
(2005) 02 P&H CK 0047
In the Punjab And Haryana At Chandigarh
Case No : G.S.T.R. No. of 1990

Sant Lal Tek Chand

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision : 07-02-2005

Acts Referred:

Central Sales Tax Act, 1956 — Section 2
Haryana General Sales Tax Act, 1973 — Section 25, 25(2), 25(3), 25(4), 25(5)
Haryana General Sales Tax Rules, 1975 — Rule 17, 17(1), 17(2), 2, 30
Income Tax Act, 1922 — Section 23(3), 28(1), 35
Income Tax Act, 1961 — Section 139(1), 271, 271(1), 274(2), 276C
Punjab General Sales Tax Act, 1948 — Section 10(6), 10(7)

Citation : (2005) 142 STC 135

Hon'ble Judges : Jasbir Singh, J;G.S. Singhvi, J

Bench : Division Bench

Advocate : R.P. Sawhney, sisted by Salil Bali, for the Appellant; Jaswant Singh, Sr. Deputy Advocate-General, for the Respondent

Judgement

G.S. Singhvi, J.—The Sales Tax Tribunal, Haryana (for short, "the Tribunal") has referred the following questions for the opinion of this Court:

"(i) Whether in the facts and circumstances of the case, the Tribunal was justified in upholding the penalty u/s 48 of the Haryana General Sales Tax Act, 1973 ?

(ii) Whether in the facts and circumstances of the case, the Tribunal was justified in inferring deliberateness in filing the third quarterly return by ignoring the explanation of the petitioner?

(iii) Whether in the facts and circumstances of the case, the Tribunal was justified in confusing the words "withholding" with the words "evasion of tax" and was right in law in upholding the penalty when the turnover for the whole of the year as returned by the petitioner in the return of paddy has been accepted and the assessment made for the whole of the year?" (In the original reference order as well as statement of case sent to this Court, the Tribunal has, by mistake used

the word "concluding" but with the consent of the learned Counsel for the parties, we have read the word "confusing" instead of the word "concluding" because the said word does not make any sense).

2. The petitioner is running a rice sheller at Kaithal and is also doing the business of commission agency. It is registered as a dealer under the Haryana General Sales Tax Act, 1973 (for short, "the 1973 Act"). It has been filing returns u/s 25(2) of the 1973 Act on quarterly basis. In the third quarterly return filed for the period ending on December 31, 1975 (assessment year 1975-76), the petitioner did not disclose the purchase of paddy valued at Rs. 9,20,554 and did not deposit the tax, i.e., Rs. 65,727 as required by Section 25(3). While finalising the assessment, the Assessing Authority noted that the petitioner had not filed correct return and observed that this was done with a view to avoid the payment of tax. He, therefore, issued notice to the petitioner proposing to levy penalty u/s 48 of the 1973 Act. The same was accompanied by a detailed memo containing the facts relating to the incorrect return. In the reply filed on behalf of the petitioner, it was pleaded that difference between quarter to quarter is due to the practice of paying tax on receipt of sale proceeds invoice. It was also pleaded that the legal requirements of paying tax on purchase value at the time of dispatch is impracticable by reason of impossibility of computing the purchase value of paddy. It was further pleaded that the tax due for the third quarter had been paid in the fourth quarter. In the course of hearing before the Assessing Authority, the petitioner's representative submitted that the tax was withheld in the third quarter to tide over the financial crisis faced by the firm. The Assessing Authority did not accept the explanation of the petitioner and imposed penalty of Rs. 1,31,455 vide his order dated May 10, 1980 by making the following observations :

"The Act enjoins upon every registered dealer to file quarterly returns and to deposit tax according to such returns before their filing.

The offence of depositing less tax than the full amount due according to the returns has been dealt in by way of levying interest u/s 25(5) and imposing penalty escape the painful provisions of Section 48. The correctness and true character of returns is to be examined in respect of each quarter separately and not on the basis of the four quarterly returns for the whole year. Statutory notice in form ST-27 makes it clear when it deals with suppression in sales or purchase on quarterly basis. The overall effect in a year may be relevant for determining the quantum of penalty but it does not exclude the application of Section 48.

