
(2010) 02 P&H CK 0204
In the Punjab And Haryana At Chandigarh

N.S.S. Enterprises

APPELLANT

Vs

The State of Punjab and Another

RESPONDENT

Date of Decision : 10-02-2010

Acts Referred:

Income Tax Act, 1961 — Section 206C
Punjab General Sales Tax Act, 1948 — Section 8

Citation : (2010) 30 VST 244

Hon'ble Judges : Mehinder Singh Sullar, J; Ashutosh Mohunta, J

Bench : Division Bench

Judgement

Mehinder Singh Sullar, J.—Impugning the order dated 5.12.2006 (Annexure A8), the appellant-assessee-N.S.S. Enterprises (for brevity ?the assessee?) has directed the present appeal, vide which, VAT Tribunal, Punjab, Chandigarh has dismissed its appeal. 2. The brief facts, relevant for disposal of present appeal and emanating from the record, are that the assessee is engaged in the business of trading of bardana, scrap and other disposal of goods. The assessee claimed that in the normal course of the business, it submitted a tender with MSTC Ltd., which is a Government of India enterprise, for purchase of unserviceable crawler tractors, which was accepted and the goods were sold to it (assessee), after deduction of TCS at the rate of 1.1% u/s 206C of the Income Tax Act. Government of India enterprise issued order-cum-acceptance letter dated 9.3.2004 (Annexure A1) and sale invoice dated 17.3.2004 (Annexure A2). The crawler tractor purchased by the assessee was further stated to have been sold by it (assessee) to M/s Jagdish Narain Indira Bahadur, Kolkata vide Bill No. 2365 dated 27.3.2004 for Rs. 703800/-including CST @ 2%, vide Bill/cash Memo dated 27.3.2004 (Annexure A3). These goods are being transported through M/s Pappu Transport Company, Pathankot in vehicle No. HR-38-5119 alongwith GR No. 551 dated 27.3.2004. While the goods were going to Kolkata, the driver of the vehicle voluntarily stopped the said vehicle at ICC (Export) Shambhu for generation of necessary information as prescribed under the provisions of the Punjab General Sales Tax Act, 1948 (for short ?the Act?). The driver submitted

the accompanying bill and GR to the computer operator and generated the necessary information. It was pointed out that CST @ 2%, on inter state sale, has been charged instead of tax @ 4%, which is leviable on the sale of machinery. Consequently, the vehicle was detained u/s 14B(6)(i) of the Act and notice dated 1.4.2002 (Annexure A4) was issued to the assessee.

3. In the wake of notice, the assessee explained that the goods are sold by MSTC Limited, a Government of India Enterprise, as a scrap and it (assessee), under the bonafide impression, charged CST @ 2%, which is leviable on the scrap, as per the notification issued u/s 8(5) of the Act.

4. The explanation put forth by the assessee did not find favour and the Adjudicating Authority imposed the penalty of Rs. 2,07,000/- on it u/s 14-B(7)(ii) of the Act, vide order dated 21.4.2004 (Annexure A5).

5. Aggrieved by the impugned order Annexure A5, the assessee filed the appeal, which was dismissed by the Deputy Excise & Taxation Commissioner-cum-Joint Director (ENF) Patiala Division, Patiala, vide impugned order dated 23.3.2005 (Annexure A6).

6. Still aggrieved by the orders (Annexures A5 and A6), the assessee filed the appeal, which was also dismissed by the VAT Tribunal, Punjab, Chandigarh, vide impugned order dated 5.12.2006 (Annexure A8). The rectification application filed by it (assessee) was also met the same fate, vide order dated 18.9.2007 (Annexure A9).

7. The assessee still did not feel satisfied with the impugned orders and filed the present appeal in this Court.

8. The appeal was admitted to consider the following substantial question of law:

Whether the Information Collection Centre authorities appointed under the Punjab General Sales Tax Act, 1948, can detain the goods and impose penalty u/s 14-B of the Act even if the incharge of the vehicle has voluntarily came to the information collection centre and produced all the papers including bill and goods receipt, if there is a bona fide difference of opinion regarding rate of tax leviable on the goods under transport?

