GAHC010187992018

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/5858/2018

ASSAM GAS COMPANY LTD.
A COMPANY INCORPORATED UNDER THE COMPANIES ACT, 1956 AND HAVING ITS REGISTERED OFFICE AT DULIAJAN, DIST- DIBRUGARH, AND IN THE PRESENT PROCEEDINGS REPRESENTED BY SRI ADITYA KUMAR SHARMA,AGE ABOUT 57 YEARS, THE MANAGING DIRECTOR OF THE PETITIONER COMPANY.

VERSUS

THE STATE OF ASSAM AND 2 ORS.
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM, DEPTT. OF FINANCE AND TAXATION, ASSAM SECRETARIAT, DISPUR, GUWAHATI- 781006.

2:THE COMMISSIONER OF STATE TAXES
(EARLIER KNOWN AS THE COMMISSIONER OF TAXES) ASSAM
KAR BHAWAN
DISPUR
GUWAHATI- 781006.

3:THE SUPERINTENDENT OF STATE TAXES (EARLIER KNOWN AS THE SUPERINTENDENT OF TAXES)
NAHARKATIA
ASSAM

Advocate for the Petitioner : DR. A SARAF

Advocate for the Respondent : SC, FINANCE AND TAXATION

BEFORE

HON'BLE MR. JUSTICE KAUSHIK GOSWAMI

Dates of Hearing	:	**23.02.2024, 27.02.2024, 28.02.2024.**
Date of CAV	:	**28.02.2024.**
Date of Judgment	:	**02.04.2024**

JUDGMENT & ORDER (CAV)

Heard Dr. A Saraf, learned Senior Advocate assisted by Mr. P. Baruah, learned Advocate for the petitioner. Also heard Mr. B. Gogoi, learned Standing Counsel for the Finance & Taxation Department.

2. The challenge made in the writ petition is the order of re-assessment dated 17.03.2018 passed by the Superintendent of Taxes, Naharkatia (Respondent No. 3) for the assessment year 2009 - 2010 under Section 40 of the Assam Value Added Tax Act, 2003 (hereinafter referred to as 'Act, 2003').

3. The facts of the case are that on 12.10.2017, the assessing authorities issued notice to the petitioner under Section 40 of the said Act, 2003 stating that they have reason to believe that the turnover of the petitioner's business assessable to tax for the assessment period from 2009 – 2010 has escaped assessment as the petitioner has failed to deposit VAT on transmission charge amounting to Rs. 103,05,23,595/- as the same was clearly part of the sale price and therefore proposes to re-assess the petitioner for the aforesaid period under Section 40 of the said Act, 2003.

4. The petitioner vide letter dated 25.10.2017 submitted its reply.

5. Thereafter the assessing authorities by order dated 17.3.2018 re-assessed

the petitioner under Section 40 of the Act, 2003 and came to a finding that the petitioner is liable to pay Rs.21,85,79,385.00/- as penalty.

6. Accordingly, notice of demand was issued on 17.3.2018 by the respondent No. 3 to the petitioner for making payment of Rs. 21,85,79,385.00/-. The aforesaid re-assessment order and notice of demand are challenged before this Court.

7. Dr. A. Saraf, learned Senior Counsel for the petitioner submits that though the re-assessment has been shown to have been completed under Section 40 of the Act, 2003 but in fact the same is under audit assessment under Section 36 of the Act, 2003 and since the assessment under Section 36 became barred by limitation, the assessing authority has shown the assessment to have been completed under Section 40 of the Act, 2003. He further submits that Section 39 of the Act, 2003 provides for that no assessment shall be completed after the expiry of five years from the end of the year to which the assessment relates and no assessment under Sections 34, 35, 36 or 37 of the Act, 2003 was completed by the assessing authority. He further submits that the powers under Section 40 is that of re-assessment and the condition precedent for exercise of such re-assessment is that a dealer must have been assessed under Sections 34, 35, 36 or 37 of the Act, 2003 for any year or part thereof. He further submits that in the present case, no assessment was made under Sections 34, 35, 36 and 37 of the Act, 2003 and therefore, the order of re-assessment under Section 40 is totally erroneous and illegal.

