

(2005) 01 P&H CK 0045
In the Punjab And Haryana At Chandigarh
Case No : C.W.P. No. 14180 of 2002

Integrated Informatics Private Limited	APPELLANT
Vs	
State of Haryana and Others	RESPONDENT

Date of Decision : 13-01-2005

Acts Referred:

Constitution of India, 1950 — Article 226
Haryana General Sales Tax Act, 1973 — Section 2, 2(1), 27, 3, 3(1)
Haryana General Sales Tax Rules, 1975 — Rule 24
Income Tax Act, 1961 — Section 271, 271(1)
Punjab General Sales Tax Act, 1948 — Section 11, 11A

Citation : (2005) 142 STC 182

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

Bench : Division Bench

Advocate : R.P. Sawhney and Salil Bali, for the Appellant; Jaswant Singh, Sr. Deputy Advocate-General, for the Respondent

Final Decision : Dismissed

Judgement

G.S. Singhvi, J.—Whether supply of five sets of line card testers by the petitioner to the Indian Telephone Industries Limited, Gonda (for short, "the I.T.I.") at a cost of Rs. 2,40,000 per set in furtherance of purchase order dated February 27, 1992 amounted to sale within the meaning of Section 2(1) of the Haryana General Sales Tax Act, 1973 (for short, "the 1973 Act") and the same was rightly assessed to tax is the question which arises for determination in this petition filed for quashing orders dated December 23, 1998 (annexure P5), May 17, 2000 (annexure P7) and February 28, 2002 (annexure P8) passed by the Excise and Taxation Officer (Inspection) Gurgaon-cum-Revisonal Authority (respondent No. 2) and Sales Tax Tribunal, Haryana (for short, "the Tribunal") respectively.

2. For deciding the aforementioned question, we may notice the relevant facts.

3. In response to notice inviting tenders issued by the I.T.I. for development and supply of 50 line card testers, the petitioner submitted tender dated April 27,

1991. Being the lowest, the petitioner's tender was accepted by the I.T.I. Thereafter, order No. 1900482-2/ 1394 dated February 27, 1992 was issued for purchase of five sets line card testers (semi-automatic tester Model 015) development model at the rate of Rs. 2,40,000 per set along with one set production model at a cost of Rs. 1,35,000. A sum equivalent to 10 per cent of the total cost was also remitted to the petitioner who, in turn, furnished bank guarantee of Rs. 1,33,500 in terms of Clause 2(a)(1) of the purchase order. The petitioner supplied five line card testers of Rs. 2,40,000 each on March 31, 1993 for a total cost of Rs. 12 lakhs. The goods were sent by road after workability test was conducted by the officers of the I.T.I. in the factory premises of the petitioner at Gurgaon on March 30, 1993. The test report was signed by the representatives of the petitioner and the I.T.I. However, the price of the goods was not paid to the petitioner who then filed a suit in the court of Sub-Judge, 1st Class, Delhi for restraining State Bank of Bikaner and Jaipur from releasing the amount of bank guarantee in favour of the I.T.I. It also filed a petition in the Court of Sub-Judge, 1st Class, Gurgaon for appointment of arbitrator. An application for restraining the I.T.I. authorities from disposing of the line card testers lying in its premises was also filed. In both the cases, interim injunctions were granted by the concerned courts. On notice, the I.T.I. through its representative appeared in the court at Gurgaon and raised an objection to its jurisdiction to entertain the prayer made by the petitioner. Additional Civil Judge (Senior Division), Gurgaon, to whom the case appears to have been transferred upheld the objection and dismissed the petition filed by the petitioner. Thereafter, the petitioner filed a miscellaneous petition on June 28, 1996 in Allahabad High Court for appointment of Arbitrator. In the reply filed on behalf of the I.T.I. it was admitted that the tender submitted by the petitioner had been accepted and that in pursuance of the purchase order, five line card testers were supplied. However, it was also averred that the petitioner is not entitled to get the price because the goods were of sub-standard quality and request made to the petitioner to rectify the defects did not yield any result. By an order dated May 13, 1999, a learned single Judge of the Allahabad High Court disposed of the petition giving liberty to the petitioner to file application in the court at Gonda for appointment of arbitrator. However, the petitioner did not file any such application.

