
(1994) 04 MP CK 0034

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 22 of 1988

Hans Dal Mill

APPELLANT

Vs

Sales Tax Commissioner

RESPONDENT

Date of Decision : 05-04-1994

Acts Referred:

Constitution of India, 1950 — Article 20
Entry Tax Act, 1976 — Section 13, 7(1), 7(6)
Madhya Pradesh General Sales Tax Act, 1958 — Section 17(3)

Citation : (1994) 1 MPJR 412 : (1994) 39 MPLJ 936 : (1994) MPLJ 936

Hon'ble Judges : T.S. Doabia, J; S.K. Dubey, J

Bench : Division Bench

Advocate : K.K. Lahoti, for the Appellant; R.K. Vashishtha, A.A.G., for the Respondent

Judgement

T.S. Doabia, J.

This is an application u/s 44(4) of the M. P. General Sales Tax Act, 1958 (hereinafter referred to as the 1958 Act) by a dealer dealing in the business of whole pulses and broken pulses. In this application, the assessee wanted three questions of law to be referred to this Court but at the time of arguments, he restricted his submissions to seek a reference with regard to the questions mentioned at S. No. (B) and (C). The English rendering of the questions of law has been given in the petition and these are reproduced below :-

"(B) Whether S.T.O. alone is competent authority to impose order of penalty u/s 7(6) of the Entry Tax Act and hence the impugned penalty is illegal and without jurisdiction?

(C) Whether the impugned penalty can be said to be just and legal as it has been imposed by ignoring the Explanation that omission to affix seal as required by Section 7(1) of the Act in respect of transactions relating to manufactured broken Dal was a bonafide omission because Amendment made by Act No. 33/81 in Entry 14 of Schedule II was given a retrospective operation w.e.f. 1-9-1976 and

whole dal and broken dal were treated as different goods?"

The brief facts for the purpose of this reference may be noted.

An ex parte order of assessment was made on 12th of September, 1989. The total amount of purchases which were found exigible to entry tax were found to be to the tune of Rs. 8,80,000/-. On this, entry tax, at the rate of 1% was levied. This was done u/s 13 of the Entry Tax Act read with Section 17(3) of the 1958 Act. A penalty of Rs. 1,760/- was also imposed. The total demand raised was to the extent of Rs. 10,560/-. This best judgment assessment order which was ex parte in nature was passed on 12th of September 1979.

4-5. The assessee preferred an appeal before the appellate authority. This was decided on 18th September 1981. This appeal was allowed as the appellate authority came to a conclusion that this was not a case which necessitated ex parte proceedings to be taken against the assessee. It was further found by the appellate authority that the assessee was able to show that purchases were made by him from registered dealers to the extent of Rs. 7,21,322.51p. and, therefore, there was no justification to include this turnover in the taxable turnover. The matter was accordingly remanded to the assessing authority with liberty to pass fresh order in accordance with law.

The assessing authority gave a fresh look to the entire matter and passed an order on 9th of June 1982. After examining the facts and figures given by the assessee, the turnover for the purposes of entry tax was assessed at Rs. 1,01,509/-. The tax on this turnover was assessed at Rs. 1,015.09, the rate of tax being 1%. Total penalty to the extent of Rs. 350/- was also imposed. The total amount which thus became payable came to Rs. 1,365.09. As the assessee had already deposited a sum of Rs. 5,280/- an amount of Rs. 3,914.91 was required to be refunded. This refund could be made only after obtaining sanction by making a reference to the Dy. Commissioner of Sales Tax. The matter was as such referred to him. In the meantime, there was amendment in the law by Act No. 33 of 1981. The State Legislature amended Entry No. 14 in Schedule II of Entry Tax Act and gave retrospective effect to this amendment. This amendment was enforced retrospectively with effect from 1st September; 1976. Taking note of this amendment, the liability under the Entry Tax Act was again enhanced and penalty was also imposed.

Against the order of imposition of penalty another round of litigation was initiated. Assessee preferred an appeal before the appellate authority which was dismissed on 11th of April, 1985. The further appeal preferred before the Board of Revenue met with the same fate.

Still convinced that there was merit in the legal proposition propounded, the assessee filed an application u/s 44(1) of the 1958 Act requesting the Tribunal to refer the question of law for opinion to this Court. This prayer was declined by the Board of Revenue.

The assessee has filed the present application seeking intervention of this Court.

As is apparent from the question of law formulated by the assessee, he wants determination of two legal issues. The first submission is that penalty could not be imposed with retrospective effect. as penal provisions brought on Statute book can operate prospectively only. The second submission made by him is that the Sales Tax Officer was not within his rights to impose the penalty because no such power vested in him. According to him, there has to be a specific mention with regard to the conferment of power for levying penalty. Merely because under the Entry Tax Act, the Sales Tax Officer has been authorised to make assessment, he would not be clothed with the jurisdiction to levy penalty as well.