8. Mr. B. Gogoi, learned Standing Counsel, Finance & Taxation Department submits that the assessment for the period 2009 - 2010 was completed under Section 40 of the said Act, 2003 and notice before the assessment was issued to the petitioner in the requisite form. He further submits that the petitioner's

representative had appeared and furnished reply. He further submits that the petitioner has cooperated with the assessing authorities and submitted requisite documents for verification. He further submits that after completion of verification, assessment was completed on 17.03.2018 under Section 40 of the said Act, 2003. He further submits that since the petitioner had filed audited balance sheet and Form 23, self-assessment under Section 35 of the Act was deemed completed before initiation of proceedings under Section 40. He further submits that in the assessment order, inadvertently due to typographical mistake 'Section 36' was mentioned instead of 'Section 40'. In support of the aforesaid submission, he submitted a copy of the instructions received from the Department vide letter dated 28.2.2024 with a copy to the other side. A copy of the aforesaid letter is kept on file and marked as 'X'.

9. I have heard the submissions made at the Bar and have perused the materials available on record.

10. Before adverting to the contentions of the parties, it is pertinent to refer to the relevant provisions of the said Act, 2003:-

i) *Section 29 of the ACT, 2003 provides that*

"***29. Periodical returns and payment of tax****:*

(1) Every registered dealer and every dealer liable to pay tax shall furnish a correct and complete tax return in such form for such period, by such dates and to such authority, as may be prescribed;

Provided that different periods may be prescribed for different classes of dealers for the purpose of filing tax return.

(2) Every registered dealer and every dealer liable to pay tax shall furnish, in addition to the tax return, if any, furnished under sub- section (1), a correct and complete annual return in the prescribed form within such time as may be prescribed.

(3) If the Prescribed Authority has reason to believe that the turnover of sales or the turnover of purchases of any dealer has exceeded the taxable limit

as specified in sub-section (6) of section 7, so as to render him liable to pay tax under this Act for any year or part thereof, he may, by notice served in the prescribed manner, require such dealer to furnish tax return under sub-section (1) and an annual return under sub-section (2) as if he were a registered dealer.

(4) If any dealer having furnished a tax return or an annual return under this section, discovers any omission or any other error in the return so filed, he may without prejudice to the charge of any interest, furnish revised tax return or revised annual return, as the case may be, in the prescribed manner and within the prescribed time.

(5) Every dealer required to file return under this section shall pay the full amount of tax, interest and any other sum payable by him according to such return or the differential tax payable according to the revised return furnished, if any, and shall furnish along with the return or revised return, as the case may be, a receipt showing full payment of such amount into the Government account.

(6) Every return under this section shall be signed and verified-

(a) in case of an individual, by the individual himself, and where the individual is absent by some person duly authorized by him in this behalf;

(b) in the case of a Hindu Undivided family, by the Karta;

(c) in the case of a company or local authority, by the principal officer or Chief Executive or authorized signatory thereof;

(d) in the case of a firm, by any partner thereof not being a minor or by a manager;

(e) in the case of any other association, by the person competent to act on behalf of the association."

ii) *Section 35 of the ACT, 2003 provides that*

*"**35. Self assessment:***

(1) the amount of tax due from a dealer liable to pay tax may be assessed separately for each year during which he is so liable;

Provided that, the Commissioner may, subject to such conditions if any, as may be prescribed, assess the tax due from any dealer during a part of a year and the other provisions of this section shall be construed accordingly.

