

(1971) 05 P&H CK 0008
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ No. 532 of 1971

Fancy Nets and Fabrics

APPELLANT

Vs

The State of Punjab and Another

RESPONDENT

Date of Decision : 05-05-1971

Acts Referred:

Constitution of India, 1950 — Article 226
Punjab General Sales Tax Act, 1948 — Section 11, 14, 2, 5, 6

Citation : (1971) 28 STC 433

Hon'ble Judges : Gopal Singh, J; D.K. Mahajan, J

Bench : Division Bench

Advocate : L.K. Sood, O.P. Hoshiarpuri and Mehr Chand Sud, for the Appellant;
H.L. Sibal, General and S.C. Sibal, for the Respondent

Judgement

1. This is a petition under Article 226 of the Constitution of India calling in question the order of the assessing authority passed u/s 5(2)(a)(ii) of the Punjab General Sales Tax Act, 1948 (Act 46 of 1948) (hereinafter referred to as the Act).

2. The petitioner, Messrs Fancy Nets and Fabrics, Batala Road, Amritsar, is a partnership concern carrying on the business of manufacture of cloth. The firm is a registered dealer under the Act. The registration certificate is No. AMR-III-15152 and is annexure "A" to the petition. The petitioner purchased yarn, dyes and chemicals, accessories, packing material, etc., during the year 1969-70. With regard to its turnover, the petitioner filed returns with the Assessing Authority wherein it was indicated that part of the goods purchased during the year 1969-70 were resold whereas the other part was used for the manufacture of cloth which is a tax-free item. The Assessing Authority brought to tax the goods which had been used by the petitioner for the manufacture of cloth u/s 5(2)(a)(ii) of the Act. The petitioner has objected in the present petition to this assessment. The State has filed the return and has controverted the stand taken by the petitioner. While dealing with the various contentions advanced at the Bar, the respective stands of the parties would be apparent.

3. The contentions advanced by the learned Counsel for the petitioner may now be enumerated. They are as follows:

1. That under the registration certificate, the petitioner being a manufacturer of cloth could buy the goods that have been brought to tax u/s 5(2)(a)(ii) for manufacturing tax-free goods, i.e., cloth, and therefore, the use of these goods for the manufacture of cloth is not liable to tax under the aforesaid provision.

2. That the return was filed in form S.T. VIII which has nothing to do with the use of goods for the manufacturing business of the petitioner and, therefore, there was no return regarding the purchase of goods on which purchase tax could be levied. The contention, in short, is that what is sought to be levied from the petitioner is purchase tax which cannot be levied as items which he purchased are not items covered by Schedule C as per the definition of "purchase" in Section 2(ff) of the Act.

3. That there is no machinery provided in the Act or the Rules for the collection of tax u/s 5(2)(a)(ii) and, therefore, the tax cannot be levied from the petitioner.

4. We propose to deal with these contentions in the order in which they have been mentioned.

5. In order to appreciate the first contention, it will be proper to examine the scheme of the Act and the purpose of Section 5(2)(a)(ii). Under the Act, every dealer who carries on the business of buying and selling goods has to get himself registered u/s 7 of the Act, provided his turnover is (a) in relation to a dealer who himself manufactures or produces any goods for sale Rs. 10,000, (b) in relation to any dealer who runs a tendoor, loh, dhaba, hotel, etc. Rs. 25,000, (c) in relation to any particular classes of dealers not falling within the above two categories, such sum as may be prescribed, and (d) in relation to any other dealer Rs. 40,000.

6. Section 6 of the Act exempts certain goods mentioned in Schedule B from the operation of the Act, both in the matter of sale and purchase. Regarding certain goods mentioned in Schedule C no sales tax can be levied; only purchase tax can be levied.

