
(1989) 06 GAU CK 0003
In the Gauhati High Court
Case No : Civil Rule No. 102 of 1981

Braj Lal Banik

APPELLANT

Vs

State of Tripura and Another

RESPONDENT

Date of Decision : 09-06-1989

Acts Referred:

Tripura Sales Tax Act, 1976 — Section 26(1), 26(2), 26(3)

Citation : (1990) 79 STC 217

Hon'ble Judges : J.M. Srivastava, J;B.P. Saraf, J

Bench : Division Bench

Advocate : S. Deb and R. Dasgupta, for the Appellant; M. Majumdar, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

B.P. Saraf, J.—By this writ petition the petitioner challenges an order passed by the Superintendent of Taxes, Agartala, imposing penalty of Rs. 5,000 u/s 26(2) of the Tripura Sales Tax Act, 1976, for failure to pay penalty of Rs. 5,000 earlier levied by him u/s 10A of the Central Sales Tax Act, 1956.

2. The petitioner, a dealer carrying on business of execution of contract works under the name and style of Auto Engineering Works, Agartala, is registered as a dealer under the Central Sales Tax Act, 1956 (hereinafter referred to as "the Central Act"), as well as under the Tripura Sales Tax Act, 1976 (hereinafter referred to as "the Act"). By order dated September 2, 1980, the Superintendent of Taxes, Agartala, imposed a penalty of Rs. 5,000 on the petitioner u/s 10A of the Central Act and directed him to pay the same by September 30, 1980. The petitioner preferred an appeal against the said order which was rejected. The petitioner thereafter preferred further appeal before the Sales Tax Tribunal on April 29, 1981, along with a petition for stay of realisation of the amount of penalty till disposal of the appeal. In the meantime the petitioner received a notice dated March 31, 1981, issued by the Superintendent of Taxes asking him to deposit the amount of penalty of Rs. 5,000 imposed under the Central Act by

April 7, 1981, as the appeal against the same had already been rejected by the Assistant Commissioner of Taxes. The petitioner informed him that a further appeal was being preferred before the Sales Tax Tribunal and requested him not to start any penalty proceeding for non-payment of the said amount u/s 26(2) of the Act. The petitioner also prayed for two months' time to enable him to obtain stay order from the appellate authority. In reply, the Superintendent of Taxes, by his letter dated April 8, 1981, informed the petitioner that his decision to prefer an appeal had no bearing on the payment of penalty money and directed the petitioner to deposit the same by April 15, 1981, failing which it was stated in the said notice that action would be taken u/s 26(2) of the Act. The petitioner by letter dated April 15, 1981, explained the entire position of the case and also the reasons for nonpayment of the amount of penalty under the Central Act amounting to Rs. 5,000 and prayed for some time. The Superintendent of Taxes, however, did not grant the time as prayed for by the petitioner and directed him to deposit the penalty money by April 30, 1981. On April 30, 1981, the petitioner again wrote a letter informing him that the appeal had already been filed before the Sales Tax Tribunal and the matter would be heard by the Tribunal within seven days. Accordingly, prayer was made for keeping the proceeding in the matter pending till finalisation of the appeal. The Superintendent of Taxes, however, without considering the aforesaid petition and without issuing any show cause notice levied a penalty of Rs. 5,000 being 100 per cent of the amount due from the petitioner in exercise of the power u/s 26(2) of the Act and issued a notice of demand for payment of the same. It appears that the petition filed by the petitioner on April 30, 1981, for grant of time was not considered before passing the impugned order of penalty on May 2, 1981. This is evident from a letter dated May 4, 1981, issued by the Superintendent of Taxes intimating the petitioner that no action could be taken on the said application dated April 30, 1981, since action had already been taken by him.

3. The petitioner has now challenged the aforesaid order of penalty passed u/s 26(2) of the Act mainly on three grounds. First ground is that the penalty was levied without issuing any show cause notice to the petitioner. The second ground is that the penalty has been levied mechanically without application of mind to the facts and circumstances of the case and without arriving at a finding as to why the petitioner was deemed to be in default despite various petitions for extension of time stating the grounds therein. The third ground is that the maximum amount of penalty leviable u/s 26(2) has been levied without stating the basis and/or justification for such an action.

