

BEFORE THE COMMISSIONER OF STATE TAXES & EXCISE-CUM-

APPELLATE AUTHORITY, HIMACHAL PRADESH,

(Block No. 30, SDA complex, SHIMLA- 171009)

Appeal No. : 08/2021-22
Date of Re-Institution : 28-04-2023
Date of order : 23-05-2023

With:

Appeal No. : 09/2021-22
Date of Re-Institution : 28-04-2023
Date of order : 23-05-2023

In the matter of:-

M/s Himachal Filling Station,
Dhalli, Shimla-12

.....Appellant

Vs

Jt. Commissioner (ST&E),

South Enforcement Zone, Parwanoo, Solan.....Respondent

Parties represented by:--

1. Shri Vishal Mohan, Learned Senior Advocate along with Shri Praveen Sharma, Learned Advocate for the Appellant.
2. Shri Sandeep Mandyal, Learned Senior Law Officer along with Ms Reema Sood, Assistant State Taxes & Excise Officer, South Enforcement Zone, Parwanoo for the respondent.

Order

in

Appeal under section 45 (1) (b) of the Himachal Pradesh Value Added Tax Act, 2005

1. The above two appeals have been filed by M/s Himachal Filling Station, Dhalli, Shimla-12, (hereinafter referred to as "the Appellant"), who is a registered dealer vide TIN 02010300672 allotted under the Himachal Pradesh Value Added Tax Act, 2005 (herein after referred to as "the Act") and the Central Sales Tax Act, 1956. The Appellant is engaged in the business of purchase and sale of petrol, diesel, lubricants etc.
2. Brief facts of the case are that during the course of discharge of his duties, the ASTEO (Assistant State Taxes & Excise Officer), South



Enforcement Zone, Parwanoo, brought to the notice of the Respondent that the Appellant though had filed the returns under section 16 of the Act, but, had not actually paid the due and self-declared VAT liabilities for the Financial Year 2020-21. The Respondent, thereafter, inquired into the matter further through ACST&E (Assistant Commissioner State Taxes & Excise) and on the basis of report submitted by the ACST&E initiated proceedings against the Appellant under provisions of section 16 (4), 16 (7) and 19 (1) of the Act and created an additional demand of Rs. 5, 51, 59, 932/- (Rs. Five Crores Fifty One Lakh, Fifty Nine Thousand and Nine Hundred Thirty-two only on account of tax, penalty and interest. Feeling aggrieved by the order above, the Appellant preferred above enumerated appeals in the matter before this forum, duly instituted on 31-08-2021. As the issues involved in appeals, above, were similar, so both the appeals were clubbed together and before hearing the cases on merit, the Appellant as per provisions of Section 45 (5) of the Act, vide order dated 08-12-2021, was directed to deposit a conditional sum of eighty percent of the additional demand in appeals. The Appellant, despite seeking many adjournments and extensions in the matter, failed to deposit the conditional amount, so the appeals above, vide order dated 24-08-2022, were dismissed in default for non-deposition of conditional amount. The Appellant, further, preferred appeals against these orders, before the learned HP Tax Tribunal. The learned Tribunal vide order dated 19-11-2022 remanded the case back to this Forum with the direction that the Appellant shall produce the proof of deposit of Rs. 60, 11, 433/- before Respondent No. 1 (Commissioner of State Taxes & Excise, HP) on or before 03-01-2023 for the Appeals to be heard on merits. The Appellant, again failed to deposit the conditional amount by the directed date. The Appellant, thereafter, submitted an application, dated 21-04-2023, before the learned Tribunal, requesting, therein, to grant one month's more time to deposit the above conditional amount. Learned Tribunal, allowing the application above, vide order dated 21-04-2023, granted the Appellant one week's time with the further directions that the proof of deposit of amount shall be produced before the Commissioner of State Taxes & Excise on or before 01-05-2023 and the case will, thereafter, be heard on merits. The Appellant, complying with the above directions of the Learned Tribunal, accordingly, on 28-04-2023, produced the proof of having deposited the directed sum above. The appeals, as per directions of the



learned Tribunal, were, thereafter, re-instituted vide order dated 28-04-2023 and listed for hearing on merits.

