
(2000) 11 P&H CK 0197
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 16201 of 2000

Deputy Controller of Stores	Vs	APPELLANT
State of Haryana and Others		RESPONDENT

Date of Decision : 27-11-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Haryana General Sales Tax Act, 1973 — Section 28, 39, 39(1), 39(2), 39(5)
Income Tax Act, 1922 — Section 30, 46(1)
Punjab General Sales Tax Act, 1948 — Section 20(5)

Citation : (2006) 143 STC 670

Hon'ble Judges : Nirmal Singh, J;G.S. Singhvi, J

Bench : Division Bench

Advocate : R.C. Dogra and Sushil Dogra, for the Appellant;

Final Decision : Dismissed

Judgement

G.S. Singhvi, J.—This is a petition for quashing of the order (annexure P6) dated August 10, 1999 and annexure P7 dated May 25, 2000 passed by the Joint Excise and Taxation Commissioner (Appeals), Ambala (respondent No. 3), and Sales Tax Tribunal-II, Haryana (for short, "the Tribunal"), respectively, declining the prayer made by the petitioner for grant of exemption from payment of tax, which constitutes a condition precedent to the entertaining of an appeal filed u/s 39(1) of the Haryana General Sales Tax Act, 1973 (for short, "the 1973 Act").

2. The petitioner is registered as a dealer under the 1973 Act. It filed four quarterly returns for the assessment year 1994-95. The Excise & Taxation Officer-cum-Assessing Authority, Yamuna Nagar, (respondent No. 4) did not accept the return and issued notice in form ST-25 u/s 28 of the 1973 Act for finalisation of the assessment. Shri Rakesh Mehta, Advocate, and Shri Harpal Singh, Office Superintendent, appeared on behalf of the petitioner and produced the records. After hearing them, respondent No. 4 passed the order dated May 21, 1998 (annexure P1) for levy of tax, penalty and interest amounting to Rs.

1,41,88,234.36 and after taking note of the fact that a sum of Rs. 1,41,64,080 had already been paid, he issued demand notice for payment of Rs. 24,154. For the assessment year 1996-97, respondent No. 4 passed order, annexure P4, dated February 18, 1999, vide which he held the petitioner liable to pay tax amounting to Rs. 99,37,858. The petitioner challenged that order by filing the appeal u/s 39(1) of the 1973 Act. He also filed an application under proviso to Section 39(5) of the 1973 Act for grant of exemption from payment of tax on the ground that due to legal complications involved in the Railway Department, he was not in a position to pay the amount of tax. Respondent No. 3 rejected the same on August 10, 1999 assigning the following reasons :

I have considered the arguments from both the sides and have gone through the record of the case. Now it is a well-settled law that the merits of the case cannot be taken into consideration at this stage. Only the applicant's ability to pay the tax is to be seen. The arguments put forth by the applicant that due to some legal complications involved in the Railway department, the applicant is not in a position to pay the amount involved in the case, has no force as u/s 39(5) of the State Act pre-payment of tax for entertaining the appeal is necessary. The only exemption can be the inability to pay the amount which is not the case with the applicant department. The applicant department is a big department and one cannot even imagine that it cannot deposit the amount, involved in the case. Accordingly, it is concluded that the applicant is in a position to pay the amount. In view of this I do not see any reason to entertain the appeal without payment of tax. Stay application is, thus rejected/filed and the applicant is directed to pay the amount up to September 15, 1999. Case to come up on September 22, 1999.

The appeal filed by the petitioner against the order passed by respondent No. 3 was dismissed by the Tribunal on May 25, 2000 on the ground that the appellant (petitioner herein) did not make any effort to plead or establish financial inability before the Tribunal. The relevant extract of the Tribunal's order is reproduced below :

I have heard the arguments of both the sides and have also gone through the facts on record. It appears that the appellant did not make any effort to plead or establish financial inability before the Tribunal. I order that the appellant shall pay the entire amount within 45 days from the receipt of the order and thereafter the appeal shall be heard by this Tribunal within 38 days from the deposit.

