
(2004) 05 AHC CK 0208

In the Allahabad High Court

Case No : Sales Tax Revisions No's. 1728, 1729, 1730, 1731, 1732, 1733, 1734, 1735 and 1736 of 1993

Commissioner of Sales Tax

APPELLANT

Vs

Sadhana Press

RESPONDENT

Date of Decision : 28-05-2004

Acts Referred:

Central Sales Tax Act, 1956 — Section 10A, 7(1), 7(2), 8, 8(3)
Uttar Pradesh Sales Tax Act, 1948 — Section 2, 6
Uttar Pradesh Sales Tax Rules, 1948 — Rule 3(3)

Citation : (2006) 146 STC 153

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Advocate : B.R. Tripathi, for the Appellant; Bharat Ji Agrawal, for the Respondent

Final Decision : Allowed

Judgement

Prakash Krishna, J.—These nine revisions are at the instance of Commissioner of Sales Tax and relate to the assessment years 1981-82 to 1989-90. All these revisions arise out of common order dated July 17, 1993. Identical questions of law and fact are involved in these revisions. The learned Counsel for both the parties made submissions with reference to the facts given in Sales Tax Revision No. 1728 of 1993 and submitted that the facts are similar in other sales tax revisions also. In view of this the necessary facts which emerge from the Sales Tax Revision No. 1728 of 1993 are being noticed herein in brief.

2. The factual scenario is almost undisputed. The opposite- party deals in paper, etc., and printing on job-work. It is a registered dealer u/s 7(1) and 7(2) of the Central Sales Tax Act, 1956. A copy of the registration certificate has been filed as annexure 7. The dealer-opposite party has been authorised to purchase tissue paper, craft paper and printing ink for resale. It is also authorised to purchase tissue paper, craft paper, printing ink for use in production or manufacturing process.

3. The assessing authority for all these assessment years issued show cause notices u/s 10A of the Central Sales Tax Act, 1956 (hereinafter referred to as "the Act") as to why penalty be not imposed for purchase of printing ink worth Rs. 2,29,179, chemicals, machinery parts and rubber roller, etc., worth Rs. 29,332.62 from outside State of U.P. against the form C at concessional rate of tax. According to the department the dealer has made total purchase of Rs. 2,58,501.60 from outside the State of U.P. by unauthorisedly using form C, at concessional rate of tax. The case of the department was that the dealer was entitled to purchase from outside the State of U.P. tissue paper, craft paper and printing ink for resale or for use in the manufacture or processing of goods for sale, against form C.

In reply to the show cause notice the dealer came out with the case that he has been purchasing these goods against form C since long time. The assessing authority took the view that the dealer has not sold the goods, thus, purchased against form C. Reliance was placed upon a judgment of the Supreme Court given in the case of Assessing Authority-cum-excise and Taxation Officer, Gurgaon and Another Vs. East India Cotton Mfg. Co. Ltd., Faridabad, It has held that in view of the fact that the job-work was done by the dealer for others and there is no evidence that such other persons have sold the goods, therefore, the goods, thus, purchased were not used "for sale". Penalty u/s 10A at the rate of 15 per cent was levied. This order was modified by the appellate authority. The appellate authority has set aside the levy of penalty on ink, thus, purchased and reduced the quantum of penalty from 15 per cent to 10 per cent on the purchase of machinery parts, rubber roller, etc. Against the order of the appellate authority both the department as well as the dealer filed second appeals before the Tribunal. The Tribunal by the order under revision has set aside the entire penalty order u/s 10A of the Act on two grounds. Firstly, the certificate of registration was granted by the Sales Tax Officer, Sector 3, Moradabad. The penalty was levied by the Assistant Commissioner (A), Sales Tax, to whom the assessment was transferred by the order of the Commissioner of Sales Tax. The Assistant Commissioner (A) was not competent to impose the penalty as the registration was not granted by him. He had no jurisdiction to impose the penalty u/s 10A of the Act. Secondly, the department having not raised any objection regarding the practice of the dealer to issue form C in importing the goods right from the very beginning for which he was not empowered or authorised, therefore, there was no mens rea on the part of the assessee. Hence no penalty could be levied.

4. Heard the counsel for the parties and perused the record. From the above discussion, the following three questions fall for determination in these revisions:

1. Whether the Assistant Commissioner (A), Sales Tax, to whom the "assessment" was transferred, was competent to levy penalty u/s 10A of the Act ?

2. Whether the Tribunal has rightly set aside the order of penalty levied u/s 10A

of the Act in respect of those goods (chemicals, machinery parts, rubber rollers, etc.,) for which no registration certificate was granted by the department Under Sections 7(1) and 7(2) of the Act ?