9. Assailing the impugned orders, the learned Counsel for the assessee has submitted that the Government of India Enterprise MSTC Ltd., which is dealing only in the scrap, being sold by the Central Government authorities, has not charged any tax from the assessee, as it was a registered dealer and it has collected the tax at source under the provisions of the Income Tax Act, which was deductible only in case of sale of scrap. The argument is that the driver of the vehicle has voluntarily disclosed at the ICC and produced all the requisite documents, so the question of concealment did not arise and if there was no concealment of facts, then the required tax can be calculated at the time of assessment, but no penalty can be imposed u/s 14-B(7) of the Act. The argument further proceeds that there must be a cogent material on record and

specific finding that there has been an attempt to avoid and evade the tax before invoking the penalty clause contained in Section 14-B(7) of the Act, which, according to the learned Counsel for the assessee, is totally lacking in the present case. In support of his contention, he has placed reliance on the judgment of this Court in case Xcell Automation Vs. Government of Punjab and Another, and judgment of Allahabad High Court in case Parry and Company Ltd. v. Commissioner of Sales Tax, U.P., Lucknow [2004] 138 STC 437.

10. Hailing the impugned orders, on the contrary, the learned Counsel for the State has argued that 2% central sales tax was charged in the bill issued in favour of M/s Jagdish Narain Indira Bahadur, Kolkata, instead of 4% and, thus, the assessee has charged 2% sales tax on the goods in transit. Therefore, the penalty clause was rightly invoked by the authorities under the law and no interference is called for in this relevant connection.

11. Thus, it would be seen that the facts of this case are neither intricate nor much disputed. Now the core question, that arises for determination in this case, is whether on the facts and circumstances of the case, penalty u/s 14-B(7) of the Act was exigible or not.

12. Having regard to the rival contentions of learned Counsel for the parties, we are of the view that the impugned orders cannot legally be sustained and the appeal deserves to be accepted.

13. Section 14 of the Act postulates that "the commissioner or any person appointed to assist him under Sub-section (1) of Section 3 not below the rank of an Excise and Taxation Officer may for the purposes of this Act, require any dealer referred to in Section 10 to produce before him any book, document or account relating to his business and may inspect, examine or copy the same and make such enquiries from such dealer relating to his business, as may be necessary." Sub-section (3) of Section 14 of the Act further posits that "If any officer referred to in Sub-section (1) has reasonable ground for believing that any dealer is trying to evade liability for tax or other dues under this Act, and that anything necessary for the purpose of an investigation into his liability may be found in any book, account, register or document, he may seize such book, account, register or document, as may be necessary."

14. To check the evasion of tax, Section 14-B of the Act was amended. he penalty has been imposed on the assessee, invoking the provisions of Section 14-B(7), which is as under:

14-B(7)(i) The officer detaining the goods under Sub-section 6, shall record the statement, if any, given by the consignor or consignee of the goods or his representative or the driver or other person-in-charge of the goods vehicle and shall require him to prove the genuineness of the transaction before him in his office within a period of seventy two hours of the detention. The said officer shall, immediately thereafter, submit the proceedings alongwith the concerned records to such officer, as may be authorised in that behalf by the State

Government for conducting necessary enquiry in the matter.

(ii) The officer authorized by the State Government shall, before conducting the enquiry, serve a notice on the consignor or the consignee of the goods detained under Clause (i) of Sub-section (6), and give him an opportunity of being heard and if, after the enquiry, such officer finds that there has been an attempt to avoid or evade the [tax due or likely to be due under this Act, he shall, by order, impose on the consignor or consignee of the goods, a penalty, which shall not be less than twenty per cent and not more than thirty per cent of the value of the goods and in case he finds otherwise, he shall order the release of the goods and the vehicle, if not already released, after recording reasons in writing and shall decide the matter finally within a period of fourteen days from the commencement of the enquiry proceedings.