3. Shri R.C. Dogra, learned Counsel for the petitioner, argued that the rejection of the applications filed by the petitioner under proviso to Section 39(5) of the 1973 Act should be declared as vitiated by an error of law because respondent No. 3 and the Tribunal have failed to consider the petitioner's plea that order of assessment passed by respondent No. 4 was contrary to law and on the basis of such order, he could not be burdened with the liability to pay huge amount of tax. He submitted that due to procedural complications and lack of sanction by the Railway Administration, the petitioner could not deposit the amount of tax

stipulated in the order of assessment and this aspect has been completely overlooked by respondent No. 3 and the Tribunal. He then argued that the petitioner's case falls in the category of exceptional cases and, therefore, respondent No. 3 and the Tribunal should have accepted his prayer for grant of exemption. Learned counsel submitted that a Department of the Government or a State Agency cannot be treated at par with private assesseees in the matter of grant of exemption and respondent No. 3 and the Tribunal have committed a serious error by applying the rule of thumb while deciding the applications filed by the petitioner for grant of exemption. Shri Dogra relied on the decision of the Supreme Court in *State of Orissa v. Ion Exchange India Ltd.* [2000] 117 STC 436, and the decision of the Full Bench of this Court in *Emerald International Ltd. v. State of Punjab* [2001] 122 STC 382 ; (1997) (2) 116 PLR 797, in support of his argument that respondent No. 3 and the Tribunal should have granted exemption to the petitioner from payment of tax. He lastly submitted that this Court should relieve the petitioner of the burden of paying the tax and direct respondent No. 3 to entertain and decide the appeal.

4. We have thoughtfully considered the arguments/submissions of the learned Counsel. Section 39(1), (2) and (5) of the 1973 Act read as under :

(1) An appeal from every original order, including an order u/s 40, passed under this Act or the Rules made thereunder shall lie :

(a) if the order is made by an assessing authority, Officer-in-charge of a check-post or barrier, or an officer below the rank of a Deputy Excise and Taxation Commissioner, to the Deputy Excise and Taxation Commissioner or such other officer as the State Government may by notification appoint ;

(b) if the order is made by the Deputy Excise and Taxation Commissioner, or any other officer not below the rank of a Deputy Excise and Taxation Commissioner, to the Commissioner or such other officer as the State Government, may by notification, appoint;

(c) if the order is made by the Commissioner, to the Tribunal.

(2) An order passed in appeal by the Deputy Excise and Taxation Commissioner or the officer appointed by the State Government under Clause (a) of Sub-section (1) or by the Commissioner or the officer appointed by the State Government under Clause (b) of that Sub-section shall be further appealable to the Tribunal.

(3) ...

(4) ...

(5) No appeal shall be entertained unless it is filed within sixty days from the date of the order appealed against and the Appellate Authority is satisfied, that the amount of tax assessed and the penalty and interest, if any, recoverable from the person has been paid :

Provided that the said authority, if satisfied that the person is unable to pay the whole of the amount of tax assessed, or the penalty imposed, or the interest due, he may, if the amount of tax and interest admitted by the appellant to be due has been paid, for reasons to be recorded in writing, entertain the appeal and may stay the recovery of the balance amount subject to the furnishing of a bank guarantee or adequate security in the prescribed manner to the satisfaction of the appellate authority :

Provided further that in the case of an appeal against any order which has to be communicated by the appropriate authority to the appellant, the period of sixty days shall commence from the date of receipt of the copy of the order by the appellant and in the case of an appeal against any other order made under this Act, the time spent in obtaining the certified copy of the order shall be excluded in computing the period of sixty days.

A reading of the provisions quoted above shows that an appeal from every original order made by an assessing authority lies to the Deputy Excise and Taxation Commissioner or such other officer who may be appointed in this behalf by the State Government and an appeal against the appellate order passed by the Deputy Excise and Taxation Commissioner or the officer appointed by the State Government, lies before the Tribunal. Sub-section (5) of Section 39, which contains a non obstante clause, declares that no appeal shall be entertained unless it is filed within 60 days from the date of order appealed against and the appellate authority is satisfied that the amount of tax, penalty and interest has been paid. First proviso to Section 39(5) empowers the appellate authority to entertain the appeal without insisting on payment of the whole of the amount of tax, penalty or interest due, if, for reasons to be recorded in writing, it is satisfied that the appellant is unable to pay the same.

5. The ambit and scope of the first proviso to Section 39(5) has been considered by this Court in several decisions. However, instead of burdening this order with a large number of precedents, we may only refer to the Full Bench decision in *Emerald International Ltd. v. State of Punjab* [2001] 122 STC 382 ; (1997) (2) 116 PLR 797. We may also notice some decisions of the Supreme Court including the latest pronouncement in *State of Haryana Vs. M/s. Maruti Udyog Ltd. Ors.*, . In *Emerald International Ltd. v. State of Punjab* [2001] 122 STC 382 ; (1997) (2) 116 PLR 797 the Full Bench analysed the provisions of Section 20(5) of the Punjab General Sales Tax Act, 1948 (for short, "the 1948 Act") and Section 39 of the 1973 Act in the context of the plea raised by the assesseees that while deciding the application for exemption under proviso to Section 20(5) of the 1948 Act and Section 39(5) of the 1973 Act, the appellate authority is bound to examine the merits of the case and laid the following proposition :

- (a) The appeal is a creation of a statute and in case a person wants to avail of the right of appeal, he has to accept the conditions imposed by the statute.
- (b) The right of appeal being a creature of statute, the Legislature could impose

conditions for exercise of such a right. Neither there is a constitutional nor legal impediment for imposition of such a condition.

