
(2013) 02 MP CK 0001

In the Madhya Pradesh High Court

Case No : Writ Petition No. 1231 of 2004

Hindustan Lever Ltd.

APPELLANT

Vs

Assistant Commissioner

RESPONDENT

Date of Decision : 26-02-2013

Acts Referred:

Citation : (2014) 74 VST 220

Hon'ble Judges : Shantanu Kemkar, J;M.C. Garg, J

Bench : Division Bench

Final Decision : Disposed Off

Judgement

M.C. Garg, J.—The short point involved in this writ petition is as to whether "non-payment of less than 80 per cent of the tax along with return amounts to filing of a false return so as to attract the penalty u/s 69(3) of the M.P. Commercial Tax Act, 1994" (hereinafter referred to as "the MPCT Act"). The said provision reads as under:

"69. Power of Commissioner or appellate or revisional authority to impose penalty in certain circumstances.--(1) and (2) ...

(3) If the total tax shown as payable according to the return or returns and paid by a dealer for any period or part thereof is less than eighty per cent of the total tax assessed u/s 27 such dealer shall be deemed to have concealed his turnover or aggregate of his purchase prices or to have furnished false particulars of his sales or purchases in his return or returns to have furnished a false return or returns for the purpose of sub-section (1) unless he proves to the satisfaction of the Commissioner or the appellate or the revisional authority, as the case may be, that the concealment of the said turnover or the aggregate of purchase prices or furnishing of particulars of sales or purchases or furnishing of the false return or returns was not due to any fraud or gross negligence on his part."

According to the petitioner, once the return has been filed correctly and the tax has also been calculated in the return correctly, mere non-payment of the tax

along with return would not attract the penalty u/s 69(3) of the Act. It is submitted that in such circumstances, at the most provision of section 26 of the Act may be attracted which reads as under:

26. Returns.--(1)(i) Every such dealer as may be required so to do by the Commissioner by notice served in the prescribed manner;

(ii) Every registered dealer; and

(iii) Every dealer whose registration certificate has been cancelled under clause (d) or (e) of sub-section (9) of section 22,

shall furnish return in such form, in such manner, for such period, by such dates and to such authority as may be prescribed:

Provided that the Commissioner may, subject to such terms and conditions as may be prescribed, exempt any such dealer from furnishing such returns or permit any such dealer to furnish them for such different period, in such other form and to such other authority, as he may direct.

(2) Every dealer required to file return under sub-section (1) shall pay the full amount of tax payable according to the return as required by sub-section (2) of section 32 or the difference of the amount of tax payable according to the revised return as required by sub-section (3) of the said section, and the full amount of interest, if any payable under clause (a) or clause (b) of sub-section (4) and shall furnish the proof of such payment along with the return under sub-section (1) or the revised return under sub-section (3)."

2. On behalf of the respondents it is submitted that section 69(3) and section 26 deals with different situations. In the first case, if return has been filed but with payment of less than 80 per cent of the tax the proviso u/s 69(3) of the Act is attracted and the assessing officer is entitled to impose the penalty. Whereas, in the case of the delayed payment of the tax along with returns, section 26 is attracted where the assessee along with return and deposit of tax can also pay the penalty as per the provision of section 26(2).

3. Briefly stating the facts giving rise to the filing of this writ petition are that the petitioner who is an entry tax assessee for the year 1997-98 filed his return. After disclosing his turnover and the amount of taxable income, tendered tax which was less than 80 per cent of the amount due. The matter went to the assessing officer. However, the assessing officer also initiated proceedings for imposition of penalty u/s 69 of the MPCT Act on the ground of short-deposit of entry tax to the tune of Rs. 72,874 along with the return. A show-cause notice was given to the petitioner, who preferred to file a reply. The crux of the reply is in para 2 of the reply placed on record as annexure P2 which is reproduced hereunder for the sake of reference:

"2. As regards facts relating to entry tax assessment, the assessee had, inter alia, explained during the proceedings of assessment that they were under bona

fide impression and belief that entry tax is payable during the relevant time only upon the realisation of sale proceeds of the goods brought into the State of M.P. However, the assessee had maintained necessary books of account depicting the entry and receipt of various goods and the extract of entry of goods effected into the State of M.P., was produced during the assessment process and the same was accepted without any demur.

3. It is therefore clear from the fact that the assessee did not conceal any transactions in their books of account during the relevant period especially in the light of the fact that the figures relating to entry of various goods as extracted from the books of account was accepted for the purpose of assessment. Thus, the bona fides of the assessee are proved and established beyond the doubt that the books of account reflect true position and it is the figure that was extracted from the books of account is adopted and considered by the assessing authority for the purpose of assessment."

