
(1972) 04 P&H CK 0024

In the Punjab And Haryana At Chandigarh

Case No : Letters Patent Appeal No. 379 of 1971

Khosla Mills

APPELLANT

Vs

The State of Punjab and Others

RESPONDENT

Date of Decision : 26-04-1972

Acts Referred:

Punjab General Sales Tax Act, 1948 — Section 10, 5

Citation : (1973) 31 STC 85

Hon'ble Judges : Harbans Singh, C.J.;Ranjit Singh Sarkaria, J

Bench : Division Bench

Advocate : D.S. Nehra, S.S. Mahajan and P.K. Bansal, for the Appellant;
Mohinderjit Singh Sethi, for the Respondent

Final Decision : Allowed

Judgement

Harbans Singh, C.J.—This appeal under Clause 10 of the Letters Patent is directed against the judgment of the learned single Judge, dismissing the writ petition filed by the appellant, Messrs. Khosla Rice Mills, Sarna (hereinafter referred to as the dealer) against the imposition of a penalty by the Assessing Authority to the tune of Rs. 1,25,000 for filing a false return u/s 10(7) of the Punjab General Sales Tax Act (Act No. 46 of 1948) (hereinafter referred to as the Act), which penalty was subsequently reduced by the Sales Tax Tribunal to Rs. 20,000.

2. With effect from 15th January, 1968, both paddy and rice were included in Schedule C to the Act and thus became articles on which purchase tax was payable by the last purchaser. The dealer apparently purchased large quantities of paddy and, after shelling the same, sold the resultant rice mostly to the State Government. On 30th January, 1969, a return was filed by the dealer for the third quarter ending 31st December, 1968, in which the purchases were shown as "nil". Along with his return, the dealer sent a covering letter giving his reasons for non-liability for payment of tax and for his filing a "nil" return. In this, inter alia, he stated as following:

(a) The paddy had been acquired by the dealer through commission agents with whom his relationship was that of principal and agents and, consequently, the purchases made by him from the agents were not on the basis of a contract of purchase and sale.

(b) The bulk of the purchases were not made in the normal course of business but in the course of enforcement of Essential Supplies Act/ Punjab Procurement Price Control Order and in view of this compulsory acquisition of rice by the Government, the purchase could not be said to be made in the normal course of business and, therefore, is not purchase within the meaning of the Act.

(c) Rice and paddy is one commodity u/s 5(2)(a)(ii) of the Punjab General Sales Tax Act, 1948 and as the tax is leviable on the last purchaser, the dealer is not liable, because the entire quantity of rice had been sold to somebody else.

(d) The entire stock of paddy had not yet been exhausted and thus qua such quantity the dealer has not acquired the character of the last purchaser.

(e) Even if the compulsory acquisition of rice by the Food and Supplies Department is treated as sale, the entire quantity of rice having been sold to the Food Corporation of India or the Food and Supplies Authorities, who are registered under the Act, the dealer is entitled to deductions u/s 5(2)(a)(vi).

3. On 10th February, 1969, the Assessing Authority under the Act issued a notice u/s 10(7) of the Act calling upon the dealer to show cause why penalty be not imposed for filing a false and inaccurate return. On 12th February, 1969, a reply was put in, in which mostly the grounds mentioned above were reiterated and details given. On 13th February, when the dealer appeared in pursuance of the notice, he was asked to bring the accounts on the following day, i.e., on 14th February, 1969. On 14th February, 1969, nobody appeared on behalf of the dealer. It is stated that a telegram was given and a letter was also sent per registered post expressing inability of the dealer to appear on 14th February and asking for an adjournment. As the telegram and the registered letters did not reach the Assessing Authority before the end of the working hours on 14th February, the impugned order imposing penalty was passed ex parte. A copy of this order is annexure B.

4. With regard to point (a), i.e., as to whether the purchases were made through the commission agents and relationship between the dealer and the commission agents was that of principal and agent, the learned Assessing Authority observed as follows:

In so far as the alleged source of purchases by the dealer from commission agents, etc., is concerned, no evidence has been led nor any account books produced. In the circumstances, it is not possible to give any finding on this point.

5. Thereafter, the Assessing Authority observed that the enquiries made revealed that paddy worth Rs. 89,009.07 was purchased by the dealer locally and he paid market-fee to the Market Committee, Pathankot, directly and that the lists of

sales of registered dealers, details of which had been given, had revealed that the dealer had made considerable purchases, as detailed therein, on his registration certificate during the return period, the total figure coming to Rs. 33,44,368.

6. With regard to point (b), he came to the conclusion that the fact that the dealer is running a rice sheller at Sarna and he made huge purchases of paddy and shelled the same, would show that the purchases were made in the normal course of business. The mere fact that the purchases were made for the purpose of procurement would not change the character of the business.

7. With regard to points (c) and (d), he came to the conclusion that paddy and rice are two commodities and it does not make any difference whether paddy has been exhausted or not. With regard to point (e) also it was held that what was supplied was rice and what was purchased was paddy and, therefore, the question of exemption did not arise.

