
(2006) 11 P&H CK 0036
In the Punjab And Haryana At Chandigarh

Makin Paper Mills	Vs	APPELLANT
State of Punjab and Others		RESPONDENT

Date of Decision : 29-11-2006

Acts Referred:

Punjab Value Added Tax Act, 2005 — Section 51

Citation : (2007) 2 RCR(Civil) 207 : (2007) 5 VST 363

Hon'ble Judges : Rajesh Bindal, J; Adarsh Kumar Goel, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. This petition has been filed against show cause notices dated September 24, 2005 (annexure P 1) and September 27, 2005 (annexure P 3) and further proceedings taken in pursuant thereto.

2. Case set out in the petition is that the petitioner is a dealer registered under the provisions of the Punjab Value Added Tax Act, 2005 (for short, "the State Act") and Central Sales Tax Act, 1956 at Ludhiana. It is engaged in manufacturing of paper and allied items. On September 23, 2005, the petitioner sold a consignment of paper to a Delhi dealer and goods were loaded on truck No. HR-38L-3685. In transit, the consignment was intercepted and detained on September 24, 2005 by respondent No. 2, the Excise and Taxation Officer-cum-Assistant Director (Investigation), Patiala, u/s 51(6)(a)(b) read with Explanation u/s 51(7)(d) of the Act and show cause notice, annexure P 1, was issued proposing to levy penalty for evading tax on the ground that the petitioner had given wrong description of goods in the bill. The petitioner gave reply and relied upon RG-1 register maintained under the provisions of the Central Excise Act, 1944. He submitted that the consignment carried the correct description being "paper" on which one per cent Central sales tax was leviable as against the same being "cardboard" as suggested by the detaining authority attracting rate of tax at four per cent. Another consignment was detained on September 27, 2005 in respect of which show cause notice, annexure P 3, was given to the petitioner on

the same ground. The petitioner submitted its reply on September 30, 2005. Two consignments of the petitioner were released on bank guarantee and the matter was pending before the check-post officer.

3. The case of the petitioner is that show cause notice given was illegal as the check-post officer could exercise this jurisdiction only when there was any attempt at evasion of tax. The petitioner was sending such consignments in the course of business regularly and even during assessment proceedings classification of the said commodity was accepted as "paper" as against the "cardboard" and thus no question of any attempt at evasion arose. Reliance has been placed on the order of the assessing authority, annexure P 4, wherein tax has been assessed at the rate of one per cent in respect of the turnover of the petitioner for the same item.

4. In reply, apart from raising an objection to the entertainment of the petition at the stage of notice in view of the judgments of the honourable Supreme Court in *Siliguri Municipality and Others Vs. Amalendu Das and Others*, , *Union of India (UOI) and Others Vs. Oswal Woollen Mills Ltd. and Others*, and *P. Radhakrishna Naidu and Others Vs. Government of Andhra Pradesh and Others*, , it is further stated that the goods comprised in the consignment being card-board, higher rate of tax was attracted and since the petitioner was transporting the goods mis-describing the cardboard as paper, attempt to evade tax was patent.

5. The fact that the Assessing Authority has accepted the description of the goods as "duplex paper", taxable at the rate of one per cent Central sales tax before and even after the detention of the consignment by the Check-post Officer, has not been disputed. It is stated that the stand of the Assessing Authority was wrong and the stand of the check-post officer was correct. It is further submitted that check-post officer could check the description of goods, whereas Assessing Authority had not actually seen the goods during assessment.

6. We have considered the rival submissions and perused the record.

7. As regards the objection as to availability of alternative remedy, the matter was gone into in the connected matter decided by this Court on November 22, 2006 being C. W. P. No. 4603 of 2005 (*Xcell Automation v. State of Punjab* [2007] 5 VST 308 and after referring to the judgments of the honourable Supreme Court in *State of U. P. v. Mohammed Nooh* AIR 1958 SC 86 and *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others*, , it was held that if on undisputed facts, an authority was shown to have assumed jurisdiction which it did not possess, bar of alternative remedy was not absolute. In the present case, for the reasons recorded in later part of the judgment, we are of the view that the exercise of power to impose penalty at the check-post was without jurisdiction.