3. Shri Vishal Mohan, Learned Senior Advocate along with Shri Praveen Sharma, Learned Advocate argued the matter on 17-05-2023 for the Appellant as under:

- 1) That the case of the Appellant could not have been adjudicated under section 16 (4) and 16 (7) of the Act as provisions for making "Assessment of tax" under the Act are contained only in Sections 21, and 22 of the Act read with Rules 67, 68 and 69 of the HP VAT Rules, 2005. Every assessment of tax must be framed only in compliance with the procedure prescribed in the said provisions. The impugned order creating additional demand has expressly been made under section 16 of the Act, but no demand of VAT can legally be created under this section. Section 16 of the Act provides for payment of tax, filing of the returns, periodicity of returns and manner of tax payment. As Section 16(4) does not have any provision for adjudicating the matter, so, the demand created under section 16(7) could not have been made without having been issued notice under section 21. Thus, the additional demand has been created with preconceived mind and the same is wrong as well as *ultra vires*.
- 2) Further, the Respondent has imposed huge interest liability on the determined tax without having assigned any reason for doing so. Huge penalty has also been, similarly, imposed in the matter i.e. without giving the reasons for the same.
- 3) There is violation of the provisions given under Rule 67 (2) of the HP VAT Rules, 2005, as the proceedings in the matter have gone beyond the maximum prescribed period of three months. The proceedings in the matter were initiated on 10-03-2021 and concluded on 05-08-2021. Assessment proceedings, thus, being time barred, are *non est*.
- 4) It was the Jt. Commissioner (State Taxes & Excise), South Enforcement Zone, Parwanoo who detected the case and also adjudicated the matter against the principles of Natural Justice. It is well established law that prosecutor cannot assume the role of the adjudicator as well. Moreover, the Jt. C. (ST&E) SEZ, the Respondent,



is not the appropriate Assessing Authority to frame the assessment in the matter.

4. During the course of arguments above, the Counsels for the Appellant relied upon the citations of **M/s John Raymond Bright vs Additional Excise and Taxation Commissioner (STR 8 of 2009)** and **CWP No. 178 of 2001, titled as M/s Manali Resorts Vs. State of Himachal Pradesh and others, Ambica Lamp House Vs CTO (2005 (2) ALD 704, 2005 (3) ALT 190, 2005 142 STC 551 AP)**.
5. Shri Sandeep Mandyal, Ld. Senior Law Officer, replying for the Respondent, submitted that:

- 1) The appellant before filing the returns under section 16 of the Act was bound to deposit the payable tax into the treasury but he failed to do so. In fact, the Appellant appended with the filed returns such tax receipts which were not successfully completed i.e. the tax claimed to have been deposited was not, at all, deposited into the Government Treasury. The Appellant, therefore, has tried to cheat the State Exchequer. Thus the Appellant has violated the provisions of section 16 (4) of the Act and was liable to be proceeded against as per provisions of section 16 (7) as has rightly been done by the Respondent. In fact, the Appellant by his misdeeds, was liable to be prosecuted under section 50 (1) of the Act. Interest under section 19(1) of the Act is always and automatically leviable, in the manner prescribed in the section itself, in such cases where the due tax is not deposited by the prescribed due dates.

- 2) The Respondent was competent and empowered to adjudicate up on the matter and had statutory jurisdiction over the Appellant firm as the Appellant is having its registered business premises in District Shimla which falls under the jurisdiction of South Enforcement Zone, Parwanoo, headed by the Respondent. Referring to Section 3 (4) of the HP VAT Act, 2005 and Notification No. EXN-F (10)-5/81 dated 28.09.2004, the Respondent authority being Dy. Excise & Taxation Commissioner (now re-designated as Jt. Commissioner State Taxes & Excise) is a duly authorized person to exercise the powers and perform the duties/functions of