3. Whether the levy of penalty on "printing ink" when the same was used in job-work for printing paper for others will entail penalty in view of Section 8(3)(b) of the Act read with Section 10A of the Act in absence of any specific finding that the printed material was "for sale" ?

Question No. 1

5. There is no dispute that the authority who granted the certificate of the registration was the Sales Tax Officer, Sector 3, Moradabad. There is also no dispute that the assessment file of the dealer-opposite party was presently transferred by the Commissioner of Sales Tax for assessment to the Assistant Commissioner (A), Sales Tax. There is also no dispute that the point of jurisdiction was not raised by the dealer-opposite party either before the assessing authority or before the appellate authority. It was raised for the first time before the Tribunal. The Tribunal has decided this controversy in a very summary manner without entering into much discussion. It opined that the Assistant Commissioner (A) was "to perform the assessment only and not to perform all the functions of the assessing authority as Assistant Commissioner (A), Sales Tax, it neither granted certificate of registration nor is the competent authority to grant the registration". The Tribunal by giving the word "assessment" a very restricted meaning held that "assessment" work would not authorise the Assistant Commissioner (Assessment) to levy penalty. Giving of such restricted meaning to "assessment" has not been approved by the Supreme Court and I could lay my hand on one judgment of the Supreme Court in the case of State of U. P. Vs. Dyer Meakin Breweries Ltd., . This was actually a converse case. In this case the registration was granted to the dealer by the Sales Tax Officer, Ghaziabad. The Sales Tax Officer, Ghaziabad, issued penalty notice u/s 10A of the Act. But before he could pass the penalty order the assessee got the registration certificate cancelled from Ghaziabad and he was registered with the Sales Tax Officer, Lucknow. In this factual back ground the assessee contended, and the said contention was also accepted by the High Court, that the Sales Tax Officer, Ghaziabad, who granted the certificate of registration could not levy the penalty. The Supreme Court disagreeing with the High Court has observed in the matter as follows:

... In fact, the levy of penalty is one form of levying tax. If the Sales Tax Officer was competent to levy sales tax on the assessee in respect of those assessment years, he was equally competent to levy penalty on the assessee in respect of the offences committed during those years.

6. The aforesaid observations are fully applicable to the facts of the present case also. It has not been disputed nor it could have been disputed by the dealer-opposite party that for these assessment years in question the Assistant

Commissioner (A) was not the assessing officer and was not competent to levy or assess tax on the dealer. As observed by the Supreme Court in the above case which is also u/s 10A of the Act, the levy of penalty is one form of levying tax, i.e., assessment.

7. There is one more reason for not agreeing with the view of the Tribunal on this issue. Section 9 of the Act deals with the levy and collection of tax and penalties. Sub-section (2) of Section 9 provides that subject to the other provisions of the Act and Rules made thereunder, the authorities for time being empowered to assess, reassess, collect and enforce payment of any tax under the general sales tax law of the appropriate States shall, on behalf of Government of India, assess, reassess, collect and enforce payment of any tax including any penalty, payable by the dealer under this Act. Section 2(a) of the U.P. Sales Tax Act defines "assessing authority" under the U.P. Sales Tax Act means any person appointed by the State Government or the Commissioner of Sales Tax to perform all or any of the functions of the assessing authority under the U.P. Sales Tax Act. Section 10A of the Act uses the words "who granted to him", or as the case may be, is competent to grant to him a certificate of registration. The assessing authority is the competent authority to grant registration certificate to any person under the Sales Tax Act. Apart from the authority who granted the registration, the authority who would be competent to grant registration is also mentioned u/s 10A of the Act. The Tribunal overlooked that the authority who is competent to grant the registration is also mentioned in Section 10A of the Act and it is assessing authority namely, Assistant Commissioner (A), in the present case.

8. Apart from the above, the Tribunal has failed to take into consideration Section 6 of the U.P. Sales Tax Act. The objection regarding jurisdiction to levy penalty by the Assistant Commissioner (A) was not raised either before him or before the appellate authority. Section 6 of the U.P. Sales Tax Act has made a provision that no objection as to the territorial or pecuniary jurisdiction of any assessing authority shall be allowed by any appellate or revising authority or the Tribunal unless such objection was taken before the assessing authority at the earliest possible opportunity and in the opinion of the appellate authority or Tribunal there is failure of justice. There is no finding by the Tribunal that a failure of justice has, in fact, occasioned, due to passing of the penalty order by the Assistant Commissioner (A). The finding on the above issue of the Tribunal cannot be sustained in view of Section 6 of the U.P. Sales Tax Act, and the said finding is hereby vacated.

