

(1988) 02 MP CK 0012

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 376 of 1985

Commissioner of Sales Tax

APPELLANT

Vs

Balaji Cotton Co.

RESPONDENT

Date of Decision : 09-02-1988

Acts Referred:

Madhya Pradesh General Sales Tax Act, 1958 — Section 38(3), 43, 44(1)

Citation : (1990) 76 STC 53

Hon'ble Judges : G.G.Sohani, Acting C.J.;K.K. Adhikari, J

Bench : Division Bench

Advocate : Rajendra Tiwari, D.A.G, for the Appellant; B.L. Nema, for the Respondent

Judgement

G.G. Sohani, Ag. C.J.

1. By this reference u/s 44(1) of the M.P. General Sales Tax Act, 1958 (hereinafter referred to as "the Act"), the Board of Revenue has referred the following question of law to this Court for its opinion :

"Whether in the facts and circumstances of the case, the Tribunal was justified in holding that appeal before the Appellate Deputy Commissioner could not be rejected on account of non-payment of 50 per cent of the total demand of tax and penalty and it be heard on merits on payment of 10 per cent of additional demand and 50 per cent of the penalty ?"

2. The material facts giving rise to this reference briefly are as follows : While framing assessment of the assessee for the period from 4th November, 1975 to 23rd October, 1976, the Sales Tax Officer rejected the books of account and made a best judgment assessment. After adjusting the amount of tax paid by the assessee, the assessee was held liable to pay Rs. 4,04,207. This sum consisted of tax amounting to Rs. 3,02,286 and penalty amounting to Rs. 1,00,000. The assessee preferred an appeal before the Appellate Deputy Commissioner who held that as the amount deposited by the assessee was not as required by the

provisions of Section 38(3) of the Act, as it stood at the material time, the appeal was liable to be rejected summarily. The contention advanced on behalf of the assessee that it had complied with the provisions of Section 38(3) of the Act at the time when the appeal was taken up for consideration was rejected on the ground that such compliance was not within the time prescribed therefor. The assessee thereupon preferred a second appeal before the Tribunal. It was urged on behalf of the assessee that both the provisions of Clauses (a) and (c) of Section 38(3) were attracted and that the assessee was required to deposit 10 per cent of the amount of tax demanded and 50 per cent of the amount of penalty levied. This contention was upheld by the Tribunal. The other contention advanced on behalf of the assessee that it had deposited the amount as required by Section 38(3)(c), after the receipt of the show cause notice and in view of that fact the summary dismissal of the appeal was not justified, was not considered by the Tribunal as the Tribunal upheld the first contention advanced by the assessee. The Tribunal accordingly allowed the appeal and remanded the case to the Appellate Deputy Commissioner, Sales Tax, for deciding the appeal afresh. Aggrieved by the order passed by the Tribunal, the department sought reference and it is at the instance of the department that the aforesaid question of law has been referred to this Court for its opinion.

3. Before we proceed to appreciate the contentions advanced on behalf of the parties, it would be useful to refer to the relevant provisions of Section 38(3) of the Act in force on 27th April, 1979, when the appeal was filed. These provisions are as follows :

" (3) No first or second appeal against an order of assessment, with or without penalty or against an order imposing penalty, shall be admitted by the appellate authority unless out of the total balance due from the dealer :--

(a) where all the returns for the period to which the order appealed against relates, have been filed and tax payable according to such returns has been paid one-tenth of such balance ;

(b) where one or more of returns for the period to which the order appealed against relates, have not been filed and tax has not been paid or where such return or returns have been filed but tax has not been paid--

(i) one-third of such balance ; or

(ii) such part thereof as bears the same proportion to the total balance due as the period for which the returns have not been submitted bears to the period for which the assessment has been made not exceeding seventy-five per cent of such balance whichever is more ;

(c) where a penalty u/s 43 has been imposed, one half of such balance ;

(d) where the order appealed against has been passed u/s 19 and a penalty has been imposed under the said section one half of such balance ; and

(e) in any other case, one-fourth of such balance ;

is paid and thereupon the appellate authority shall stay the recovery of the balance of tax and/or penalty till the decision of appeal."

It was contended on behalf of the assessee that if the assessee had preferred an appeal against the order of assessment, it was required to pay the amount in accordance with the provisions of Clause (a) of Section 38(3) and that in case of another appeal against the order imposing penalty, it would have been required to pay half the amount of penalty only as required by Clause (c) of Section 38(3) of the Act. It was urged that merely because there was a composite order, the assessee should not be placed in a disadvantageous position. In reply, it was contended on behalf of the department that as the case of the assessee was covered by Clause (c) of Section 38(3) of the Act the Tribunal was not justified in holding that the appeal before the Appellate Deputy Commissioner could not be summarily rejected.

4. Having given our conscious consideration to the matter, we are of the opinion that the Tribunal failed to appreciate that whenever an appeal was preferred from an order imposing penalty, the appellant was required to pay one half of the total balance due from the appellant. The expression "such balance" occurring in Section 38(3)(c) has reference to "the total balance due" from the dealer as specified in Section 38(3). The assessee, in the instant case, had preferred appeal against an order of assessment whereby penalty was also imposed u/s 43 of the Act. Clause (c) of Section 38(3) was, therefore, clearly attracted and unless one half of the total balance due from the assessee, which included the balance of the amount of tax found payable by the assessee and the amount of penalty imposed on the assessee was paid, the appeal preferred by the appellant could not be admitted. The Tribunal, therefore, was not justified in holding that the appeal before the Appellate Deputy Commissioner could not be rejected on account of non-payment of 50 per cent of the total demand of tax and penalty due from the assessee.

5. Our answer to the question referred to this Court is, therefore, in the negative and against the assessee.

6. It was urged before us on behalf of the assessee, relying on the decision in *Babulal Mohanlal Kandle v. Commissioner of Sales Tax* [1981] 47 STC 164 (MP), that as the assessee had complied with the provisions of Section 38(3)(c) of the Act when the appeal was taken up for consideration, the appeal should not have been summarily rejected. Though this point was urged before the Tribunal, the Tribunal has not decided it. We, therefore, refrain from expressing any opinion in that matter but it will be open to the assessee to urge that point before the Tribunal and it would be open to the Tribunal to decide that point, now that the case would be before it again for disposal according to law. In the circumstances of the case, the parties shall bear their own costs of this reference.