
(2008) 11 OHC CK 0053
In the Orissa High Court

M.G. Garments

APPELLANT

Vs

Sales Tax Officer, Investigation Unit and Others

RESPONDENT

Date of Decision : 11-11-2008

Acts Referred:

Income Tax Act, 1961 — Section 271

Citation : (2008) 106 CLT 865 : (2009) 19 VST 372

Hon'ble Judges : B.S. Chauhan, C.J;B.N. Mahapatra, J

Bench : Division Bench

Judgement

B.N. Mahapatra, J.—In this Writ Petition, the Petitioner challenges the action of Opposite Parties in levying penalty of Rs. 35,000/- u/s 73(10) of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as "OVAT Act") and Rs. 3,500/- and Rs. 7,000/- towards tax and penalty respectively under the Orissa Entry Tax Act, 1999 (hereinafter referred to as "OET Act") on the ground that the same were levied without passing any speaking order and affording any opportunity of hearing to the Petitioner.

2. The short facts giving rise to this Writ Petition are that the Petitioner is a registered dealer under OVAT Act having TIN No. 21591107414. The departmental officer visited the place of business of the Petitioner on 02.02.2008 and on inspection found excess stock of kids and ladies wears worth Rs. 1.75 lakhs which were not accounted for in the books of account, register or document maintained in the course of business of the Petitioner. The Petitioner was served with a notice dated 02.02.2008 u/s 73(10) of the OVAT Act to show cause by 08.02.2008 as to why penalty equal to five times of the tax leviable or 20% of the value of the goods whichever is higher may not be levied on the Petitioner for keeping goods worth Rs. 1.75 lakh which were not accounted for in the books of account, register or document maintained in course of business by the Petitioner. However, before filing of reply to the show cause, on 04.02.2008 Opp. Party No. 1 collected tax and penalty amounting to Rs. 45,500 from the Petitioner vide receipt No. 062913. Hence, this petition.

3. Mr. B. Panda, Learned Counsel for the Petitioner submitted that the Opposite Parties have collected the amount of tax and penalty amounting to Rs. 45,500/- under OVAT Act and OET Act without passing any specific order and without affording any opportunity of hearing to the Petitioner before collecting such tax and penalty. No basis or reason has been assigned for estimating the value of goods at Rs. 1.75 lakhs. Though show cause notice u/s 73(10) of the OVAT Act was issued on 02.02.2008 fixing the date to 08.02.2008 for compliance, the Petitioner was forced to make payment of Rs. 45,500/- immediately and the same was collected from the Petitioner on 04.02.2008. According to Mr. Panda, such collection of penalty and tax from the Petitioner, who is a registered dealer under the OVAT Act and OET Act, is not in accordance with law.

4. The Learned Counsel for Revenue submitted that on the date of inspection on 02.02.2008, the Inspecting Officer found excess stock of kids and ladies wears amounting to Rs. 1.75 lakhs in the business premises of the Petitioner, which were not reflected in the regular books of account, register or document maintained by the Petitioner in course of business. Notice u/s 73(10) was issued to the Petitioner by giving seven days time to explain regarding excess stock found in the business premises. The Petitioner after receiving the said show cause notice requested Opp. Party No. 1 to accept tax and penalty and, accordingly, issued a cheque bearing No. 034216 dated 02.02.2008 for Rs. 45,500/- drawn on Axis Bank Ltd. in favour of the Sales Tax Officer, Investigation Unit, Bhubaneswar (hereinafter called as "STO"), which the STO refused to accept.

5. Thereafter, Petitioner opted to pay the amount of tax and Penalty in shape of cash and the STO received the same. Receipt No. 062913 dated 04.02.2008 was issued to the Petitioner against collection of penalty amounting Rs. 35,000 u/s 73(10) of the OVAT Act, Rs. 3,500/- and Rs. 7,000/- towards tax and penalty under OET Act. There is no violation of principles of natural justice and Section 73(10) does not contemplate any provision for passing any speaking order before imposing such penalty as provided in said Section.

6. In view of the rival contentions, the following questions fall for consideration by this Court.

(i) Whether, on the facts and circumstances of the case, the Assessing Officer is justified in collecting penalty to the tune of Rs. 35,000/- u/s 73(10) of the OVAT Act and penalty of Rs. 7,000/- under the OET Act without affording reasonable opportunity of being heard to the Petitioner?

(ii) Whether, on the facts and circumstances of the case, Learned Assessing Officer is justified in imposing and collecting penalty to the tune of Rs. 35,000/- u/s 73(10) of the OVAT Act and Rs. 7,000 under the OVAT Act without passing any speaking order for imposing such penalty?

(iii) Whether, on the facts and circumstances of the case, the Assessing Officer is justified in collecting entry tax amounting to Rs. 3,500/- without giving any

opportunity of hearing to the Petitioner and passing any order for levying such tax?