4. In the meanwhile, the petitioner filed return for the assessment year 1992-93 showing its income as nil. On being questioned by the Assistant Excise and Taxation Officer, Gurgaon (East) (here-in-after described as the "Assessing Officer"), the petitioner gave out that it had not shown the sale of line card testers to the I.T.I. because the latter had not accepted the goods. The assessing officer vide his order dated January 23, 1998 (annexure P2) accepted the explanation given by the petitioner and held that it was not liable to pay sales tax under the 1973 Act by observing that the dealer had made sale to M/s. Indian Telephone Industries Ltd., Makanpur for which Central sales tax was charged and there is no local sale. He also computed the petitioner's liability under the Central Sales Tax Act, 1956 (for short, "the Central Act") as nil by

recording the following observations :

"The brief facts of the case are that the dealer made sale of line card testers to M/s. Indian Telephone Industries Ltd., Makanpur (U.P.) for Rs. 12,00,000 vide BNO 51/93 dated March 31, 1993 against one purchase order. Upon checking of quality, the buyer rejected the goods. As per the purchase order of M/s. Indian Telephone Industries Ltd., the goods were to be inspected for quality control before acceptance. In the instant case all the goods were rejected and as such were not accepted.

As the property/goods did not change hand or were not accepted the sale was not completed. Accordingly the dealer had shown this rejection of goods in the next quarterly return. The case was examined at length. The dealer had submitted written arguments on January 12, 1998 and reliance was made on the judgments cited as Bhopal Sugar Industries Ltd., Madhya Pradesh Vs. D.P. Dube, Sales Tax Officer, Bhopal Region, Bhopal, and The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., in which it has been held that where the title of the goods does not pass, it is merely an agreement to sell and not a complete sale. As such the goods rejection is allowed, as the goods are the property of the dealer the same have been taken in closing stock. The computation is done as under :

Gross turnover ... 12,00,000 Less rejections ... 12,00,000 Taxable turnover ...
"Nil"

5. After about 10 months, respondent No. 2 issued notice dated November 12, 1998 (annexure P3) to the petitioner u/s 40(1) of the 1973 Act proposing to revise order dated January 23, 1998. In its reply dated December 14, 1998, the petitioner took up the stand that the line card testers sent to the I.T.I. had been rejected and were lying in their premises and further that the same had not been removed because of the pendency of the suit. According to the petitioner, the sale had not been completed and, as such, the transaction was not liable to be taxed. After considering the plea of the petitioner and hearing its advocate, respondent No. 2 passed order dated December 23, 1998 (annexure P5) vide which he held the petitioner liable to pay tax amounting to Rs. 1,32,000. The reasons assigned by respondent No. 2 for not accepting the petitioner's plea read as under :

"M/s. Indian Telephone Industries Ltd., Makanpur District, Gonda (U.P.) has not rejected the goods but gave a report on the line card tester placed on the file in which overall performance of the tester is stated to be not satisfactory and the tester was required to undergo an adjustment and was required to be referred again to undergo a workability test which cannot be stated to be a rejection report.

In fact the goods in question have neither been returned by M/s. Indian Telephone Industries Ltd. to M/s. Integrated Informatics P. Ltd. up to now whereas the rejected goods should have been returned by the purchasing dealer

within a period of six months as required under the provisions of Rule 24 of the Haryana General Sales Tax Rules, 1975. The contention of the dealer that he has filed a suit in the court of law for damages/cost of the goods against the purchaser, i.e., M/s. Indian Telephone Industries Ltd., Makanpur District, Gonda (U.P.) is also a valid proof of sale. Further in this case the essential elements of sale, i.e., the agreement between two parties for transferring the property to constitute a sale is complete. There is presence of the seller, the buyer, the goods and consideration for the purpose of goods which are essential elements of sale. The goods are still in possession of the purchaser. So the property in goods passes to the purchaser and the sale is complete.

Therefore, the rejection allowed by the Assessing Authority is not in order and the order of the Assessing Authority is revised as under :

Gross turnover (ISS) ... 12,00,000 Taxable turnover at 10% ... 12,00,000
1,20,000 Surcharge ... 12,000 Total due ... 1,32,000."

