**(1983) 12 AHC CK 0030**

**In the Allahabad High Court**

**Case No :** Sales Tax Revision No. 4 of 1983

Commissioner, Sales Tax — APPELLANT

Vs

Nand Mohan Madan Mohan — RESPONDENT

**Date of Decision :** 08-12-1983

**Acts Referred:**
Uttar Pradesh Sales Tax Act, 1948 — Section 11(1)

**Citation :** (1984) 57 STC 35

**Hon'ble Judges :** K.N. Misra, J

**Bench :** Single Bench

**Advocate :** K.M. Sahai, for the Respondent

**Final Decision :** Dismissed

## Judgement

K.N. Misra, J.—This revision u/s 11(1) of the U. P. Sales Tax Act (for short "the Act"), is directed against the order dated May 24, 1980, passed by the Additional Judge (Revisions), Sales Tax, Varanasi Range, Varanasi, by which a revision filed by M/s. Nand Mohan Madan Mohan (hereinafter to be referred to as "the dealer"), Visheshwarganj, Varanasi, against the order of the appellate authority, has been allowed and the penalty imposed on the assessee u/s 15-A(1)(a) and (c) of the Act has been quashed and it is directed that the amount of penalty, if paid, shall be refunded according to law.

2. It appears that the Sales Tax Officer inspected the shop of the dealer on January 10, 1973, and took in his possession certain account books. An assessment order was passed on January 20, 1977, relating to the year 1973-74. A notice u/s 15-A(1)(c) was served on the dealer to show cause why a penalty should not be imposed on them for deliberately furnishing inaccurate particulars of turnover and also concealing substantial particulars of the turnover.

3. The notice was contested by the dealer and it was asserted that some of the account books which were taken into custody by the Sales Tax Officer on January 10, 1973, did not relate to their business but these relate to the separate

business of one of the partners, namely, Sri Madan Mohan Bhargava. It was further asserted that they have not deliberately concealed any turnover; nor have furnished wrong turnover. By order dated May 7, 1977, the Sales Tax Officer disbelieving the version of the dealer imposed a penalty of Rs. 20,000 u/s 15-A(1)(c) of the Act. Aggrieved by that order an appeal was filed by the dealer which was partly allowed by the Assistant Commissioner (Judicial), Sales Tax, Varanasi, by the order dated January 9,1979, and the amount of penalty was reduced to Rs. 8,000. Still aggrieved by the said order passed by the Assistant Commissioner (Judicial), Sales Tax, the dealer preferred a revision, which was allowed by the Additional Judge (Revisions), Sales Tax, vide order dated May 24, 1980, and the order imposing penalty was quashed. This order has been challenged by the Commissioner, Sales Tax, U. P., Lucknovv, in this Court through the instant writ petition.

4. I have heard learned counsel for the parties and I have gone through the impugned orders referred to above.

5. Learned counsel for the applicant urged that when on the facts and circumstances of the case the revising authority had himself held the turnover of the dealer has been suppressed, he erred in not imposing penalty u/s 15-A(1)(c) of the Act. Learned counsel further urged that a concurrent finding was recorded by two authorities below to the effect that the assessee''s account books did not relate to the private arhat business conducted by one of the partners of the firm Madan Mohan Bhargava, but those relate to the business of the assessee-firm. Learned counsel urged that the lower revisional authority, without setting aside that finding, has acted illegally and with material irregularity in exercise of jurisdiction in quashing the penalty imposed u/s 15-A(1)(q) of the Act. He has further submitted that there was deliberate concealment of particulars and inaccurate turnover was deliberately furnished by the assessee and as such, the penalty imposed u/s 15-A(1)(c) of the Act deserves to be maintained. In reply, learned counsel for the opposite party urged that the burden of proof lay on the department for establishing that the assessee had deliberately concealed the turnover and there is no material or evidence for showing any intention of the assessee to conceal facts nor there is any material on record to indicate that an inaccurate turnover was furnished deliberately concealing material facts regarding business turnover of the assessee. Learned counsel further urged that Sri Madan Mohan Bhargava who had carried on private arhat business had submitted turnover relating to his business and he had also deposited sales tax on November 17, 1975, relating to the turnover of the business entered in the seized account books. Learned counsel thus urged that there was no deliberate omission or concealment on the part of the opposite party-assessee in submitting their return. The Additional Judge (Revisions), Sales Tax, after taking into consideration the facts and circumstances of the case observed :

I must record a finding that except from the entries found in the aforesaid rokar bahi, which is always liable to be contradicted, there is no other material in the hands of the department to positively prove the mens rea and the fact of concealment.

6. Placing reliance upon the decision of this Court in Satya Confectionery Works v. Commissioner of Sales Tax 1980 UPTC 356, he observed that the facts of this case are also the same as in the cited case; wherein it has been held that penalty cannot be imposed u/s 15A(1)(a) and (c) simply on the material found at the time of survey that the assessee had concealed some turnover. In that view of the matter he found that the department has not discharged the burden of proof which lay on it to establish positively the mens rea and the fact of concealment by the assessee. I have given my anxious consideration to the argument of the learned counsel for the parties and I find much substance in the argument advanced by the learned counsel for the opposite party. The question whether there had been a deliberate concealment of particulars of turnover and the assessee had furnished inaccurate turnover is essentially a question of fact and the finding recorded by the lower revisional authority on the said fact cannot be questioned in revision u/s 11(1) of the Act unless it is shown that the finding recorded is perverse being based on no evidence on record or that it is based on inadmissible evidence or the same is contrary to evidence on record.