In the present case, the dealer has wilfully suppressed the purchases and husking of paddy in the third quarter to the tune of Rs. 9,20,554 having a tax effect of Rs. 65,727.46 by filing a false and incorrect third quarterly return to avoid the payment of tax and a penalty of Rs. 1,31,455 is imposed u/s 48 of the Haryana General Sales Tax Act, 1973. I shall not refrain from remarking that it is a heavy penalising burden whom the avoidance in temporary on equity cannot transform the heavily penalising provisions of Section 48 to the lighter provisions

of interest u/s 25(5) and penalty u/s 47 since a taxing statute knows no equity."

3. The first appeal filed by the petitioner was dismissed by Joint Excise and Taxation Commissioner (Appeals), Ambala (hereinafter described as "the Appellate Authority") vide his order dated March 31, 1983, the relevant extracts of which are reproduced below:

"After considering the matter, I am inclined to hold that the dealer had deliberately filed incorrect and false returns and he could not be permitted to say that since the turnover was returned in the later quarter the same had mitigated the offence of filing the third quarterly return falsely and incorrectly. The provisions for filing of revised return u/s 48 also needs to be understood at this stage. Section 25(4) contemplates revised returns which may be justified on account of omission or error in the filing of the original return. It is not a case where the dealer has discovered any omission or other error in the original return which he tried to rectify in the later return. Had that been the position, I feel the position of the case would have been different. In this case, the admitted facts are that the dealer had deliberately suppressed the turnover and made up the same in the subsequent quarter on the grounds that he was financially tight which the provisions u/s 25(4) neither contemplate nor provide for. The plea of assuming that fourth quarterly return was in the nature of revised return is hardly of any avail and has to be brushed aside. I accordingly hold that the dealer had squarely been guilty of offence u/s 48 in filing false and incorrect return which clearly attracted provisions of Section 48. The penalty imposed is the minimum provided under the law and permits no interference."

4. The second appeal filed by the petitioner was dismissed by the Tribunal vide order dated May 20, 1987. The Tribunal referred to the judgment of this Court in Vardhman Spinning and General Mills Limited v. State [1983] 53 STC 335 and rejected the petitioner's plea that no penalty could be levied u/s 48 of the 1973 Act for filing incorrect return for one quarter of the year because the assessment is required to be made for whole of the year and not for different quarters. The Tribunal confirmed the concurrent finding recorded by the Assessing Authority and the Appellate Authority that the petitioner had deliberately not shown the purchase of paddy with a view to avoid payment of tax. It also referred to the admission made by the petitioner before the Assessing Authority that the tax was withheld in the third quarter to tide over the financial crisis and held :

"It will, therefore, be reasonable to hold that the case is covered by Section 48 in so far as the appellant had submitted incorrect return for one quarter and had concealed particulars of purchases and sales in that quarter. Thus, the appellant deliberately withheld the payment of tax which was otherwise due in respect of that quarter. It was admitted by the appellant before the Assessing Authority that the tax was withheld in the third quarter to tide over financial crisis they were facing at that time. From the circumstances of this case and from the admission of the appellant before the Assessing Authority, deliberateness can be inferred in this case and the return for the third quarter must be branded as a false return,

making the appellant liable for the imposition of penalty u/s 48. The amount of penalty is the minimum prescribed under that section and cannot be considered to be excessive."

5. Shri R.P. Sawhney, learned Senior Counsel appearing for the petitioner referred to the provisions contained in Chapters VI and VIII of the Act and argued that the order passed by the Assessing Authority for levy of penalty which was confirmed by the Appellate Authority and the Tribunal should be declared as nullity because no evidence was adduced by the department to show that the petitioner had deliberately filed wrong return and withheld the tax payable for the third quarter. He further argued that no penalty could be levied on the petitioner u/s 48 of the 1973 Act because the assessment was required to be made for whole of the year, i.e., 1975-76 and in the fourth quarter, it had not only rectified the deficiency in the quantum of purchases which had not been reflected in the third quarter, but also deposited the tax due. Learned Counsel emphasised that the return filed by the petitioner for the fourth quarter should be treated as a revised return within the meaning of Section 25(4) and argued that rejection of the petitioner's explanation for not showing the total purchases of the third quarter was by itself not sufficient to levy penalty u/s 48 of the 1973 Act because no material was available before the Assessing Authority for forming an opinion that the petitioner had intentionally withheld the tax due in the third quarter. Shri Sawhney lastly argued that even if there was default on the petitioner's part in the matter of filing correct return for the third quarter and payment of tax, the Assessing Authority should have resorted to Section 46 or Section 47 of the 1973 Act and there was no justification to impose penalty u/s 48 of the 1973 Act. To buttress his argument, Shri, Sawhney relied on the observations made in order dated May 10, 1980 passed by the Assessing Authority and the judgments of the Supreme Court in *Hindustan Steel Ltd. v. State of Orissa* [1970] 25 STC 211, *Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax, Indore* [1980] 45 STC 197 and of this Court in *Khosla Mills v. State of Punjab* [1973] 31 STC 85.