9. The learned Standing Counsel has placed on record as annexure 6 a copy of the order of the Commissioner, Sales Tax, dated August 3, 1984 issued by him in exercise of power conferred on him Under Rule 3(3) of the U.P. Sales Tax Rules, 1948 transferring the file of the present assessee along with the file of other dealers from the jurisdiction of Sales Tax Officers, Sectors 1 to 6, to Assistant Commissioner (A), Moradabad. This order of transfer of file has not been subject-matter of challenge by the dealer and could not have been challenged before the

Tribunal for the first time.

Question No. 2

10. Now I take up the second question for consideration. From the registration certificate, annexure 7 it is clear that the dealer was authorised to purchase only three items, namely, tissue paper, craft paper and printing ink either "for resale" or "for use in the production or manufacture" against form C. It has been found that the dealer imported ink, wax, rubber, thinner, tape and machinery. These imported goods from outside of Uttar Pradesh were partly used in own business and partly in job-works for others. The assessing authority as well as the appellate authority both have negatived the case of the dealer that he purchased these goods under bona fide belief that these goods are covered by the registration certificate. Except ink other goods are not covered by the registration certificate. These goods are not covered by the registration certificate and it is not the case of the dealer that these goods by any stretch of imagination could have been covered by the items shown in the registration certificate. It cannot be said under such circumstances that there was no mens rea or false representation on behalf of dealer to the selling dealer. Form C is a prescribed form under the Central Sales Tax Rules. The proforma of form C as has been provided clearly stipulates a certificate to be signed by the purchasing dealer that the goods which he is purchasing "are covered by my/our registration certificate No dated issued under the Central Sales Tax Act, 1956". He has to give a declaration that the above statement is true to the best of my knowledge and belief by signing form C. The Tribunal has recorded a finding of no mens rea only on the ground that the dealer by practice has been issuing form C in respect of all items other than those specified in the registration certificate in the past but the department never objected to it. This observation of the Tribunal is of general nature. It has not given any specific instance of past transactions. The gist of the offence u/s 10(b) is false representation made to the outside State dealer at the time of purchase goods intended to be purchased, are of the class covered by the certificate of registration. There is no material to show that the dealer entertained the bona fide belief that the goods are covered by the certificate of registration. Assuming for a moment that on earlier occasion the department did not object will not make wrong action by the dealer as valid one. This can only be a mitigating circumstance not to impose the maximum amount of penalty. Therefore, the finding of the Tribunal on the question of mens rea qua the goods not mentioned in the registration certificate besides being perverse cannot be supported on any relevant evidence and thus cannot be sustained. The assessing authority in respect of those goods not mentioned in the registration certificate purchased by the dealer by issuing form C levied the penalty one and half times of the tax which would have been levied Under Sub-section (2) of Section 8 in respect of the sale of goods, was reduced to 10 per cent by the appellate authority. The quantum of penalty on purchase of such goods, namely, chemicals, machinery parts and rubber roller other than printing ink as modified by the appellate authority is confirmed and to that extent the order of the

Tribunal is set aside.

Question No. 3

11. Now I consider the question of levy of penalty on the purchase of "printing ink" which was used in job-work of others and was not used by the dealer for resale or in manufacture or processing of any goods for sale. Section 10(d) of the Act provides that if any person after purchasing any goods for any of the purposes specified in Clause (b) or Clause (c) or Clause (d) of Sub-section (3) of Section 8 fails, without reasonable excuse, to make use of goods for any such purposes shall be liable for imprisonment and u/s 10A of the Act penalty in lieu of the imprisonment to the extent of one and half times of the tax. In the present case the complaint of the department is that the dealer-opposite party has violated Section 8(3)(b) of the Act. The assessing authority was of the opinion that the ink was used by the dealer in job-work of others. The ink was used in the printing on job-work but the goods were not sold by such persons who got the job-work done by the dealer. It has recorded a specific finding that in view of Section 8(3)(b) the goods, thus, manufactured, should be sold by the person who got the goods manufactured on job-work. The dealer has failed to produce any such person who got the job-work done by the dealer and had sold the goods. The appellate authority without considering the matter in detail has disposed of this issue on making reference to various judgments. On the basis of a certificate issued by M/s. Nayab Biri Factory certifying that it got the printing work-done on job-work done by the dealer on the jhilli of biri. In that jhilli the bundle of biri was wrapped and was ultimately sold. He was of the opinion that the price of biri was fixed by such person taking into account the price of jhilli also and as such there is a sale. This finding of the first appellate authority was not accepted by the department in the memo of second appeal filed before the Tribunal. Through the grounds Nos. 5 and 6 the observation of the appellate authority was objected to on the plea that the said observations were made by the appellate authority without making any enquiry. The jhilli as a matter of fact has no value with reference to the sale of biri. Nor any such evidence was given by the dealer that the value of the jhilli is also included in the price of biri. The Tribunal has not discussed this aspect of the matter at all. It decided the appeal on the short ground of mens rea. It has discussed the judgment of the Supreme Court given in the case of Assessing Authority-cum-excise and Taxation Officer, Gurgaon and Another Vs. East India Cotton Mfg. Co. Ltd., Faridabad, . The apex Court in this case has interpreted Section 8 of the Act. After quoting Section 8 of the Act it has been observed that this section provides three different rates of the tax, one in Sub-section (1), Clauses (a) and (b), another in Sub-section (2) (a) and the third in subsection (2)(b). It has been further held that the assessee is clearly bound to use the goods purchased by it against its certificate of registration and the declaration in form C in the manufacturing of "goods for sale". If the assessee fails without reasonable causes to do so and used the goods, thus, purchased by it for a different purpose, then, u/s 10(d) the assessee would be liable to be punished with imprisonment or fine or both and, u/