8. The Assessing Authority thus dismissed the pleas and objections of the dealer and also came to the conclusion that Section 10(7) of the Act covers not only wrong maintenance of accounts but also filing of incorrect returns and in the face of the figure of purchase of paddy to the tune of Rs. 89,009 from the market direct and of over Rs. 33 lacs from others "it undoubtedly tantamounts to the furnishing of incorrect return and warrants action u/s 10(7) of the Act". Estimating that the purchase tax at 3 per cent, would be over a lac of rupees and holding that the proper tax has not been paid in time deliberately for a considerable time, he imposed a penalty of Rs. 1,25,000.

9. The following points were urged before us as well as before the learned single Judge :

(1) The return could not be said to be false and, at the most, it may be treated that no return was filed.

(2) No reasonable opportunity had been given for showing cause against the action taken.

(3) In any case, the penalty could not be imposed before the assessment for that quarter had, at least, been done.

(4) The penalty proceedings are quasi-criminal proceedings and even if the legal or the factual pleas taken by the dealer for his view that he is not liable to tax are not accepted, the liability for the payment of penalty would not automatically arise and the burden is on the department to establish that false or inaccurate information has been given deliberately. In other words, *metis rea* has to be established by the department before a penalty can be imposed.

10. None of these contentions found favour with the learned single Judge who dismissed the writ petition and hence this appeal.

11. The main stress before us was first laid on the point that the return cannot

be said to be false or inaccurate, because the return taken with the covering letter disclosed everything and, if those pleas had not been accepted, the Assessing Authority could have either called upon the dealer to produce the account books for the purpose of assessment for which no notice was ever given or made the best judgment assessment taking that no return had been filed. In such a case, the provisions of Sub-section (6) of Section 10 of the Act were attracted rather than those of Sub-section (7). The only matter of which there is an omission in the return is with regard to the figure of purchases. Nowhere it was stated in the return that no purchases of paddy had been made. All that was stated was the paddy was purchased through commission agents with whom the relationship of the dealer was that of principal and agent. It was urged that, at the most, it could be said that qua Rs. 89,000 worth of purchases made directly, there was some sort of concealment, because it was not made clear that some paddy was purchased directly. It was vehemently urged that, according to the decision of the Supreme Court in *Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another*, when such a plea is taken, it is a matter to be gone into by the department and the mere fact that on the very first date of hearing, which was within four days of the date of the notice u/s 10(7) of the Act, if, for any reason, the dealer could not be present, it was not appropriate for the Assessing Authority to assume that the plea taken by the dealer was incorrect. In fact, the Assessing Authority itself had stated that it was not possible without the material being there to give any finding on this matter.

12. In *Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another*, their Lordships of the Supreme Court started examining the following question which was raised in Civil Writ No. 344 of 1964, before them :

Whether the purchase tax should have been assessed in the hands of the commission agents through whom the purchase had been made and not in the hands of the petitioners.

13. After examining the definition of "dealer" and noticing a number of decisions, their Lordships at page 305 of the report, observed as follows:

It has been necessary to advert to the various situations that can arise as a result of the contract entered into between the commission agents and their principals because without a complete investigation of the entire terms of the contract and the course of dealings between the parties, the Assessing Authority would not be in a position to determine on whom the purchase tax should be levied...

No hard and fast rule can be laid down and this matter has naturally to be left for decision on the merits of each case. The Assessing Authority was certainly wrong in taking the view as has been done in some of the cases, e. g., Civil Writ No. 344 of 1964, that it was not necessary to examine the parties from whom the assessee had purchased cotton seeds in order to determine the liability for purchase tax...It is necessary for the Assessing Authority to determine in each

case who is liable to pay purchase tax without being entitled to claim any exemption and once the liability is determined or tax has been paid by that assessee the goods cannot be subjected to the levy of tax in the hands of any subsequent dealer.

14. In view of the above, there does appear to be some force in the argument of the learned counsel for the appellant that this plea of the dealer required investigation whether, in view of the terms of the contract between the dealer and the commission agent in their course of transaction, it was the dealer or the commission agent who was liable to pay purchase tax. Without going into this "matter, it was not possible for the Assessing Authority to come to the conclusion that the plea taken by the dealer was wrong and, for that reason, the return was false.

15. The next argument that the penalty could not be imposed on a dealer under Sub-section (7) of Section 10 of the Act, before arriving at an assessment, need not detain us. Penalty to be imposed under Sub-section (7) for filing a false or incorrect return has to bear certain proportion (ranging between 10% and 150%) to the amount of tax "to which he is assessed or is liable to be assessed", It could, therefore, be argued, as was done, that after coming to a figure of the purchases, the Assessing Authority had come to a tentative figure of tax over a lac of rupees to which the petitioner was liable and then imposed the penalty of Rs. 1,25,000, which figure is within 150% of the tax. It was, however, urged that it was rather an unsatisfactory way of doing things that the assessment even for a quarter should not be done in a proper manner, but the penalty should have been imposed, which penalty has to be imposed in terms of the assessment made or liability to be assessed. It is, however, not necessary to go into this matter any further in the light of the view that we have taken of the next contention of the learned counsel that the penalty proceedings are quasi-criminal proceedings and the burden is on the Assessing Authority to show that there was a mens rea.