6. Shri Jaswant Singh, learned Senior Deputy Advocate General defended the invoking of Section 48 of the 1973 Act by the Assessing Authority and argued that levy of penalty was fully justified because the petitioner had deliberately filed incorrect return for the third quarter with a view to avoid payment of the tax due. He submitted that the finding recorded by the Assessing Authority that the petitioner had intentionally filed wrong return and withheld the tax payable in terms of Section 25(3) of the 1973 Act is a pure finding of fact based on correct appreciation of factual and legal position and the Appellate Authority and the Tribunal did not commit any illegality by confirming the said finding.

7. We have given serious thought to the respective arguments. Sections 25, 46, 47 and 48 of the 1973 Act which have bearing on the decision of this reference read as under :

"Section 25. Submission of returns and payment of tax.-

(1) Tax payable under this Act shall be paid in the manner hereinafter provided at such intervals, as may be prescribed.

(2) Such dealer as may be required so to do by the Assessing Authority by notice served in the prescribed manner, and a dealer who has applied for the grant of registration certificate and no final decision in that behalf has been taken and every registered dealer shall furnish such correct returns by such dates and to such authority as may be prescribed.

(2A) Every dealer who is liable to pay tax and who paid or was liable to pay tax including Central sales tax according to the monthly or quarterly returns, as the case may be, filed by him under this Act or the Central Sales Tax Act, 1956, for the period of one year ending 31st March last or part thereof, equal to or exceeding rupees one lakh, shall pay tax including Central sales tax by the 15th day of every month on his turnover of the previous month, in the manner prescribed :

Provided that if he is not able to quantify his tax liability accurately by that time, he shall pay one-twelfth of the tax which he was liable to pay according to the monthly or quarterly returns, as the case may be, filed by him under the Act and the Central Sales Tax Act, 1956, for the period of one year ending 31st March last and in case he was not liable to pay tax for the full year or part thereof for which he has been liable to pay tax, and the balance, if any, he shall pay by the 25th day of the month, and the excess, if any, he may adjust towards the tax payable in the next month or thereafter.

(3) Before any dealer as mentioned in Sub-section (2) furnishes the returns, he shall, in the prescribed manner, pay into a Government Treasury or the Reserve Bank of India or the State Bank of India the full amount of tax due from him under this Act according to such returns and shall furnish along with the returns receipt from such treasury or bank showing the payment of such amount.

(4) If any dealer discovers any omission or other error in any return furnished by him, he may at any time before the date prescribed for the furnishing of the next return by him furnish a revised return, and if the revised return shows a greater amount of the tax to be due than was shown in the original return, it shall be accompanied by a receipt showing payment in the manner provided in Sub-section (3) of the extra amount.

(5) If any dealer fails to pay tax, as required by Sub-section (2A) or by Sub-section (3), he shall be liable to pay in addition to the tax payable, simple interest on the amount of tax remaining unpaid at one per cent per month from the date commencing with the date following the last date for the payment of tax, for a period of one month and at one and a half per cent per month thereafter during the period he continues to make default in the payment :

Section 46 . Failure to furnish returns.--If a dealer fails, without sufficient cause, to comply with the requirements of the provisions of Sub-section (2) of Section

25, the Commissioner or any person appointed to assist him under Sub-section (1) of Section 3 may, after giving such dealer a reasonable opportunity of being heard, direct him to pay by way of penalty a sum calculated at a rate which shall not be less than five rupees or more than ten rupees for every day during which the default continues.

