
(1986) 09 RAJ CK 0077

In the Rajasthan High Court

Case No : Civil Writ Petition No. 1620 of 1985

Bul Chand

APPELLANT

Vs

The State of Rajasthan and Another

RESPONDENT

Date of Decision : 10-09-1986

Acts Referred:

Rajasthan Sales Tax Act, 1954 — Section 11B, 17(3), 7AA

Citation : (1987) 65 STC 6

Hon'ble Judges : Jasraj Chopra, J

Bench : Single Bench

Advocate : B.L. Purohit and N.S. Acharya, for the Appellant; K.C. Bhandari, for the Respondent

Final Decision : Allowed

Judgement

J.R. Chopra, J.—The petitioner, who is the proprietor of M/s. All Fruit Juice, Sojatigate, Jodhpur, has filed this writ petition challenging the three notices issued to him u/s 17(3) of the Rajasthan Sales Tax Act (No. 29 of 1954) (hereinafter referred to as "the Act"), by the Assistant Commercial Taxes Officer, Ward-I, Circle-A, Jodhpur (for short "the A.C.T.O."), relating to assessment years 1972-73 to 1976-77. These notices are dated 28th July, 1986 and have been marked exhibit 5 to exhibit 7.

2. The facts leading to this writ petition briefly stated are : that the petitioner is doing the business of selling fresh fruits and fresh fruit juice since 1972. He was advised that no sales tax is leviable on the sale of fresh fruits and fresh fruit juice. However, the A.C.T.O. (respondent No. 2) called upon the petitioner to seek registration of his firm under the Act vide his order dated 31st May, 1974. The petitioner contested the claim of respondent No. 2 but respondent No. 2, however, ordered that the petitioner is liable to registration u/s 16(1)(a) read with Section 6(1) of the Act. The petitioner filed an appeal before the Revenue Appellate Authority, which was accepted and the order of the A.C.T.O. (respondent No. 2) was set aside. The department, however, filed a revision

which was accepted by the Board of Revenue for Rajasthan vide its order dated 29th November, 1982. The appellate order of the Deputy Commissioner (Appeals) (Revenue Appellate Authority) was set aside and the order given by respondent No. 2 was maintained. Aggrieved against this order, the petitioner presented an application for reference to this Court and the Board of Revenue referred the following question to this Court for its opinion :

Whether under the facts and circumstances of the case, fresh fruit juice was within the entry No. 2(a) of the Schedule to the Act, i. e., fresh fruits.

3. However, respondent No. 2 after the decision of the Board of Revenue compelled the petitioner to deposit the penalty u/s 16(1)(a) of the Act along with registration fee. The registration fee was deposited by the petitioner on 4th March, 1983. The petitioner was treated as a registered dealer under the Act with effect from 4th March, 1983 and he was assessed for the assessment years 1972-73 to 1976-77 vide assessment orders exhibit 2, exhibit 3 and exhibit 4 dated 21st October, 1983. The petitioner preferred appeals against these assessment orders exhibit 2 to exhibit 4, which are pending before the Deputy Commissioner, Appeals. Thereafter, respondent No. 2 issued three notices (exhibit 5 to exhibit 7) to the petitioner calling upon him to show cause why penalty u/s 7AA and interest u/s 11B of the Act be not imposed against the petitioner for the assessment years 1972-73 to 1976-77 and has fixed 5th August, 1985 for the appearance of the petitioner. On 5th August, 1985, the petitioner appeared through his counsel and requested respondent No. 2 to drop the proceedings as the same are without jurisdiction but respondent No. 2 did not accede to the petitioner's request and fixed 13th August, 1985, for determining the amount of penalty and the interest. The petitioner has, therefore, challenged the jurisdiction of respondent No. 2 (A.C.T.O.) to issue these notices, which, according to him are against the Rules. Respondent No. 2 vide his assessment orders exhibit 2 to exhibit 4 has specifically mentioned that no penalty and interest are being charged from the petitioner because he has been registered as a dealer only on 5th March, 1983.

4. No return has been filed on behalf of the respondents. Only reply to the stay application was filed in which it was contended that liability to pay interest u/s 11B of the Act is automatic and mandatory and respondent No. 2 had no discretion to grant any exemption from payment of interest. It was further contended that the provisions of Section 7AA of the Act are automatically attracted when no returns were filed within the time. It was, therefore, contended that notices exhibit 5 to exhibit 7 are valid and respondent No. 2 has jurisdiction to issue such notices. It was further contended that alternative efficacious remedy is available to the petitioner by way of appeals under Sections 13 and 14 of the Act to the Deputy Commissioner (Appeals) and the Tribunal and a further revision to this Court and, therefore, this writ petition is premature.

5. I have heard Mr. N.S. Acharya, learned counsel for the petitioner and Mr. K.C. Bhandari, learned counsel for the respondents.

