
(1980) 04 MP CK 0003

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 458 of 1977

Laxmandas Ramesh Kumar

APPELLANT

Vs

The State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 03-04-1980

Acts Referred:

Central Sales Tax Act, 1956 — Section 9
Constitution of India, 1950 — Article 20, 226

Citation : (1980) JLJ 775 : (1980) MPLJ 607

Hon'ble Judges : G.P. Singh, C.J.; B.C. Varma, J

Bench : Division Bench

Advocate : Y.S. Dharmadhikari, for the Appellant; S.L. Saxena, Government Advocate, for the Respondent

Judgement

G.P. Singh, C.J.

The petitioner is a dealer registered under the Madhya Pradesh General Sales Tax Act, 1958, as also under the Central Sales Tax Act, 1956. For the period from 25th October, 1965, to 12th November, 1966, the petitioner was assessed to Central sales tax at Rs. 46,644 by the order of the Assistant Commissioner of Sales Tax dated 29th July, 1969. In penalty proceedings for the same period, the Assistant Commissioner by his order dated 15th September, 1969, imposed a penalty of Rs. 35,000 on the petitioner u/s 43 of the State Act for concealment of the turnover under the Central Act. The petitioner filed a revision against the order imposing penalty which was dismissed by the Commissioner of Sales Tax on 28th February, 1975. Similarly, for the period from 3rd November, 1967, to 21st October, 1968, a penalty of Rs. 9,200 was imposed on the petitioner u/s 43 of the State Act for concealment of the turnover under the Central Act by order of the Assistant Commissioner of Sales Tax dated 12th January, 1972. A revision against this order was dismissed by the Commissioner of Sales Tax on 30th August, 1974. The petitioner then filed two applications for rectification to the Commissioner of Sales Tax drawing attention to the decision of the Supreme

Court in *Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra*, in which it was held that penalty provisions under the State Act were not attracted for assessment of tax u/s 9 of the Central Act. The applications for rectification were allowed by order dated 27th July, 1976, passed by the Commissioner of Sales Tax and the penalties imposed for both the periods were cancelled. After the Central Act was amended by the Central Sales Tax (Amendment) Act, 1976, the Assistant Commissioner of Sales Tax by order dated 11th July, 1977, held that the Commissioner's order dated 27th July, 1976, passed in rectification proceedings became inoperative. Recovery proceedings for penalties imposed for both the periods were started against the petitioner. The petitioner then filed this petition under Article 226 of the Constitution for restraining the respondents to continue the recovery proceedings.

The first contention raised by the learned counsel for the petitioner is that the amending Act had not the effect of reviving the orders of penalty which were cancelled by the Commissioner's order dated 27th July, 1976. The second contention of the learned counsel for the petitioner is that Section 43 of the State Act which provides penalty for concealment of turnover is not attracted u/s 9 of the Central Act even after the amendment. It is lastly contended that the orders of the Commissioner dismissing the petitioner's revisions against orders imposing penalty were erroneous in law.

By Section 6 of the amending Act, Sub-section (2A) was inserted in Section 9 of the Central Act, which reads as follows :

(2A) All the provisions relating to offences and penalties (including provisions relating to penalties in lieu of prosecution for an offence or in addition to the penalties or punishment for an offence but excluding the provisions relating to matters provided for in Sections 10 and 10A) of the general sales tax law of each State shall, with necessary modifications, apply in relation to the assessment, reassessment, collection and the enforcement of payment of any tax required to be collected under this Act in such State or in relation to any process connected with such assessment, reassessment, collection or enforcement of payment as if the tax under this Act were a tax under such sales tax law.

Section 9 of the amending Act, which dealt with validation, is as under :

9. Validation.-(1) The provisions of Section 9 of the principal Act shall have effect, and shall be deemed always to have had effect, in relation to the period commencing on the 5th day of January, 1957, and ending with the date immediately preceding the date of commencement of this Act as if that section also provided-

(a) that all the provisions relating to penalties (including provisions relating to penalties in lieu of prosecution for an offence or in addition to the penalties or punishment on conviction for an offence but excluding the provisions relating to matters provided for in Sections 10 and 10A of the principal Act and the provisions relating to offences) of the general sales tax law of each State shall,

with necessary modifications, apply in relation to-

(i) the assessment, reassessment, collection and enforcement of payment of any tax required to be collected under the principal Act in such State ; and

(ii) any process connected with such assessment, reassessment, collection or enforcement of payment; and

(b) that for the purpose of the application of the provisions of such law, the tax under the principal Act shall be deemed to be tax under such law.