7. This brings us to Section 5, on which the entire controversy has been raised before us. This section provides the rate of tax and also defines taxable turnover as follows :

(2) In this Act the expression "taxable turnover" means that part of a dealer's gross turnover during any period which remains after deducting therefrom--

(a) his turnover during that period on--

(i) the sale of goods declared tax-free u/s 6;

(ii) sales to a registered dealer of goods other than sales of goods liable to tax at the first stage under Sub-section (1-A) declared by him in a prescribed form as

being intended for resale in the State of Punjab or sale in the course of inter-State trade or commerce or sale in the course of export of goods out of the territory of India or of goods specified in his certificate of registration for use by him in the manufacture in Punjab of any goods, other than goods declared tax-free u/s 6, for sale in Punjab and on sales to registered dealer of containers or other materials for the packing of such goods :

Provided that in case of such sales, a declaration duly filled up and signed by the registered dealer to whom the goods are sold and containing prescribed particulars on a prescribed form (obtained from the prescribed authority) is furnished by the dealer who sells the goods :

Provided further that when such goods are used by the dealer to whom these are sold for purposes other than those for which these were sold to him, he shall be liable to pay tax on the purchase thereof at such rate, not exceeding the rate of tax leviable on the sale of such goods, as the State Government may by notification direct in respect of a class of dealers specified in such notification, notwithstanding that such purchase is not covered by Clause (ff) of Section 2.

Clauses (iv) to (vii) of Sub-section (2)(a) are not relevant for our purposes. Sub-section (3) provides an exemption in respect of the declared goods and at what stage the tax would be levied thereon. It is really the two provisos to Section 5(2)(a)(ii) that are relevant for purposes of the contention that has been raised.

8. In order to examine the validity of the contention, we have to see what has exactly happened? The petitioner purchased under his registration certificate certain goods. Those goods were purchased under a declaration furnished in form S.T. 22 and the purpose mentioned therein is :--

- (1) for use in the manufacture in Punjab of any goods, other than goods declared tax-free u/s 6, for sale in Punjab,
- (2) for resale in the State of Punjab,
- (3) for sale in the course of inter-State trade or commerce, and
- (4) for sale in the course of export out of the territory of India.

9. In the present case, it was not mentioned in the declaration form that the goods were being purchased for manufacturing tax-free goods. When the returns were filed and the matter was examined, the Assessing Authority in the impugned order came to the following conclusion:

The dealer is liable to pay tax under the second proviso to Section 5(2)(a)(ii) of the Act on the purchases of yarn, etc., made on the basis of registration certificate for use in the manufacture of cloth which is a tax-free item. Assessment in this connection is computed as under after thorough examination of books of accounts.

10. Therefore, whatever material had been purchased on the basis of the

declaration furnished in pursuance of the registration certificate and had been used for manufacture of cloth, a tax-free item, that material was brought to tax under the proviso. If it had been disclosed at the time of the purchase of this material that it was to be used for the manufacture of tax-free items, the seller would have levied sales tax thereon inasmuch as these goods are not exempt from sales tax. The other alternative would have been that the registered dealer who sold those goods would not have sold them to the petitioner without levy of sales tax. If he had done so, he would have done so at his own risk because in that event the incidence of tax would have fallen on the seller. In a similar situation, the Patna High Court in *Jamuna Flour and Oil Mills (Private) Ltd. v. The State of Bihar* [1968] 22 S.T.C. 1, while dealing with a similar provision in the Patna Act, observed as follows:

Sales to registered dealers may be of two categories. There may be sales of raw materials which the registered dealer converts into manufactured goods. Such sales are exempt from sales tax by virtue of the said notification, and they will come within the scope of Sub-clause (i) of Clause (a) of Sub-section (2) of Section 7. But there may also be sales to registered dealers of goods which are subsequently sold by them without undergoing any process of manufacture, milling, etc. Such sales are regulated by Clause (b) of Sub-section (2) of Section 7. If, in respect of such sales, the purchasing dealer mentions in his certificate of registration that those goods were intended for sale by him inside Bihar or in the course of inter-State trade or commerce or export out of the territory of India or for use by him in the packing of goods [Sub-clauses (i) and (ii) of Clause (b)], the sale price on account of such sales may be excluded from the turnover of the selling dealer. But the second proviso is in the nature of a provision for preventing evasion. If the purchasing dealer, after obtaining them from the selling dealer free from sales tax, utilises the goods for purposes other than those mentioned in his declaration, he is penalised by the inclusion in his taxable turnover of the sale price of the goods so purchased. This liability is in addition to other penalties provided in the Act for contravention of a declaration made under the provisions of the Act....