(iii) The officer referred to in Clause (ii), before conducting the enquiry, shall serve a notice on the consignee of the goods, detained under Clause (ii) of Sub-section (6), and give him an opportunity of being heard and if, after the enquiry, such officer is satisfied that the documents as required under Sub-section (2) and Sub-section (4), were not furnished at the information collection centre or the check post, as the case may be, with a view to attempt to avoid or evade the tax due or likely to be due under the Act, he shall by order for reason to be recorded in writing, impose on the consignor or the consignee of the goods, penalty equal to fifty per cent of the value of the goods involved. In case, he finds otherwise, he shall order release of the goods for sufficient reasons to be recorded in writing. He may, however, notwithstanding anything contained in Clause (ii) of Sub-section (6), order release of the goods and vehicle on furnishing a security by the consignor or the consignee in the form of cash or bank guarantee or crossed bank draft for an amount equal to the amount of penalty imposeable and shall decide the matter within a period of fourteen days from the commencement of the enquiry proceedings.

15. The co-joint reading of these provisions would reveal that the appropriate authority is under legal obligation to conduct an enquiry after serving a notice on the consignor or consignee and give him an opportunity of being heard. If after the enquiry, such officer finds that there has been an attempt to avoid or evade the tax due or likely to be due under this Act, he shall, by order, impose on the consignor or consignee of the goods, a penalty, which shall not be less than twenty per cent and not more than thirty per cent of the value of the goods and in case he finds otherwise, he shall order the release of the goods and the vehicle, if not already released, after recording reasons in writing and shall decide the matter finally within a period of fourteen days from the commencement of the enquiry proceedings. According to Section 7 (iii) if the appropriate authority is satisfied that the documents as required under Sub-sections (2) and (4), were not furnished at the information collection centre or the check post, as the case may be, with a view to attempt to avoid or evade the tax due or likely to be due under the Act, he shall by order for reason to be

recorded in writing, impose on the consignor or consignee of the goods, penalty equal to fifty per cent of the value of the goods involved. In case, he finds otherwise, he shall order release of the goods for sufficient reasons to be recorded in writing. He may, however, notwithstanding anything contained in Clause (ii) of Sub-section (6), order release of the goods and vehicle on furnishing a security by the consignor or the consignee in the form of cash or bank guarantee or crossed bank draft for an amount equal to the amount of penalty imposeable and shall decide the matter within a period of fourteen days from the commencement of the enquiry proceedings.

16. Meaning thereby, the penalty u/s 14-B(7) can only be imposed if there is sufficient material and specific finding that an attempt to avoid or evade the tax due or likely to be due has been made by the assessee and not otherwise.

17. An identical question arose before a Full Bench of this Court in Mool Chand Chuni Lal's case (supra), Having interpreted the relevant provisions and relying upon the judgment of this Court in case *Dunlop India Limited v. State of Punjab* [1972] 30 S.T.C. 597, it was held that the amended Section 14-B(7) of the Act for levy of penalty is not based on any assumption that the goods were transported after sale within the State. Its basis is the attempt to evade tax and it prescribes a condition precedent for the levy of penalty. The condition precedent is that the authorized officer should record a finding that there has been an attempt to evade the tax due under the Act. The goods which are to be detained are also specified in Section 14-B(6) as goods meant for trade and not covered by proper and genuine documents. Sequel, in *Prakash Roadlines (P) Ltd's case* (supra), it was observed that "mere failure to produce documents on demand by the assessee not by itself sufficient to sustain levy of penalty."

18. Again, this Court in *Xcell Automation's case* (supra) has held as under:

That exercise of power at the check-post, to be valid, should have reasonable nexus with the attempt at evasion. 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. 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. In the case of the petitioner, contention raised by him that the cast iron castings carried by it were not "cast iron" liable to tax at the first stage, could not be held to be requiring no adjudication or frivolous or mala fide. It is not relevant as to what is the interpretation finally taken on this subject. The petitioner having not concealed any information, and having placed reliance on the judgments of the Supreme Court [*Bengal Iron Corporation v. Commercial Tax Officer* [1993] 90 STC 47 and *Vasantham Foundry v. Union of India* [1995] 99 STC 87], the matter did require serious consideration, and adjudication by the check-post officer was not called for. In

such a situation invocation of jurisdiction for imposing penalty on the allegation of attempt at evasion was not permissible.