(2) If a dealer has filed all the tax returns and the annual return or revised returns in the prescribed manner and within the prescribed time and has paid the tax payable according to such returns or revised returns and also interest payable if any, the returns or revised returns so filed shall be accepted and his assessment shall be deemed to have been made for the purpose of subsection (1) subject to adjustment of any arithmetical error apparent on the face of the said return;

Provided that the assessment under this sub-section of every such registered dealer who is required to furnish audit report under section 62 shall be deemed to have been made if such dealer has furnished the audit report along with the annual return."

iii) *Section 39 of the ACT, 2003 provides that*

*"**39. No assessment after five years.-** no assessment under the foregoing provisions of this Act, shall be made after the expiry of five years from the end of the year to which the assessment relates:*

Provided that in case of offence under this Act for which proceedings for prosecution has been initiated, the limitation as specified in this sub-section shall not apply."

iv) *Section 40 of the ACT, 2003 provides that*

*"**40. Turnover escaping assessment:***

(1) Where after a dealer is assessed under section 34, 35, 36 or 37 of this Act for any year or part thereof, the Prescribed Authority has reason to believe that the whole or any part of the turnover of the dealer in respect of any period has,-

(a) escaped assessment; or

(b) been under assessed; or

(c) been assessed at a rate lower than the rate at which it is

assessable; or

(d) been wrongly allowed any deduction therefrom; or

(e) been wrongly allowed any credit therein.

The Prescribed Authority may, after giving the dealer a reasonable opportunity of being heard and after making such enquiries as he considers

necessary, proceed to assess to the best of his judgment, the amount of tax due from the dealer in respect of such turnover, and the provisions of this Act shall, so far as may be, apply accordingly.

(2) No order of assessment and reassessment shall be made under sub- section (1) after the expiry of eight years from the end of the year in respect of which or part of which tax is assessable."

Pertinent also to refer to Rule 17 of Assam Value Added Tax Rules, 2005 (hereinafter referred to as said Rules, 2005).

"***17. Submission of returns under Section 29***.-

(1) Every registered dealer or any dealer liable to pay tax whose turnover of taxable goods in any assessment year exceeds Rupees 3 (three) lakhs, shall furnish to the Prescribed Authority, a tax return for each month in Form-13 within the next twenty one days of the succeeding month.

Explanation - For the purpose of this sub-rule, the due date for submission of the tax return, for a particular month shall be the twenty first day of the following month.

(2) Every registered dealer or any dealer liable to pay tax under the Act, other than a dealer referred to in sub-rule (1), shall furnish to the Prescribed Authority, a tax return for each quarter in Form-13 within twenty one days of the succeeding month from the date of expiry of each quarter. Explanation For the purpose of this sub-rule, the due date for submission of the quarterly tax return for a particular quarter shall be the twenty first day of the month following the quarter.

(2A) Notwithstanding anything contained in sub-rule (1) or sub-rule (2) of this rule, every registered dealer who is a holder or a holder in due course of Certificate of Entitlement under the Assam Industries (Tax Remission) Scheme, 2005 shall furnish to the Prescribed Authority periodic tax return in the manner laid down in such Scheme;

Amendment: Sub-rule (2A) has been inserted vide notification No. FTX.29/ 2003/25 dated 4-11-2006 w.e.f. 14-11-2006.

(2B) Notwithstanding anything contained in sub-rule (1) or sub-rule (2) of this rule, every registered dealer who is permitted to avail any scheme of composition of any tax liability within the meaning of section 20 of the principal Act shall furnish to the Prescribed Authority periodic tax return

or statement of the quantity of goods imported in the manner laid down in such scheme."

Amendment: Sub-rule (2B) has been inserted vide notificaiton No. FTX.29/ 2003/25 dated 4-11-2006 w.e.f. 14-11-2006.

(3) The tax return shall be accompanied by a receipt from the Designated Bank, a crossed cheque or a crossed demand draft for the full amount of tax payable on his taxable turnover during the month or the quarter to which the return relates.

Explanation - For the purpose of Explanation 2 to clause (b) of sub-section (1) of Section 10, the challans for payment of tax received by a bonded warehouse from a retail licence holder or by a excise warehouse from a retail vendor, shall also form part of the full amount of tax payable on the taxable turnover of such bond or warehouse for the month to which the tax return relates.

