
(2011) 05 MP CK 0006
In the Madhya Pradesh High Court
Case No : Writ Petition No. 7454 of 2010

Bhanu Pratap Singh

APPELLANT

Vs

State of Madhya Pradesh and Another

RESPONDENT

Date of Decision : 02-05-2011

Acts Referred:

Commercial Tax Act — Section 28(1)

Citation : (2011) 3 MPJR 27 : (2011) 45 VST 58

Hon'ble Judges : Sushma Shrivastava, J; K.K. Lahoti, J

Bench : Division Bench

Advocate : Sanjay Mishra, for the Appellant; K.K. Dubey, Penal Lawyer, for the Respondent

Final Decision : Allowed

Judgement

1. This petition is directed against an order (annexure P4) dated December 4, 2009, passed by the Commercial Tax Officer, Sagar Circle I in Case No. 7 of 2008 for the assessment year April 1, 2004 to March 31, 2005, by which the Commercial Tax Officer reopened the case u/s 28(1) of the Commercial Tax Act and liability of entry tax of Rs. 81,993 along with penalty of Rs. 81,993 was imposed on the petitioner.

2. The facts of the case are thus :

(1) That vide order (annexure P2) dated January 27, 2008, the case of the petitioner for the same assessment year was assessed by the Commercial Tax Officer, Sagar Circle 1, on the entire amount of purchase, i.e., Rs. 2,04,70,725. The petitioner had paid the tax of Rs. 88,350. The assessing officer found that the petitioner was liable to make payment of entry tax for Rs. 1,130 and penalty Rs. 200 and directed refund of Rs. 87,020 to the petitioner. This amount was refunded to the petitioner.

(2) Thereafter, another Commercial Tax Officer reopened the case of the petitioner u/s 28(1) of the Commercial Tax Act, 1994 and directed that the

aforesaid entire amount was liable for payment of entry tax, and tax and penalty was imposed on the petitioner.

3. It is submitted by the petitioner that respondent No. 2 committed an error of jurisdiction in imposing the penalty on the petitioner for the amount of tax, which was already paid and refunded to the petitioner vide order (annexure P2). That the tax was already deposited and after the earlier assessment, excess amount of tax was refunded to the petitioner.

4. Even after reassessment, penalty could not have been imposed, as there was no mistake on the part of the dealer and until and unless, reassessment is attributable to the dealer, penalty cannot be imposed.

5. The learned counsel appearing for the respondents though supported the order but has not disputed the aforesaid factual position.

6. Section 28(1) of the Commercial Tax Act, 1994 provides thus :

28. (1) Where an assessment has been made under this Act or the Act repealed by this Act and if for any reason any sale or purchase of goods chargeable to tax under this Act or the Act repealed by this Act during any period has been under-assessed or has escaped assessment or assessed at a lower rate or any deduction has been wrongly made therefrom or a set off has been wrongly allowed, the Commissioner may, at any time within five calendar years from the date of order of assessment after giving the dealer a reasonable opportunity of being heard and after making such enquiry as he considers necessary, proceed in such manner as may be prescribed to reassess within a period of two calendar years from the commencement of such proceedings the tax payable by such dealer and the Commissioner may, where the omission leading to such reassessment is attributable to the dealer, direct that the dealer shall pay by way of penalty in addition to the amount of tax so assessed, a sum not exceeding that amount.

7. The aforesaid provision though gives power to the Commercial Tax Officer to reopen the assessment but in respect of penalty, it is provided that where the omission leading to such reassessment is attributable to the dealer, the dealer can be directed to make payment by way of penalty in addition to the amount of tax so assessed, a sum not exceeding that amount.

8. In the present case, it is not in dispute that the dealer had already deposited the amount and at the time of initial assessment, this fact was brought into the notice of the Commercial Tax Officer and vide order (annexure P2), the Commercial Tax Officer had refunded excess amount of tax to the petitioner. On reopening the assessment, another Commercial Tax Officer found that the aforesaid amount was payable for entry tax and the dealer was liable not only for payment of tax but also for penalty.

9. The learned counsel appearing for the petitioner submitted that the dealer had already deposited the amount of tax, but the Commercial Tax Officer refunded

the amount to the petitioner and the liability of tax was not denied by the petitioner. Apart from this, there was no omission on the part of the dealer in refunding the amount and it was in fact error on the part of the Commercial Tax Officer who directed for refund of the tax, then such penalty could not have been imposed.

10. Though, learned counsel for the State tried to support the aforesaid order but in the facts of the present case, it is apparent that there was no omission, error or default on the part of the petitioner, on the contrary petitioner had deposited the entire amount of the entry tax and after the aforesaid assessment order, annexure P2 dated January 27, 2008, excess amount of entry tax was refunded to the petitioner. After reassessment u/s 28(1) of the Commercial Tax Act, if the petitioner was found liable for payment of the tax, which was earlier deposited and refunded to him then no penalty could have been imposed on the petitioner.

11. In view of the aforesaid, the impugned order dated December 4, 2009, insofar as it relates to imposition of penalty, is hereby quashed.

12. Considering the facts of the case, petitioner shall be entitled to cost of petition. Counsel fee Rs. 2,000.