
(2011) 07 MP CK 0049
In the Madhya Pradesh High Court
Case No : Writ Petition No. 3731 of 2005

Kailash Chandra

APPELLANT

Vs

Commercial Tax Officer-Cum-Additional Tehsildar and others

RESPONDENT

Date of Decision : 07-07-2011

Acts Referred:

Companies Act, 1956 — Section 5

Income Tax Act, 1961 — Section 41(2)

Madhya Pradesh Commercial Tax Act, 1994 — Section 2, 22, 23, 24A, 26

Citation : (2011) 4 MPHT 315 : (2011) 4 MPJR 80 : (2011) 4 MPLJ 111 : (2011) 46 VST 484

Hon'ble Judges : S.S. Kemkar, J;S.C. Sharma, J

Bench : Division Bench

Final Decision : Allowed

Judgement

S.C. Sharma, J.

The petitioner before this Court has filed this present writ petition being aggrieved by the action of the respondents in auctioning the personal property of the petitioner for satisfying the recovery of the Sales Tax dues relating to M/s. Mahesh Niranjana Jute Pvt. Ltd. a Company incorporated and registered under the Companies Act, 1956. The contention of the petitioner is that he is an individual engaged in various businesses in his individual capacity and is the owner of the property in question which is being auctioned by the Commercial Tax Department. The petitioner has categorically stated before this court that the property has been acquired by him in his individual capacity and it is not a property belonging to the Company, meaning thereby, it is a self acquired property which includes a residential house situated at Plot No. 147 / 47, Bhagwandin Nagar, Indore. The petitioner has further stated that he is a regular assessee of the Income Tax Department and has enclosed copies of the Income Tax Returns for the years 2001 to 2004. He has also stated that he is owner of a Maruti Car which also does not belong to M/s. Mahesh Niranjana Jute Pvt. Ltd. The petitioner has further stated that the Company in question was a registered

dealer with the Sales Tax Department for the period w.e.f. 1-4-1998 to 31-3-1999 and the Company has been assessed as a dealer by the Sales Tax Department. An assessment order was passed u/s 28(1) of the MP Commercial Tax Act by the Asstt. Commissioner of Commercial Tax, Indore Division No. 3 and vide order dt. 30th August, 2002, a demand of Rs. 4419450/- was raised. The petitioner has further stated that the Company in question being a distinct legal and juristic entity, has challenged the aforesaid demand and now the matter is pending before this Court in WP No. 547 / 2005. The contention of the petitioner is that the Sales Tax Department in spite of the fact that the Company was liable to pay the dues being a dealer, as defined u/s 2(h) of the MP Commercial Tax Act, has initiated recovery proceedings against the petitioner who is a Director of the Company and a proclamation of sale vide proclamation dt. 2-8-2005 has been issued and the residential house belonging to the petitioner, situated at Plot No. 147/47 Bhagwandin Nagar, Indore has been put to auction. The petitioner has raised various grounds before this Court and he has also stated that his Car is also being sold by way of public auction by the Sales Tax Department. The petitioner has raised various grounds challenging the auction proceedings and his contention is that there is no provision under the MP Commercial Tax Act for authorising the recovery of dues relating to a Company which is a separate and juristic entity having a juristic personality, from the personal assets of the Directors and therefore the action of the Department in auctioning the personal property of the petitioner, is bad in law. The petitioner has also raised a ground that section 32 of the MP Commercial Tax Act permits the recovery of dues from a Dealer or a person liable to pay tax and only a dealer or a person liable to pay tax can be treated as a defaulter against whom recovery proceedings can be initiated. The contention of the petitioner is that the Company in question is the alleged defaulter and therefore in absence of specific provisions permitting the Sales Tax Department to recover the dues, the dues of the Company cannot be recovered from the personal property of the Director who is doing business independently. Learned counsel for the petitioner has also argued before this Court that by virtue of amendment in the MP Commercial Tax Act, 2003, section 24-A has been inserted w.e.f. 25-11-2003, which authorises the Commissioner to obtain a personal / corporate guarantee from the Directors of the Company / promoters of the Company for realisation of tax in relation to the Company and no such personal guarantee has been furnished by the petitioner and therefore by no stretch of imagination the personal property of the petitioner can be subjected to auction proceedings. The petitioner has placed reliance upon the following judgments in order to substantiate the grounds raised by him:

1. Ramchandran v. State of Kerala (1984) 55 STC 209
2. Tikamchand Jain v. State Government of Haryana and another (1987) 67 STC 388
3. Punalur Paper Mills Ltd. v. District Collector (1985) 60 STC 193.
4. Western India Gunnies Pvt. Ltd. v. CTO and Ramnarayan Sahu v. CTO (1990) 78 STC 97 (AP).
5. Gc Malhotra v. Deputy Collector (Collections) Sales Tax (1998) 110 STC 406 (All)
6. Nishad Patel and another v. State of Kerala (1999) 113 STC 395 (Ker)
7. Maddi Swarna

Vs. Commercial Tax Officer and Another, Prabhoo and another v. Assistant Commissioner of Commercial Tax (2001) 124 STC 238.

The petitioner has prayed for quashing of order dt. 2-5-2008 and 29-5-2005 relating to auction of the petitioner's property as well as sale proclamation issued by the respondents.

A reply has been filed on behalf of the respondents and the stand of the respondents is that they have initiated action by invoking provisions of the MP Land Revenue Code, 1959 as the petitioner is the Director of a Private Limited Company. The respondents have placed reliance upon section 5 of the Companies Act, 1956 and their contention is that the petitioner is an Officer who is in default and is certainly liable for punishment or penalty by way of imprisonment or fine and therefore by invoking the provisions of the Companies Act, 1956, the Sales Tax Department has rightly initiated action for disposing off the private property of the petitioner. The respondents have also stated that the State exchequer cannot be put to loss by restricting scope of tax recovery to the provisions of the MP Commercial Tax Act and the procedure provided under other statutes for recovery of outstanding dues can be followed for recovery of Sales Tax dues. The respondents have also stated that even if the MP Commercial Tax Act is silent about the liability of a Director of a Private Limited Company, by borrowing the provisions of the Constitution of India, Companies Act, 1956 and the Central Sales Tax Act, the recovery of outstanding tax dues can be done from a Director of a Company even though the Company is a juristic person. The respondents have also taken shelter of the definition of "dealer" as defined u/s 2(h) of the MP Commercial Tax Act, 1994 and their contention is that the petitioner being a Director of a Company, is covered under the definition of "Dealer" and their action is in consonance with the statutory provision. The respondents have lastly stated in the return that the petitioner has submitted an undertaking to repay the outstanding dues on 2-8-2005 and therefore no case is made out in the peculiar facts and circumstances of the matter. Respondents have prayed for dismissal of the writ petition.

Heard learned counsel for the parties at length and perused the record.

In the present case, it is an admitted fact that M/s. Mahesh Niranjana Jute Pvt. Ltd. is a Company duly incorporated and registered under the Companies Act, 1956. The dues relating to non-payment of Sales Tax were assessed for the period w.e.f. 1-4-1998 to 31-3-1999 and an order was passed under the provisions of MP Commercial Tax Act on 30-8-2002 raising a demand of Rs. 4419450/-. It is also an admitted fact that the petitioner is one of the Directors of the Company and owns a house at Plot No. 147 / 47, Bhagwandin Nagar, Indore. The respondents have stated that as the demand of Rs. 4419450/- was not satisfied, they have started proceedings under the MP Commercial Tax Act r/w. MP Land Revenue Code against the petitioner who is also the Director of the Company and the residential house of the petitioner as well as the personal car of the petitioner was put to an auction by issuing a proclamation of sale on