7. In order to resolve the rival contentions it is necessary to quote Section 73(10) of the OVAT Act and relevant portions of Section 3 of the OET Act, which are as follows:

73(10). The officer referred to in Sub-Section (8) may, after giving the dealer an opportunity of being heard and after holding such further enquiry as he may consider necessary, impose on him for the possession of goods not accounted for, whether seized or not under Sub-Section (8), a penalty equal to five times of the tax leviable or twenty percent of the value of such goods, whichever is higher, and such officer may release the goods, if seized, on payment of the penalty imposed.

3. Levy of tax.-(1) There shall be levied and collected a tax on entry of the scheduled goods into a local area for consumption, use or sale therein at such rate not exceeding twelve per centum of the purchase value of such goods from such date as may be specified by the State Government and different dates and different rates may be specified for different goods and local areas subject to such conditions as may be prescribed.

xx xx xx xx

(2) The tax leviable under this Act shall be paid by every dealer in scheduled goods or any other person who brings or causes to be brought into a local area such scheduled goods whether on his own account or on account of his principal or customer or takes delivery or is entitled to take delivery of such goods on such entry:

Provided that no tax shall be levied under this Act on the entry of scheduled goods into a local area, if it is proved to the satisfaction of the assessing authority that such goods have already been subjected to entry tax or that the entry tax has been paid-by any other person or dealer under this Act.

Explanation.- Where the goods are taken delivery of on its entry into a local area or brought into local area by a person other than a dealer, the dealer who takes delivery of the goods from such person or makes carriage of the goods shall be deemed to have brought or caused to have brought the goods into the local area.

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8. So far as the first question is concerned, provisions contained in Section 73(10) of the OVAT Act make it clear that penalty under said Section can be imposed in respect of possession of goods not accounted for in the books of account equal to five times of the tax leviable or 20% of the value of the goods whichever is higher. Further, penalty under this Section can be imposed only after giving the dealer an opportunity of being heard and after holding such further enquiry as the authorized officer concerned may consider necessary. In

the present case, the concerned officer has collected Rs. 45,500/- vide receipt dated 04.02.2008 (Annexure-2 series) from the Petitioner under the following heads:

ET " 2% Rs. 3,500.00 ET penalty Rs. 7,000.00 VAT penalty u/s 73(10) Rs. 35,000.00 ----- Total: Rs. 45,500.00 -----

9. The receipt does not reveal under which provision of the OET Act or Rules, the tax amounting Rs. 3,500/- and penalty of Rs. 7,000/- have been collected. However, the receipt shows that penalty of Rs. Rs. 35,000 was collected u/s 73(10) of the OVAT Act. Admittedly, the Opp. Party No. 1 has issued notice dated 02.02.2008 to the Petitioner to show cause by 08.02.2008 as to why penalty as provided u/s 73(10) of the OVAT Act shall not be levied on the Petitioner, as on inspection it was found that excess stock in question was kept by the Petitioner without any proper document in contravention of Section 73(2) and 76(2) of the OVAT Act. But before any such explanation was filed by the Petitioner and without waiting till 08.02.2008, the date fixed for filing reply to the show cause, Opp. Party No. 1 collected penalty amounting to Rs. 35,000 under OVAT Act. No opportunity of hearing was also afforded to the Petitioner as provided u/s 73(10) of the OVAT Act before collecting such penalty. This collection of Rs. 35,000/- towards penalty amounts to gross violation of the statutory provisions contained in Section 73(10) of the OVAT Act. Penalty of Rs. 7,000/- has been imposed under the OET Act without mentioning any provisions of the Act under which such a penalty has been imposed. Before imposing penalty of Rs. 7,000 under OET Act neither any show cause notice was issued nor any opportunity of hearing was afforded to the Petitioner. This is purely arbitrary.

10. Therefore, the Opp. Party No. 1 is not justified in collecting penalty of Rs. 35,000/- under the OVAT Act and Rs. 7,000/- under OET Act without giving an opportunity of hearing to the Petitioner which is violative of the principles of natural justice and the statutory provisions contained in Section 73(10) of the OVAT Act.

11. The second question relates to whether any penalty can be collected from the Petitioner without passing any speaking order imposing such penalty. Section 73(10) does not expressly provide for passing of any speaking order for imposing penalty. The penal proceedings under the fiscal statutes are quasi judicial in nature. Before collection of any penalty, a speaking order imposing such penalty must have been passed. An order passed by the concerned authority imposing maximum penalty permissible under the law should contain reasons in support of it. If such an order is not a speaking order, it is liable to be quashed following the principles of audi altern partem, see *Hukamchand Shankarlal Vs. Commissioner of Wealth Tax*, ; *G.R. Engineering Works (P.) Ltd. Vs. The Additional Commercial Tax Officer, XI Circle, Bangalore and Others*, , *Braja Lal Banik v. State of Tripura* (1970) 78 STC 283 (Guj). The Hon"ble Supreme Court in *C.I.T. v. S.V. Angidi Chettiar* 14 ITR 739 held that the power to impose penalty depends upon the satisfaction of the ITO in the course of the proceedings under the Act. It cannot