Even if the view taken by the Sales Tax Tribunal regarding the applicability of the second proviso to Clause (b) of Section 7(2) to sales to a purchasing dealer of raw materials and their subsequent conversion into manufactured products be taken as correct, the conclusion drawn by the Tribunal will not necessarily follow. The second proviso merely says that, if the very goods which are purchased by the purchasing dealer from the selling dealer free of sales tax are utilised for any purpose other than those specified in Sub-clause (i) or (ii), the sale price of the goods so purchased shall be included in the taxable turnover of the purchasing dealer. This would only mean that, if wheat is purchased free of sales tax by a purchasing dealer from a selling dealer and the purchasing dealer subsequently contravenes the declaration given under the notification, the sale price of that wheat may be added to the turnover...

11. These observations fully apply to the facts of the present case and we are in respectful agreement with the same. The mere fact that in the registration certificate it is mentioned that the petitioner is manufacturing cloth does not mean that he is entitled to purchase goods liable to sales tax without paying sales tax thereon. What he produces is a commodity which is tax-free. No provision has been brought to our notice that in order to produce a tax-free commodity, all material used therein has to be tax-free. In this situation, we are unable to accept the contention advanced before us. The object of the second proviso to Section 5(2)(a)(ii) is that where certain goods liable to sales tax were not made so liable because of a declaration furnished under the registration certificate of a purchasing dealer, and in the hands of the purchasing dealer those goods have not earned the tax which they would have earned when the purchasing dealer disposed them of in one of the four methods mentioned in form S.T. 22, that tax which would have been recovered at the stage of the first sale is made recoverable by fiction of law in the hands of the purchasing dealer.

12. Before we part with this part of the case, it will be proper to deal with the decision of Tuli, J., in *Messrs Karnal Gur and Khandsari Industries v. The State of Haryana* C.W. No. 1287 of 1968 decided on 10th February, 1970. Strong reliance has been placed by the learned Counsel for the petitioner for his contention on this decision. If the learned Judge is taken to have accepted the contention raised at the Bar, with utmost respect to him we have no hesitation in saying that that view would be unsupportable. However, that is not the case. The learned Judge proceeded on a simple basis, the basis being admitted before him, namely, that in the declaration furnished at the time of the purchase of the goods, it was specified that the goods were being purchased to manufacture tax-free item. Therefore, the purchaser of goods committed no violation of his registration certificate. On the face of that certificate, the seller had to recover sales tax and the incidence of that tax fairly and squarely fell on the seller. In that situation, the learned Judge came to the conclusion that the provisions of Section 5(2)(a)(ii) could not be made applicable and tax recovered from the purchaser of goods. There can be no quarrel with this proposition and Mr. Sibal, learned Advocate-General concedes that on that assumption no fault could be found with the decision of Tuli, J. Therefore, this decision is of no assistance to the learned Counsel for the petitioner.

13. If the scheme of the Act and the considerations we have mentioned above are kept in view, it would be evident that there is no merit whatever in the first contention. The same is repelled.

14. The second contention of the learned Counsel is that the return was filed in form S.T. VIII. This return is filed by dealers who are engaged in the business of selling goods. There was no question of the petitioner having purchased goods and thus making himself liable to purchase tax. Therefore, this Assessing Authority had no jurisdiction to levy the purchase tax. This argument has to be stated to be rejected. It is a misnomer to say that what is levied from the

petitioner is purchase tax. Purchase tax is only levied on goods mentioned in Schedule C. The goods in question are not the goods mentioned in Schedule C. What Section 5(2)(a)(ii) provided for is for the evasion of sales tax at the stage of the sale and does not impose a purchase tax. In fact, it is aimed at preventing evasion. What should have been recovered at the time of sale is sought to be recovered at a later stage, not because the seller deliberately did not realise the tax but, because he was misled by the declaration form furnished by the purchaser. It is the purchaser who has violated the declaration form and used the goods for a purpose other than those mentioned in the form. It is in fact the recovery of a tax which should have been recovered at the stage of the sale but for the default of the purchaser. We, therefore, repel the second contention.

