the order of the tribunal and remit the matter back to it to determine the market value of the goods and the amount of penalty in accordance with the principles discussed above with proper reasons. We request the learned Tribunal to rehear the matter.

15. During hearing of this application it was stated that about Rs.8 lacks have been realized in execution proceedings arising out of the impugned order of the tribunal, which is lying in deposit with the tribunal or the respondent authorities. Let that sum remain deposited in accordance with the rules for deposit pending hearing of the appeal. We further direct that an additional sum of Rs.8 lacs be deposited by the petitioner pending fresh hearing of the appeal before the tribunal within a period of four weeks from date of receipt of this order. Upon receipt of such deposit the tribunal will proceed to hear the application afresh as directed by us and to dispose of the same within three months from the date of expiry of four weeks prescribed for additional deposit. In default of deposit, this order will remain permanently stayed.

16. With the above order, this application is disposed of.

17. There will be no order as to costs.

18. Urgent certified photocopy of this judgment and order, if applied for, to be provided upon complying with all formalities.

I agree.

(K.J. Sengupta, J.)

(I.P. Mukerji, J.)