2-8-2005. It is pertinent to note that the order of assessment is subject-matter of WP No. 547 / 2005 filed by the Company and the same is pending adjudication before this court. It is also an admitted fact that the property in question is the personal property of the petitioner and it is not the property of the Company in question. Section 2(h) of the MP Commercial Tax Act, 1994 defines a "Dealer" as under:

(h) Dealer means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash, or for deferred payment or for commission, remuneration or other valuable consideration and includes --

(i) a local authority, a company, an undivided Hindu family or any society (including a co-operative society), club, firm or association which carries on such business;

(ii) a society (including a co-operative society), club, firm or association which buys goods from, or sells, supplies or distributes goods to, its members;

(iii) a commission agent, broker, a del-credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of the principal;

(iv) any person who transfers the right to use any goods for any purpose, (whether or not for a specified period) in the course of business to any other person;

Explanation (i) Every person who acts as an agent of a non-resident dealer, that is as an agent on behalf of a dealer residing outside the State and buys, sells, supplies or distributes goods in the State or acts on behalf of such dealer as

(i) a mercantile agent as defined in the Indian Sale of Goods Act 1930 (III of 1930); or

(ii) an agent for handling goods or documents of title relating to goods; or

(iii) an agent for the collection or the payment of the sale price of goods or as a guarantor for such collection or payment, and every local branch of a firm or company situated outside the State.

Shall be deemed to be a dealer for the purpose of this Act.

(II) The Central or a State Government or any of their departments or officers which, whether or not in the course of business, buy, sell, supply or distribute goods, directly or otherwise, for cash or for deferred payment, or for commission, remuneration or for other valuable consideration, shall be deemed to the petitioner before this Court has filed this present writ petition being aggrieved by the order a dealer for the purpose of this Act.

The Company in question M/s. Mahesh Niranjana Jute Pvt. Ltd. is registered as a Dealer with the Sales Tax Department and is a "Dealer" within the meaning of

the term "Dealer" as defined u/s 2(h) of the MP Commercial Tax Act, 1994. The petitioner is certainly not a dealer, as defined u/s 2(h) of the Act.

Section 24A which came into force w.e.f. 25-12-2003 of the MP Commercial Tax Act, reads as under:

24-A. Furnishing of guarantee by the dealers (1) Notwithstanding anything contained in sections 22 and 23, the Commissioner, before issuing a permanent registration certificate, shall require the dealer, who is a company registered under the Companies Act, 1956 (No. 1 of 1956), to furnish personal / corporate guarantee of the promoters for proper realisation of tax or any other sum payable under this Act, in such form and in such manner as may be prescribed.

(2) Where a company registered u/s 22 or section 23 and liable to pay tax under the Act ordinarily at the rate of rupees twelve thousand per quarter or rupees forty eight thousand per annum or above, fails to furnish returns u/s 26 in time or fails to pay the tax payable according to such returns or fails to furnish any return or fails to pay tax payable under the Act, the Commissioner may require to furnish personal / corporate guarantee of the promoters of such company for proper realisation of tax or any other sum payable under this Act, in such form and in such manner as may be prescribed.

Explanation For the purpose of this section

(1) the expression "promoters" means

(i) who subscribes to the Memorandum of Article of Association, or

(ii) who holds 20 per cent or more of the share capital directly or indirectly or in the name of his / her relatives, and

(2) in the case of a corporate body is a subsidiary or holding company of that body and holds 20 per cent or more of the share capital.

(3) the expression "relatives" shall have the same meaning as assigned to it in Companies Act, 1956 (No. 1 of 1956) or Income Tax Act, 1961 (No. 43 of 1961).

