

(2005) 11 RAJ CK 0026

In the Rajasthan High Court

Case No : Civil Sales Tax Revision No. 462 of 2005

ACTO

APPELLANT

Vs

Juharmal Badri Lal

RESPONDENT

Date of Decision : 14-11-2005

Acts Referred:

Income Tax Act, 1961 — Section 186, 260A, 78(2), 78(5), 86

Citation : (2006) 2 RLW 957 : (2007) 5 VST 276 : (2006) 2 WLC 350

Hon'ble Judges : Vineet Kothari, J

Bench : Single Bench

Advocate : Sangeet Lodha, for the Appellant;

Final Decision : Dismissed

Judgement

Vineet Kothari, J.—This revision petition is directed against the order of Tax Board dt.3.8.2004 rejecting the Revenue's Appeal No. 202/2003/Dungarpur CTO Dungarpur v. Juharmal Badri Lal, Devli, by which the Tax Board upholding the order of learned D.C. (Appeals) held that no penalty u/s 78 of the Act was liable to be imposed on the respondent-assessee.

2. The Assessing authority - learned CTO, Anti Evasion, Dungarpur imposed a penalty of Rs. 23,618/- @ 30% of the value of the goods of Rs. 78,725/- u/s 78(5) of the Act on the ground that the goods in question namely 100 bags of wheat being carried by Truck No.GJ-9T/8473 on 22.11.2001 and along with the said transit, two sale bills, one bearing No. 943 dated 21.11.2001 for Rs. 78,725/- for 100 bags of wheat of the respondent-assessee to M/s. Ambika Fine Food Rader, Gujarat was found and also another Bill bearing hand written No. 940 of the same date in favour of the same party, of the same amount and same quantity of the wheat was also found. On the said bill, which is produced as Annexure-1 with the revision petition, the bill No. 940 was hand written. The bilty of the transport was also found along with the goods.

3. A case u/s 78(5) of the Act was made out against the respondent - assessee

on the ground that in view of two bills for the same goods having been found, there was an intention to evade the tax under the Act and, therefore, the respondent - assessee was liable to pay the penalty @ 30% of the value of the goods of Rs. 23,618/-. The assessee in pursuance of the notice u/s 78(5) of the Act filed a reply thereto vide Annexure-2 dated 21.11.2001 in which the accountant (Mu-nim) of the said firm appeared before the Assessing authority and explained that by mistake two bills bearing No. 940 and 943 of the same amount of Rs. 78,725/- for 100 bags of wheat have been issued and he produced before the said authority the regular bill book and letter pad. Admitting the said mistake of making two bills, a request was made to the Assessing authority to decide the case on the same day. Treating the said explanation for reply as admission of guilt of evasion of tax, the assessing authority imposed the said penalty of Rs. 23,618/-, which the assessee appears to have paid for release of his goods.

4. Thereafter, the assessee approached the first appellate authority DC (Appeals) Kota who by a detailed order allowed the appeal of the assessee and quashed the said penalty u/s 78(5) of the Act. The learned DC (Appeals) in his order found that the bill No. 940 dated 21.11.2001 was found to have been issued in favour of the some local dealer of Devli for Rs. 16,114/- for the sale of wheat and Jow by the said bill, whereas the bill No. 943 dated 21.11.2001 was issued in favour of the said purchasing dealer M/s. Ambika Fine Food, Eader, Gujarat which was found which the said transit. The learned DC (Appeals) found that the second bill bearing hand written bill No. 940 was inadvertently written as 940 and since the regular bill No. 943 for the said sale was issued and which was found during the transit at the time of the checking with the bilty relating to the said goods i.e. 100 bags of wheat, no penalty u/s 78(5) of the Act was imposable. Accordingly, the said penalty was set aside.

5. The Revenue aggrieved by the said order, approached the Tax Board by second appeal for restoration of said penalty which was rejected by the Tax Board by the impugned order dated 3.8.2004 in which the Tax Board accepted the eonierition on the part of the assessee that writing of bill No. 940 is the hand writing on the duplicate bill was a clerical error and same did not disclose any intention on the part of the assessee respondent to evade the tax and the penalty was not justified.

6. Being aggrieved by the said order of the Tax Board, the Revenue is before this Court in revisional jurisdiction u/s 186 of the Act.