7. In the present case, the Additional Judge (Revisions), Sales Tax, has held that there is no other material in the hands of the department, except the entries found in the aforesaid seized rokar bahi, to positively prove the mens rea and the fact of concealment. In view of aforesaid finding I find that no case was made out for imposing penalty on the dealer and the revisional court appears to have rightly set aside the orders of the assessing and the lower appellate authorities imposing penalty.

8. It is well-settled that even if certain evidence led by the assessee in support of the turnover submitted by him has not been accepted by the assessing authority, and the turnover submitted by him is found to be wrong but that by itself cannot be taken to be a valid ground for holding that the assessee has deliberately submitted wrong turnover or has concealed material particulars in submitting turnover. In proceeding u/s 15-A(1)(a) and (c), the onus lies on the department to positively prove the mens rea and the fact of deliberate concealment of the particulars of the turnover and the findings recorded by the assessing officer in assessment proceeding cannot be made the basis of any order imposing penalty u/s 15-A(1)(a) and (c) of the Act. Merely because the assessee''s books of account had not been accepted and a best judgment assessment has been made at a figure higher than that indicated in the .dealer''s turnover it would not mean that the dealer had deliberately furnished inaccurate particulars of the turnover so as to attract the provisions of Section 15-A(1)(a) and (c) of the Act. There should be some element of mens rea before it can be said that there was concealment of turnover or that a false return was furnished so as to make the dealer liable to pay penalty under the aforesaid provision. In penalty proceedings the taxing authority has to deal with the matter independently of assessment

proceedings by drawing separate proceedings and proceed to decide the case in accordance with the provisions of the Act after giving full opportunity of hearing to concerned parties.

9. In Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, , the Supreme Court held :

In the absence of cogent material evidence, apart from the falsity of the respondent''s explanation, from which it could be inferred that the respondent had concealed the particulars of his income or had deliberately furnished inaccurate particulars in respect of the source and that the disputed amount was a revenue receipt, the penalty could not be imposed.

10. In Anantharam Veerasinghaiah and Co. Vs. Commissioner of Income Tax , Andhra Pradesh, , the Supreme Court held:

It is now settled law that an order imposing a penalty is the result of quasi-criminal proceedings and that the burden lies on the Revenue to establish that the disputed amount represents income and that the assessee has consciously concealed the particulars of his income or has deliberately furnished inaccurate particulars. Commissioner of Income Tax, West Bengal v. Anwar Ali 1970 UPTC 594. It is for the Revenue to prove those ingredients before a penalty can be imposed. Since the burden of proof in a penalty proceeding varies from that involved in an assessment proceeding, a finding in an assessment proceeding that a particular receipt is income cannot automatically be adopted as a finding to that effect in the penalty proceeding. In the penalty proceeding the taxing authority is bound to consider the matter afresh on the material before it, and in the light of the burden to prove resting on the Revenue, to ascertain whether a particular amount is a revenue receipt.

11. It was further held :

The mere falsity of the explanation given by the assessee, it was observed, was insufficient without there being in addition cogent material or evidence from which the necessary conclusion attracting a penalty could be drawn. These principles were reiterated by this Court in The Commissioner of Income Tax Madras Vs. Khoday Eswarsa and Sons, .

12. In Commissioner of Income Tax, Lucknow v. Mohinder Singh, Prop : M/s. United Industries, Hardoi 1980 Tax LR 1178, the Division Bench of this Court held :

It is settled that proceedings for penalty are of quasi-criminal nature, and while adjudging as to whether the assessee is guilty of concealment, the Tribunal has to examine the facts afresh, and is not to be guided by the findings given in the quantum appeal. This being so, the Tribunal has to determine as to whether an assessee is guilty of concealment, and further the amount of concealed income, in order that the amount of penalty to be imposed on an assessee can be determined.

 

13. Although the aforesaid decisions were given in the matter relating to the Income Tax Act, yet the principles enunciated therein would equally apply to these proceedings u/s 15-A(1)(a) and (c) of the Act. In Paras Nath Jaiswal v. Commissioner of Sales Tax 1981 UPTC 1197, Honourable R. M. Sahai, J. held that mens rea is a part of the offence under Clause (f) of Section 15-A(1)- penalty cannot be levied unless it was held that the assessee did not act honestly in disregarding the statutory provisions of issuing cash memo.

14. In this view of the matter, I find that the conduct of the assessee was bona fide and there was no material to establish that the assessee deliberately concealed material facts and submitted incorrect statement of turnover. Thus, no penalty can be imposed u/s 15-A(1)(a) and (c) of the Act. The burden of proof lies on the department to establish the said fact. In the present case the lower revisional Court has observed that apart from the aforesaid rokar bahi, which is always liable to be contradicted, there is no material in the hands of the department to positively prove the mens rea and the facts of concealment. The assessing authority as well as the lower appellate authority have held that the seized account books relate to the business of the assessee and not to the private arhat business of partner Madan Mohan Bhargava on the ground that Madan Mohan Bhargava had not got himself registered as a registered dealer and that he had not submitted his return at the relevant time. This could not be a sufficient ground for holding that the assessee had deliberately concealed the particulars of the turnover or that he has deliberately submitted an inaccurate turnover, specially in view of the fact that subsequently Madan Mohan had got himself registered as a registered dealer and had also paid sales tax on the alleged suppressed turnover indicated in the seized account books. This explanation appears to have found favour with the lower revisional authority while quashing the order imposing penalty on the opposite party. It, therefore, cannot be said that the order passed by the lower revisional authority is perverse or that it is based on non-consideration of material facts or on consideration of inadmissible evidence. The exercise of discretion by the revising authority cannot be said to be arbitrary, and is not liable to interference by this Court as it raises no question of law nor the order suffers from the error of jurisdiction.

15. In the result the revision being devoid of merits is accordingly dismissed. I, however, direct the parties to bear their own costs.

 