15. The third contention is that no machinery has been provided to recover the tax due u/s 5(2)(a)(ii). In this connection certain forms were brought to our notice where the consequential changes have not been made. Section 5 provided for the purchase of declaration forms from the department. It is on the basis of those forms that goods are purchased. It has been held that the tax which is sought to be recovered is sales tax. The machinery and the form for its recovery is provided in the Act. In the second place, the mere fact that the forms do not conform to the substantive provisions of the Act will not derogate from the machinery to recover the same as provided in the Act. A similar contention was advanced in *Modi Spinning and Weaving Mills Co. Ltd. Vs. Commissioner of Income Tax, Punjab and Another*, and their Lordships of the Supreme Court repelled this contention in the following terms:

The contention that the charging section is incomplete without the prescription of the proper form for the certificate of registration need not detain us. We have already shown that the old form must be deemed to be modified and even otherwise the section and the rules did not depend on the new form. They were complete and effective. The registration certificate was only the evidence that the company was a registered dealer for purposes of certain commodities to be used in manufacture, one of them being cotton. The omission to prescribe the new form or to issue it did not render Section 5 and the rules ineffective.

16. We see no infirmity in the Act which stands in the way of collection of tax due u/s 5(2)(a)(ii). There is no substance in the third contention.

17. For the reasons recorded above, this petition fails and is dismissed with costs, which are assessed at Rs. 200.

Appendix

[The judgment of Bal Raj Tuli, J., of the Punjab and Haryana High Court in *Karnal Gur and Khandsari Industries v. The State of Haryana and Anr.* Civil Writ No. 1287 of 1968 delivered on 10th February, 1970, is printed below :--]

Karnal Gur and Khandsari Industries v. The State of Haryana and Anr.

18. The petitioner is a firm registered under the Indian Partnership Act and

carries on business at Smalkha in the district of Karnal. The firm is registered as a dealer under the Punjab General Sales Tax Act (hereinafter called the Act) and the Rules made thereunder. According to the certificate of registration issued to the petitioner on 3rd June, 1965, the petitioner-firm is a dealer in gur, khandsari, baidana, etc., and manufacturer of khandsari and gur-sheera and is entitled to purchase gur, firewood, sajji and lime for purposes of manufacture, and gur etc., for resale free of tax. On the basis of this registration certificate the petitioner-firm purchased gur and other goods, some of which were resold and others were used for manufacturing khandsari and gur-sheera during the assessment year ending 31st March, 1966. For that year the petitioner submitted quarterly returns of its turnover and paid the tax in accordance with the returns every quarter. According to these returns the gross sales of the petitioner-firm amounted to Rs. 2,28,312.43, out of which sales to the extent of Rs. 1,87,895.23 were of exempted goods, namely, khandsari, sales to the extent of Rs. 39,652.61 were made to registered dealers against the relevant forms supplied by them and were, therefore, exempt from the taxable turnover and the tax was payable only on the turnover amounting to Rs. 765.69. On this turnover the tax was assessed at Rs. 45.94 which was duly paid.

19. The Assessing Authority, respondent 2, issued notice to the petitioner-firm for assessment purposes under Sections 11(2) and 14 of the Act calling upon the petitioner to appear before him on 20th March, 1968, with particulars regarding the purchase of gur and accounts etc. The date was changed to 27th March, 1968, and the petitioners were given to understand by respondent 2 that in his view the petitioner-firm was liable to purchase tax on the purchases of gur made by them for utilization in the manufacture of khandsari under second proviso to Section 5(2)(a)(ii) of the Act. The petitioner-firm controverted the view of the Assessing Authority by filing a written reply stating its own contentions which were rejected by the Assessing Authority with the following observations :

I have considered over the matter and I find that the arguments advanced by you in your communication referred to above regarding the non-taxability of tax liable to be imposed on the purchase of gur utilised in the manufacture of khandsari, a tax-free commodity under the Punjab General Sales Tax Act, 1948, purchased on the strength of registration certificate granted to the party under the Punjab General Sales Tax Act, 1948, under the second proviso to Section 5(2)(a)(ii) of the Act *ibid* are not convincing. You are, accordingly, requested to furnish before me the relevant account books and also the details of purchases of gur made by your client on the strength of registration certificate under the Punjab General Sales Tax Act, 1948.