8. Coming to the merits, it may be observed that provisions to check and detain goods at a check-post to prevent evasion of tax have already been upheld as being necessary to check evasion with a view to enforce the charging provision

under the Punjab VAT Act, 2005 with reference to entry 54 of List II of the Seventh Schedule to the Constitution. We have also noticed that mere conferring of such drastic power did not mean that power could be used arbitrarily. Invocation of such powers is called for for checking evasion when a person either conceals relevant information, gives misleading information or acts in any other clandestine way or where from the available information itself, attempt to evade tax is patent. The said power has to be exercised with caution and not as a substitute for ordinary assessment or penalty as separately provided for under the Act. Exercise of power may sometime be overlapping and mere existence of an alternative procedure is not conclusive for not exercising the said powers, where it is clear that either there is evasion there being deficiency in documents, inaccurate declaration having been made about description, value and contents of goods or otherwise but where there may be bona fide dispute about interpretation of law, about taxability or otherwise, summary power of imposing penalty at the check-post is not intended to be exercised.

9. In Xcell Automation Vs. Government of Punjab and Another, after referring to the judgments in The Check Post Officer and Others Vs. K.P. Abdulla and Bros., , Sodhi Transport Co. and others Vs. State of U.P. and others, , Delite Carriers (Regd.) Vs. State of Haryana and Others, ; Mool Chand Chuni Lal Vs. Manmohan Singh and Another, and Amrit Banaspati Company Ltd. v. State of Punjab [2001] 122 STC 323 (P & H) (on the issue of vires of provisions relating to inspection of goods in transit) ; Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others, , Automobile Products of India Limited v. State of Karnataka [1991] 81 STC 414 (Kam) Orient Paper and Industries Limited v. State of Orissa [1995] 97 STC 490 (Ori) Utkal Galvanisers Limited v. Commissioner of Commercial Taxes, Orissa [1997] 104 STC 222 (Ori) Shahnas Trading Co. v. State of Kerala [2002] 127 STC 1 (SC) Parry and Company Ltd. Vs. Commissioner of Sales Tax, ; United Polymer Industries Vs. State of Punjab and Others, ; Commissioner of Sales Tax and Another Vs. M/s. P.T. Enterprises and Another, (on the issue of jurisdiction of the check-post officer) ; State of Haryana and Others Vs. Sant Lal and Another, ; Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others, , Saral Kumar Vs. State of Haryana and Others, ; State of Rajasthan and Another Vs. M/s D.P. Metals, , Commercial Tax Officer and Others Vs. Swastik Roadways and Another, , A.B.C. (India) Ltd. Vs. State of Assam and Another, and Krishna Bus Service Pvt. Ltd. Vs. State of Haryana and Others, (provisions for records to be maintained by carrying and forwarding agents and detention of transport vehicles) ; Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another, , Lucknow Development Authority Vs. M.K. Gupta, , Tata Cellular Vs. Union of India, , Common Cause, A Registered Society Vs. Union of India and Others, , Union of India (UOI) and Another Vs. S.B. Vohra and Others, , and (judicial review by High Court under Article 226), position was summed up as under:

(1) Exercise of power at the check-post, to be valid, should have reasonable

nexus with the attempt at evasion.

(2) 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.

(3) In an appropriate case, the writ court may examine the exercise of power and interfere if exercise of power is found to be arbitrary, mala fide and without nexus with attempt at evasion.

(4) If there are disputed questions and there is reasonable nexus of exercise of power with attempt at evasion, writ petition against imposition of penalty at the check-post cannot be entertained.

(5) 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.

10. In the present case, the Assessing Authority itself having upheld the stand of the petitioner, even after detention of goods, it could not be held that the petitioner was attempting to evade tax by wrong description of goods in the bill, which were described by the petitioner as "paper" and which ought to be declared as "cardboard", according to the view taken by the check-post authority. Though, we do not express any final opinion on this issue, which may, if necessary, be gone into in appropriate proceedings, contention raised by the assessee could not be rejected as frivolous or mala fide so as to infer attempt at evasion. A bona fide contention raised cannot be equated to attempt at evasion. Thus, invocation of jurisdiction to impose penalty at the check-post was not called for.

11. For the above reasons, this petition is allowed, impugned notices, annexure P 1, dated September 24, 2005 and annexure P 3 dated September 27, 2005 are quashed.