6. The appeal filed by the petitioner against the aforementioned order was dismissed by the Tribunal vide its order dated May 17, 2000 (annexure P7). The Tribunal rejected the petitioner's plea that the property cannot be treated to have passed to the purchaser without acceptance by the latter of the goods as fault-free. The relevant extract of the Tribunal's order is reproduced below :

"The plain reading of the contract would indicate that first set was to be supplied as a production model and the other four were to be supplied as the approved goods. They were not found fault-free at the purchaser's end but he only wanted these to be adjusted. The terms of the payment also indicate various stages. The part of payment had to be made before the delivery. The goods were manufactured to the required specification. The claim of the assessee itself in the Civil plaint is for the value of the goods supplied."

7. The review application filed by the petitioner was dismissed by the Tribunal on the ground that order dated May 17, 2000 (annexure P7) passed by it did not suffer from any mistake apparent.

8. Shri R.P. Sawhney, learned Senior Advocate appearing for the petitioner, vehemently argued that order dated December 23, 1998 (annexure P5) passed by respondent No. 3 for levy of tax under the Central Act should be declared as without jurisdiction and the orders passed by the Tribunal dismissing the appeal filed against order, annexure P5, and the review petition should be declared as vitiated by error of law apparent on the face of the record because despatch of line card testers by the petitioner to the I.T.I. did not amount to sale within the meaning of Section 2(1) of the 1973 Act. Shri Sawhney emphasised that the line card testers sent by the petitioner were never accepted by the concerned authority of the I.T.I. and argued that the mere fact that the same were not returned within six months could not be made a ground for holding that the title of the property, i.e., line card testers stood transferred to the I.T.I. Shri Sawhney also assailed the notice issued by respondent No. 2 u/s 40(1) of the 1973 Act by

arguing that the same does not indicate application of mind by the officer concerned to the necessity of issuing notice for revising the assessment order passed by the Assessing Officer. In support of his arguments, Shri Sawhney relied on the judgments of the Supreme Court in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., , Bhopal Sugar Industries Ltd. v. D.P. Dube, Sales Tax Officer* [1963] 14 STC 406, *Commissioner of Sales Tax, U.P. v. Bhagwan Industries (P.) Ltd.* [1973] 31 STC 293 and *Bidar Sahakar Sakkare Karkhane Ltd. v. State of Karnataka* [1985] 58 STC 65 and of this Court in *D.M. Oil and General Industries v. Assessing Authority-cum-Additional Excise and Taxation Officer* [1983] 52 STC 199.

9. Shri Jaswant Singh, learned Senior Deputy Advocate-General appearing for the respondents, argued that the concurrent finding recorded by respondent No. 2 and the Tribunal that the transaction in question amounted to sale is a pure finding of fact based on correct appreciation of material placed on record and the same does not call for interference under Article 226 of the Constitution of India. He emphasised that all the elements necessary for constituting a sale were fulfilled in the case of the petitioner, inasmuch as, after accepting the tender submitted by it, the I.T.I. had issued purchase order dated February 27, 1992 : had advanced money for supply of line card testers : the goods were dispatched by the petitioner and received by the purchaser : the purchaser did not reject the goods in the first instance but pointed out that the performance of the testers was not satisfactory and the same required to undergo an adjustment : the goods were not returned by the I.T.I. authorities to the petitioner within a period of 6 months as required by Rule 24 of the Haryana General Sales Tax Rules, 1975 (for short, "the rules") and the petitioner had initiated legal proceedings for realisation of price of the goods and damages. Shri Jaswant Singh referred to the averments contained in paragraphs 11 to 17 of affidavit dated June 28, 1996 filed by Shri Sarvesh Sharma on behalf of the petitioner in Allahabad High Court to show that the petitioner had always treated the sale as completed in all respects and argued that at this stage, it cannot turn around and deny its liability to pay tax under the Central Act. Shri Jaswant Singh also countered the argument of Shri Sawhney on the issue of violation of Section 40(1) of the 1973 Act and submitted that notice dated November 12, 1998 (annexure P3) issued by respondent No. 2 gave sufficient indication about the proposed revision of order dated January 23, 1998 and in any case, the petitioner is estopped from questioning the legality of orders dated December 23, 1998 and May 17, 2000 on the ground of violation of Section 40(1) because it did not raise any such objection in the reply filed before respondent No. 2 and the appeal filed before the Tribunal.