the Assessing Authority within the meaning of clause (a) of Section 2 of the erstwhile HP General Sales Tax Act, 1968. The aforesaid HPGST Act, though, has been repealed; however, by virtue of saving clause provided under Section 64(2) (a) of the HPVAT Act, 2005, the notification dated 28th Sept., 2004 is still in force and operative. Therefore, the Respondent authority, being Dy. Excise and Taxation Commissioner, is a duly appointed authority with jurisdiction over South Zone, encompassing within his jurisdiction the Districts of Kinnaur, Shimla, Solan, Sirmour and Spiti area of Lahaul & Spiti district. Also, the Respondent is duly authorized to perform the functions and duties of Assessing Authority by virtue of the powers vested in him under Section 3 (3) of HP VAT Act, 2005 which provides that:

"The commissioner and other persons appointed under THE HIMACHAL PRADESH VALUE ADDED TAX ACT, 2005 sub-section (1) shall perform such functions and duties as may be required by or under this Act or as may be conferred, by the State Government, by notification..."

Thus, the contention of the Appellant that the impugned order has been passed without jurisdiction is not legally sustainable.

- 3) The period of limitation referred to by the Appellant, in view of Covid-19, is duly excluded from the limitation period as the Hon'ble Supreme Court vide order, dated January 10, 2022, in Miscellaneous Application No. 21 of 2022 in Miscellaneous Application No. 665 of 2021 in Suo Moto Writ Petition (C) No. 3 of 2020, has directed that the period from 15-03-2020 till 28-02-2022 shall stand excluded for the purpose of limitation.
- 4) The contentions of the Appellant that Prosecutor cannot be adjudicator is not applicable in the instant appeal matters as the "prosecutors" in the present appeals were the ASTEO and the team led by the ACST&E and not the Authority passing the impugned order.



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6. I have heard the arguments and replies of the concerned parties. I have also, carefully, gone through the record file of the case for the relevant period, provisions of the Act and Notifications referred to therein.
7. First argument in the matter on behalf of the Appellant is that the impugned order has been passed without jurisdiction. This argument of the Appellant-Counsel is contrary to what has explicitly been provided in section 3 (4) of the HPVAT Act:

Taxing authorities.

3. (4) The jurisdiction of the Commissioner and other officers posted at the State Headquarters shall extend to the whole of the State of Himachal Pradesh, and the jurisdiction of other officers or officials shall, unless the State Government otherwise directs, by notification, extend to the districts or the areas of the districts for which they are for the time being posted.

In view of above express provision and, further, by virtue of Notification No. EXN-F(10)-5/81 dated 28th September, 2004, the Respondent authority being Deputy Excise & Taxation Commissioner (now re-designated as Jt. Commissioner State Taxes & Excise) was a duly appointed and posted **assessing authority** with jurisdiction of Flying Squad, South Enforcement Zone, Parwanoo, encompassing within his jurisdiction the Districts of Kinnaur, Shimla, Solan, Sirmour and Spiti area of Lahaul & Spiti District. By virtue of below quoted powers vested in him under section 3 (3) of the HP VAT Act:

The Commissioner and other persons appointed under THE HIMACHAL PRADESH VALUE ADDED TAX ACT, 2005 sub-section (1) shall perform such functions and duties as may be required by or under this Act or as may be conferred, by the State Government, by notification...

The Respondent being Deputy Excise and Taxation Commissioner (now Jt. Commissioner State Taxes & Excise) has statutory jurisdiction over the Appellant, as the Appellant is having its registered business in Shimla District. Ld. Senior Counsel along with other Counsel with him argued that the DETCs had the powers of Assessing Authority only under the repealed HP GST Act, 1968. But, even after the repeal of HPGST Act, 1968; when the HPVAT Act, 2005 came into force w.e.f. 31-03-2005, section 64 of the Act, under the "Repeal and Savings" clause provided that:



'the repeal of the HPGST Act, 1968 shall not affect the previous operation of the aforesaid Act or anything duly done or suffered there under.'

