
(2000) 08 P&H CK 0099
In the Punjab And Haryana At Chandigarh
Case No : C.W.P. No. 8671 of 2000

Jai Durga Marble

APPELLANT

Vs

State of Haryana and Others

RESPONDENT

Date of Decision : 26-08-2000

Acts Referred:

Haryana General Sales Tax Act, 1973 — Section 39
Limitation Act, 1963 — Section 5

Citation : (2001) 123 STC 34

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

Bench : Division Bench

Advocate : Avneesh Jhingan, for the Appellant; Jaswant Singh, Deputy Advocate-General, for the Respondent

Final Decision : Allowed

Judgement

G.S. Singhvi, J.—Whether delay in the filing of appeal u/s 39(1) of the Haryana General Sales Tax Act, 1973 (for short, "the 1973 Act") against the order of assessment can be condoned by applying the provisions of the Limitation Act, 1963, is the only question which arises for determination by the court in this petition filed under Article 226 of the Constitution of India.

2. A perusal of the record shows that the appeal filed by the petitioner u/s 39(1) of the 1973 Act against the order dated March 27, 1998 passed by the Excise and Taxation Officer-cum-Assessing Authority, Rewari (respondent No. 2) holding the petitioner liable to pay tax amounting to Rs. 85,571 was entertained by the Joint Excise and Taxation Commissioner (Appeals), Faridabad Circle, Faridabad (respondent No. 3) on November 5, 1998 subject to the condition of furnishing surety bond but, later on, by an order dated November 30, 1998, the said respondent dismissed the appeal as barred by limitation. The review petition filed by the petitioner u/s 41 was also dismissed by respondent No. 3 on October 5, 1999 and appeal against that decision was dismissed by the Sales Tax Tribunal (for short, "the Tribunal").

3. Shri Avneesh Jhingan referred to the decision of the Full Bench in *Bharat Rubber and Allied Industries Vs. The State of Punjab and Others*, and the order dated May 10, 2000 passed by the division Bench in C.W.P. No. 16973 of 1998-*Shivam Riceland Vs. State of Haryana*, and argued that the order passed by respondent No. 3 dismissing the appeal as time-barred should be declared illegal and quashed with a direction that the same be decided on merits. The learned Deputy Advocate-General argued that there is no provision in the 1973 Act for condonation of delay in the filing of appeal u/s 39 and in the absence of statutory empowerment, the appellate authority cannot condone the delay in the filing of appeal. In support of his argument, Shri Jaswant Singh relied on the decision of the division Bench in *Ballarpur Industries Limited Vs. State of Haryana and Another*, .

4. We have thoughtfully considered the respective submissions. In *Bharat Rubber and Allied Industries Vs. The State of Punjab and Others*, the following questions of law were referred to the Full Bench for its opinion :

"(1) Whether the benefit of Section 12(2) of the Limitation Act can be allowed to an applicant in reference application filed u/s 22 of the Punjab General Sales Tax Act, for the days spent in obtaining the certified copy of the order of the Tribunal against which reference is sought ?

(2) If the benefit of Section 12(2) cannot be allowed, whether the delay in filing the reference application can be condoned u/s 5 of the Limitation Act by extending the period of limitation by the number of days spent in obtaining the certified copy of the order of the Tribunal against which reference is sought ?"

5. It was argued on behalf of the State that in the absence of any provision in the Punjab General Sales Tax Act, 1948 for condonation of delay, a reference application filed after the expiry of the period of limitation cannot be entertained. While rejecting that argument, the Full Bench observed as under :

"We are unable to appreciate the argument in view of the clear provision contained in Section 29(2) of the Limitation Act and in the absence of an express provision to the contrary in the Sales Tax Act, Sections 4 to 24, inclusive of Sections 5 and 12 of the Limitation Act, would apply to all proceedings under the special law, i.e., the Sales Tax Act, in the present case."

6. The question which arose for consideration before the division Bench in the case of *Shivam Riceland Vs. State of Haryana*, was whether the Tribunal constituted under the 1973 Act can condone delay in the filing of appeal u/s 39(2) by invoking the provisions of the Limitation Act, 1963. The Division Bench referred to the observations made by the Full Bench in the case of *Bharat Rubber and Allied Industries Vs. The State of Punjab and Others*, and held that Section 5 of the Limitation Act would apply to the proceedings under the 1973 Act.

7. In view of the abovementioned decisions, we do not have any hesitation to hold that respondent No. 3 and the Tribunal constituted under the 1973 Act have

the power to condone delay by invoking the relevant provisions of the Limitation Act, 1963.