6. Mr. K.C. Bhandari, learned counsel for the respondents, has frankly conceded that fresh fruits are not liable to any sales tax under the Act. He has, however, contended that fresh fruit juice is not covered by entry 2(a) of the Schedule appended to the Act and, therefore, the petitioner has been held to be a dealer liable to registration w.e.f. the year 1972, when he has started this business of selling fresh fruit juice. He has submitted that the A.C.T.O. (respondent No. 2) had no power to grant exemption to the petitioner from the levy of penalty u/s 7AA of the Act and to grant the petitioner the relief relating to interest u/s 11B of the Act was a mistake apparent on the face of the record and, therefore, respondent No. 2 (A.C.T.O.) issued the notices exhibit 5 to exhibit 7 dated 28th July, 1985, to show cause why penalty and interest be not levied against him.

7. Mr. N.S. Acharya, learned counsel for the petitioner, has submitted that u/s 17 of the Act, an order can be rectified by the assessing authority if it is proved that there exists any mistake apparent on the face of the record. In this case, no mistake is apparent on the face of the record. Respondent No. 2 has passed concious orders exhibit 2 to exhibit 4 wherein it has been said that the petitioner has been registered as a dealer w.e.f. 5th March, 1983 and as his case was also pending before the Board of Revenue wherein he has contested his liability to pay sales tax because he was a fresh fruit dealer, the assessing authority (A.C.T.O.) felt that no penalty u/s 7AA and no interest u/s 11B of the Act should be levied from the assessee. Mr. N.S. Acharya, learned counsel for the petitioner, has argued that when the A.C.T.O. has exercised his jurisdiction in a particular manner in passing the assessment orders exhibits 2 to 4, respondent No. 2 has no authority to review or revise his orders without showing that any mistake apparent on the face of the record was committed in issuing these orders.

8. Mr. K.C. Bhandari, learned counsel for the respondents, has submitted that according to Section 11B of the Act, the levy of interest on the arrears is automatic and the A.C.T.O. had no authority to exempt the dealer from the payment of interest. Mr. Bhandari has further submitted that when the liability to pay interest is created by the statute no discretion vests in the assessing authority to grant that relief. In this respect, he placed reliance on a Full Bench decision of the Allahabad High Court in H. Ramzan Ali v. State of U.P. 1975 Tax LR 1674 (FB), wherein it has been observed as under:

The liability to pay interest is created by the statute and the Sales Tax Officer has no discretion to grant any exemption from the payment of interest. The period during which an order of stay remains in operation is not liable to be excluded for purposes of computing penal interest u/s 8(1-A) of the Act, because the interest runs automatically and does not stop running by virtue of any stay order.

9. Mr. K.C. Bhandari, learned counsel for the respondents, has submitted that the provisions of Section 8(1-A) of the U.P. Sales Tax Act, 1948, are almost similar to the provisions of Section 11B of the Rajasthan Sales Tax Act and a Division Bench of this Court in Natwarlal v. State of Rajasthan (D.B. Civil Writ petition No. 146 of 1979 decided on 11th May, 1979) has held that the provisions of Section

11B read with Section 11AA of the Rajasthan Sales Tax Act are analogous to those contained in Section 8(1-A) of the U.P. Act and, therefore, the principles laid down by the Supreme Court in Haji Lal Mohd. Biri Works" case [1973] 32 STC 496 (SC) that the liability to pay interest was automatic and arose by operation of law and it was not necessary for the assessing authority to specify the amount of interest in the recovery certificate as it was not possible to specify a definite figure in respect of interest in the recovery certificate till the arrears of sales tax were paid, shall be equally applicable to the payment of interest under the Rajasthan Sales Tax Act. Mr. K.C. Bhandari, learned counsel for the respondent, has, therefore, submitted that so far as the interest is concerned, respondent No. 2 had full authority to issue such notices. He was perfectly within his jurisdiction to issue the notices. Mr. Bhandari has, however, conceded that he cannot support the respondents so far as the levy of penalty is concerned because the levy of penalty is a discretionary matter and when the A.C.T.O. has exercised his jurisdiction in a particular manner, no mistake apparent on the face of the record appears to be existed in the case and, therefore, Mr. Bhandari did not press his point so far as the levy of penalty is concerned. As regards the interest, he has contended that the levy of interest is statutory and automatic and, therefore, the A.C.T.O. had no discretion to grant any relief. Section 17(1) of the Act provides that the assessing authority may rectify its order when it finds that a mistake apparent on the face of the record exists. In this respect, reliance was placed on a decision of the Mysore High Court in M.V. Govindaraju Chetty v. Commercial Tax Officer, Hassan Circle, Hassan [1968] 22 STC 46.