Section 47. Failure to pay the tax due according to the return.--If any dealer fails to pay the tax due as required by Sub-section (2A) or Sub-section (3) of Section 25, the Commissioner or any other person appointed to assist him under Sub-section (1) of Section 3 may, after affording to the dealer a reasonable opportunity of being heard, impose a penalty not exceeding one and a half times the amount of tax to which he is assessed or is liable to be assessed u/s 28.

Section 48. Failure to maintain correct accounts and to furnish correct returns.--If a dealer has maintained false or incorrect accounts or documents with a view to suppressing his sales, purchases or stocks of goods, or has concealed any particulars of his sales or purchases or has furnished to or produced before any authority under this Act or the rules made thereunder any account, return, document or information which is false or incorrect in any material particular, the Commissioner or any person appointed to assist him under Sub-section (1) of Section 3 may, after affording such dealer a reasonable opportunity of being heard, direct him to pay by way of penalty, in addition to the tax to which he is assessed or is liable to be assessed, a sum not less than twice and not more than three times the amount of tax which would have been avoided on the basis of aforesaid circumstances and where no tax is payable, a sum not less than one hundred rupees and not exceeding one thousand rupees."

8. The word "quarter" has been defined in Rule 2(q) of the Haryana General Sales Tax Rules, 1975 (for short, "the Rules"). The same reads as under :

"(q) "Quarter" means the period from-

- (i) 1st April to 30th June,
- (ii) 1st July to 30th September,
- (iii) 1st October to 31st December,
- (iv) 1st January to 31st March."

9. Rule 17 of the Rules (as it was in 1975-76), which too has bearing on this case reads as under :

"Payment of tax and submission of returns.-(1) Every registered dealer or a dealer on whom a notice in form S.T. 8 has been served under Sub-section (2) of Section 25 in the State shall furnish return to the appropriate Assessing Authority in form S.T. 9 or in form S.T. 10 or both, as the case may be, for each quarter of a year, within thirty days of the expiry of the quarter.

(2) Every registered dealer shall pay the full amount of tax due from him under

the Act according to the return in form S.T. 9 or S.T. 10 or both, as the case may be before filing the return in the manner prescribed in Rule 30."

10. An analysis of the above reproduced provisions shows that in terms of Section 25(1), a dealer is required to pay the tax in the prescribed manner. Sub-section (2) of Section 25 imposes a duty on the dealer to furnish correct returns before the prescribed authority on or before the appointed date. Sub-section (2A) lays down that every dealer who is liable to pay tax and who has paid or was liable to pay tax including Central sales tax according to the monthly or quarterly returns as the case may be, filed by him under this Act or the Central Sales Tax Act, 1956, for the period of one year ending 31st March last or part thereof equal to or exceeding rupees one lakh, shall pay tax including Central sales tax by the 15th day of every month on his turnover of the previous month. Proviso to this Sub-section lays down that if the assessee is not able to quantify his tax liability accurately, then he shall pay one-twelfth of the tax which he was liable to pay according to the monthly or quarterly returns, as the case may be, filed by him under the Act and the Central Sales Tax Act, 1956, for the period of one year ending 31st March last and in case he was not liable to pay tax for the full year or part thereof for which he has been liable to pay tax, and the balance, if any, he shall pay by the 25th day of the month, and the excess, if any, he may adjust towards the tax payable in the next month or thereafter. Sub-section (3) requires the dealer to pay full amount of tax due from him before furnishing return under Sub-section (2). Sub-section (4) lays down that if any dealer discovers any omission or other error in any return furnished by him, he may at any time before the date prescribed for the furnishing of the next return by him, furnish a revised return, and if the revised return shows a greater amount of the tax to be due than was shown in the original return, it shall be accompanied by a receipt showing payment of the balance tax. Sub-section (5) provides for charging of interest. It lays down that if any dealer fails to pay tax as per the requirement of Sub-section (2A) or Sub-section (3), then he shall be liable to pay simple interest on the amount of tax remaining unpaid at one per cent per month from the date commencing with the date following the last date for the payment of tax, for a period of one month and at one and a half per cent per month thereafter during the period of default. Section 46 provides for levy of penalty if a dealer fails to comply with the requirement of Sub-section (2) of Section 25 of the 1973 Act. Section 47 provides for levy of penalty if a dealer fails to pay the tax due as per the requirement of Sub-section (2A) or Sub-section (3) of Section 25. Section 48 lays down that if the dealer maintains false or incorrect accounts with a view to suppress his sales, purchases or stocks of goods, or conceals the particulars of his sales or purchases, the Assessing Authority may impose penalty which shall not be less than two times and not more than three times of the amount of tax which had not been paid by the assessee. Rule 17(1) requires filing of quarterly return by every registered dealer. Sub-rule (2) thereof makes the payment of full tax mandatory and a condition precedent to the filing of the return.