s 10(d), such assessee would incur the liability to penalty in a sum not exceeding one and the half times, the tax which should have been levied Under Sub-section (2) in respect of sale to him of the goods, if the sale had been a sale falling within that sub-section, in lieu of prosecution. It then considered the Sub-Section 3(b) of Section 8 and reached to the conclusion that such registered dealer is entitled to use the goods purchased as mentioned in the registration certificate against form C for job-work of third party also. Section 8(3)(b) would therefore clearly cover a case where a registered dealer manufactures or processes goods for a third party on job contract and uses in manufacturing and processing of such goods or material purchased by him against a certificate of registration and declared in form C so long as the manufactured or processed goods are intended to be for sale by such third party. I am laying emphasis on the words used by the Supreme Court in the aforesaid decision "intended for sale by such third party". The further observation in this connection is quoted below:

... It is, of course, true that if the proceedings are taken against the registered dealer u/s 10, Clause (d) or Section 10A, the question would arise whether the goods manufactured or processed by the registered dealer for a third party were intended for sale by such third party and that would have to be decided by the court or the competent authority according to the appropriate and relevant rules of evidence, but merely because some difficulty may arise in the determination of this question by reason of the third party coming into the picture that would be no ground for refusing to place reliance on the provisions of Section 8(3)(b) the only consideration which it can reasonably bear.

12. The aforesaid authority of the Supreme Court was also relied upon by the counsel for both the parties before me as well as by the assessing authority and the appellate authority. A clear-cut finding has been recorded by the assessing authority that the dealer has failed to produce any material on record to show that such goods, thus, manufactured by the dealer for a third party were intended for sale by such third party. In absence of any material no fault can be found in the conclusion of the assessing authority on this issue. The appellate authority without advertng to this issue in detail has disposed of the matter on the basis of one certificate filed by one such third party, namely, Nayab Biri Factory. The department has challenged the said finding by raising grounds Nos. 5 and 6 in the memo of second appeal before the Tribunal.

13. The Tribunal without recording any finding has set aside the entire penalty order. This approach of the Tribunal cannot be given the seal of approval by this Court. At this place it is also to be noticed that the Supreme Court in the case of Raj Steel and Others Vs. State of A.P. and Another, in para 9 (page 387 of STC) has observed as follows:

It is, therefore, perfectly plain that the issue as to whether packing material has been sold or merely transferred without consideration depends on the contract between the parties. The fact that the packing material is of insignificant value in relation to the value of the contents may imply that there was no intention to sell

the packing material.

14. The Tribunal having omitted to record any finding on this vital issue it is necessary that the matter may be remitted to the Tribunal for recording its finding on this issue alone.

15. It is made clear that the findings recorded in this judgment under points Nos. 1 and 2 shall not be open for consideration by the Tribunal. The matter is remanded to the Tribunal only for a limited purpose to record a finding as to whether the third parties for whom the job of printing by the use of imported ink against form C was done by the dealer have actually sold the goods or not.

16. The inevitable conclusion is that the revision is based on terra termia and the order of the Tribunal cannot be sustained.

17. In the result all the revisions are allowed as indicated above. The penalty order as modified by the appellate authority on items other than ink is hereby confirmed. The question of determination of penalty on "ink" is remitted back to the Tribunal to record the necessary finding as indicated above.