16. In Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, the decision of the Calcutta High Court reported as Commissioner of Income Tax (Central), Calcutta Vs. Anwar Ali, was approved. That was a case under the Income Tax Act, 1922 and Section 28(1)(c) provided that if the assessee had concealed the particulars of his income or deliberately furnished inaccurate particulars of such income, then he was liable to a penalty. The provisions of that section were similar to those of Sub-section (7) of Section 10 of the Act. The facts in that case were that while making the assessment for the year 1947-48, the Income Tax Officer discovered an undisclosed bank account of the respondent in which a cash deposit of Rs. 87,000 had been made. According to the respondent's explanation, that sum represented diverse amounts entrusted to him by his relatives who had got panicky during the communal riots in Bihar in 1946. The Income Tax Officer rejected the explanation and brought the sum of Rs. 87,000 to tax as his income from undisclosed sources. Thereafter, penalty of

Rs. 66,000 was imposed on the respondent u/s 28(1)(c) of the Income Tax Act, 1922, for concealment of particulars of his income. On appeal, the Tribunal held that no penalty could be imposed on the ground that the onus lay upon the department to show, by adequate evidence, that the amount of cash was of a revenue nature and that the respondent had concealed it and that onus was not discharged by showing merely that the respondent's explanation was found to be unacceptable. The same view was taken by the High Court on a reference and this view was approved by the Supreme Court. At page 700 of the report, their Lordships observed as follows :

The section is penal in the sense that its consequences are intended to be an effective deterrent which will put a stop to practices which the Legislature considers to be against the public interest....It appears to have been taken as settled by now in the sales tax law that an order imposing penalty is the result of quasi-criminal proceedings....In England also it has never been doubted that such proceedings are penal in character....The next question is that when proceedings u/s 28 are penal in character what would be the nature of the burden upon the department for establishing that the assessee is liable to payment of penalty. As has been rightly observed by Chagla, C.J., in *Commissioner of Income Tax, Ahmedabad Vs. Gokuldas Harivallabhdas*, the gist of the offence u/s 28(1)(e) is that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income and, therefore, the department must establish that the receipt of the amount in dispute constitutes income of the assessee. If there is no evidence on the record except the explanation given by the assessee, which explanation has been found to be false, it does not follow that the receipt constitutes his taxable income.

17. In view of this decision, which was not available to the Assessing Authority at the time of imposing the penalty, it is obvious that even if it be found that the explanation given by the dealer is wrong, that by itself is not enough and the onus to show that there was a mens rea and the concealment was deliberate with a view to avoid payment is on the department which can discharge this burden only by bringing adequate evidence in this respect, on the record.

18. In the present case, it is clear that the question, whether rice and paddy are one and the same commodity, was thrashed out by a Bench of this Court in *Ganesh Trading Co. v. Haryana State, etc.*, L.P.A. 37 of 1970 decided on 15th October 1970 27 S.T.C. 340. and on a certificate having been granted by this Court in S.C.A. 427 of 1970, the matter is stated to be pending in the Supreme Court. Similarly, the question, whether for the paddy purchased through commission agent it would be the commission agent or the dealer who would be liable, is a matter which cannot be said to be so obvious.

19. In *Hindustan Steel Ltd. Vs. State of Orissa*, *Hindustan Steel Ltd.* did not register itself as a dealer because it felt that the bricks and coal, etc., supplied to the contractors for constructing some of its building at a rate slightly higher than the cost price would not bring it within the definition of "dealer". The question

arose whether it was liable for penalty in not getting itself registered. Their Lordships of the Supreme Court observed as follows :

...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.

20. Thus in the light of the Supreme Court decision, the impugned order imposing the penalty on the appellant without any material on the record to show that there was a deliberate concealment with a view to avoid payment of the tax and without there being any clear finding in that respect, cannot be sustained and has to be set aside.

21. On behalf of the respondents it was urged that in the order there is a clear mention that purchases amounting to Rs. 89,000 were made in the market and that, to that extent, the return was false. The penalty has not been imposed only in respect of purchases to this extent. At this stage it is not necessary for us to go into this matter. It is the common case of both the parties that the tax has already been assessed. The matter has been taken up in appeal. It will be open to the department to take up proceedings with regard to the imposition of penalty, subject to any rules with regard to limitation, etc., in accordance with law and in the light of the observations made above and this matter can be gone into during such proceedings if any.

22. For the reasons given above, we accept this appeal, reverse the order of the learned Single Judge and make the rule absolute and quash the impugned order. There will, however, be no order as to costs.