
(2010) 02 P&H CK 0355

In the Punjab And Haryana At Chandigarh

Case No : Value Added Tax Appeal No. 4 of 2009

Jain Steel Industries

APPELLANT

Vs

State of Punjab and Another

RESPONDENT

Date of Decision : 17-02-2010

Acts Referred:

Punjab Value Added Tax Act, 2005 — Section 51, 51(6), 51(7)

Citation : (2011) 36 VST 485

Hon'ble Judges : Mehinder Singh Sullar, J; Ashutosh Mohunta, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Mehinder Singh Sullar, J.—The brief facts, relevant for disposal of present appeal, filed by the Assessee-M/s. Jain Steel Industries (for brevity, "the Assessee"), emanating from the record and as set up by the Assessee, are that during the course of its normal business of sale and purchase, it sold the goods falling under the category of "iron and steel" to Bombay firms, vide bills on inter-State sale basis against C form and charged CST at the rate of two per cent on those goods, in view of the notification dated March 31, 1995. On April 23, 2006, while transporting the goods to its destination, the driver of the vehicle voluntarily reported the goods at ICC (Export), Shambhu and produced the copies of two invoices/bills (annexures A1 and A2) along with the receipts. The checking officer claimed that the goods were liable to be taxed at the rate of four per cent, while the Assessee has taxed it at the rate of two per cent. It was claimed by the Assessee that under similar circumstances, vide order dated March 5, 2001 (annexure A3), the tax was charged at the rate of two per cent, but in the instant case, the penalty was wrongly imposed by the Assistant Excise and Taxation Commissioner, vide order dated April 28, 2006 (annexure A4).

2. According to the Department, as the consignor/dealer has charged CST at the rate of two per cent, instead of four per cent, therefore, taking it to be a case of not covered by proper and genuine documents, a show-cause notice was issued

to the Assessee.

3. In the wake of notice, the Assessee tried to explain that in view of prevailing rate at the relevant time, only two per cent tax was chargeable on the iron and steel. The explanation put forth by the Assessee did not find favour and the Assistant Excise and Taxation Commissioner, ICC (Export), Shambhu imposed a penalty of Rs. 2,88,612 u/s 51(7)(b) of the Punjab Value Added Tax Act, 2005 (for short, "the Act"), vide impugned order (annexure A4).

4. Aggrieved by the aforesaid impugned order, the Assessee filed the appeal, which was dismissed by the Appellate Authority, vide impugned order dated February 19, 2007 (annexure A6).

5. The appeal filed by the Assessee was also dismissed by the Punjab VAT Tribunal, Chandigarh, vide impugned order dated August 16, 2007 (annexure A9).

6. The Assessee still did not feel satisfied with the impugned order and filed the present appeal in this Court.

7. The appeal was admitted to determine the following substantial questions of law:

(i) Whether, on the facts and circumstances of the case, the authorities below have rightly invoked the provisions of Section 51 of the Punjab VAT Act, 2005 and imposed the penalty when the goods were voluntarily reported at ICC and therefore cannot remain unaccounted in the books of account ?

(ii) Whether provisions of Section 51 can be invoked and goods detained, if there is a bona fide difference of opinion on the application of rate of tax on a particular kind of goods ?

(iii) Whether the provisions of Section 51(7) can be applied and penalty imposed, in a case where the transaction is of inter-State sales and not taxable under the Punjab VAT Act, 2005 ?

8. Impugning the order, the learned Counsel for the Assessee has contended with some amount of vehemence that as per the notification dated March 31, 1995, the goods falling within the category of "iron and steel", are taxable at the rate of two per cent. The argument is that since the driver of the vehicle had voluntarily reported at ICC (Export) Shambhu Barrier and produced all the bills, receipts and requisite documents, so, question of any concealment did not arise and if there was no concealment of facts, then the required tax can be calculated and charged at the time of final assessment, but no penalty can be imposed on the Assessee in this respect u/s 51 of the Act. The argument further proceeds that there must be a cogent material on record and specific finding that there has been an attempt to avoid and evade the tax before invoking the penalty clause, which, according to the learned Counsel for the Assessee, is totally lacking in the present case. In support of his contention, he has placed reliance on the judgment of this Court in case *Xcell Automation v. Government of Punjab* [2007]

5 VST 308, judgment dated January 18, 2010 passed in case GSTR No. 17 of 2006 titled as "Anand Refrigeration Co. (P) Limited, Jalandhar City v. State of Punjab [2010] 30 VST 235 (P&H), judgment dated February 10, 2010 passed in case V. A. T. A. P. No. 18 of 2008 titled as N.S.S. Enterprises Vs. The State of Punjab and Another, and judgment of the Allahabad High Court in the case of Parry and Company Ltd. v. Commissioner of Sales Tax, U. P., Lucknow [2004] 138 STC 437.