4. However, the assessing officer did not agree with the contentions of the petitioner and passed an order against the petitioner, who stopped appearing during the course of proceedings. Penalty was imposed upon the petitioner on the ground of deemed concealment due to deposit of tax less than 80 per cent of the tax payable. The assessment order so passed is annexure P3.

5. The petitioner aggrieved of the order of assessing officer filed a revision petition before the revisional authority vide annexure P4. The revisional authority finding that assessment though was made on the basis of books of accounts of the petitioner after observing that the petitioner has not concealed his turnover, confirmed the imposition of penalty on the ground of short-deposit of tax. Non-deposit of full tax was treated as negligence on the part of the petitioner. According to the revisional authority, the petitioner ought to have filed revised return and deposited the tax.

6. A perusal of the aforesaid order of the revisional authority shows that the order passed by the assessing officer was based upon non-deposit of the relevant amount of tax despite knowing its liability. Non-deposit of tax despite knowing its liability was found to be a good ground for imposition of penalty u/s 69(3) of the M.P.C.T. Act. It is against the aforesaid order, the petitioner has come to this court. The present writ petition has been filed by the petitioner aggrieved of the order of the revisional authority which order for the sake of reference is reproduced hereunder:

The use of words "false" "suppressing" or "concealed", etc., in section 10(7) clearly shows that penalty is not intended to be imposed under the sub-section for honest mistakes of clerical errors or omissions, but only for deliberate false entries or false evidence involving something like mens rea".

7. It is the contention of the petitioner that they having filed a return showing the actual turnover and the tax payable and as such, had no mens rea or any intention to avoid payment of tax and therefore, they are not liable to be

proceeded ahead u/s 69(3) of the Act thus it has been submitted that the penalty imposed against them is liable to be set aside.

8. It has been submitted by the petitioner:

(I) That the proceedings for penalty u/s 69 may be initiated if the dealer has--

(a) concealed his turnover, or the aggregate amount of purchase prices in respect of any goods, or

(b) has furnished false particulars of his sales or purchases in his return or returns for any year or part thereof, or

(c) has furnished a false return or returns for such period.

Thus the condition precedent for initiation of proceedings for imposition of penalty is concealment of turnover or furnishing false particulars of sales or purchases or filing of false returns. Non-payment or short-payment of tax is not punishable u/s 69.

(II) That sub-section (3) of section 69 which shifts the burden of proof upon the dealer if total shown as payable according to the return or returns and paid by the dealer for any period or part thereof is less than 80 per cent of the total tax assessed is only a rule of evidence and creates a rebuttable presumption about deemed concealment by the dealer. However, the presumption can be rebutted by dealer by showing that the concealment or furnishing of particulars of sales, etc., or furnishing of the false returns, etc., was not due to any fraud or gross negligence on his part.

(III) That thus even in rebuttal the dealer is required to prove that the concealment or furnishing of inaccurate particulars or filing of false returns was not due to any fraud or gross negligence.

(IV) That the amount of penalty calculated under sub-section (2) is also relatable to the amount of tax evaded. Hence if there is no concealment of turnover or furnishing of inaccurate particulars of sales or purchases or there is no filing of false returns, no proceedings u/s 69 can be initiated.

(V) That so far as the non-payment or short-payment of tax is concerned the Act provides for levy of penal interest u/s 26(4)(a).

(VI) That in the instant case the revisional authority has recorded a specific finding that the AO has assessed the turnover as per petitioner's books of accounts, as such, it is clear that the dealer has not concealed any turnover. However, the revisional authority confirmed the imposition of penalty only on the ground of non-deposit of tax. It may further be relevant to note that the AO has already levied interest u/s 26(4)(a) of the Act in his order dated December 11, 2000 but initiated proceedings u/s 69 by invoking section 69(3) and ultimately imposed penalty for short-deposit of tax by annexure P/3.

(VIII) That the provisions of section 43 of the MPGST Act which are in pari

materia with section 69(3) of the MPCT Act have been interpreted by Division Bench of this honourable court in case of Food Corporation of India Vs. Commissioner of Sales Tax, (copy of judgment already provided during last hearing). According to their Lordships, the dealer shall be deemed to have concealed his turnover if the tax returned is less than 80 per cent of the tax assessed does not have effect of altering the substantive law on the subject of penalty for concealment. It only introduces a special rule of evidence applicable to the case coming within a particular penalty bracket.

It is, therefore, being prayed that the petition be allowed and the impugned order be quashed.

9. On the other hand, learned counsel for the State/Revenue authority has submitted that the very fact that the tax therefore calculated at Rs. 2,15,361, but tax actually paid was Rs. 1,41,212, i.e., less than 80 per cent of the tax payable and therefore the case was covered u/s 69(3) of the Act and therefore the order of assessing officer and confirmed by the appellate authority and revisional authority cannot be set aside.