(c) The right of appeal is neither natural nor inherent attaching to a litigation and such a right neither exists nor can be assumed unless expressly given by the statute.

(d) Even if, this Court was to interpret the bare provisions of two statutes, i.e., the Punjab General Sales Tax Act, 1948 and the Haryana General Sales Tax Act, 1973 it could safely be held that there is a complete bar to the entertainment of an appeal by the appellate authority without the payment of tax amount unless the authority is satisfied that the dealer is unable to pay the amount so assessed and only in that situation the appellate authority for the reasons to be recorded in writing can entertain the appeal without deposit of the payment of such amount.

(e) Neither on the wording nor in view of the spirit of the Punjab and Haryana Acts it is possible to hold that the appellate authority should see the prima facie nature of the case while hearing the stay matter.

(f) The factum of tax assessed being illegal cannot be a relevant consideration for grant of stay by an appellate authority.

(g) The High Court in exercise of its jurisdiction under Article 226 of the Constitution of India in rarest of the rare cases in the given facts and circumstances, can grant stay and waive the condition of pre-deposit of tax and the existing alternative remedy in such circumstances would be no ground to refuse interference.

6. In *The Anant Mills Co. Ltd. Vs. State of Gujarat and Others*, , a Constitution Bench of the Supreme Court while considering challenge to the validity of some of the provisions of the Bombay Provisional Municipal Corporations Act, 1949 observed as under :

...The bar created by Section 406(2)(e) to the entertainment of the appeal by a person who has not deposited the amount of tax due from him and who is not able to show to the appellate Judge that the deposit of the amount would cause him undue hardship arises out of his own omission and default. The above provision, in our opinion, has not the effect of making invidious distinction or creating two classes with the object of meting out differential treatment to them ; it only spells out the consequences flowing from the omission and default of a person who despite the fact the deposit of the amount found due from him would cause him no hardship, declines of his own volition to deposit that amount. The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the Legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the

imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid. Such a provision was on the statute book in Section 30 of the Indian Income Tax Act, 1922. The proviso to that section provided that "...no appeal shall lie against an order under Sub-section (1) of Section 46 unless the tax had been paid". Such conditions merely regulate the exercise of the right of appeal so that the same is not abused by a recalcitrant party and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the Legislature to impose an accompanying liability upon a party upon whom a legal right is conferred or to prescribe conditions for the exercise of the right. Any requirement for the discharge of that liability or the fulfilment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation, and we can discern no contravention of Article 14 in it. A disability or disadvantage arising out of a party's own default or omission cannot be taken to be tantamount to the creation of two classes offensive to article 14 of the Constitution, especially when that disability or disadvantage operates upon all persons who make the default or omission.

7. In *State of Haryana Vs. M/s. Maruti Udyog Ltd. Ors.*, , the Supreme Court considered the ambit and scope of the expression "unable to pay the whole of the amount of tax assessed" used in proviso to Section 39(5) of the 1973 Act in the context of challenge to the order passed by this Court in C.W.P. No. 6932 of 1998 relieving the respondent of its obligation to deposit the tax in terms of Section 39(5) of the 1973 Act on the ground that it had not collected additional tax from the customers and, therefore, it was unable to deposit the amount of additional demand created by the Assessing Authority. Their Lordships of the Supreme Court outlined the object of Section 39(5), referred to the decision of the Supreme Court in *Lakshmi Rattan Engineering Works Ltd. Vs. Asstt. Commr. Sales Tax, Kanpur and Another*, and the Full Bench decision of this Court in *Emerald International Ltd. v. State of Punjab* [2001] 122 STC 382 ; (1997) (2) 116 PLR 797, and held that the order passed by the division Bench of the High Court directing the Tribunal to dispose of the appeal on furnishing of bank guarantee by the company was legally unsustainable. Some of the observations made by the Supreme Court are extracted below :

The object of Sub-section (5) of Section 39 of the Act is to ensure the deposit of amount claimed from an assessee in case of an appeal filed against the tax demanded. However, power is given to the Appellate Tribunal to relieve him from the rigour of above restriction under the circumstances spelt out in the proviso of the aforesaid section. Sub-section (5) regulates the exercise of right of appeal conferred upon an assessee u/s 39 of the Act, the object being to keep in balance the right of the aggrieved person and the right of the State to speedy

recovery of tax.