(2) Notwithstanding anything contained in any judgment, decree or order of any court or tribunal or other authority, all penalties under the general sales tax law of any State imposed or purporting to have been imposed in pursuance of the provisions of Section 9 of the principal Act, and all proceedings, acts or things taken or done for the purpose of, or in relation to, the imposition or collection of such penalties, before the commencement of this Act shall, for all purposes, be deemed to be and to have always been imposed, taken or done as validly and effectively as if the provisions of Sub-section (1) had been in force when such penalties were imposed or proceedings or acts or things were taken or done and, accordingly,-

(a) no suit or other proceedings shall be maintained or continued in or before any court or any tribunal or other authority for the refund of any amount received or realised by way of such penalty ;

(b) no court, tribunal or other authority shall enforce any decree or order directing the refund of any amount received or realised by way of such penalty ;

(c) where any amount which had been received or realised by way of such penalty had been refunded before the commencement of this Act and such refund would not have been allowed if the provisions of Sub-section (1) had been in force on the date on which the order for such refund was passed, the amount so refunded may be recovered as an arrear of tax under the principal Act ;

(d) any proceeding, act or thing which could have been validly taken, continued or done for the imposition of such penalty at any time before the commencement of this Act if the provisions of Sub-section (1) had then been in force but which had not been taken, continued or done, may after such commencement be taken, continued or done.

(3) Nothing in Sub-section (2) shall be construed as preventing any person,-

(a) from questioning the imposition or collection of any penalty or any proceedings, act or thing in connection therewith ; or

(b) from claiming any refund, in accordance with the provisions of the principal Act read with Sub-section (1).

Explanation.-In computing the period of limitation, if any, for questioning as provided in Clause (a) or for claiming as provided in Clause (b), the period

commencing on the 27th day of February, 1975, and ending with the date of commencement of this Act shall be excluded.

(4) Any interest charged or paid or purporting to have been charged or paid, and any proceeding, act or thing taken or done or purporting to have been taken or done for charging or paying any interest, under the provisions of the general sales tax law of any State read with Section 9 of the principal Act, before the commencement of this Act, shall be deemed to be and to have always been as validly charged, paid, taken or done as if the amendment made by Clause (b) of Section 6 had been in force "when such interest was charged or paid or when such proceeding, act or thing was taken or done.

Explanation.-For the purposes of this section, "general sales tax law" shall have the same meaning as in the principal Act.

As stated in the objects and reasons, the amendments in Section 9 of the Central Act and the validation provisions in Section 9 of the amending Act. were made with the object to get over the majority judgment in the *Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra*, . The objects and reasons as appended to the Bill read as follows :

Sub-section (2) of Section 9 of the Central Sales Tax Act empowers the State sales tax authorities to assess, reassess, collect and enforce payment of Central sales tax. The sub-section also authorises the authorities under the State sales tax laws to exercise all the powers which they have under those laws (including, inter alia, the power to impose penalties) for the purposes of the Central Sales Tax Act also. In *Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra*, the Supreme Court, by a majority of 3 : 2, held that the provisions of the State sales tax laws as to penalties do not apply for purposes of the Central sales tax. In view of this judgment, the State Governments are faced with the problem of having to refund the amounts collected in the past by way of penalties. The judgment has also resulted in a vacuum being created in regard to levy of penalties. It is, therefore, necessary to amend Section 9 of the Central Sales Tax Act to provide expressly that the provisions relating to offences and penalties under the general sales tax law of each State shall, with necessary modifications, apply in relation to the assessment, reassessment, collection and the enforcement of tax under the Central Sales Tax Act. It is also necessary to validate the penalties which have been levied in the past, for the purposes of the Central Sales Tax Act, on the basis of the provisions of the State sales tax laws.