10. We have given serious thought to the respective arguments and have carefully gone through the records including photostat copies of documents produced by Shri Sawhney. These include letters dated November 4, 1993 and November 5, 1993 sent by Indian Telephone Industries Ltd. to the Branch Manager, State Bank of Bikaner and Jaipur, Naraina Industrial Estate, Phase-I,

New Delhi and the petitioner respectively : letter dated November 11, 1993 sent by the bank to the petitioner and photostat copies of orders dated November 3, 1993 and October 31, 1994 passed by Sub-Judge 1st Class, Delhi in Suit No. 625 of 1993 and Sub-Judge 1st Class, Gurgaon in Case No. 124 of 1994 respectively.

11. Section 2(1) of the 1973 Act (as it was up to 1995), which defines the term "sale" and Section 2(p), which defines the term "taxable turnover", read as under :

"Section 2(l) of the 1973 Act :

"Sale" means any transfer of property in goods for cash or deferred payment or other valuable consideration and includes--

(i) transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(ii) transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract entered into on or after the 18th day of April, 1984;

(iii) delivery of goods on hire-purchase or any system of payment by installments;

(iv) transfer of the right to use any goods except tents, kanats, chholdari, crockery, utensils, furniture and all other goods dealt with by the tent dealers as also other allied dealers for decoration and lightning purposes for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply to a person to whom such transfer, delivery or supply is made but does not include a mortgage, hypothecation, charge or pledge.

Note 1 : Sub-Clauses (i) and (v) shall be deemed to have come into force on the second day of February, 1983.

Note 2 : Sub-Clauses (ii) and (iv) so far as it relates to the goods, namely, shuttering material (used in construction of buildings), tents, kanats, chholdari, crockery, utensils, furniture and all other goods dealt with by the tent dealers as also other allied dealers for decoration and lightning purposes, electricity meters and water meters, shall come into force with effect from the 1st day of April, 1987 :

Provided that a dealer, who has charged tax or has made use of authority of his

registration certificate under this Act or the Central Sales Tax Act, 1956, during the period from 18th day of April, 1984 to 31st day of March, 1987, shall be liable to pay tax to the extent of charging of tax or tax on the goods purchased on the authority of his registration certificate and used in the execution of the works contract, as the case may be, and for this purpose sub-Clause (ii) and sub-Clause (iv) shall be deemed to have come into force with effect from the 18th day of April, 1984.

Note 3 : A sale falling under sub-Clause (ii) shall be deemed to have taken place within the State if the goods involved in the execution of a works contract are within the State at that time of their use in the execution of the works contract.

Note 4 : A sale falling under sub-Clause (iv) shall be deemed to have taken place within the State if the goods in respect of which right to use has been transferred are within the State at the time of their use;

Section 2(p) of the 1973 Act :

"Taxable turnover" means that part of a dealer's gross turnover which remains after allowing deductions u/s 27 of the Act."

12. A reading of the above reproduced definition of the term sale shows that it is very wide and comprehensive. However, for the purpose of deciding the question raised in this petition, we shall confine our consideration to the main part of the definition which lays down that any transfer of property in goods for cash or deferred payment or other valuable consideration amounts to sale. An analysis of this part of the definition shows that for the purpose of deciding whether or not a particular transfer of goods amounts to sale, the court has to find out whether there has been an agreement between the parties : whether there has been a transfer of goods by the seller to the purchaser in furtherance of such agreement and whether such transfer is for cash or deferred payment or other valuable consideration. If these ingredients are satisfied, the transaction will have to be treated as sale. In *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, the Supreme Court, while considering the vires of the Madras General Sales Tax Act, 1939, noticed a large number of Indian and English precedents on the subject and laid down the following proposition :

"According to the law both of England and of India, in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, which of course presupposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be no sale. Thus, if merely title to the goods passes but not as a result of any contract between the parties, express or implied, there is no sale. So also if the consideration, for the transfer was not money but other valuable consideration it may then be an exchange or barter but not a sale. And if under the contract of sale, title to the goods has not passed, then there is an agreement to sell and not a complete sale."