11. In the light of the above, we shall now determine whether the Assessing Authority committed a jurisdictional error by imposing penalty on the petitioner u/s 48 of the 1973 Act. A recapitulation of the facts shows that the petitioner had been filing return on quarterly basis and paying tax as per the requirement of Section 25(3) of the Act. For the year 1975-76, it had filed separate returns for each of the four quarters. For the first and second quarter, it filed return after depositing the tax due. In the third quarter, it suppressed the purchase of paddy valued at Rs. 9,20,554 and did not pay the tax amounting to Rs. 65,727. In the fourth quarter, it made good the deficiency of the previous return and also paid the balance tax. It is, thus, clear that the petitioner had not only filed incorrect return for the third quarter but also failed to pay the full amount of tax due. Therefore, there is no escape from the conclusion that the assessee had contravened Sub-sections (2) and (3) of Section 25 and, thereby, made itself liable for levy of penalty u/s 48 of the 1973 Act.

12. The argument of Shri R.P. Sawhney that the Assessing Authority could not have, without recording a finding that the assessee had deliberately filed incorrect return and omitted to pay the tax due, imposed penalty u/s 48 of the 1973 Act sounds attractive but lacks merit. A reading of the plain language of Section 48 shows that the assessee incurs the liability to pay the penalty if he maintains false or incorrect accounts or documents with a view to suppress his sales, purchases or stocks of goods or he has concealed the particulars of his sales or purchases or has furnished any account, return, document or information which is false or incorrect in any material particular. To put it differently, penalty u/s 48 can be imposed if the concerned authority is satisfied that the dealer has maintained incorrect accounts or documents with a view to suppress sales, etc., or has concealed the particulars of sales or purchases or has filed false or incorrect return, etc., and the existence of deliberateness or mens rea is not sine qua non for imposing penalty in such a case.

13. In *Gujarat Travancore Agency, Cochin Vs. Commissioner of Income Tax, Kerala, Ernakulam*, their Lordships of the Supreme Court, while dealing with a case involving imposition of penalty u/s 271(1)(a) of the Income Tax Act, 1961 (for short, "the 1961 Act"), read that provision in conjunction with Section 276C of the said Act and observed :

"It is sufficient for us to refer to Section 271(1)(a), which provides that penalty may be imposed if the Income Tax Officer is satisfied that any person has, without reasonable cause, failed to furnish the return of total income, and to Section 276C which provides, that if a person wilfully fails to furnish in due time the return of income required u/s 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what is intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can be no dispute that having regard to the provisions of Section 276C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty,

which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established. In most cases of criminal liability, the intention of the Legislature is that the penalty should serve as a deterrent. The creation of an offence by statute proceeds on the assumption that society suffers injury by the act or omission of the defaulter and that a deterrent sentence must be imposed to discourage the repetition of the offence. In the case of a proceeding u/s 271(1)(a), however, it seems that the intention of the Legislature is to emphasise the fact of loss of revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection, the terms in which the penalty falls to be measured are significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea, it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision. We are supported by the statement in Corpus Juris Secundum, Volume 85, page 580, paragraph 1023 :

"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws." (Underlining is ours).

14. The same view was reiterated in Commissioner of Income Tax (Additional) v. I.M. Patel and Co. : [1992]196ITR297(SC) .