(4) If the amount paid by a dealer along with the tax return under sub-rule (1) or (2) or (2A) or (2B), is less than the amount of tax payable by him, the Prescribed Authority shall serve a notice of demand and the dealer shall pay the sum demanded in the said notice within the time and in manner specified in the notice.

Amendment: In between the existing numeral "(2)" and the punctuation mark ",", the words and bracket "or (2A) or (2B)" have been inserted vide notification No. FTX.29/2003/25 dated 4-11-2006 w.e.f. 14-11-2006.

(5)(a) Every dealer as mentioned in sub-rule (1) and sub-rule (2) in addition to the tax returns furnished, shall submit an annual return in Form-14 within two months after the close of the year to which the return relates;

(5)(b) Every dealer as mentioned in sub-rule (2A) and sub-rule (2B) in addition to the tax returns or statements of quantity of goods imported furnished shall submit an annual return or statement of quantity of goods imported in the Form or Format as may be laid down in the applicable tax remission scheme or composition scheme:

Provided that in case of a dealer who is liable to produce a certificate of

Audit of Accounts by a Chartered Accountant under section 62, the annual return shall be submitted within seven months from the end of the year to which the return relates.

Amendment: Sub-rule (5) has been substituted vide notification No. FTX.29/2003/25 dated 4-11-2006 w.e.f. 14-11-2006. Prior to its substitution, it read as under:

"(5) Every dealer as mentioned in sub-rule (1) and sub-rule (2) in addition to the tax returns furnished, shall submit an annual return in Form-14 within two months after the close of the year to which the return relates:

Provided that in case of a dealer who is liable to produce a Certificate of Audit of Accounts by a Chartered Accountant under section 62, the annual return shall be submitted within seven months from the end of the year to which the return relates."

(6) Every registered dealer who submit a return under sub-rule (5) shall, except when tax has been paid in advance in full with the tax returns furnished, submit along with the annual return a receipt from a Designated Bank, crossed cheque or crossed demand draft in favour of the Prescribed Authority for the full amount of tax payable for the year, half year or a quarter, as the case may be, on the basis of the return after deducting therefrom the advance taxes, if any, already paid for the year, half year or the quarter, as the case may be.

(7) Where any dealer other than a registered dealer liable to pay tax fails to submit the return under sub-section (3) of Section 29 the Prescribed Authority shall serve on such a dealer a notice in Form-15 requiring him to furnish such return within such date as may be specified in the notice.

(8) In case of discovery of any omission or any other error in the tax return or annual return filed, the dealer may furnish a revised tax return or the revised annual return, as the case may be, within a period of six months from the due date of submission of tax return or annual return, as the case may be :

Provided that, no revised tax return or revised annual return shall be entertained if the case has been taken up for audit assessment and

notice to that effect has already been served on the dealer.

(9) Omitted.

Amendment: Sub-rule (9) has been omitted vide notificaiton No. FTX.29/ 2003/25 dated 4-11-2006 w.e.f. 14-11-2006. Prior to its omission, it read as under:

"(9) A dealer, opting for composition scheme under Section 20, shall be liable to pay tax quarterly. Such dealer shall make the payment by challan into a Designated Bank within twenty one days of the succeeding month from the date of expiry of each quarter."

11. Section 29 of the Act, 2003 provides that every dealer has to furnish periodical returns within the prescribed time. Rule 17 of the said Rules, 2005 provides that such return for each month has to be filed within the next 21 days of the succeeding month.