13. In the present case, all the ingredients necessary for making the transaction involving supply of line card testers by the petitioner to the I.T.I. as sale were fulfilled. At the cost of repetition, we deem it proper to mention that line card testers were supplied by the petitioner to the I.T.I. in furtherance of purchase order dated February 27, 1992 : the latter had given advance towards the price of the goods : the petitioner gave bank guarantee of Rs. 1,33,500 for ensuring supply of the goods : the goods were despatched by the petitioner and received by the I.T.I. authorities after the workability test was conducted in the petitioner's factory at Gurgaon; the goods were not returned by the I.T.I. authorities within six months from the date of receipt and the petitioner had filed claim for price of the goods and damages. Therefore, the finding recorded by respondent No. 2 and the Tribunal that the transaction in question amounted to sale within the meaning of Section 2(1) of the 1973 Act, which is essentially a finding of fact based on evaluation of the facts placed before them, cannot be held as vitiated by an error of law. The mere possibility of this Court, on a re-evaluation of the facts and other material brought on record, forming a different opinion cannot be made a ground for nullifying the impugned orders.

14. The petitioner's plea that sale of line card testers cannot be treated as complete because the I.T.I. authorities had not accepted the goods is falsified by the averments contained in paragraphs 7 to 16 of affidavit dated June 28, 1996 of Shri Sarvesh Sharma filed in Allahabad High Court along with Civil Miscellaneous Petition No. 3 of 1996. The same read as under :

"7. That since the tender submitted by the applicant was lowest and the same was accepted by the opposite party No. 1. A true copy of the said offer of the applicant dated May 25, 1991 is being filed herewith and marked as annexure No. 2 to this affidavit. The applicant is also filing the letter of acceptance of opposite party No. 1 and also the purchase order issued by the opposite party No. 1 dated February 27, 1992 and the same are marked as annexure Nos. 3 and 4 respectively to this affidavit.

8. That the opposite party No. 1 placed an order No. 1900482-2/1394 dated February 27, 1992 for purchase of 5 sets line card testers (semi-automatic tester model 015) development model at the rate of Rs. 2,40,000 per set along with one set production model at the rate of Rs. 1,35,000 for the total purchase price of Rs. 13,35,000.

9. That in terms of Clause 2(a)(1) of the purchase order dated February 27, 1992, the applicant furnished bank guarantee for the sum of Rs. 1,33,500.

10. That the applicant on March 31, 1993, supplied 5 Nos line card testers each of the value of Rs. 2,40,000 for the total cost of Rs. 12 lakhs plus escalation due to Foreign Exchange rate variation plus sales tax by road after workability test conducted by the officers of the opposite party No. 1 in the factory premises of the applicant at Gurgaon from 30th March, 1993.

11. That the opposite party No. 1 conducted test of 5 sets line card testers from

March 30, 1993 who found O.K. in all respect and subsequently the test report was signed by the opposite party No. 1 as well as by the applicant. A photo copy of the said report dated April 3, 1993 is being filed herewith and marked as annexure No. 5 to this affidavit.

12. That in accordance with the terms and conditions of the purchase order, the opposite party No. 1 agreed to release 60 per cent of the total cost of the first line card tester and 80 per cent of the price against deliveries of remaining 4 testers but the opposite party No. 1 failed to fulfil their contractual obligations enshrined in the agreement. For the sake of convenience, the applicant is reproducing relevant terms and conditions as under :

"2. Commercial:

(a) Payment terms.--Payment will be made at various stage as follows :

13. 10 per cent payment of total order value as advance will be made against submission of bank guarantee of same amount valid for 1 and/or years or 2 months after completion of supply whichever is earlier.

14. Against supply of first set after demonstrating the workability to Research and Development Unit 60 per cent payment of the value of that set will be made and balance 30 per cent after acceptance of the material.