As such, the notification issued under the above repealed Act, which notified the DETC as the competent Authority for framing assessment, has been saved as such under the HP VAT Act, 2005 also. Hence, by virtue of the above said notification and express provisions under Rule 2 (c) of the HP VAT Rules, 2005, DETCs (Flying Squads) are the duly authorized and competent assessing authorities for framing assessments and demands under the Act. So, the arguments on behalf of the Appellant that the Respondent is neither the prescribed Assessing Authority nor the authority with jurisdiction over the Appellant business premises is contrary to the above given statutory provisions and are rejected.

8. Perusal of the case record, inquiry and inspection reports and notices issued to the Appellant reveals that the Appellant had not deposited the due amount of tax under the Act as was required under section 16 (4) of the Act:

(4) Before a registered dealer furnishes the return required by sub-section (3), he shall, in the prescribed manner, pay [manually or electronically] into a Government Treasury or the Scheduled Bank which is a treasury bank, or at the office of the Assistant Excise and Taxation Commissioner or Excise and Taxation Officer-in-charge of the District, the full amount of tax due from him under the Act according to such returns and shall furnish along with the returns a receipt from such treasury, bank or office of the Assistant Excise and Taxation Commissioner or Excise and Taxation Officer-in-charge of the District showing the payment of such amount:

The Appellant did not show any proof of payment of such due tax either to the prosecuting/inspecting authorities or to the adjudicating authority. The Appellant also failed to show any sufficient cause for not complying with the provisions of section 16 (4) of the Act, thus, rendered himself liable for proceedings as provided under section 16 (7) of the Act:

(7) If a dealer fails without sufficient cause to comply with the requirements of the provisions of sub-section (4), the Commissioner or any person appointed to assist him under sub-section (1) of section 3 may, after giving such dealer a reasonable opportunity of being heard, direct him to pay by way of penalty, a sum -



equal to ten percentum, for the delay upto fifteen days, equal to twenty five percentum, for the delay exceeding fifteen days but not exceeding thirty days and equal to fifty percentum, for the delay exceeding thirty days, of the amount of tax to which he is assessed or is liable to be assessed under section 21, in addition to the amount of tax to which he is assessed or is liable to be assessed.

As the Appellant had failed to abide by the provisions of Section 16 (4), therefore, he was rightly and lawfully issued notices as per explicit provisions of Section 16 (7) of the Act and accordingly, proceeded against. As the turnover and assessment of tax was never in dispute, so, the provisions of Section 21 were not applicable to the present case; therefore, the argument of the Appellant that notice under Section ibid has not been issued is not tenable for the lack of merit worth consideration. Argument on this account is rejected as well.

9. Regarding the issue of interest, the Appellant argued that interest has been levied in violation of the provisions of the Act. However, as per discussions in the preceding paras, the Appellant was duly heard in the matter. Notwithstanding the discussion above, provisions of section 19 (1) of the HP VAT Act provide for automatic levy of interest, if any dealer fails to pay the amount of tax due from him under this Act:

19. (1) If any dealer fails to pay the amount of tax due from him under this Act except to the extent mentioned in subsection (2), he shall, in addition to the amount of tax, be liable to pay simple interest on the amount of tax due and payable by him at the rate of one percentum per month, from the date immediately following the last date on which the dealer should have either filed the return or paid the tax under this Act, for a period of one month and thereafter at the rate of one and a half per centum per month till the default continues.

Interest on willfully escaped VAT liability, including penalty for the defaulted period December 2019, and June, 2020 to February, 2021, becomes, automatically, payable in view of the provisions of section 19 (1) of the HPVAT Act, 2005.

The case law cited in *J. K. Synthetic Case 1994*, relied on by the appellant pertains to the period prior to enactment of HPVAT Act, 2005 and Finance Act, 2000 and the latter enactments have over-riding effect, the citation becomes obsolete, hence not applicable. In view of the above given



provisions of the Act, the argument of the Appellant that huge interest has been charged without adhering to the provisions of the Act is without support from law and enactments and objection of the Appellant on this particular issue is rejected.