19. The same view was expressed by this Court in case M/s Anand Refrigeration Co.(P) Limited, Jalandhar City v. The State of Punjab GSTR No. 17 of 2006, decided on 18.1.2010.

20. It is not a matter of dispute that in the wake of tender, the assessee purchased unserviceable crawler tractor from the Government of India Enterprise MSTC Ltd. and after deduction of TCS at the rate of 1.1% under the provisions of Income Tax Act. It issued order-cum-acceptance letter (Annexure A1) and sale invoice (Annexure A2). The crawler tractor purchased by the assessee was further stated to have been sold by it (assessee) to M/s Jagdish Narain Indira Bahadur, Kolkata, vide Bill No. 2365 dated 27.3.2004 for Rs. 703800/- including CST @ 2%, vide Bill/cash Memo dated 27.3.2004 (Annexure A3). The driver of the truck himself informed and submitted the bills and relevant documents to the ICC. The truck was detained only on the ground that as the assessee was required to charge 4% tax from the Kolkata Firm, but as it has charged 2% less, so, the penalty was imposed u/s 14-B(7) of the Act.

21. In the instant case, the assessee has plausible and reasonable explanation to offer that only 2% tax is leviable on the scrap sold by the Government of India Enterprise MSTC Limited and not 4% on machinery, as claimed by the revenue. Whether the tax is to be levied at the rate of 2% or 4% is entirely a different matter, to be determined by the authorities at the appropriate stage of considering the annual assessment return of the assessee, in this respect.

22. Be that as it may, the fact remains is that as the assessee duly submitted all the documents, receipts and bills to the authority, therefore, in that eventuality, it cannot possibly be saith that there was any attempt on the part of it (assessee) to avoid/evade the tax.

23. As is evident from the record that the assessee submitted all the relevant documents, bills and receipts etc., but the penalty was imposed on the ground that it (assessee) charged tax at the rate of 2%, instead of 4% from the Kokata Firm, without any cogent material. In State of Kerala v. M.M. Mathew and Anr. [1978] 42 S.T.C. 348, Hon"ble Supreme Court observed that "strong suspicion, strange coincidences and grave doubts cannot take the place of legal proof." In the absence of cogent evidence, the penalty cannot be imposed u/s 14-B(7) of the Act, without recording a specific finding that there has been an attempt to avoid or evade the tax, which is totally lacking in the instant case. In that eventuality, the penalty clause cannot possibly be invoked, under the present set of circumstances.

24. There is another aspect of the matter, which can be viewed from a different angle. As indicated above, Section 14-B(7) of the Act envisaged different situations for levying penalty. That means, there is a provision for levying a penalty in this respect, but penalty should not ordinarily be imposed only on the

ground that such provision exists in statute. It should only be imposed if the party 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 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 consideration of all the relevant circumstances. Hon"ble Apex Court in Hindustan Steel Ltd. v. The State of Orissa [1970] 25 S.T.C. 211 has ruled that "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."

25. Thus, seen from any angle, we are of the considered opinion that in the absence of any cogent material and specific finding that there has been an attempt to avoid or evade the tax due or likely to be due, no penalty can be imposed on the assessee as contemplated u/s 14-B(7) of the Act. The contrary argument on behalf of the Department "stricto-sensu" deserves to be and are hereby repelled as the aforesaid judgments are the complete answer to the problem in hand, in the obtaining circumstances of the case.

26. In the light of the aforesaid reasons, the substantial question of law as framed by this Court is answered in favour of the assessee.

27. For the reasons recorded above, the present appeal is hereby accepted and the impugned orders (Annexures A5, A6 and A8) are accordingly set aside.