15. De hors the above discussion, we are convinced that the petitioner had intentionally filed incorrect return and suppressed the purchase of paddy worth Rs. 9,20,554 with a view to avoid payment of the tax due, i.e., Rs. 65,727. When he appeared before the Assessing Authority, the petitioner's representative admitted that the return filed for the third quarter was not correct and that the amount of tax due was not paid, but he tried to justify the same by stating that this was done with a view to tide over the financial crisis. The Assessing Authority did not accept his explanation by observing that the provisions of the 1973 Act and the Rules do not permit the assessee to file false return/suppress the sales or purchases with a view to avoid payment of the tax due on the pretext of financial stringency. The Appellate Authority and the Tribunal independently examined the matter and confirmed the finding recorded by the Assessing Authority that the petitioner had deliberately filed incorrect return with a view to avoid payment of the tax due. Therefore, we do not find any illegality in the order passed by the Assessing Authority for levy of penalty u/s 48 of the 1973 Act which, as mentioned above, was confirmed by the Appellate Authority and the Tribunal.

16. The deliberateness of the petitioner's part to suppress the figures of purchase made during the third quarter is clearly established from the fact that it had filed correct returns for the first two quarters and the fourth quarter and also paid the additional tax in the last quarter which was withheld while filing

incorrect return for the third quarter. The lack of bona fides on the petitioner's part is established from the fact that it did not file revised return u/s 25(4) of the 1973 Act and waited till the filing of fourth return. Later on, it tried to justify non-filing of the correct return for the third quarter and non-payment of the tax due by claiming that the assessment was required to be made for whole of the year and not for each quarter. In *Vardhman Spinning and General Mills Limited v. State* [1983] 53 STC 335, a somewhat similar question was considered by this Court and answered in the negative. The facts of that case were that for the assessment year 1969-70, the petitioner was assessed on October 6, 1970. Prior to this, the Assessing Authority issued notice u/s 10(6) of the Punjab General Sales Tax Act, 1948 proposing to impose penalty on account of short deposit of purchase tax for the quarter ending on June 30, 1969, September 30, 1969, December 31, 1969 and March 31, 1970. In its reply, the petitioner took up the stand that there was no short deposit of purchase tax in the first, second and fourth quarters and in the third quarter ending on December 31, 1969, there had been short deposit due to some clerical error and that there was no mala fide on its part. The Assessing Authority did not accept the petitioner's plea and imposed penalty. The same was upheld by the Appellate Authority and the Tribunal. On an application made by the petitioner, the Tribunal referred the following question of law for the opinion of this Court:

"Whether, on the facts and in the circumstances of the case, it was legal and just to impose penalty on the applicant in accordance with the provisions of Section 10(6) of the Punjab General Sales Tax Act ?"

17. It was argued before this Court that no penalty could be levied u/s 10(7) of the Punjab General Sales Tax Act, 1948 because the assessment was required to be made for whole of the year and not for the quarter. While rejecting its plea, a division Bench of this Court observed as under :

"...The plea of the petitioner that quarterly returns were filed corresponding to the calendar year instead of the financial year, has rightly been rejected. There is no gainsaying that from the very beginning the petitioner has been filing quarterly returns corresponding to the financial year. As earlier observed, the Tribunal was justified, in the circumstances of the case, to have negated the plea of the petitioner that sufficient cause existed for the short deposit of the purchase tax for the 3rd quarter."

18. In *D.M. Manasvi Vs. Commissioner of Income Tax, Gujarat, II Ahmedabad*, , the Supreme Court upheld the levy of penalty on the assessee on the ground of non-disclosure of business profits from a particular mill. The facts of that case were that the assessment for 1959-60 was made u/s 23(3) of the Income Tax Act, 1922. The assessing officer subsequently found that income from the business in the name of M/s. Kohinoor Grain Mills Sales Depot was not included in the return. For the subsequent three years, the assessee himself disclosed 20 per cent share of the profits from Kohinoor Mills. The assessing officer was of the opinion that Kohinoor Mills was not a genuine partnership but was the sole