The aforesaid statutory provision of law provides that promoters of the Company shall furnish personal/corporate guarantee for realisation of tax in relation to the Company at the time of grant of registration to the Company under sections 22 and 23 of the MP Commercial Tax Act. However, in the present case, the registration of the Company under the MP Commercial Tax Act was prior to 25-12-2003 and at no point of time any personal/corporate guarantee was furnished by the Company or by the Directors or by the promoters for realisation of the tax in relation to the Company. This Court has carefully gone through the statutory provisions as contained under the MP Commercial Tax Act and it does not provide for recovery of dues against the dealer, which is a Company in the present case, from the Director of the Company that too by auctioning the personal property belonging to a Director.

In the case of Nishad Patel and another v. State of Kerala and others (1999) 113 STC 395, the Kerala High Court while dealing with a similar problem has arrived at a conclusion that arrears of dues due from the Company cannot be recovered from Directors personally as a Company is a legal entity distinct from its shareholders as well as its Directors. In the case of Punalpur Paper Mills Ltd. v. District Collector, Quilon and others (1985) 60 STC 193, again while dealing with a similar controversy the Kerala High Court has held that arrears of tax cannot be recovered from the Directors which are due to a Company, specially in view of the fact that there is no provision under the Kerala General Sales Tax Act fastening tax liability of the Company upon the Director / Managing Director of the Company. The Kerala High Court in the aforesaid case in para 11 has held as under:

11. The Kerala General Sales Tax Act, as seen from the preamble, is one consolidating and amending the law pertaining to sales tax. It is axiomatic that while interpreting a consolidating Act, it must always be borne in mind that such Act is a complete code by itself and exhaustive of the matters mentioned therein. The rights and liabilities of parties governed by a consolidating enactment are determined only with reference to the provisions contained in the said enactment and it would be repugnant to the character of such enactment to add to the said rights and liabilities by referring to other laws (vide Ravula Subba Rao and Another Vs. The Commissioner of Income Tax, Madras, . Unless provisions of other laws are expressly or by necessary implication incorporated in a codifying and amending Act such provisions have no relevance to decide questions directly falling under the codifying statute. State of Punjab Vs. Jullunder Vegetables Syndicate, supports this view. It therefore follows that in the absence of a specific provision in the Sales Tax Act fastening liability on the Director or the Managing Director of a company for the tax due by the company, I am of the view, that no proceedings can be initiated against the Director or the Managing Director for recovery of the said dues.

In the case of Peter J.R. Prabhu and another v. Asstt. Commissioner of Commercial Taxes, Kumta (Uttara Kannada District), Karnataka and others reported in (2001) 124 STC 238, the Karnataka High Court has again held that arrears of tax cannot be recovered personally from the Director and any reference to personal liability of the Director of the Company would be inappropriate, when it comes to recovery of arrears of Sales Tax due from a Company.

The High Court of Andhra Pradesh, in the case of Western India Gunnies Private Limited v. Commercial Tax Officer (FAC), Mehdipatnam Circle, Hyderabad and another, (1990) 78 STC 97 while dealing with Sec. 16-B of the Andhra Pradesh General Sales Tax Act, 1957, has held that tax due from a Private Limited Company under the Andhra Pradesh General Sales Tax Act, 1957, can be recovered from the Directors of the Company only in terms of Sec. 16-B of the Act i.e., when the Company is in liquidation and not otherwise. In the case of

Maddi Swarna v. Commercial Tax Officer, Chilakaluripet reported in (2001) 124 STC 203, the Andhra Pradesh High Court again while dealing with Sec. 16-B of the Andhra Pradesh General Sales Tax Act has held that Sales Tax arrears of a Company cannot be recovered from a Director except in the case of liquidation.

The Madras High Court in the case of Chamundeeswari and P.R. Sridharan Vs. The Commercial Tax Officer, while dealing with the matter of payment of Sales Tax and recovery from a Director has held that in absence of specific statutory provision enabling recovery of tax due from Company, from Directors, no such recovery can be done against a Director as a Company is a legal entity by itself and dues, if any, have to be recovered from the Company and not from the Directors.