10. We have heard the submissions of both the learned counsel for the parties and also considered the judgments relied upon by the petitioner. The first judgment delivered by the honourable Supreme Court in the case of Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others, In that case it was held that while interpreting section 43 of the M.P.S.T. Act, which is in pari materia with the provisions contained u/s 69(3) of the M.P.C.T. Act, it was held as under:

"A return cannot be said to be "false" within the meaning of section 43 unless there is an element of deliberateness in it. It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no reasonable explanation forthcoming from the assessee for such want of care, the court may, in a given case, infer deliberateness and the return may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable so to include it, it would not be right to condemn the return as a "false" return inviting imposition of penalty."

11. In so far as the observations made in that case is concerned they have no application to the facts of this case inasmuch as in the present case, it is not a case that the return filed by the petitioner was a return filed in inadvertence or based upon wrong calculation.

12. Another judgment relied upon by the petitioner is the decision of the apex court delivered in the case of Hindustan Steel Ltd. Vs. State of Orissa, In that case it was held as under:

"... An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed

unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."

13. In the present case, the petitioner was fully aware of its liability inasmuch as they knew the amount in terms of return, tax payable yet they have not deposited the tax. They deposited less than 80 per cent of the due amount. This provision makes section 69(3) of the M.P.C.T. Act applicable in this case. The very fact that the petitioner knew as to what was its liability, non-payment of the said amount certainly amounted to negligence.

14. Another judgment relied upon by the petitioner is the judgment of this court in the case of Commissioner of Sales Tax v. Gajra Gears reported in [1996] 29 VKN 185 (MP), wherein it has been held as under:

"Imposition of penalty is a discretionary matter and the discretion is required to be exercised on sound judicial principles... The discretion cannot be arbitrary or capricious. The conduct of the non-applicant was not accompanied by a guilty mind there was no case of mens rea.

... there was no mens rea and the bona fide error yielded bona fide conduct and thus assured immunity from the rigour of section 43 of the Act."

15. Thus, the proposition as aforesaid are also not applicable to the present case for the reason that the provisions of section 69(3) of the M.P.C.T. Act as quoted above basically creates a presumption that when tax deposited is less than 80 per cent of the tax due, there is no question of M.P.C.T. Act or any guilt intention. The very fact that the tax has not been deposited as per the tax calculated, a presumption would arise provided that the tax deposited is less than 80 per cent of the amount due. In the present case, the aforesaid judgment is of no consequence for the simple reason that the penalty which can be levied has to be five times of the tax evaded, the question of discretion does not arise.

16. We have also gone through the other judgments cited on behalf of the petitioner. We are of the considered view that the judgments cited does not come to rescue the petitioner. Here it was not a case of concealment of the turnover or any mistake committed on behalf of the petitioner in calculating the tax. Here it was a case where the petitioner was fully aware of its liability yet decided not to deposit the tax which made it a "defaulter" within the definition of section 69 of the M.P.C.T. Act so as to call the return filed by him as false return.

17. The learned counsel for the petitioner is also relied upon the judgment of the Division Bench of this court delivered in the case of Ind Exports Limited v. Assistant Commissioner of Commercial Tax reported in [2011] 43 VST 450 (MP).

18. In that case, the Division Bench of this court set aside the imposition of penalty imposed under the M.P. Commercial Tax Act, 1994 as also the entry tax and on the basis of return filed by the assessee wherein, it was claimed that the entire turnover of sales of items including edible oil was duly disclosed but mistakenly the rate of tax on edible oil was shown as two per cent in place of four per cent. The assessment was completed on the basis of the disclosures made in the return raising an additional demand on account of variance in the rate of edible oil from two per cent to four per cent.

19. In that case, the Division Bench of this court has opined that in the peculiar facts of that case it could not have been said that the assessee concealed his turnover or filed a false return. In that case, the petitioners have been shown rate of tax to be paid two per cent in place of four per cent in its return was not taken as willful in non-filing of the due return and it was opined that in that case there was no deliberate or dishonest disclosure of the turnover correctly and therefore, it was held that in that case it was not the case of filing false return within the meaning of section 69 in invoking the penalty clause of imposition of penalty. The relevant discussion in that case reproduced here as under (pages 456 and 457 in 43 VST):

"11. On a plain reading of section 69 of the Act of 1994 it is clear that the imposition of penalty is attracted if the Commissioner or the appellate or the revisional authority is satisfied that the dealer has concealed his turnover or the aggregate amount of purchase prices in respect of any goods or has furnished false particulars of his sale or purchases, as the case may be, in his return or returns for any year or part thereof, or has furnished a false return or returns for such period. Thus, it has to be seen that whether the petitioner has concealed his turnover or has furnished false particulars of his sale or purchases in his return or has furnished a false return.