proprietorship concern of the assessee. The income from Kohinoor Mills was, therefore, included in the income of the assessee in all the four years. The non-disclosure of the business profits from Kohinoor Mills was considered by the assessing officer, to represent deliberate concealment. He, therefore, initiated penalty proceedings u/s 271. As the minimum penalty leviable u/s 271(1)(c)(iii) exceeded the sum of Rs. 1,000, the cases were referred u/s 274(2) to the Inspecting Assistant Commissioner. After hearing the assessee, the Inspecting Assistant Commissioner came to the conclusion that he had concealed the income and deliberately furnished inaccurate particulars thereof. He accordingly levied penalties of Rs. 21,062, Rs. 1,14,477, Rs. 2,02,584 and Rs. 1,02,731 respectively. The Tribunal held that the levy of penalties was valid, though it gave some relief to the assessee in the matter of quantum of penalties. While rejecting the assessee's plea that the inference drawn by the assessing officer about the concealment of income was not based on any evidence was rejected by the Supreme Court by making the following observations :

"In the present case, the inference that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars is based not merely upon the falsity of the explanation given by the assessee. On the contrary, it is made amply clear by the order of the Tribunal that there was positive material to indicate that the business of Kohinoor Mills belonged to the assessee and the whole scheme was to disguise the profits of the assessee as those of a firm of four partners. The present is not a case of inference from mere falsity of explanation given by the assessee, but a case wherein there are definite findings that a device had been deliberately created by the assessee for the purpose of concealing his income."

19. The aforementioned two judgments support our conclusion that the petitioner had deliberately filed incorrect return and omitted to pay the amount of tax due and thereby contravened Section 25(2) and (3) of the 1973 Act and that the Assessing Authority did not commit any illegality by imposing penalty u/s 48 of the 1973 Act.

20. We may now notice the judgments on which reliance has been placed by Shri Sawhney. The facts of Hindustan Steel Ltd. Vs. State of Orissa, were that between 1954 and 1959, the appellant-company was erecting factory building for its steel plant, residential buildings for its employees and ancillary works such as roads, water supply and drainage. Some constructions were done departmentally and the rest through the contractor. The company supplied bricks, coal, cement, steel, etc., to the contractor for a consideration which in addition to the cost price included some additional amounts charged by the appellant. The question considered by the Supreme Court was whether supply of building materials amounted to "sale" and the appellant-company was a "dealer" for the purpose of sales tax under the Orissa Sales Tax Act, 1947. After examining the relevant statutory provisions, their Lordships of the Supreme Court held that supply of building materials constituted "sale". Their Lordships observed that those in-

charge of the affairs of the appellant-company had acted in an honest and genuine belief that the company was not a dealer and as such, it was not required to be registered under the Act and held that levy of penalty was not justified.

21. In the case of Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax, Indore [1980] 45 STC 197, the Supreme Court interpreted Section 43 of the Madhya Pradesh General Sales Tax Act, 1958 and held that where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable so to include it, the return cannot be treated as false warranting imposition of penalty. The facts of that case were that the appellant had effected certain transactions of sale of cement in accordance with the provisions of the Cement Control Order and deducted the amount of freight from the price shown in the invoices sent to the purchasers. The Supreme Court held that the amount of freight formed part of the sale price within the meaning of the first part of the definition in Section 2(o) of the Madhya Pradesh General Sales Tax Act, 1958 and Section 2(h) of the Central Sales Tax Act and was rightly included in the taxable turnover. However, the penalty levied by the concerned authority was set aside by making the following observations :

"A return cannot be said to be "false" within the meaning of Section 43 unless there is an element of deliberateness in it. It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no reasonable explanation forthcoming from the assessee for such want of care, the court may, in a given case, infer deliberateness and the return may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable so to include it, it would not be right to condemn the return as a "false" return inviting imposition of penalty."