8. Before parting with this aspect of the case, we may refer to the decision of the division Bench in Ballarpur Industries Limited Vs. State of Haryana and Another, on which reliance has been placed by the learned Deputy Advocate-General in support of his submission that delay in the filing of appeal u/s 39 cannot be condoned. The facts of that case show that the application filed by the petitioner therein under Rule 28A(5) of the Haryana General Sales Tax Rules, 1975 was dismissed by the concerned authority as barred by limitation. Before this Court, it was argued that the rule prescribing the period of limitation is directory and, therefore, the application could not have been dismissed as barred by time. While rejecting this argument, the court held as under :

"The argument of the learned counsel for the petitioner is that even though the application for exemption was not filed within 90 days of the unit going into commercial production, the petitioner is still entitled to the exemption from the period of 90 days immediately preceding the date of the application whenever such application is made. We find no merit in this contention which is contrary to the plain reading of the rule. If the argument were to be accepted there would be no purpose in prescribing the period of 90 days in Rule 28A(5) of the Rules and fixing the starting point of the limitation from the date when the unit goes into commercial production. Thus, if an eligible industrial unit is desirous of availing the benefit it has to apply within 90 days from the date it goes into commercial production and not thereafter. The expression "commercial production" has not been defined in the Rules but as understood in common parlance it means when the unit starts sale of its products in the market. The units very often go into trial production which would be different from commercial production but when the product is sought to be sold, it is then only that the unit will be said to have gone into commercial production. In other words, the moment the eligible unit issues the first sale voucher it would go into commercial production for the purpose of this rule and the application for exemption will have to be filed within 90 days from that date. From the language used in Sub-rule (5) of Rule 28A of the Rules, it is clear that the limitation of 90 days prescribed therein is mandatory and there is no provision for any authority to condone this delay or entertain an application beyond the period fixed therein. In the case before us the application for exemption from sales tax was filed by the petitioner-company on September 9, 1993 whereas it had gone into commercial production on October 10, 1992. It is thus clear that the application for exemption was filed much beyond the period of 90 days and the same was rightly rejected both by the Higher Level Screening Committee and by the appellate authority. In this view of the matter, no fault can be found with the impugned orders."

9. A careful reading of the abovementioned judgment shows that the question as to whether the provisions of the Limitation Act, 1963 can be applied for deciding an appeal/application filed under the 1973 Act or the Rules framed thereunder

was neither raised nor decided by the division Bench and this must be the reason why the division Bench did not notice the judgment of the Full Bench in *Bharat Rubber and Allied Industries Vs. The State of Punjab and Others*, . Be that as it may, the decision relied upon by the learned Deputy Advocate-General cannot be read as laying down a proposition of law contrary to the one laid down by the Full Bench. Moreover, in a later decision in the case of *Shivam Riceland (C.W.P. No. 16973 of 1998 decided on May 10 2000) [2001] 123 STC 23 (P&H)*, the same division Bench held that Section 5 of the Limitation Act, 1963 is applicable to the proceedings under the 1973 Act. In view of this, the opinion expressed in the case of *Ballarpur Industries Limited Vs. State of Haryana and Another*, , must be treated as confined to the facts of that case and the same cannot be relied upon for declaring that the appellate authority/Tribunal constituted under the 1973 Act have the power to condone the delay in filing of the appeal u/s 39 of the said Act.

10. We shall now consider the issue as to whether the order passed by respondent No. 3 dismissing the petitioner's appeal as barred by limitation is legally correct and justified. A perusal of the record shows that the order of assessment was served upon the petitioner on May 5, 1998 and the appeal filed by it was received in the office of respondent No. 3 on July 7, 1998, i.e., one day after the expiry of the prescribed period of limitation (60 days). Respondent No. 3 dismissed the appeal as time-barred with the observation that in view of the decision of the Tribunal reported in (1998) 12 PHT 236, he had no power to condone the delay.

11. In our opinion, the dismissal of the petitioner's appeal as barred by time and confirmation thereof by the Tribunal is vitiated by a patent error of law and, therefore, the impugned orders deserve to be quashed. The assumption on which respondent No. 3 proceeded to decide the appeal, namely, the absence of power to condone the delay will have to be treated as erroneous in view of the judgment of the Full Bench in *Bharat Rubber and Allied Industries Vs. The State of Punjab and Others*, , and of the Division Bench in *Shivam Riceland v. State of Haryana (C.W.P. No. 16973 of 1998 decided on May 10, 2000)*-- *Shivam Riceland Vs. State of Haryana*, . Therefore, the order passed on the basis of such assumption cannot be sustained.

12. In the result, the writ petition is allowed. Order dated November 30, 1998 passed by respondent No. 3 is quashed with the direction that the appeal filed by the petitioner be heard and decided on merits.