15. For the remaining sets the payment will be made against phased delivery as follows:

80 per cent against delivery and balance 10 per cent after acceptance of the material.

(b) Exchange rate : Prices are based on Reserve Bank of India selling exchange rate of 1 US dollar - Rs. 25.86. Any change in exchange rate by 1 per cent shall change the price by 0.3 per cent.

Exchange rate applicable shall be that prevailing on 2 months prior to date of delivery of first set for the purpose of escalation.

16. That the opposite party No. 1 did not fulfil its part of the contract and did not pay the price as agreed by the opposite party No. 1. Consequently, the applicant suffered great loss. Thus, the opposite parties are liable to pay the cost of line card testers of Rs. 12 lakhs along with interest at 18 per cent per annum besides the charges of Central sales tax at 10 per cent plus surcharge and escalations due to Foreign exchange rate variations, etc. Break up of losses sustained by the applicant is as under :

(a) Cost of equipment : Rs. 12,00,000 (b) Foreign exchange rate escalation : Rs. 80,603 (c) Central sales tax : Rs. 1,28,060 (d) Surcharge : Rs. 12,806 (e) Cost of opportunity lost : Rs. 6,07,500 (f) Interest at 18% per annum from April 1, 1993 till the date of payment : Rs. 20,28,069."

15. A reading of the above reproduced contents of the affidavit of Shri Sarvesh

Sharma leaves no room for doubt that on its part, the petitioner had treated the sale as complete. It had demanded price and also claimed damages. Therefore, it was not open to the petitioner to take a contrary stand before the authorities constituted under the 1973 Act or seek invalidation of the impugned orders by contending that the transaction involving supply of line card testers to the I.T.I, did not amount to sale within the meaning of Section 2(1) of the 1973 Act.

16. There is another reason for not accepting the petitioner's plea. The expression "taxable turnover" as defined in Section 2(p) means that part of the dealer's gross turnover which remains after allowing deductions u/s 27 of the 1973 Act. Section 27 specifies various deductions which are to be excluded from taxable turnover. Clause (a) of Rule 24 of the Rules, which has been framed with reference to Section 27 of the 1973 Act, lays down that in calculating the taxable turnover, the dealer may deduct from his gross turnover the amount allowed to a purchaser in respect of the goods returned by him to the dealer within a period of six months from the date of purchase of such goods provided that the account shows the dates on which the goods were purchased and returned and the amount for which refund was given or credit was allowed to the purchaser. In the present case, it is an undisputed position that line card testers supplied by the petitioner to the I.T.I. in furtherance of purchase order dated February 27, 1992 were not returned within six months. Initially, the I.T.I authorities wanted rectification of the equipments but, later on, they decided to cancel the supply order. This is clearly borne out from a reading of letters dated November 4, 1993 sent by Materials Manager (Research and Development) to the Branch Manager, State Bank of Bikaner and Jaipur, Naraina Industrial Estate, Phase-I, New Delhi and November 5, 1993 sent to the petitioner. The averments contained in paragraphs (iii) to (v) of affidavit dated May 15, 2000 filed by Shri Sarvesh Sharma, Managing Director of the petitioner before the Tribunal, which are also indicative of this, read as under :

"(iii) That the buyers through their registered letter dated June 11. 1993 informed the appellant that the workability of the supplied testers had been checked as per the specifications furnished and the testers had failed in most of the parameters. Accordingly, the buyers advised the appellant to take immediate action to rectify the testers to meet the required specifications. The period of the bank guarantee furnished by the appellant was also sought to be extended up to December 31, 1993.

(iv) That the buyers through their letter dated June 2, 1994 informed the appellant that the buyers had closed the order and asked the appellant to return the advance amount as well as line cards lying with the appellant.

(v) That the buyers through their subsequent letter No. MRD/10/0260B/190048-2 dated July 25, 1994 alleged that no action had been taken by the appellant towards returning the advance amount and informed the appellant that they had finally cancelled the order and that the buyers were free to take any action for recovering the advance amount as well as Line Cards

through the sale of rejected testers and the balance amount through legal proceedings."