9. Supporting the impugned order, on the contrary, the learned Counsel for the State has argued that four per cent Central sales tax was leviable on the goods, but since the Assessee had taxed it at the rate of two per cent, the penalty clause was rightly invoked by the authority u/s 51 of the Act and no interference is warranted in this regard.

10. Above being the position, the facts of this case are neither intricate nor much disputed. Now the short question that arises for determination in this case is whether, on the facts and circumstances of the case, penalty can be imposed on the Assessee, in view of bona fide difference of opinion on the application of rate of tax.

11. It is not a matter of dispute that Chapter IX of the Act deals with the power of Information Collection Centre, check-post and inspection of goods in transit. Section 51(7) (a), (b), (c) is reproduced as under for facilitation:

51. (7)(a) The officer detaining the goods under Sub-section (6), shall record the statement, if any, given by the consignor or consignee of the goods or his representative or the driver or other person incharge of the goods vehicle and shall require him to prove the genuineness of the transaction before him in his office within the period of seventy-two hours of the detention. The said officer shall, immediately thereafter, submit the proceedings along with the concerned records to the designated officer for conducting necessary enquiry in the matter.

(b) The designated officer shall, before conducting the enquiry, serve a notice on the consignor or the consignee of the goods detained under Clause (a) of Sub-section (6), and give him an opportunity of being heard and if, after the enquiry, such officer finds that there has been an attempt to avoid or evade the tax due or likely to be due under this Act, he shall, by order, impose on the consignor or consignee of the goods, a penalty, which shall be equal to thirty per cent of the value of the goods. In case he finds otherwise, he shall order release of the goods and the vehicle, if not already released, after recording reasons in writing and shall decide the matter finally within a period of fourteen days from the commencement of the enquiry proceedings.

(c) The officer referred to in Clause (b), before conducting the enquiry, shall serve a notice on the consignor or consignee of the goods detained under Clause (b) of Sub-section (6), and give him an opportunity of being heard and if, after the enquiry, such officer is satisfied that the documents as required under Sub-sections (2) and (4), were not furnished at the information collection centre or

the check-post, as the case may be, with a view to attempt to avoid or evade the tax due or likely to be due under the Act, he shall by order, for reasons to be recorded in writing, impose on the consignor or the consignee of the goods, penalty equal to fifty per cent of the value of the goods involved. In case, he finds otherwise, he shall order release of the goods for sufficient reasons to be recorded in writing. He may, however, order release of the goods and vehicle on furnishing of a security by the consignor or the consignee in the form of cash or bank guarantee or crossed bank draft for an amount equal to the amount of penalty imposable and shall decide the matter finally within a period of fourteen days from the commencement of the enquiry proceedings.

12. A conjoint reading of these provisions would reveal that the designated officer is under legal obligation to conduct an enquiry after serving a notice on the consignor or consignee and give him an opportunity of being heard. If after the enquiry, such officer finds that there has been an attempt to avoid or evade the tax due or likely to be due under this Act, he shall, by order, impose on the consignor or consignee of the goods, a penalty, which shall be equal to thirty per cent of the value of the goods and in case he finds otherwise, he shall order the release of the goods and the vehicle, if not already released, after recording reasons in writing and shall decide the matter finally within a period of fourteen days from the commencement of the enquiry proceedings. If after the enquiry, such officer is satisfied that the documents as required under Sub-sections (2) and (4), were not furnished at the information collection centre or the check-post, as the case may be, with a view to attempt to avoid or evade the tax due or likely to be due under the Act, he shall by order for reason to be recorded in writing, impose on the consignor or consignee of the goods, penalty equal to fifty per cent of the value of the goods involved. In case, he finds otherwise, he shall order release of the goods for sufficient reasons to be recorded in writing. He may, however, order release of the goods and vehicle on furnishing of a security by the consignor or the consignee in the form of cash or bank guarantee or crossed bank draft for an amount equal to the amount of penalty imposable and shall decide the matter within a period of fourteen days from the commencement of the enquiry proceedings.

13. In other words, the penalty u/s 51(7) of the Act can only be imposed, if there is sufficient material and specific finding that an attempt to avoid or evade the tax due or likely to be due has been made by the Assessee and not otherwise.