12. Section 35 of the said Act, 2003 deals with self-assessment and sub section 2 of the said Section provides that the assessment shall be deemed to have been completed if the dealer has filed all the tax returns and annual returns or revised returns in the prescribed manner and within the prescribed time and has paid the tax payable according to such returns or revised returns and also interest payable, if any. In the present case, monthly returns were required to be filed by 21st day of the following month according to the explanation of sub rule 1 of Rule 17 of the said Rules, 2005. Pertinent to extract paragraph 4 of the writ petition, wherein the petitioner has given the date of submission of monthly returns for the year 2009 -2010, which is extracted hereunder for ready reference:-

"4. That the petitioner begs to state that the petitioner submitted monthly return of turnover as well as annual return for the year 2009-2010 under the

Assam VAT Act, 2003. The petitioner submitted its monthly returns on different dates as per the details given below:-

Sl. No.	Month	Value Excluding VAT (Rs.)	VAT claimed (RS)	Date of submission
1	April 2009	3,09,28,031/-	61,85,607/-	12.06.2009
2	May 2009	3,91,79,574/-	78,35,911/-	01.07.2009
3	June 2009	4,20,55,665/-	84,11,135/-	28.07.2009
4	July 2009	4,64,37,259/-	92,87,454/-	07.09.2009
5	August 2009	5,01,17,644/-	1,00,23,532/-	06.10.2009
6	September 2009	4,87,23,383/-	97,44,675/-	31.10.2009
7	October 2009	5,50,83,986/-	1,10,16,799/-	03.12.2009
8	November 2009	4,37,57,371	52,69,269/-	04.01.2010
9	December 2009	3,01,58,235/-	36,71,416/-	01.02.2010
10	January 2010	1,33,74,924/-	16,37,413/-	08.03.2010
11	February 2010	92,93,537/-	11,15,225/-	26.03.2010
12	March 2010	2,57,59,296/-	30,97,542/-	30.04.2010

13. It is thus evident that the monthly returns for the annual year 2009 - 2010 was not submitted within the 21st day of the succeeding month, in other words, it was not submitted within the time prescribed under 17 (1) of the said Rules, 2005, which is within next 21 days of the succeeding months. It is evident that the return for the month of April 2009 was submitted on 12.06.2009 which is after the expiry of the prescribed time. Similarly, in respect of other months for the year 2009-2010, the monthly returns were submitted after the expiry of the prescribed time. Further, the dates of the revised returns for the period from April 2009 to March 2010 is also given in paragraph 5 of the writ petition which is hereunder:-

> "*5. That the petitioner thereafter submitted its revised returns for the period from April 2009 to March 2010 as per the details given below:*

Return period	Date of filing of original return	Date of filing of revised return
April 2009	12.06.2009	13.04.2011
May 2009	01.07.2009	13.04.2011
June 2009	28.07.2009	13.04.2011
July 2009	07.09.2009	13.04.2011
August 2009	06.10.2009	13.04.2011
September 2009	31.10.2009	13.04.2011
October 2009	03.12.2009	13.04.2011
November 2009	04.01.2010	13.04.2011
December 2009	01.02.2010	13.04.2011
January 2010	08.03.2010	13.04.2011
February 2010	26.03.2010	13.04.2011
March 2010	30.04.2010	13.04.2011

The petitioner also submitted its annual return for the year 2009 – 2010 alongwith the said revised return on 13.04.2011."

14. From the aforesaid chart, it further appears that the revised returns were filed on 13.04.2011 i.e after expiry of two months prescribed in Rule 17 (5) (a) of the said Rules, 2005 and as such the said revised returns were also not submitted within the prescribed time and therefore, no self-assessment can be deemed to have been completed under Section 35 of the said Act. Pertinent to

mention that in the affidavit-in-opposition filed by the assessing authorities, there is no denial to the aforesaid statements made in paragraphs 4 and 5 of the writ petition. It is well settled that averments if not denied would amount to an admission of the facts. Reference is made to the following cases of the Apex Court which is as below:-

1. ***Badat & Co. Bombay Vs. East India Trading Co,*** reported in ***AIR 1964 SC 538*** at ***paragraph 11.***
2. ***M. Venkataramana Hebbar (Dead) by LRS Vs. M. Rajagopal Hebbar & Others*** reported in ***(2007) 6 SCC 401*** at **paragraphs 12 and 13.**