12. Undoubtedly, there is no allegation or findings that the petitioner has concealed his turnover or has furnished false particulars of sale or purchases in the return. On the other hand the petitioner's turnover as was disclosed in the return was duly accepted. So far as furnishing of false return the petitioner has stated that there is no furnishing of false return. The mistake about rate of tax was a bona fide mistake on its part and it had occurred due to lack of knowledge to the petitioner about the increase in the rate of tax from two per cent to four per cent with effect from May 1, 1999. It is not in dispute that though the petitioner recovered and paid the tax at the rate of two per cent but when the additional demand of Rs. 10,48,301 was raised, the same was deposited.

13. It is now well-settled that the order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceedings, and penalty

will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. To make the assessee liable for penalty fallacy should be in the disclosure of the facts required to be stated in the return. When the facts are fully disclosed in a return and are not misstated, the raising of a legal plea of exemption cannot make the return a false return within the meaning of section 69 unless there is an element of deliberateness in it. Where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable so to include it, it would not be right to condemn the return as a "false" return inviting imposition of penalty. The concealment of turnover and furnishing of a false return, to fall within the ambit of this section must be accompanied with mens rea. If the assessee had a bona fide doubt whether the particular item is taxable or not and for the reason if he did not show the purchases in the return, it cannot be said that there was any mens rea. The expressions "concealment of turnover", "furnished false particulars of sales or purchase" and "furnished false returns" used in section 69(1) clearly show that the element of mens rea is a necessary component. In order to expose the assessee to penalty, unless the case is strictly covered under the provision of penalty, the same cannot be invoked. [See Hindustan Steel Ltd. Vs. State of Orissa, Dadabhoy's New Chirimiri Ponri Hill Colliery Company Private Ltd. Vs. Commissioner of Sales Tax, Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others, , Govindram Chatramal Vs. Commissioner of Sales Tax, Commissioner of Sales Tax Vs. Shivandas Tekchand, Jayshree Chemicals Ltd. v. Additional Commissioner of Sales Tax, Orissa [1992] 87 STC 359 (Ori) and Commissioner of Income Tax, Ahmedabad Vs. Reliance Petroproducts Pvt. Ltd.,

14. In the light of the aforesaid pronouncement of the Supreme Court and this court and keeping in view the language of section 69, and the expressions used for making liable for imposition of penalty and the explanation offered by the petitioner in our considered view, it cannot be held that the petitioner deliberately or dishonestly shown rate of tax to be two per cent in place of four per cent in its return. It is also not a case that the petitioner had recovered the tax at the rate of four per cent and deposited it with the Department at the rate of two per cent On the other hand, it has recovered and deposited the tax at the rate of two per cent

15. Having regard to the aforesaid, we are of the view that no case u/s 69 of the Act of 1994 for imposition of penalty is made out, as according to us there was no deliberate action on the part of the petitioner, therefore, in the absence of mens rea, the provision of penalty could not have been invoked against the petitioner."

20. It was in the peculiar facts of that case as discussed above where there was a confusion in the mind of the assessee as to whether the tax was payable at two per cent or it was payable at four per cent The Division Bench considered that it

was a case where there was a mistake in deposit of tax due for the aforesaid reasons and that it was not a case of negligence.

21. Now coming to the argument of the learned counsel for the petitioner that in the present case even if there was deficiency in payment of tax determined, then also the case would have attracted the penalty in accordance with provision contained u/s 26 of the Act and not the one as provided for u/s 69 of the Act.

22. However, on perusal of the provisions of sections 69 and 26 of the M.P.C.T. Act it is clear that in section 69, the liability for imposition of penalty arises on account of less payment of tax that also below 80 per cent, when it was known fully well that it was their liability to pay full tax, whereas in the case of section 26, the liability to pay penalty at the time of filing of the return and payment of tax, at that time of filing of the return, when tax is paid simultaneously. Both these situations are different and deals with the different situation. However, even otherwise fiscal statutes are to be construed strictly and on their plain reading reference can be made to a judgment of the honourable Supreme Court delivered in the case of Catholic Syrian Bank Ltd. Vs. Commissioner of Income Tax, Thrissur,

23. In these circumstances, while answering the issue framed above against the petitioner, we find no infirmity in the order of the revisional authority. However, in the facts and circumstances of the case, we find appropriate to reduce the penalty from 5 times to 3 times. The petitioner would therefore be liable to pay penalty three times of the tax. If the tax unpaid and in case, he has already paid the penalty, as imposed by the assessing authority they would be entitled for refund of the balance.

24. With these observations, we dispose of the petition filed by the petitioner with no orders as to costs. C.C. as per rules.