We find substance in the submission of Mr. K.T.S. Tulsi, Senior Advocate, that the inability mentioned in the proviso refers to the paying capacity and financial position of the company and its scope cannot be widened to the extent as suggested by Mr. Nariman. ...The word "unable" used in the proviso has been defined to mean not having sufficient strength, power and means. In relation to money, it means insufficiency of funds. It follows, therefore, that the inability to pay the amount is referable to the paying capacity of the person concerned and not his legal or actual liability to pay the amount demanded. It has to be kept in mind that the payment made under the proviso only enables the appellate court to entertain the appeal for adjudication and does not decide the rights of the parties.

In the instant case the prayer was made to grant stay on the ground that "the petitioner has not collected any additional tax from the customers and is unable to deposit the amount of additional demand created by patently illegal orders". The respondent-company nowhere mentioned to or referred to its inability to pay the amount on account of its alleged financial difficulties or incapacity to make the requisite payment. The legality of the additional demand created could not be made the basis for insisting to entertain the appeal without prior payment, as that would have required the determination of the merits of the appeal....

In view of the decisions of the Supreme Court in *The Anant Mills Co. Ltd. Vs. State of Gujarat and Others*, , and *State of Haryana Vs. M/s. Maruti Udyog Ltd. Ors.*, , and of the Full Bench in *Emerald International Ltd. v. State of Punjab* [2001] 122 STC 382 ; (1997) (2) 116 PLR 797, we hold that the condition embodied in Section 39(5) requiring the appellant to pay the amount of tax, etc., is not ultra vires the provisions of the Constitution, we further hold that exemption from payment of the tax in terms of Section 39(5) can be granted only if the appellate authority is satisfied that due to financial stringency the appellant is unable to pay the amount of tax assessed, penalty or interest. But, at that stage, it is not open to the appellate authority/Tribunal to go into the merits of the appeal.

8. The decision of the Supreme Court in *State of Orissa v. Ion Exchange India Ltd.* [2000] 117 STC 436, relied upon by Shri Dogra, does not have any bearing on the points raised in this petition. In that case their Lordships interpreted Section 24(7) of the Orissa Sales Tax Act, 1947, and held that the bar created by a statute cannot bar exercise of jurisdiction by the High Court under Article 226 of the Constitution. At the same time, their Lordships observed that the High Court should keep in mind the legislative intention indicated by Sub-section (7) of Section 24 and should respect it.

9. In this case, the petitioner had neither pleaded nor any evidence was produced before the appellate authority and the Tribunal that on account of financial difficulty he was not in a position to pay the amount of tax. Rather, the

only plea raised by him was that due to legal complications involved in the Railway Department, he was not in a position to deposit the amount of tax. The appellate authority and the Tribunal rejected this plea on the ground that first proviso to Section 39(5) of the 1973 Act does not provide for grant of exemption to the State Agency simply because it faces some legal hurdles in getting the requisite amount released. We approve the reasons assigned by the appellate authority and the Tribunal and further add that exemption under proviso to Section 39(5) cannot be claimed by the appellant as of right simply because it happens to be a department of the Government. A similar plea was turned down by this Court in *Food Corporation of India v. Sales Tax Tribunal* [1989] 73 STC 241, and we do not find any reason to take a different view.

10. The argument of Shri R.C. Dogra that even though the reasons assigned by the appellate authority and the Tribunal for declining to entertain the petitioner's request may be legally correct, this Court should grant exemption by exercising its powers under Article 226 of the Constitution of India, sounds attractive, but deserves to be rejected because no extraordinary reason has been put forward by the petitioner for issuance of a direction in derogation of the statutory provision. In fact, a similar direction given by this Court in the case of *Maruti Udyog Ltd. (C.W.P. No. 6932 of 1998)* was reversed by the Supreme Court. Therefore, we do not find any valid ground to accept the petitioner's plea for directing the appellate authority to entertain the appeal without insisting on deposit of the amount of tax.

11. At this stage, Shri R.C. Dogra stated that by an order dated October 20, 2000 the appellate authority has dismissed the appeal on account of non-deposit of tax, and, therefore, the petitioner may be given liberty to challenge that order by availing appropriate legal remedy. In this respect, it is sufficient to mention that we have not made any adjudication on the legality of the order dated October 20, 2000 and it is open to the petitioner to avail appropriate legal remedy against that order.

12. For the reasons mentioned above, the writ petition is dismissed. However, it is made clear that the petitioner shall be free to challenge the order dated October 20, 2000 by filing appeal u/s 39(2) of the 1973 Act or availing other legal remedy. We also make it clear that it will be open to the petitioner to pay the amount of tax assessed by the Excise and Taxation Officer-cum-Assessing Authority, Yamuna Nagar, and then file an application before the Excise and Taxation Commissioner (Appeals), Ambala, for revival of the appeal.

13. Copy of this order be given dasti on payment of fee prescribed for urgent applications.