A reading of Sub-section (1) of Section 9 of the amending Act would go to show that the provisions analogous to Sub-section (2A) inserted in Section 9 of the Central Act are deemed to be in force with effect from 5th January, 1957. Sub-section (2) of Section 9 declares that all penalties under the State Act imposed or purporting to have been imposed in pursuance of the provisions of Section 9 shall, for all purposes, be deemed to be and to have always been imposed as validly and effectively as if the provisions of Sub-section (1) had been in force

when such penalties were imposed. The combined effect of Sub-sections (1) and (2) is that the penalties imposed by the Assistant Commissioner and confirmed in revision by the Commissioner are deemed to have been validly imposed u/s 9 of the Central Act as amended by the amending Act. What is argued by the learned counsel is that this result is not possible in the instant case because the penalties were cancelled in rectification proceedings by order of the Commissioner dated 27th July, 1976. In our opinion, this argument is met by the opening words of Sub-section (2) which give primacy to the validation provisions contained therein. These words are "notwithstanding anything contained in any judgment, decree or order of any court or tribunal or other authority". The notwithstanding clause with which Sub-section (2) opens makes the order passed by the Commissioner in rectification proceedings inoperative and the orders of the Assistant Commissioner imposing penalty which were confirmed in revision by the Commissioner are brought back into life. The learned counsel's argument that there should be a fresh order imposing penalty under the new provisions and that such an order alone can be enforced and the orders which were previously cancelled and had become, dead for all purposes, are not made effective, does not give full effect to the notwithstanding clause in Sub-section (2). The view taken by us is further supported by clauses (b) and (c) of Sub-section (2). Clause (b) specifically provides that no court, tribunal or other authority shall enforce any decree or order directing the refund of any amount received or realised by way of such penalty. This clause presupposes that the decree or order directing the refund has become ineffective and inoperative because of Sub-section (2) and the penalty imposed has become operative. Clause (c) also proceeds upon the same hypothesis when it provides that where any amount which had been received or realised by way of such penalty had been refunded before the commencement of the amending Act and such refund would not have been allowed if the provisions of Sub-section (1) of Section 9 had been in force on the date on which the order for such refund was passed, the amounts so refunded may be recovered as arrears of tax. It is implicit in this provision that the order directing refund on cancellation of penalty becomes inoperative because of the validating provisions contained in Section 9 of the amending Act and the penalty refunded can be recovered back as arrears of tax. For the reasons given above, we are of the opinion that the effect of the validating provisions of Section 9 of the amending Act is that the order passed by the Commissioner in rectification proceedings which proceeded solely on the ground that penalty could not be imposed in view of the law laid down by the Supreme Court in the *Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra*, has become inoperative and ineffective and the orders imposing penalty which were cancelled by the said order have become operative.

As regards the second contention that the provision relating to penalty u/s 43 of the State Act is even now not attracted, the argument of the learned counsel for the petitioner is that under Sub-section (2A) of Section 9 what has been made applicable is "all the provisions relating to offences and penalties" which means