10. It has also been argued for the Appellant that the Jt. Commissioner (State Taxes & Excise) South Enforcement Zone, Parwanoo who detected the case, himself adjudicated the matter against the established principles of Natural Justice: *One cannot be a judge for his own cause/Prosecutor cannot be the adjudicator*. However, perusal of the case record reveals that it was the ASTEO who, vide office report dated 10-03-2021, brought the matter of non-deposit of dues to the notice of the Respondent, who, in turn, on dated 15-3-2021, ordered the ACSTE of the Enforcement Zone to conduct an inspection and inquiry in the matter. The inquiry officer, in his detailed report dated 16-03-2021, reported that, on account of having furnished invalid tax receipts, about Rs. Three Crores are the pending liabilities as VAT/tax against the Appellant since May 2020. It was on the basis of this information, that the Respondent's office directed the Appellant to appear before the Respondent. Thus, it is evident that the Respondent has neither been a member of the inquiry/inspection/raiding team nor Prosecutor at any stage of the case proceedings. The Respondent has only adjudicated the case. So, this argument of the Appellant is quite contrary to the facts available on record and is liable to be dismissed out-rightly and is dismissed so, accordingly. In view of this discussions, the case citations of **M/s John Raymond Bright vs Additional Excise and Taxation Commissioner (STR 8 of 2009)** and **CWP No. 178 of 2001, titled as M/s Manali Resorts Vs. State of Himachal Pradesh** quoted for the Appellant become irrelevant and are not applicable in the present case.

11. The argument of the Appellant that penalty has been imposed without detailed reasons, is again, not based on facts as reasons for imposing penalty and the quantum of penalty as provided under section 16(7) of the Act has lucidly been quoted and calculated in tabular form in the impugned order. Similarly, as per discussion in para 9 and preceding para, the reason for liability to pay interest as per provisions of section 19 (1) of the Act is sufficiently recorded in the impugned order.



12. The last contention of the Appellant that the assessment proceedings were not completed within the period as has been prescribed under Rule 67 (2) of the HP VAT Rules, 2005 lacks in merit as the Hon'ble Supreme Court vide order, dated January 10, 2022, in Miscellaneous Application No. 21 of 2022 in Miscellaneous Application No. 665 of 2021 in Suo Moto Writ Petition (C) No. 3 of 2020, has directed that the period from 15-03-2020 till 28-02-2022 shall stand excluded for the purpose of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi judicial proceedings. For this stated reason, the case proceedings w.e.f 10-03-2021 till 05-08-2021, being excluded from limitation period are not time barred; therefore, this part of the argument, being without merit, is rejected.
13. In view of the facts discussed above, arguments advanced by the parties and perusal of record, it is amply clear that the Appellant had regularly been admitting his pending liabilities and seeking time to deposit the pending liabilities during the case proceedings before the authorities. Therefore, the submissions, pleadings, and arguments in the present appeals, being without any statutory backing and merit are liable to be rejected, and are rejected accordingly.
14. The impugned order, dated 05-08-2021, of the Respondent being legal, proper and just, is accordingly, upheld. Both the appeals are disposed of as rejected. This order shall also dispose of any other miscellaneous application(s) (OMA) filed in the matter.
15. Inform the parties accordingly. File after completion be consigned to records. Record requisitioned from authorities below may forthwith be returned for further necessary action.

Announced in the Open Court on this day i.e. 23rd of May, 2023.

**Commissioner of State Taxes & Excise
-cum-Appellate Authority (HP),
Shimla-09**



Endst. No.:ST&E/CoST&E/Appeals/Reader/2023/14278-14284 Dated: 23-05-2023

Copy for information and necessary action to:

1. Ms Himachal Filling Station, Dhalli, Shimla-12.
2. Jt. Commissioner State Taxes & Excise, FS/SEZ, Parwanoo.
3. Dy. Commissioner State Taxes and Excise, District Shimla.
4. Assistant Commissioner State Taxes and Excise, Dhalli Circle, Shimla-05.
5. Shri Vishal Mohan, Ld. Senior Advocate/Shri Praveen Sharma, Ld. Advocate, 4, Argyle House, The Mall, Shimla-01.
6. Shri Sandeep Mandyal, Sr. Law Officer (Legal Cell), HQ.
IT Cell.

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Reader to the
Commissioner of State Taxes & Excise,
H. P.

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