It is settled law that a reference is required to be made only if there is a question of law which has not been answered earlier. So far this case is concerned, the matter is not *res intergra*. The contention of the counsel for the assessee that penalty cannot be imposed retrospectively is a matter which stands decided by the Supreme Court in the case of *Shiv Dutt Rai Fateh Chand v. Union of India and Anr.* (1983) 53 STC 289 . In this case, Section 9(2) of the Central Sales Tax Act, 1956 was amended retrospectively in 1969 empowering the local sales tax authorities to assess, collect and enforce payment of tax including any penalty payable under the Central Sales Tax Act, 1956 (hereinafter referred to as the Central Act), as if the tax or penalty was payable under the local General Sales Tax Acts. Earlier, there was no express provision in the Central Act itself authorising the levy of any penalty for delay or default in payment of the tax due under the Central Act or for other breaches contemplated by the local General Sales Tax Acts, in so far as they were adopted by Section 9(2) of the Central Act. It was, however understood by all the local sales tax authorities in the States that penalty could also be collected by them in accordance with the provisions of the general sales tax law of the appropriate State in order to enforce the provisions of the Central Act including collection of tax thereunder. This action of the appropriate authorities was challenged in the Supreme Court in the case of *Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra*, The Supreme Court in above case laid down that the levy of penalty under the local General Sales Tax Act for delay or default in payment of tax due under the Central Sales Tax Act was not permissible in the absence of any provision in the Central Act for imposition of penalty for delay or default in payment of tax due thereunder. After this decision was given, Parliament by an Amending Act amended Section 9 by introducing therein sub-section (2A). This was done in the year 1976. By this amendment, it was provided that all the provisions relating to penalties in lieu of prosecution for an offence or in addition to the penalties or punishment for an offence but excluding the provisions relating to matters provided for in Sections 10 and 10A of the general sales tax law of each State shall, with necessary modifications, apply, in relation to the assessment, re-assessment, collection and the enforcement of payment of any tax required to be collected under the Central Act. The amending Act also contained a validating provision declaring that the provisions of Section 9 as so amended would have effect and should be deemed

always to have had effect in respect of the intervening period.

Petitions were filed in Supreme Court of India and the following contentions were raised :-

"1. that the introduction of sub-section (2A) in Section 9 of the Act does not have the effect of making the provisions relating to penalties leviable under the general sales tax laws of the States applicable to the proceedings under the Act;

that Parliament cannot adopt the provisions relating to penalties in the general sales tax laws of the States for enforcing the charge under the Act, as such a course would amount to an abdication of its essential legislative function by Parliament;

that the provision giving retrospective effect to sub-section (2A) of Section 9 of the Act and the provision validating all the penalties levied prior to the coming into force of the amending Act are violative of clause (1) of Article 20 of the Constitution;

the levy of penalties with retrospective effect is also violative of Article 19(1)(f) and (g) of the Constitution; and

XX XX XX XX"

The Supreme Court considered the question of retrospective levy of penalty and observed as under :-

"We shall now proceed to consider the question whether by reason of retrospective effect having been given to sub-section (2A) of Section 9 of the Act insofar as penalties are concerned by enacting Section 9 of the amending Act Parliament has contravened Article 20(1) of the Constitution."

After noticing the case law on the subject and the provisions of Article 20(1) of the Constitution Hon"ble Justice E. S. Venkataramiah (as His Lordship then was), observed as under :-

"After giving an anxious consideration to the points urged before us, we feel that the word "penalty" used in Article 20(1) cannot be construed as including a "penalty" levied under the sales tax laws by the departmental authorities for violation of statutory provisions. A penalty imposed by the sales tax authorities is only a civil liability, though penal in character. It may be relevant to notice that sub-section (2A) of Section 9 of the Act specifically refers to certain acts and omissions which are offences for which a criminal prosecution would lie and the provisions relating to offences have not been given retrospective effect by Section 9 of the amending Act. The argument based on Article 20(1) of the Constitution is, therefore, rejected.

The next point to be considered is whether the imposition and collection of penalty with retrospective effect amounts to an imposition of an unreasonable restriction on the fundamental right of the petitioners to own property and to

carry on business guaranteed under Article 19(1)(f) and (g) of the Constitution. We have already indicated above the circumstances under which it became necessary to levy penalties with retrospective effect and to validate all the proceedings relating to levy of penalties and recovery thereof."

It was further observed :-

"In this situation, where the dealers have utilised the money which should have been paid to the Government and have committed default in performing their duty, if Parliament calls upon them to pay penalties in accordance with the law as amended with retrospective effect it cannot be said that there has been any unreasonable restriction imposed on the rights guaranteed under Article 19(1)(f) and (g) of the Constitution, even though the period of retrospectivity is nearly nineteen years."

In view of the aforementioned decision of the Supreme Court, it becomes apparent that the levy of penalty with retrospective effect is permissible. It does not offend Article 20 of the Constitution of India.

The above decision of the Supreme Court was followed by the Bombay High Court in the case of Commissioner of Sales Tax v. Khimji Velji and Co., (1985) 58 STC 95.

To be fair to the counsel for the assessee we may notice a decision of the Supreme Court of India in the case of J.K. Cotton Spinning and Weaving Mills Ltd. and Anr Vs. Union of India (UOI) and Ors, According to him on the basis of law laid down by the Supreme Court, penalty cannot be imposed with retrospective effect. In the aforementioned case, the Supreme Court was considering the scope of Explanation to Section 51 of the Finance Act, 1982. This explanation reads as under :-

"Explanation.- For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force."

While interpreting the scope of the aforementioned provisions, the Supreme Court came to the conclusion that the Explanation in question does not refer to penalties and also observed that for any act or omission before the amendment, no penal action can be taken against the defaulting party. It may be seen that Explanation, was dealing with an offence and not penalty which is the position in the present case. The above case as such would not apply to the facts of this case.

So far as the question raised with regard to the power of the Sales Tax Officer to levy the penalty is concerned, the same is also without any merit. Once the Sales Tax Officer is held to have the power to make assessment under the State law, the power to levy penalty would also be there.

It may be seen that for the purposes of assessment of Entry Tax the procedure

provided under the 1958 Act is to be followed. As such, Sales Tax Officer who has the power to make assessment under the sales tax law would have the power to levy penalty while dealing a case under the Entry Tax Act.

In view of the position explained above, we are of the view that no question of law arises in this case. This prayer made in this petition seeking reference u/s 44(4) of the 1958 Act is declined.