4. We have heard Mr. S. Deb, learned counsel for the petitioner and also Mr. M. Majumdar, learned Government Advocate. We have considered the various submissions made by the learned counsel for both the parties. On consideration of the impugned order and the facts and circumstances of the case we are satisfied that the levy of penalty in the instant case is not tenable in law.

5. Section 26 of the Act deals with recovery of tax and provides for levy of

penalty on dealers in default. Section 26 is set out hereinbelow :

"26. Mode of recovery.--(1) If the demand in respect of any dues under this Act is not paid on or before the date specified as aforesaid, the dealer shall be deemed to be in default :

Provided that the Commissioner may, in respect of any particular dealer and for reasons to be recorded in writing, extend the date of payment of the dues or allow such dealer to pay the same by instalments and in that case the dealer shall not be deemed to be in default till the date as extended or the last date of payment by instalment is over.

(2) Where a dealer is in default, the Commissioner, may in his discretion, direct that, in addition to the amount due, a sum not exceeding that amount shall be recovered from the defaulter by way of penalty.

(3) Where a dealer is in default, the Commissioner may order that amount due shall be recoverable as an arrear of land revenue and may proceed to realise the amount due as such :

Provided that when security for proper payment of tax has been furnished by the dealer in pursuance of a demand under the proviso to Subsection (1) of Section 7, the Commissioner may realise any such amount due or part thereof by ordering forfeiture of the whole or any part of such security."

From a plain reading of Section 26 it is clear that if the demand in respect of any dues under this Act is not paid on or before the due date the dealer is deemed to be in default. Power is however conferred on the authority concerned under the proviso to Sub-section (1) to extend the date of payment of the dues or allow a dealer to pay the same by instalments and in such a case the dealer is not deemed to be in default till the date as extended or the last date of payment by instalment is over. When a dealer is in default within the meaning of Sub-section (1), the competent authority has also the power to impose by way of penalty a sum not exceeding the amount in respect of which the dealer is found to be in default. The power to levy penalty is in addition to the power to order recovery of the amount as an arrear of land revenue. Powers under this section have been delegated to the Superintendent of Taxes.

6. From the scheme of Section 26 of the Act, it is clear that imposition of penalty cannot be an automatic consequence of a default in payment of the tax. Non-payment of tax in itself is not sufficient to attract a penalty. That can only make the dealer a defaulter. There too a discretionary power has been conferred on the authority to extend the date of payment or to allow payment by instalments and not to treat him as in default till the expiry of such extended date. It is well-settled by a chain of decisions of the various High Courts including decisions of this Court in *Hardeodas Jagannath Vs. Income Tax Officer, Shillong, and Others*, and *Altafur Rahman v. Union of India* [1986] 1 GLR 14 that the discretionary power not to treat the assessee as a defaulter is coupled with the duty to

exercise it if the circumstances so demand. If the authority does not exercise it or exercises it in such a manner that it is no exercise of discretion at all, he can be compelled to discharge his duty. It will also amount to non-exercise of discretion if the authority does not consider the relevant facts and circumstances of the case at all and rejects the petition mechanically. The discretion vested in the authorities under the proviso to Sub-section (1) of Section 26 is not a naked and arbitrary power. The officer concerned should take all relevant circumstances into account and all considerations that could be urged or are urged by the dealer as to why he should not be treated as "not in default".

7. In VETCHA SREERAMAMURTHY Vs. THE Income Tax OFFICER VIZIANAGARAM, AND ANOTHER., Subba Rao, C.J. (as his Lordship then was), gave a few illustrations of cases where it might not be justified to treat a person as a defaulter. One of the cases illustrated was where an assessee pays the admitted amount and files an appeal raising a substantial question and gives security for the disputed amount. It was held that in such a case it would be a capricious exercise of discretion if the officer refuses to treat him as not a defaulter. It was also observed that refusal to stay the recovery of tax on the ground that the financial condition of the State requires recovery of arrears would be taking into consideration extraneous and irrelevant circumstances. Each case will have to be examined on its own facts. Cases might easily be conceived where the dealer would suffer financial ruin and irreparable injury if an order for extension of payment of dues is not made. Sometimes assessments for a number of periods are completed at one and the same time and the dealer is called upon to pay a heavy demand within a few days. There might be cases where accounts are rejected for insufficient reasons and huge estimate made of taxable turnover. The dealer might be facing acute and unforeseen financial stringency at the particular point of time. The aforesaid cases are only illustrative. There may be many other cases of similar type.