17. The argument of Shri Sawhney that notice dated November 12, 1998 (annexure P3) should be quashed because the particulars of illegality or impropriety committed by the Assessing Officer were not specified therein is without merit and is liable to be rejected. A reading of the notice shows that respondent No. 2 had categorically informed the petitioner that in his opinion, the Assessing Officer had erred in making assessment for the year 1992-93. The petitioner did not contest the notice on the ground that it was laconic or was ultra vires to Section 40(1) of the 1973 Act. In the appeal filed before the Tribunal, the petitioner did not challenge order dated December 23, 1998 (annexure P5) on the ground that the notice issued by respondent No. 2 was bad for want of particulars of illegality or impropriety. Therefore, in the writ petition, the petitioner cannot, for the first time, take this plea. Moreover, by having refrained from raising any objection to the jurisdiction of respondent No. 2 to initiate proceedings u/s 40(1) of the 1973 Act, the petitioner will be deemed to have waived his right to challenge the same at a later stage.

18. There is another reason for our disinclination to entertain the objection of the petitioner against notice dated November 12, 1998. Section 40 of the 1973 Act lays down that "the Commissioner may on his own motion call for the record of any case pending before or disposed of by any officer appointed under Sub-section (1) of Section 3 of the Act to assist him or any Assessing Authority or appellate authority other than the Tribunal for the purpose of satisfying himself as to the legality or propriety of any proceedings or of any order made therein and may pass such order in relation thereto, as he may think fit...." In notice annexure P3 respondent No. 2 had clearly indicated his intention to exercise his power u/s 40(1) for the purpose of revising the order passed by the Assessing Authority. Therefore, the petitioner will be deemed to have been made aware of the ingredients which were necessary for invoking that power and, it cannot raise the plea of violation of Section 40 of the 1973 Act and that too, at this belated stage. In *M/s. K.P. Madhusudhanan Vs. Commissioner of Income Tax, Cochin*, the Supreme Court considered the question whether non-mention of the explanation to Section 271(1)(c) of the Income Tax Act, 1961 could be made a ground to quash the penalty imposed by the competent authority. While rejecting the plea of the assessee, their Lordships held :

"The Explanation to Section 271(1)(c) is a part of Section 271. When the Assessing Officer or the Appellate Assistant Commissioner issues a notice u/s 271, he makes the assessee aware that the provisions thereof are to be used against him. These provisions include the explanation. By virtue of the notice u/s 271 the assessee is put to notice that, if he does not prove, in the circumstances stated in the Explanation, that his failure to return his correct income was not due to fraud or neglect, he shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof and, consequently be liable

to the penalty under the section. No express invocation of the Explanation to Section 271 in the notice u/s 271 is necessary before the provisions of the Explanation are applied."

19. The judgments of the Supreme Court in Commissioner of Sales Tax v. Bhagwan Industries (P.) Ltd. [1973] 31 STC 293 and Bidar Sahakar Sakkare Karkhane Ltd. Vs. The State of Karnataka, and of the single Bench in D.M. Oil and General Industries Vs. Authority-Cum-Additional Excise and Taxation Officer, are clearly distinguishable. In first of these cases, the Supreme Court interpreted the expression "reason to believe" appearing in Section 21 of the U.P. Sales Tax Act, 1948 and held that the Assessing Authority can take action under that section if there are, in fact, some reasonable grounds for it to believe that whole or any part of the turnover by a dealer had escaped assessment. In the second case, the Supreme Court interpreted Section 21(2) of the Karnataka Sales Tax Act, 1957 and held that the notice issued by the Assessing Authority without including harvesting charges in taxable turnover was bad for want of application of mind. In the third case, the learned single Judge of this Court interpreted Section 11-A of the Punjab General Sales Tax Act, 1948 and held that when the Assessing Authority intends to rely on some additional information for reopening the assessment u/s 11 of the said Act, it is bound to disclose the material to the assessee before taking any action against him. In the case before us, the petitioner was given sufficient notice of the ground on which it was proposed to revise the assessment order and, as mentioned above, it did not object to the same on the ground of non-compliance of Section 40(1) of the 1973 Act.

20. In the result, the writ petition is dismissed.