that only the penalties connected with offences are made applicable. There is no merit in this argument. The words within the brackets in Sub-section (2A)-"including provisions relating to penalties in lieu of prosecution for an offence or in addition to the penalties or punishment for an offence"-make it clear that penalties in addition to the penalties prescribed for an offence have also been brought within the scope of Sub-section (2A). The opening words of Sub-section (2A), in our opinion, should be read to mean "all the provisions relating to offences and all the provisions relating to penalties". Moreover, we are not concerned in this case with Sub-section (2A) but only with Clause (a) of Section 9(1) of the amending Act which only uses the words "all the provisions relating to penalties". The reason why offences were omitted in Section 9(1)(a) of the amending Act is that a provision relating to offences cannot be retrospectively made applicable in view of the constitutional ban contained in Article 20. That also shows that penalties referred to in Clause (a) of Section 9(1) of the amending Act and Sub-section (2A) inserted in Section 9 of the Central Act do not refer to the penalties for an offence but to penalties which are not connected with offences. It was also argued by the learned counsel that the penalty prescribed u/s 43 of the State Act for furnishing a false return, i.e., for concealment of turnover, is not a penalty which can be applied "in relation to the assessment, reassessment, collection or enforcement of the payment of any tax". Section 43 of the State Act corresponds to Section 28 of the Income Tax Act, 1922. In dealing with Section 28, the Supreme Court in C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, , observed that penalty "is imposable as a part of the machinery for assessment of tax liability". The court also quoted with approval the observations of Subba Rao, C. J., in MAREDDI KRISHNA REDDY Vs. Income Tax OFFICER, TENALI., , that "the defaults enumerated therein (section 28) relate to the process of assessment. Section 28, therefore, is a provision enacted for facilitating the proper assessment of taxable income". C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, was quoted with approval by the minority judgment in the Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra, , at page 585, and it was observed : "The ratio of the decision is that penalty is imposed as part of the machinery for assessment of tax." The insertion of Sub-section (2A) in Section 9 of the Central Act by the amending Act and the validating provision in Section 9 of the said Act have the object of restoring the law laid down by the minority judgment in the Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra, as is clear from the objects and reasons which we have extracted above. We have, therefore, no hesitation in holding that Section 43 of the State Act like Section 28 of the Income Tax Act, 1922, is a penalty provision in relation to assessment of tax and is attracted for assessment of tax under the Central Act as a result of Sub-section (2A) of Section 9 inserted therein by the amending Act and the validating provisions contained in Section 9(1) of the said Act.

As regards the merits of the orders passed in revision by the Commissioner, we

will first take up the order dated 28th February, 1975, which relates to the first period. A perusal of the order imposing penalty for this period will go to show that the turnover of inter-State sales returned by the petitioner was Rs. 17,32,817. At the time of assessment the gross turnover was found to be Rs. 21,99,261. Thus a turnover of Rs. 4,66,444 was not returned. No other explanation appears to have been offered for this discrepancy excepting that the defective returns were filed because of the mischief of the munim. This explanation was not accepted. The returns were signed by the petitioner. The amount collected by way of sales tax by the petitioner was four times the amount which the petitioner credited with the returns. In these circumstances, it cannot be said that the inference that the petitioner concealed the turnover and filed false returns was drawn without any evidence or material. There is no apparent error of law or error of jurisdiction and thus no ground to interfere with the order passed in revision relating to the first period.

As regards the order dated 30th August, 1974, relating to the second period, it appears that the assessment order for this period was set aside and the case was remanded to give the petitioner the benefit of E-I forms which were admitted in revision. The tax assessed was likely to be reduced in the assessment to be completed after remand by the Assistant Commissioner. In these circumstances, the Commissioner should have set aside the order imposing the penalty. The quantum of penalty imposable u/s 43 is related to the amount of tax and when the tax was likely to be reduced in the assessment to be made after remand, the only course open was to set aside the order imposing penalty and to remand the penalty proceedings also. We are conscious that in *Jawaharlal Ramcharan v. Sales Tax Officer* 1978 M.P.L.J. 321, a Division Bench of this Court took the view that it is not always necessary to set aside an order imposing penalty when the order relating to assessment of tax is set aside and the proceedings for assessment are remanded. It is pointed out in that case that if it is clear that the tax assessed would not be reduced in the assessment after remand, the appellate authority may not interfere with the penalty imposed. In that case there is a specific finding that there was absolutely no chance of the tax being reduced in the assessment after remand. The case is, therefore, distinguishable. In the instant case, as already pointed out by us, there is every likelihood that the tax would be reduced in the assessment after remand. It was, therefore, necessary to set aside the order of penalty also.

The petition is partly allowed. The order dated 30th August, 1974, passed by the Commissioner in Sales Tax Revision No. 24/R (Central) of 1972-73 is quashed in so far as it maintains the imposition of penalty of Rs. 9,200. The order dated 12th January, 1972, passed by the Assistant Commissioner imposing penalty is also quashed. It would be open to the Assistant Commissioner to reimpose penalty according to law u/s 43 for the second period, i.e., the period from 3rd November, 1967, to 21st October, 1968. There shall be no order as to costs. The security amount be refunded to the petitioner.