The High Court Punjab & Haryana in the case of Arun Kapoor v. Assistant Collector and another (2002) 128 STC 339 while dealing with recovery of arrears of Sales Tax payable by the Company from the Directors has held that the Directors are not liable personally for the amount due towards arrears of Sales Tax due to the Company. The Punjab & Haryana High Court again in the case of Tikam Chand Jain v. State Government of Haryana and another (1987) 67 STC 388 has taken a similar view holding that no recovery can be initiated against the Director in absence of statutory provisions under the statute governing the field. In the case of Ashok Kumar v. State of Bihar (2008) 12 STJ 335 (Pat). The High Court of Patna in para 5 has held as under:

5. It is well established that a company incorporated under the provisions of the Companies Act, 1956 is an independent juristic entity. It has its own independent legal existence. It can be sued in its name and it can sue in its own name. The liability of a company cannot become liability of the directors and / or shareholders. On this point, I need not deliberate further as this issue has been comprehensively settled by a series of judgment of this Court starting from Harihar Prasad Vs. Bansi Missir and Others, to one of the last judgments on this issue being the Division Bench judgment of this Court in the case of Kanhalya Lal v. State of Bihar reported in (2002) 2 PLJR 553. In the said case, the earlier judgment in respect of the sales tax dues and its recovery from director has also been noticed in the case of Damodar Prasad Nathani v. State of Bihar since reported in (1999) 1 PLJR 522. In that view of the matter, I have no hesitation and / or reservation in cancelling all proceedings as against the two petitioners in both the cases. The two petitioners cannot be proceeded against in any manner in the aforesaid certificate proceedings save and except that they would be the authorised representative to represent the company but beyond that they are not in any manner to be personally liable for the affairs of the company as pending scrutiny before the certificate Court.

Keeping in view the judgments delivered in the aforesaid cases as the Company is a separate legal entity and also keeping in view that there is no statutory provision under the MP Commercial Tax Act, 1994, for recovering the arrears of tax due to the Company from the Directors, the action of the respondents in

initiating auction proceedings against the petitioner is bad in law and therefore keeping in view the aforesaid analysis the proceedings initiated by the respondents for auctioning the property of the petitioner has paved the path of extinction and accordingly it is hereby lanced. In the matter of imposition of tax under a statute, every taxing statute has a charging section and provisions laying down the procedure to assess the tax and penalties and method of their collection and may also contain provisions to prevent pilferage of revenue. In a taxing statute there are three components viz., subject of the tax, person liable to pay the tax; and, the rate on which the tax is levied, as observed by the Apex Court in the case of State of Kerala Vs. Alex George and Another etc., and if there is any real ambiguity in respect of any of the aforesaid components by reasonable construction, there would be no tax in law as the person who is charged for paying the tax in case is not liable to pay the tax. Hon"ble Sheri. Justice G. P. Singh in "Principles of Statutory Interpretation" 12th Edn., 2010, while dealing with construction of taxing statutes and evaluation of statutes under the heading "General Principles of Strict Construction" has observed as under:

(b) General principles of strict construction:

A taxing statute is to be strictly construed. The well established rule in the familiar words of Lord Wensleydale, reaffirmed by Lord Halsbury and Lord Simonds, means : "The subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words. (See: Re, Micklethwait, (1885) Ex. 452. In a classic passage Lord Cairns stated the principle thus: "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute. (see: Partington v. A.G. (1869) LR 4 HL 100. Viscount Simon quoted with approval a passage from Rowlatt, J., expressing the principle in the following words:

"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. (see: Cape Brandy Syndicate v. IRC (1921) 1 KB 64.

Relying upon this passage Lord Upjohn said: "Fiscal measures are not build upon any theory of taxation".

The above passage stating the principle of strict construction of taxing was quoted (from sixth edition of this book) with approval in COMMISSIONER OF INCOME TAX Vs. KASTURI and SONS LTD., where the word "moneys" in the

expression "moneys payable" in section 41(2) of the Income Tax Act, 1961 was not construed to include "money's worth".