20. The petitioner-firm then filed the present writ petition in this Court on 8th April, 1968, which was admitted on the following day but the assessment proceedings were not stayed. It was, however, directed that after assessment is made, recovery would not be made if bank guarantee is given. During the pendency of the writ petition the Assessing Authority passed an order of

assessment on 10th April, 1968, in order to challenge which the petitioner-firm amended the writ petition after obtaining the permission of this Court. The assessment order is annexure "E" to the amended writ petition. In this assessment order the gross turnover is mentioned as Rs. 2,28,312.93. Tax has been assessed u/s 5(2)(a)(ii) of the Act on Rs. 1,31,522.31 at the rate of 6 per cent. amounting to Rs. 7,891.32. This figure of Rs. 1,31,522.31 represents the purchase value of gur consumed by the petitioner-firm in the manufacture of khandsari which is a tax-free commodity. Respondent 2 has applied the second proviso to Section 5(2)(a)(ii) of the Act for the imposition of the tax. Section 5(2)(a)(ii) of the Act with its proviso reads as under :

(2) In this Act the expression "taxable turnover" means that part of a dealer's gross turnover during any period which remains after deducting therefrom--

(a) his turnover during that period on--

(i)...

(ii) sales to a registered dealer of goods other than sales of goods liable to tax at the first stage under Sub-section (1-A) declared by him in a prescribed form as being intended for resale in the State of Punjab or sale in the course of inter-State trade or commerce or sale in the course of export of goods out of the territory of India or of goods specified in his certificate of registration for use by him in the manufacture in Punjab of any goods, other than goods declared tax-free u/s 6, for sale in Punjab and on sales to a registered dealer of containers or other materials for the packing of such goods:

Provided that in case of such sales, a declaration duly filled up and signed by the registered dealer to whom the goods are sold and containing prescribed particulars on a prescribed form obtained from the prescribed authority is furnished by the dealer who sells the goods :

Provided further that when such goods are used by the dealer to whom these are sold for purposes other than those for which these were sold to him, he shall be liable to pay tax on the purchase thereof at such rate, not exceeding the rate of tax leviable on the sale of such goods, as the State Government may by notification direct in respect of a class of dealers specified in such notification, notwithstanding that such purchase is not covered by Clause (ff) of Section 2.

21. It is not the case of the respondents in the written statement nor has the Assessing Authority stated in the order of assessment that the petitioner-firm purchased gur for some other purpose and used it for the manufacture of khandsari. The registration certificate entitled the petitioner-firm to purchase gur for the manufacture of khandsari and gur-sheera free of tax. It cannot, therefore, be said that the petitioner-firm used gur purchased for the manufacture of khandsari and gur-sheera for any purpose other than that for which it was sold to it. There was thus no misuse of the registration certificate by the petitioner-firm when it purchased gur free of tax for the manufacture of

khandsari and gur-sheera on the strength of the registration certificate. The proviso to Section 5(2)(a)(ii) of the Act has thus no applicability to this case. The dealer or dealers, who sold gur to the petitioner-firm on the basis of this registration certificate for the manufacture of khandsari and gur-sheera, may not be entitled to deduct from its/their gross turnover the value of such sales as khandsari is a tax-free goods but the petitioner cannot be held liable to the sales tax department for the payment of sales tax on the purchase of that gur. It was open to the seller to realise it from the purchaser, that is, the petitioner, but it is not open to the department to realise it from the purchaser because it is, under the Act, payable only by the seller. The levy of sales tax on the amount of Rs. 1,31,522.31 at the rate of 6 per cent. is, therefore, liable to be quashed.

22. For the reasons given above, I accept this writ petition with costs and quash the order of the Assessing Authority, Karnal, dated 10th April, 1968, in so far as it levies tax of Rs. 7,891.32 on the purchase value of gur amounting to Rs. 1,31,522.31 u/s 5(2)(a)(ii) of the Act. Counsel's fee Rs. 100.