7. Heard learned Counsel for the Revenue.

8. Section 78(5) of the Act, which lays down the requirements for certain documents to accompany the goods in transit, reads as under:

Section 78(5) : The driver or the person incharge of a vehicle or carrier or of the goods in movement shall

(a) carry with him a goods vehicle record including challans and bilties", bills of sale or despatch memo and prescribed forms....

9. It is not in dispute in the present case that bill and bilty relating to the goods namely 100 bags of wheat were found with the Truck in question and the same were produced at the time of checking. No other declaration was either required or produced and the entire case of the revenue is that since a second bill bearing No. 940 in hand writing was also found, it gave rise to intention to evade tax on the part of assessee and, therefore, penalty u/s 78(5) of the Act was justified.

10. First of all, a perusal of both these bill Nos. 943 and 940 clearly shows that the goods in question are shown to be Sales Tax Paid and Mandi Tax Paid (STP & MTP). No inquiry appears to have been made by the Assessing authority into this question. First of all whether the taxable sale attracting tax liability under the Act was at all made or not and whether that the goods in question were liable to tax first of all or not. Secondly, the assessing authority has totally failed to appreciate the averments made in reply to the notice Annexure-3 on record dated 23.11.2001 and taking the mistake of issuing two bills one bearing No. 943 and another bearing No. 940 as admission of guilt of evasion of tax, the Assessing Officer straight away proceeded to impose the penalty, which is as high as 30% of the value of the goods in question without holding any further enquiry into the matter. A closer scrutiny of this reply, which it taken as an admission of guilt by the Assessing Authority shows that only the mistake of making two bills, if at all it can be held to be a mistake was admitted and there is no admission of guilt of evasion of tax on the basis of the factum of issuing these two bills is there. The assessing authority has not explained how mere presence of duplicate bill bearing hand written No. 940 could per se result in any evasion of tax, particularly when in both these Bills, the same goods are shown to be Sales Tax Paid.

11. Once the relevant and prescribed documents as prescribed u/s 78(2) of the Act quoted above namely Bill and Bilty are found, unless these documents are found to be false or forged, the imposition of penalty u/s 78(5) of the Act, cannot be justified. Such admission or representations made before the assessing authority for securing release of goods may be made in peculiar circumstances obtaining before the assessee at that moment, but it does not absolve the assessing authority to hold enquiry into the matter and objectively arrive at the conclusion that either the prescribed documents are not available or the produced documents are false or forged. Such hasty self serving admissions are nothing better than admission of guilt before the policy authorities, which are not even admissible in evidence. They may be made under fear or undue influence of authorities, even by not specifically authorised persons on behalf of the assessee or may be made as self serving admissions to get over with the lengthy proceedings. Had it been end of the matter for the assessing authority with such admissions being conclusive proof of guilt of evasion of tax, very purpose of need to hold enquiry u/s 78(5) of the Act would be defeated. It is not the intention of

Legislature to let such loose ends in penal provisions like Section 78(5); therefore, authorities cannot be let free to impose penalty, without holding proper enquiry in the matter. Without this kind of enquiry, the imposition of penalty u/s 78(5) of the Act, cannot be justified because ultimately what is being imposed by the Assessing Authority is a penalty and not a tax which is imposed by virtue of charging provisions of a taxing enactment read with relevant Notification of rate of tax. In imposition of penalty, the existence of guilty animus is essential and in arriving at the findings of the same, holding of enquiry by the assessing officer is a sine qua non.

12. On the aforesaid facts, the appellate authorities particularly, the learned DC (Appeals) who also appears to have gone into the record of the case in detail, found that the issuance of second bill bearing, hand written No. 940 was a clerical and inadvertent mistake and since a regular bill bearing printed No. 943 along with the Bilty for the same goods was also found with the same goods, the requirements of Section 78(2) of the Act were satisfied and, therefore, no penalty u/s 78(5) of the Act could be imposed. Agreeing with the said decision of the learned DC (Appeals), the Tax Board also came to the similar conclusion.

13. This Court is of the clear opinion that no case of imposition of penalty u/s 78(5) of the Act was made out in the present case and it is essentially a finding of fact, if the authorities in the hierarchy, choose in their discretion, not to impose the penalty u/s 78(5) of the Act. Therefore, it may not even give rise to a question of law arising out of the order of the Tax Board as required by Section 86 of the Act. Secondly, the facts of the present case clearly indicate that the prescribed documents as prescribed in Section 78(2) of the Act namely bill and ability relating to the goods found at the time of checking in transit were admittedly there. There is no finding nor even an allegation against the assessee that these documents were false or forged. The mere presence of a duplicate bill bearing hand written No. 940 giving the same quantity and description of the goods cannot per se lead to any inference of the said document by itself being false or forged or even rendering the other documents false or forged in any manner. Without holding a proper enquiry into the matter after affording an opportunity of hearing to the assessee in this regard, which is the mandate of the law, no such inference or finding could be arrived at by the Assessing authority which could provide the foundation for imposition of penalty u/s 78(5) of the Act.