In fiscal legislation a transaction cannot be taxed on any doctrine of "the substance of the matter" as distinguished from its legal signification, for a subject is not liable to tax on supposed "spirit of the law" or "by inference or by analogy". In refuting the doctrine of "the substance of the matter" Lord Tomlin observed : "It is said that in revenue cases there is a doctrine that the court may ignore the legal position and regard what is called "the substance of the matter". This supposed doctrine seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting "the uncertain and crooked cord of discretion" for "the golden and straight metwand of the law (see: IRC v. Duke of Westminster (1936) AC 1). In the same case Lord Wright pointed out that "the true nature of the legal obligation" arising out of a genuine transaction "and nothing else is the substance". The above principle which is known as Duke of Westminster Principle is subject to the new approach of the courts towards tax evasion schemes consisting of a series of transactions or a composite transaction.

In interpreting a section in a taxing statute, according to Lord Simonds, "the question is not at what transaction the section is according to some alleged general purpose aimed, but what transaction its language according to its natural meaning fairly and squarely hits (see: St. Aubyn (ILM) v. A.G. (1951) 2 All ER 473). Lord Simonds call this "the one and only proper test". It is, therefore, not the function of a court of law to give to words a strained and unnatural meaning to cover loopholes through which the evasive tax payer may find escape or to tax transactions which, had the Legislature thought of them, would have been covered by appropriate words (see : IRC v. Volfson (1949) 1 All ER 865). As stated by Lord Simon : "It may seem hard that a cunningly advised tax payer should be able to avoid what appears to be his equitable share of the general fiscal burden and case it on the shoulders of his fellow citizens. But for the courts to try to stretch the law to meet hard cases (whether the hardship appears to bear on the individual tax payer or on the general body of tax payers as represented by the Inland Revenue) is not merely to make bad law but to run the risk of subverting the rule of law itself (see: Ransom (Inspector of Taxes) v. Higgs (1974) 3 All ER 949). The same rule applies even if the object of the enactment is to frustrate legitimate tax avoidance devices for moral precepts are not applicable to the interpretation of revenue statutes".

It may thus be taken as maxim of tax law, which although not to be overstressed ought not to be forgotten that, "the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him. (see: Russel v. Scott (1948) 2 All ER 1. The proper course in construing revenue Acts is to give a fair and reasonable construction to their language without leaning to one side or the

other but keeping in mind that no tax can be imposed without words clearly showing an intention to lay the burden and that equitable construction of the words is not permissible (see: Ormond Investment Co. v. Betts (1928) AC 143. Considerations of hardship, injustice or anomalies do not play any useful role in construing taxing statutes unless there be some real ambiguity. It has also been said that if taxing provision is "so wanting in clarity that no meaning is reasonably clear, the courts will be unable to regard it as of any effect. (see: IRC v. Ross and Coulter (1948) 1 All ER 616.

Thus, in the present case, the person who is to be taxed is a Dealer and the Company in question is registered as a Dealer with the Sales Tax Department and therefore any tax, keeping in view the taxing statute has to be recovered from the Dealer and not from the personal property of the Director of the Company. There is no such provision under the M.P. Sales Tax Act which empowers the respondents to recover the outstanding dues of Sales Tax from the personal property of the Director and in absence of any specific statutory provision, the petitioner cannot be held to be a person liable to pay the tax and therefore the proclamation of sale in respect of the property belonging to the petitioner has to pave the path of extinction. The impugned proclamation dt. 2-8-2005, panchnama dt. 29-8-2005 and the consequential orders are set aside. It is pertinent to note that the property in question was sold by the petitioner during the pendency of the present writ petition and vide order dt. 7-4-2011 the sale proceeds in the form of FDR have been deposited with the Principal Registrar of this Court. Resultantly, as this Court has allowed the writ petition the Principal Registrar of this Court is directed to release the FDR in question.

Ex consequenti, the writ petition is allowed. There shall be no order as to costs.