8. In a number of cases the courts have indicated the relevant factors which should go into consideration of the authorities concerned while exercising discretion. In Aluminium Corporation of India Ltd. Vs. Mr. C. Balakrishnan and Others, it was observed :

"A judicial exercise of discretion involves a consideration of the facts and circumstances of the case in all its aspects. The difficulties involved in the issues raised in the case and the prospects of the appeal being successful is one such aspect. The position and economic circumstances of the assessee is another. If the officer feels that the stay would put the realisation of the amount in jeopardy, that would be a cogent factor to be taken into consideration. The amount involved is also a relevant factor. If it is a heavy amount, it should be presumed that immediate payment, pending an appeal in which there may be a reasonable chance of success, would constitute a hardship..... If any point is involved which requires an authoritative decision, that is to say, a precedent, that is a point in favour of granting a stay."

It was further observed that quick realisation of tax may be an administrative expediency, but by itself it constitutes no ground for refusing a stay. While exercising the discretion to grant stay the authorities should not act in the role of mere a tax-gatherer. Aluminium Corporation of India Ltd. Vs. Mr. C. Balakrishnan and Others,]. The authority concerned must take an impartial and objective view in the matter and if the circumstances exist which justify the granting of stay, he cannot decline to exercise his power to do so on the ground that it was left to his discretion. He must act in a judicial spirit and not capriciously or arbitrarily. His discretion must be exercised according to common sense and justice. However, no hard and fast rules can be laid down for exercise of the discretion. Suffice it to say that the power has to be exercised judicially.

9. Once a dealer is deemed to be in default, the officer concerned is vested with the discretion to levy penalty under Sub-section (2) for nonpayment of the amount due. The maximum amount of penalty is a sum equal to the amount not paid. A plain reading of Sub-section (2) goes to show that this power can be exercised only after a dealer has been held to be a defaulter under Sub-section (1). The proceedings for levy of penalty can be initiated only after the expiry of the due date is over. Till such date is over, a dealer cannot be termed to be a defaulter, and no proceeding can be initiated for levy of penalty under Sub-section (2) or for recovery of the same as arrears of land revenue under Sub-section (3).

10. Proceeding for imposition of penalty is not a proceeding for recovery of tax. Penalty under Sub-section (2) is for non-payment of tax. As observed in B.D. Khaitan Vs. Income Tax Officer and Others,

"Penalty is, inter alia, for non-payment of tax. Penalty is a measure, inter alia, to ensure that taxes are paid. But penalty, in my opinion, is not a proceeding for recovery itself of the taxes. By imposing penalty you do not recover the tax. You help the collection of tax by deterring people from non-payment of tax. This is a means for compelling assessee or persons liable to pay tax ; but by imposing penalty the amount demanded as tax is not recovered as such."

Penalty, therefore, is not a proceeding for recovery of tax. That being the nature of penalty under Sub-section (2) the same cannot be enforced without hearing the affected person even though there is no specific provision providing for the giving of an opportunity of hearing. In this connection a decision of this Court in Tarulata Syam and Others Vs. Agricultural Income Tax Officer and Others, may be referred to. That was a case under the Assam Agricultural Income Tax Act, 1939, where also a similar provision for levy of penalty for non-payment of the amount due is contained in Sub-section (1) of Section 36, Dealing with the said provision it was held :

"A penal provision like this cannot be enforced without hearing the affected assessee. Although there is no express provision in the section itself or in any other provision of the Act with regard to the procedure of hearing the matter u/s

36, the very nature of the proceeding postulates that the principles of natural justice have got to be observed."

11. In view of the aforesaid decision of this Court it is incumbent on the part of the authority concerned before levying any penalty under Sub-section (2) of Section 26 to issue a notice to the affected dealer to give him a reasonable opportunity of hearing. Such hearing has to be given after the due date of payment is over. Any mention in a notice or order extending the date of payment to the effect that in the event of failure to pay as directed, penalty would be levied u/s 26(2) cannot be termed as a notice contemplated above. A notice can be issued after a dealer has been treated as a defaulter. Because, it is only at that stage the authority concerned gets vested with the power to levy penalty. Any notice issued prior to the expiry of the due date of payment, whether originally fixed or extended, cannot be treated as a notice to show cause against imposition of penalty u/s 26(2). That can, at the most, be termed as an advance intimation to a dealer of the legal provisions contained in the Act dealing with the consequences of failure to pay the dues in time. Therefore, the officer concerned will have to issue a notice to a dealer only after he has been treated as a defaulter. After such a notice is issued, he will have to examine all the facts and circumstances of the case including the explanation, if any, submitted by the dealer and arrive at a conclusion as to whether penalty should be levied for non-payment of the dues or not. Imposition of penalty is not an automatic consequence of default in payment of tax. As laid down by the Supreme Court in *Hindustan Steel Ltd. Vs. State of Orissa*,

"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances."