14. In this view of the matter, I do not find any force in the present revision petition and the same is liable to be dismissed, it is accordingly dismissed.

15. Before parting, it is also pertinent to once again emphasise the need for Revenue to avoid filing revision petitions, with small revenue stakes, as was done by this Court in *ACTO v. Gaurav Steels Ltd.* (2005) 13 Tax U D 64. To quote:

Another aspect of the matter which necessarily engages the attention of this Court is that petty matters or matters with small stakes like penalty quantum of

Rs. 2,000/- to Rs. 10,000/- being brought before this Court at the instance of revenue and a large chunk of revision petitions relating to penalty u/s 78(5) of the Act before this Court are in that range. While the Income Tax Department has formulated guidelines in this regard and the cases involving small stakes by limit would not be agitated after the final finding fact body has decided against it, unfortunately, no such guidelines appear to have been framed by the Commercial Taxes Department of the State of Rajasthan and that contributes even to the burden of this Court. The expenditure incurred by petitioner department itself in dealing with such cases within small stakes besides the loss of productive man hours at various level and mechanical sanctions issued for filing revision Petitions without really applying mind as to the genuine questions of law arising, is also a cause of concern and it would be only in the fitness of things if the Commercial Taxes Department considers it with all seriousness to frame the guidelines in this regard also so that repetitive appeals or revisions involving small stakes do not unnecessarily burden the dockets of this Court. The sanction order for filing Revision Petitions at the instance of Revenue, showing application of mind by the competent authority should be filed with the memo of Revision Petition in this Court. For the present this Court only considers it discretion of the department to frame the guidelines in this regard, for deciding the cut off of stakes involved for deciding whether Revision Petition should be filed in this Court or not.

16. No such guidelines appear to have been framed as yet, though the period of two months given for the said purpose in that case is over. Recently Income Tax Department, CBDT has again issued further instructions No. 2/2005 dt. 24.10.2005 in this " regard raising the limit of Tax Effect to Rs. 4,00,000/- before an appeal u/s 260A of the Income Tax Act can be filed in High Courts. The said instructions as published in (2005) 148 Taxman 26 are quoted below:

Clarification regarding revision of monetary limits for filing appeals by Department before various appellate bodies or appellate authorities

INSTRUCTION No. 2, 2005, DATED 24.10.2005

1. Reference is invited to Board's Instruction No. 1979 dated 27.3.2000 (F.NO. 279/126/98-IT) and Instruction No. 1985, dated 29.6.2000 (F.No. 279/12698-IT, dated 29.6.2000) wherein monetary limits for filing appeal's references before various appellate authorities have been prescribed.

2. In partial modification of the above instruction, it has now been decided by the Board that appeals will henceforth be filed only in cases where the tax effect exceeds the revised monetary limits given hereunder:-

Sl.No. Income Tax Tax Effect (i) Appeal before Appellate Tribunal Rs. 20,000 (ii) Appeal u/s 260A Rs. 4,00,000 (iii) Appeal before the Supreme Court Rs. 10,00,000 3. The Board has also decided that in cases involving substantial question of law of importance as well as in cases where the same question of law will repeatedly arise, either in the case concerned or in similar case, should be separately considered on merits without being hindered by the monetary limits.

4. Subject to the paragraphs 2 and 3 above the Instruction No. 1979, dated 27.3.2000 as clarified subsequently in Instruction No. 1985, dated 29.6.2000, will continue to govern the decision for filing of department appeals.

5. This Instruction will come into effect from 31.10.2005.

17. It is high time the State Departments stop approaching the higher courts like ordinary litigants, having lost before two appellate forum created by themselves, under the Act, in a mechanical fashion, burdening the Public Exchequer and Public Servants who indulge in such prolific litigation are brought to task fixing their responsibility in this regard.

18. Therefore, with these words of caution, the present revision petition of Revenue is dismissed.

19. A copy of this judgment be sent to the Commissioner, Commercial Taxes Department and Chief Secretary of the Government of Rajasthan immediately.