15. Paragraph 11 of the aforesaid judgment of ***Badat & Co. Bombay (Supra)*** is quoted hereunder for ready reference:

> "*11. Order 7 of the Code of Civil Procedure prescribes, among others, that the plaintiff shall give in the plaint the facts constituting the cause of action and when it arose, and the facts showing that the court has jurisdiction. The object is to enable the defendant to ascertain from the plaint the necessary facts so that he may admit or deny them. Order 8 provides for the filling of a written statement, the particulars to be contained therein and the manner of doing so; Rules 3, 4 and 5 thereof are relevant to the present enquiry and they reads:*
>
> *"Order 8 Rule 3. It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.*
>
> *Rule 4. Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum*

or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

Rule 5. Every allegation of fact in the plaint, if not denied specifically, or by necessary implication or stated to be not admitted the pleading of the defendant, shall be taken to be admitted except as against a person under disability.

Provided that the court may in its discreation require any fact so admitted to be proved otherwise than by such admission."

These three rules form an integrated code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. The written statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary. The first para of Rule 5 is a reproduction of Order 19, Rule 13 of the English rules made under the Judicature Acts. But in mofussil Courts in India, where pleadings were not precisely drawn, it was found in practice that if they were strictly construed in terms of the said provisions, grave injustice would be done to parties with genuine claims. To do justice between those parties, for which Courts are intended, the rigor of Rule 5 has been modified by the introduction of the proviso thereto. Under that proviso the court may, in its discreation, require any fact so admitted to be proved otherwise than by such admission. In the matter of mofussil pleadings, Courts, presumably replying upon the said proviso, tolerated more laxity in the pleadings in the interest of justice. But on the original side of the Bombay High Court, we are told, the pleadings are drafted by trained lawyers bestowing serious thought and with precision. In construing such pleadings the proviso can be invoked only in exceptional circumstances to prevent obvious injustice to a party or to relieve

him from the results of an accidential slip or omission, but not to help a party who designedly made vague denials and thereafter sought to rely upon them for non-suiting the plaintiff. The discreation under the proviso must be exercised by a court having regard to the justice of a cause with particular reference to the nature of the parties, the standard of drafting obtaining in a locality, and the traditions and conventions of a court wherein such pleadings are filed. In this context the decision this context the decision in Tildesley v. Harper will be useful. There, in an action against a lessee to set aside the lease granted under a power, the statement of claim stated that the donee of the power had received from the lessee a certain sum as a bribe, and stated the circumstances; the statement of defence denied that that sum had been given, and denied each circumstance, but contained no denial of a bribe having been given. The court held, under rules corresponding to the aforesaid rules of the Code of Civil Procedure, that the giving of the bribe was not sufficiently denied and not therefore it must be deemed to have been admitted. Fry., J. posed the question thus: What is the point of substance in the allegations in the statement of claim? and answered it as follows:

> *"The point of substance is undoubtedly that a bribe was given by Anderson to Tildesley, and that point of substance is nowhere met..... no fair and substantial answer is, in my opinion, given to the allegation of substance, namely, that there was a bribe. In my opinion it is of the highest importance that this rule of pleading should be adhered to strictly, and that the court should require the defendant, when putting in his statement of defence, and the plaintiff, when replying to the allegations of the defendant, to state the point of substance, and not to give formal denials of the allegations contained in the previous pleadings without stating the circumstances. As far as I am concerned, I mean to give the fullest effect to that rule. I am convinced that it is one of the highest benefit to suitors in the court".*

It is true that in England the concerned rule is inflexible and that there is no

proviso to it as is found in the Code of Civil Procedure. But there is no reason why in Bombay on the original side of the High Court the same precision in pleadings shall not be insisted upon except in exceptional circumstances. The Bombay High Court, in Laxminarayan v. Chimniram Girdhari Lal construed the said provisions and applied them to the pleadings in a suit filed in the court of the Joint Subordinate Judge of Ahmednagar. There, the plaintiffs sued to recover a sum of money on an account stated. For the purposed of saving limitation they relied in their plaint upon a letter sent by the defendant firm. The defendants in their written statement stated that the plaintiff's suit was not in time and that "the suit is not saved by the letter put in from the bar of limitation". The question was raised whether in that state of pleadings the letter could be taken as admitted between the parties and, therefore, unnecessary to be proved. Batchelor, Ag., C.J. after noticing the said provisions, observed:

> *"It appears to us that on a fair reading of para 6, its meaning is that though the letter put in by the plaintiffs is not denied, the defendants contend that for one reason or another its effect is not to save the suit from the bar of limitation. We think, therefore, that ... the letter, Exhibit 33, must be accepted as admitted between the parties, and therefore, unnecessary to be proved."*

The written statement before the High Court; in that case was one filed in a court in the mofussil; yet, the Bombay High Court applied the Rule and held that the letter need not be proved aliunde as it must be deemed to have been admitted in spite of the vague denial in the written statement. I, therefore, hold that the pleadings on the original side of the Bombay High Court should also be strictly construed, having regard to the provisions of Rules 3, 4 and 5 of Order 8 of the Code of Civil Procedure, unless there are circustances wherein a court thinks fit to exercise its discretion under the proviso to Rule 5 of Order 8."

16. Paragraphs 12 and 13 of the aforesaid judgment of ***M. Venkataramana Hebbar (Supra)*** is quoted hereunder for ready reference:

"*12. The contract between the parties, moreover was a contingent contract. It was to have its effect only on payment of the said sum of Rs 15,000 to the plaintiff and the other respondents by Defendants 1 to 3. It has been noticed hereinbefore by us that as of fact, it was found that no such payment had been made. Even there had been no denial of the assertions made by the appellant in their written statement in that behalf. The said averments would, therefore, be deemed to be admitted. Order 8 Rule 3 and Order 8 Rule 5 of the Civil Procedure Code read thus:*

"3. Denial to be specific.-It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

* * *

5. Specific denial.-(1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:

Provided that the court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

(2) Where the defendant has not filed a pleading, it shall be lawful for the court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall

be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced."

13. Thus, if a plea which was relevant for the purpose of maintaining a suit had not been specifically traversed, the court was entitled to draw an inference that the same had been admitted. A fact admitted in terms of Section 58 of the Evidence Act need not be proved."

17. The respondent assessing authorities having not denied the averments in paragraphs 4 and 5 with regard to the submission of annual returns after the expiry of the prescribed time-limit, the same can be inferred to have been admitted.

18. Thus, the return having been filed after the expiry of the stipulated period, there is no self-assessment under section 35 of the said Act,2003.

19. Reference is made to the decisions of the Division Bench of this Court in the case of ***Indian Oil Corporation Limited Vs. State of Assam & Others*** reported in ***(2013) 60 VST 185 Gau,*** wherein it has been held that when the time limit for completion for assessment has been indicated and after expiry of the said period no assessment can be made.

20. Reference is also made to the decision of the Division Bench of this Court in the case of ***Indian Oil Corporation Limit Vs. State of Assam*** in ***WP(C) No. 4745 of 2009***, wherein it has been held that after expiry of the prescribed period of assessment, no assessment can be made.

21. Reference is made to the decision of the Apex Court in the case of ***Shyam Das Vs. Regional Assistant Commissioner Of Sales Tax Nagar*** reported in ***1964 vol. 4 SCR*** at page **436**, wherein the Apex Court held that unless return is filed within the time limit, there cannot be an assessment.

22. It is submitted by the learned Counsel appearing for the assessing authorities that the self-assessment under Section 35 of the said Act, 2003 was deemed to have been completed as the petitioner filed audited balance sheet and form 23 and therefore, the proceedings under Section 40 was initiated. As stated earlier, the petitioner having not filed the tax returns and annual returns or revised returns within the prescribed time stipulated under Rule 17 of the said Rules, 2005, no self-assessment can be made under law. Therefore, the assessing authorities could not have deemed self-assessment under Section 35 to have been completed. As such, the said submission of the Ld. Counsel appearing for the assessing authorities is totally fallacious.