12. In order to justify imposition of penalty the authority concerned must find not only that there has been a default but should also consider the question whether there was good and sufficient reason for the default and only if he finds that there was none can he proceed to impose penalty. There may be extenuating circumstances explaining why the dealer failed to pay the dues. All these also will have to be considered. In a proper case he may not levy a penalty even if the tax is not paid by the dealer in time. The ultimate decision in this regard will depend upon the facts and circumstances of each case. The authority concerned must come to a judicious determination as to whether the facts and circumstances of the case justify levy of penalty and must state the reasons in his order for arriving at such a conclusion or in other words, the order levying penalty must be a speaking order. It must show that the authority concerned has

applied his mind judicially to the facts and circumstances of the case and has considered the explanation, if any, submitted by the dealer. A bald statement that the explanation is not acceptable by him is not sufficient as it does not indicate application of mind of the authorities. The order of penalty is also subject to appeal and revision. It will be necessary for the appellate or revisional authorities to know as to what reasons prevailed in the mind of the authority concerned levying penalty to decide the same. If the authority concerned arrives at a conclusion that the facts and circumstances of the case justify levy of penalty, he has to further decide as to what should be the quantum of penalty. Section 26(2) only speaks of the maximum amount of penalty that can be levied but that would not justify levy of maximum penalty in all cases. The authority concerned has to consider the relevant factors such as period of delay, conduct of the dealer and such other considerations. Levy of maximum penalty without stating any reason therefore may not be sustainable.

13. In the instant case, date for payment was extended by the Superintendent of Taxes, up to April 30, 1981. The petitioner filed application on April 30, 1981, asking for 7 days" further time. The said petition was not even considered. Admittedly no show cause notice was issued to the petitioner after April 30, 1981. The learned counsel for the Revenue contended that the notice issued earlier informing the petitioner that in the event of his failure to pay the amount by April 30, 1981, penalty would be levied on him, should be treated as a notice to show cause under Sub-section (2) of Section 26. We find it difficult to accept the aforesaid submission as we have already discussed earlier. A notice to show cause against levy of penalty can be issued only on a dealer who is a defaulter. A dealer can be defaulter only after due date of payment, either originally fixed or extended, is over. Till the expiry of such date he cannot be termed as a defaulter. In the instant case the date for payment was extended till April 30, 1981. The dealer can at the most be termed as a defaulter on and from May 1, 1981. Notice to show cause against penalty has to be issued after that date. Any notice issued earlier will be no notice in the eye of law. The penalty levied in the instant case is, therefore, not sustainable on that score alone.

14. However, we have also perused the impugned order of penalty dated May 2, 1981. The said order reads as follows :

".....you are hereby informed that since the penalty money has not been paid within the extended date, a further amount of Rs. 5,000 has been imposed as penalty u/s 26(2) of the Tripura Sales Tax Act, 1976, in addition to normal penalty of Rs. 5,000 imposed on September 2, 1980."

It is clear from the aforesaid order that the officer concerned has not applied his mind to the facts and circumstances of the case. It appears that he has not properly appreciated the scope and ambit of his power u/s 26(2). He has acted as if Section 26(2) gives him a blanket power to levy maximum amount of penalty provided therein in all cases, in the event of a default in the payment of any dues, which is not the correct position of law. The order does not contain any

reason, whatsoever, as to why the officer concerned has decided to levy penalty and also as to why he has levied the maximum amount of penalty provided in the section in the case of the petitioner. Such a non-speaking order is not sustainable in law in view of the discussions made above.

15. In the result, the impugned order of penalty dated May 2, 1981, passed by the Superintendent of Taxes, Agartala, is quashed. The petition is allowed with cost of Rs. 250.