14. An identical question arose before a Full Bench of this Court in *Moot Chand Chuni Lal v. Shri Manmohan Singh, Assistant. Excise and Taxation Officer, Octroi In-Charge, Shambhu Barrier, District Patiala* [1977] 40 STC 238. Having interpreted the similar (relevant) provisions and relying upon the judgment of this Court in case of *Dunlop India Limited v. State of Punjab* [1972] 30 STC 597, it was held that levy of penalty is not based on any assumption that the goods were transported after sale within the State. Its basis is the attempt to evade tax and it prescribes a condition precedent for the levy of penalty. The condition

precedent is that the authorized officer should record a finding that there has been an attempt to evade the tax due under the Act. Sequently, in *Prakash Roadlines (P) Ltd. v. Commissioner of Commercial Taxes in Karnataka* [1991] 83 STC 49 (Karn), it was observed that "mere failure to produce documents on demand by the Assessee not by itself sufficient to sustain levy of penalty".

15. Again, this Court in *Xcell Automation's* case [2007] 5 VST 308 has held as under (at page 309):

That exercise of power at the check-post, to be valid, should have reasonable nexus with the attempt at evasion. Straight-jacket approach is not called for and each instance of exercise of power has to be seen in the light of individual facts. Neither exercise of power can be restricted, wherever required for checking attempt at evasion nor can be extended to areas where there was no attempt at evasion. Where relevant documents are duly produced but a bona fide plea against taxability is raised and there is neither mis-declaration nor concealment, exercise of power of imposing penalty at the check-post on the ground of attempt at evasion may not be called for. In the case of the Petitioner, contention raised by him that the cast iron castings carried by it were not "cast iron" liable to tax at the first stage, could not be held to be requiring no adjudication or frivolous or mala fide. It is not relevant as to what is the interpretation finally taken on this subject. The Petitioner having not concealed any information, and having placed reliance on the judgments of the Supreme Court (*Bengal Iron Corporation v. Commercial Tax Officer* [1993] 90 STC 47 and *Vasantham Foundry Vs. Union of India and others*, , the matter did require serious consideration, and adjudication by the check-post officer was not called for. In such a situation invocation of jurisdiction for imposing penalty on the allegation of attempt at evasion was not permissible.

16. The same view was expressed by this Court in the cases of *Anand Refrigeration Co. (P) Limited* [2010] 30 VST 235 and *N. S. S. Enterprises, Shivani Market, Near General Bus Stand, Pathankot* [2010] 30 VST 244.

17. Again, it is not a matter of dispute that the driver of the vehicle produced all the bills, receipts and relevant documents to the ICC (Export) Shambhu, without any concealment. The designated officer proceeded on the premises that the tax was chargeable at the rate of four per cent, but as the Assessee has taxed the goods at the rate of two per cent, therefore, it (Assessee) is liable to pay the penalty. Here, to us, the authorities below committed the legal error in this regard. Whether the tax is to be levied at the rate of two per cent or four per cent, as the case may be, is entirely a different matter, to be determined by the authorities at the appropriate stage of considering the annual assessment return of the Assessee in this respect. Be that as it may, the Assessee had plausible explanation to offer and is of bona fide difference of opinion on the application of rate of tax on the goods, falling within the category of iron and steel as contemplated under notification dated March 31, 1995. Therefore, we are of the view that the designated officer did not have the jurisdiction to impose the

penalty on the Assessee in this behalf u/s 51(7) of the Act, under the present set of circumstances.

18. There is another aspect of the matter, which can be viewed from a different angle. Possibly, no one can dispute that there exists a provision u/s 51(7) of the Act for levying penalty in this connection, but that does not mean that penalty should be imposed on each and every case only on the ground that such provision exists in the statute. Penalty should only be imposed if party 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 be imposed merely because it is lawful to do so. The honourable apex court in *Hindustan Steel Ltd. v. State of Orissa* [1970] 25 STC 211 has ruled that "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".

19. Thus, seen from any angle, we are of the considered opinion that in the absence of any cogent material and specific finding that there has been an attempt to avoid or evade the tax due or likely to be due, no penalty can be imposed on the Assessee as contemplated u/s 51(7) of the Act, particularly when the Assessee has bona fide difference of opinion on the application of rate of tax on the goods falling within the category of iron and steel. The contrary argument on behalf of the Department "stricto sensu" deserves to be and are hereby repelled, as the aforesaid judgments are the complete answer to the problem in hand, in the obtaining circumstances of the case.

20. In the light of the aforesaid reasons, it is held that the authorities below committed a legal error by imposing the penalty on the Assessee despite the fact that the goods were voluntarily reported at ICC, especially when it (Assessee) has bona fide difference of opinion on the application of rate of tax on goods, falling within the category of "iron and steel". Thus, the substantial questions of law as framed by this Court are, accordingly, answered in favour of the Assessee.

21. For the reasons recorded above, the present appeal is hereby accepted and the impugned order (annexure A9) is accordingly set aside. Needless to say, this order would not reflect in any manner, on the question of rate of liability of the tax on the indicated goods, which would be decided by the authorities at the appropriate stage of finalization of the return of relevant assessment year.