23. Section 34, 36 and Section 37 of the said Act, 2003 admittedly is not applicable in the present case.

24. Section 39 of the said Act, 2003 provides that no assessment shall be completed after the expiry of five years from the end of the year to which the assessment relates and as evident from the above, in the present case, no assessment under section 34, 35, 36 or 37 of the Act, 2003 was completed by the assessing authorities. Therefore, assessment for the year 2009 – 2010 ought to have been completed within 5 years from the end of the year in respect of which the assessment relates. In terms of Section 39 of the said Act, 2003, assessment for the assessment year 2009 – 2010 got barred by limitation on 31.3.2015. Since, the time limit for completion of assessment as in terms of Section 39 of the Act expired on 31.03.2015, it appears that the assessing authority did not complete assessment within the prescribed time period. However, assessment was initiated under Section 40 of the Act without completion of assessment under Sections 34, 35, 36 or 37 of the Act, 2003. Section 40 of the Act,2003 dealing with turnover escaping assessment provides

that for invoking the powers under Section 40 of the Act, a dealer must have been assessed under Section 34, 35, 36 or 37 of the Act, 2003 for any year or part thereof.

25. Since in the facts of the instant case, no self assessment can be deemed under Section 35 of the Act, 2003 re-assessment under Section 40 of the said Act, 2003 could not have been made under the provisions of the said Act.

26. Section 40 of the Act, 2003, dealing with turnover escaping assessment provides that whenever a dealer is assessed under the said provision, three preconditions are to be fulfilled;

i. Firstly, a dealer must have been assessed under section 34, 35, 36 or 37 of the act for any year or part thereof.

ii. Secondly, the assessing authority must have reason to believe that the whole or any part of the turnover of the dealer in respect of any period has escaped assessment or has been under assessed or has been assessed at a rate lower than the rate at which it is accessible or has been wrongly allowed and deduction therefrom or has been wrongly allowed credit therein.

iii. Thirdly, if the prescribed authority has such reasons to believe then the prescribed authority has to give reasonable opportunity of being heard, and after making enquiries, proceed to assess to the best of his judgment, the amount of tax due from the dealer in respect of such turnover.

27. It is abundantly clear from the above reading of the said provision that in order to re-assess under Section 40 of the Act, 2003, there has to be firstly an

assessment in law. It is only after an assessment is made, the assessing authorities has jurisdiction to exercise powers of reassessment subject off course to the fulfillment of the other two conditions stipulated therein. The 'existence of assessment' is a condition precedent for making a reassessment under Section 40 of the Act, 2003 and if such condition precedent exist, the assessing authorities had no jurisdiction to make the reassessment. As such, without assessment under section 34, 35, 36 or 37 of the Act, 2003, the respondent authorities could not have resorted to the provisions of the re-assessment stipulated under Section 40 of the said Act.

28. Reference is made in this regard to the decision of the Apex Court in the case of ***Ghanshyamdas Vs Regional Assistant Commissioner of Sales Tax, Nagpur and others*** reported in ***(1964) 51 ITR 557(SC)*** and the decision of the Division Bench of this Court in the case of ***Radheshayam Goyal & Sons Vs State of Assam & Ors.*** in ***W.P(C) No. 4652/2015***.

29. In the present case, there was no assessment under section 35 of the Act, 2003, made during the prescribed period. Therefore, no assessment can be deemed to have been made in law.

30. In view of the above, the said order of re-assessment having been completed without any assessment made under section 35 of the Act, 2003, the order of reassessment dated 17.03.2018 is absolutely illegal and without jurisdiction.

31. As such, the very initiation of proceedings under section 40 of the Act, 2003 is absolutely illegal, without jurisdiction and not tenable in law.

32. Accordingly, the impugned Order of re-assessment dated 17.03.2018 and the Notice of Demand dated 17.03.2018 are set aside and quashed.

33. The present writ petition stands allowed and disposed of.

JUDGE

Comparing Assistant