10. Now, I have to see whether in this case, the levy of interest is automatic. It may be worthwhile to mention here that Section 11B as it exists today has been substituted by Act No. 4 of 1979 and it has become effective from 7th April, 1979. It is prospective in its operation and, therefore, Section 11B as it exists today cannot guide the assessment orders made for the assessment years 1972-73 to 1976-77. These assessments will be governed by Section 11B as it existed at the relevant time and which was inserted by Act No. 11 of 1969 with effect from 2nd May, 1969. Section 11B as it existed at the relevant time reads as under:

11B. Interest on failure to pay tax, fee or penalty.-(a) If the amount of any tax payable under Sub-sections (2) and (2A) of Section 7 is not paid within the period allowed, or

(b) If the amount specified in any notice of demand, whether for tax, fee or penalty, is not paid within the period specified in such notice, or in the absence of such specifications, within 30 days from the date of service of such notice, the dealer shall be liable to pay simple interest on such amount at one per cent per month from the day commencing after the end of the said period for a period of three months and at one and a half per cent per month thereafter during the time he continues to make default in the payments :

Provided that, where as a result of any order under this Act, amount on which

interest was payable under this section, has been reduced, the interest shall be reduced accordingly and the excess interest paid if any, shall be refunded :

Provided further that no interest shall be payable under this section on such amount and for such period in respect of which interest is paid under the provisions of Sections 11 and 14.

11. According to this section, the interest is leviable if the amount of any tax payable under Sub-sections (2) and (2A) of Section 7 is not paid within the period allowed or if the amount specified in any notice of demand, whether for tax, fee or penalty, is not paid within the period specified in such notice or in the absence of such specification, within 30 days from the date of service of such notice. It is not the case of the respondents that the amount of tax was not deposited within the time prescribed in the notice. Rather, it has been frankly conceded that the amount of tax assessed was paid within the prescribed time mentioned in the notice. It is also not the case of the respondents that the tax has not been paid according to the provisions of Section 7(2) and (2A) of the Act. What has been contended by Mr. K.C. Bhandari, learned counsel for the respondents, is that according to the decision of the Board of Revenue, the petitioner ought to have got himself registered as a dealer in the year 1972 and ought to have filed the returns from the year 1972. As he has failed to do so, the fact that he has been registered on 5th March, 1983, does not absolve him from the levy of interest from the date the tax became payable and due from the petitioner. Actually Section 11B as it existed at the relevant time is not an automatic charging section. Its language does not suggest that the levy of interest is automatic; Only the revised Section 11B which came into force from 7th April, 1979, is a charging section and a Division Bench of this Court has held that according to the provisions of Section 11B as it exists today, the payment of interest is automatic. When such is not the case regarding Section 11B which was inserted by Act No. 11 of 1969, which came into force with effect from 2nd May, 1969 and remained effective till 6th April, 1979, then before issuing the notices, the respondents will have to prove that some mistake apparent on the face of the record exists to issue the notice u/s 17(3) of the Act. No such ground has also been mentioned in the notices exhibits 5 to 7. The language of the notices is as under :

Apka kar nirdaran ukta avadi ka dinank 21-10-1983 ko kiya gaya thatha aadesh me yah ullek kiya gaya tha ki dara 7AA me shasti vivaran pathra der se dene ke liye thatha kar rashi jama nahi karne ke liye dara 11B me byaj mananeeya rajasva mandal Rajasthan me vicharadin aapke mamle ke karan nahi lagayee gayee thi. Atha ab karan batayen ki kyon na ab aap par nirdarith kar ki aadi shasti 7AA me rupeye 700 ka byaj dara 11B me 12 varsha 8 mah ka aaropit kiya jave.

12. From the language of these notices, it is clear that nothing has been mentioned in the notices which prompted the assessing authority to rectify the order. In other words, what grounds prevailed with the assessing authority to

issue such notices have not been mentioned. Without showing that there existed some mistake apparent on the face of the record, the assessment orders exhibits 2 to 4 passed by respondent No. 2 (A.C.T.O.) cannot be revised. According to Section 11B of the Act which was in force at the relevant time, it was in the discretion of the assessing authority to levy interest or not to levy interest. The levy of interest was not automatic and, therefore, the discretion that has been exercised in a particular manner by the assessing authority cannot be rectified unless it is shown that some mistake apparent on the face of the record existed, which impelled the A.C.T.O. to issue such notices. When the authority concerned acts against the rules and without jurisdiction, the petitioner can approach this Court even if alternative efficacious statutory remedy is available to him by way of appeal or revision. The levy of penalty u/s 7AA of the Act is also discretionary and the assessing authority while exercising its jurisdiction has refused to charge any penalty from the petitioner vide his order exhibit 2 to exhibit 4 dated 21st October, 1983. When no mistake apparent on the face of the record is alleged to exist, then that discretionary order cannot be revised by taking recourse to the provisions of Section 17(1) read with Section 17(3) of the Act.

13. In this view of the matter, the writ petition filed by the petitioner is accepted and the respondents are restrained from imposing any penalty or interest upon the petitioner u/s 7AA and Section 11B of the Act in pursuance of the notices exhibits 5 to 7 dated 28th July, 1985 and the notices exhibits 5 to 7 dated 28th July, 1985, are hereby quashed. In the circumstances of the case, the parties are to bear their own costs.