22. In Khosla Mills v. State of Punjab [1973] 31 STC 85, a division Bench of this Court interpreted Section 10(7) of the Punjab General Sales Tax Act, 1948 and held that even if it is found that the explanation given by the dealer for filing nil return was wrong, that by itself was not sufficient to impose penalty and the onus to show that there was a mens rea and the concealment was deliberate with a view to avoid payment of tax was on the department. The facts of that case show that the appellant purchased large quantities of paddy and, after shelling the same, sold the resultant rice most to the State Government. The appellant filed return for a particular quarter of the year 1968 showing the purchases as nil and sent a letter along with the return giving its reasons for non-liability for payment of tax on the purchase and for filing a nil return. The Assessing Authority issued notice u/s 10(7) of the Punjab General Sales Tax Act, 1948 proposing to impose penalty on the appellant for filing false and incorrect return. He dismissed the appellant's plea and objections and imposed penalty. A division Bench of this Court referred to the judgment of the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, and

Hindustan Steel Ltd. v. State of Orissa [1970] 25 STC 211 and held that the penalty could not have been imposed on the assessee merely because the explanation given by it was not found satisfactory.

23. In our opinion, none of the aforementioned judgments support the petitioner's plea because, as mentioned above, the facts brought on the record of this case show that the petitioner had deliberately suppressed the purchase of paddy valued at Rs. 9,20,554 and knowingly did not pay the tax due as per the requirement of Section 25(3) before filing the third quarterly return. The admission made by the petitioner's representative before the Assessing Authority that the particulars of purchases were suppressed and the tax was not paid because of the financial stringency leaves no manner of doubt that the petitioner had deliberately acted in violation of Section 25(2) and (3) of the 1973 Act and thereby made itself liable for penalty u/s 48. We may add that if this Court is to accept the plea, like the one set up by the petitioner as bona fide, then in all cases, the assessee would suppress the particulars of sales and purchases, refrain from paying tax due and then take similar defences.

24. Before parting with this aspect of the matter, we consider it proper to notice the judgment of the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, in some detail. The respondent was a partner in the firm M/s. Haji Sk. Md. Hussain Md. Jan of Calcutta. While making assessment for the year 1947-48, the Income Tax Officer discovered an undisclosed bank account of the assessee with the Central Bank of India Ltd., Bettiah, Bihar. It was found that a cash deposit of Rs. 87,000 had been made by the assessee on November 21, 1946. He was asked to explain the source of amount of deposit. He pleaded that the amount was entrusted to him by his relatives who got panicky during the communal riots in Bihar in 1946. The Income Tax Officer did not accept the explanation of the assessee and held that Rs. 87,000 represented his undisclosed income. This addition was maintained by the Appellate Assistant Commissioner and the Tribunal. After finalisation of the assessment, penalty proceedings were initiated u/s 28(1)(c) of the Income Tax Act, 1922. The Income Tax Officer imposed penalty of Rs. 66,000. This was reduced by the appellate authority to Rs. 44,000. Subsequently, he rectified the order u/s 35 and confirmed the penalty of Rs. 66,000. The Tribunal took the view that penalty proceedings were criminal in nature and the onus lay on the department to show by adequate evidence that the amount of cash was of a revenue nature and that the assessee had concealed it or deliberately furnished false particulars. The Tribunal held that no penalty could be imposed on the assessee because no evidence was brought on record to show that he had deliberately furnished incorrect particulars of income. Their Lordships of the Supreme Court held that penalty proceedings were quasi-criminal in nature and burden lay on the department to establish that the assessee had concealed the particulars of his income or deliberately furnished inaccurate particulars of such income. In the present case, the department will be deemed to have discharged the burden because the material brought on record amply establish that the petitioner had

knowingly filed incorrect return and suppressed the purchase of paddy valued at Rs. 9,20,554 with a view to avoid payment of tax in terms of Section 25(3), so-much so that its representative unequivocally admitted before the Assessing Authority the factum of filing incorrect return, but tried to justify the same on the pretext that this was done to tide over the financial difficulty.

25. The argument of Shri Sawhney that action could have been taken either u/s 46 or Section 47 of the 1973 Act is meritless. Section 46 is applicable to the cases in which the dealer fails, without sufficient cause, to file return in terms of Sub-section (2) of Section 25 and Section 47 is applicable to the cases in which the dealer fails to pay tax due as per the requirement of Sub-section (2A) or Sub-section (3) of Section 25. Neither of these provisions are applicable to a case, like the present one in which the assessee knowingly filed false return and suppressed the purchase made with a view to avoid payment of tax as per the requirement of Sub-section (3) of Section 25 of the 1973 Act.

26. For the reasons mentioned above, the reference is answered in favour of the department and against the petitioner.