be exercised if he is not satisfied and has not recorded the satisfaction about the existence of the conditions specified in Clauses (a), (b), and (c) before the proceedings are concluded. In the absence of any evidence on record about satisfaction of ITO, penal provision of Section 271(1)(c) were not attracted. Therefore, even though Section 73(10) is silent about passing of any order of penalty before it is collected, the authorized officer is bound to pass such order justifying the levy of penalty. The Hon"ble Supreme Court in P. Ramachandra Rao Vs. State of Karnataka, held that the primary function of judiciary is to interpret law. It may lay down principles, guidelines and exhibit creativity in the filed left open and unoccupied by legislature.

12. Before imposing any penalty, the person concerned should have been given the opportunity of hearing and the Assessing Officer must record his finding that the person concerned has knowingly violated any specific statutory provision. A situation may arise that a particular person may fail to discharge his statutory obligation without any mala fide intention. In such a situation even if the statute provides for imposition of penalty, the revenue authority may not impose any penalty if he finds that the concerned person has acted in honest and genuine belief that his action does not amount to infringement of any statutory provision.

13. The Hon"ble Supreme Court in Hindustan Steel Ltd. v. The State of Oriss (1970) 25 STC 211, held that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi- criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged 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 also be imposed merely because it is lawful to do so. 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.

14. Another aspect of the case is that the word "may" use u/s 73(10) means that the authorities have a discretion either to levy or not levy penalty. In Commissioner of Income Tax, Delhi Vs. Maya Rani Punj, , the Delhi High Court while considering the provisions of Section 271(1) of the Income Tax Act, 1961 held that the only significance of the word "may" in Section 271(1) is that ITO has a discretion either to levy a penalty or not to levy a penalty. But, if he decides to levy a penalty, then he has to levy it in accordance with the provisions of Clause (i).

Further, the power to impose penalty should not be exercised as the routine matter. It is to be exercised with proper judicial discretion vide Rajam Textiles v. State of Tamil Nadu (1977) 39 STC 124 (Mad).

15. In *Patniak and Co. (P) Ltd. v. The State of Orissa* (1975) 36 STC 362, this Court observed that the expression "may direct" in Sub-Section (5) of Section 13 shows that the imposition of penalty on the dealer for nonpayment of the tax in time is not mandatory but discretionary. Even though how discretion is to be exercised by the taxing authority is not indicated, it must be exercised judicially and not arbitrarily. This is possible only when a speaking order is passed.

16. In the present case, no speaking order imposing penalty has been passed before penalty u/s 73(10) under the OVAT Act was collected. Same is the situation in respect of collection of tax and penalty under the OET Act. This is certainly unfair. Besides, Section 73(10) provides that in addition to giving an opportunity of hearing to the Petitioner the officer should hold further enquiry as he may consider necessary before imposing penalty u/s 73(10). There is no material on record to show that any further enquiry as contemplated u/s 73(10) of the OVAT Act has been conducted before collecting penalty under the said Section.

17. Thus, Opposite Parties have committed a grave error of law by collecting penalty u/s 73(10) of the OVAT Act and OET Act without conducting any further enquiry and passing any speaking order for imposing such penalty.

18. So far as the third question is concerned, admittedly the Opp. Party No. T has neither given any opportunity of hearing to the Petitioner nor has he passed any speaking order before collecting entry tax on the estimated value of the goods. The Learned Counsel for the Petitioner has also not brought to the notice of this Court as to how the alleged unaccounted for goods were valued at Rs. 1.75 lakh. u/s 3 of the OET Act entry tax shall be levied and collected on entry of the schedule goods into the local area for consumption, use and sale therein. The Opp. Party No. 1 has never established that goods (kids and ladies wears) worth Rs. 1.75 lakh found on the date of inspection and alleged to be unaccounted for were brought from outside the local area by the Petitioner. There is no finding as to whether the scheduled goods in question are manufactured in the local area or not, and, if brought from outside the local area, any opportunity was given to the Petitioner to prove that such goods were already been subjected to tax or entry tax was paid on such goods. In absence of any such finding, levy and collection of entry tax on stock of scheduled goods found in the business premises of a dealer is not authorized under law.

19. In the above fact situation, collection of penalty amounting to Rs. 35,000/- u/s 73(10) of the OVAT Act, collection of penalty of Rs. 7,000/- and tax of Rs. 3,500/- under OET Act is held to be without any authority of law. The Petitioner is entitled to get refund of the said amount of Rs. 45,500/-. Since the Petitioner is a registered dealer under the OVAT Act and OET Act, he is entitled to adjust the said amount of tax and penalty against its tax liability in the return filed under those two Acts. However, this order will not stand on the way of department for initiation of fresh proceeding in accordance with law.

With the above observation, the Writ Petition is disposed of.

B.S. Chauhan, C.J.

I agree.