
(1989) 08 OHC CK 0035
In the Orissa High Court
Case No : O.J.C. No. 1135 of 1982

Sk. Umar Ali

APPELLANT

Vs

Additional Commissioner of Sales Tax and Another

RESPONDENT

Date of Decision : 02-08-1989

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 12(5), 13(5), 23

Citation : (1990) 78 STC 271

Hon'ble Judges : J. Das, J;D.P. Mohapatra, J

Bench : Division Bench

Advocate : R.B. Roy, for the Appellant; The Standing Counsel (CT), for the Respondent

Final Decision : Dismissed

Judgement

D.P. Mohapatra, J.—The question that arises for consideration in this case is whether in the facts and circumstances of the case imposition of penalty against the petitioner u/s 13(5) of the Orissa Sales Tax Act, 1947 (for short "the Act") was legal and justified.

2. The petitioner, an unregistered dealer, was assessed u/s 12(5) of the Act to tax amounting to Rs. 1,450 for the year 1977-78. The order was communicated to him on February 9, 1980. Having failed to pay the tax within one month as provided u/s 13(4) of the Act, the Sales Tax Officer, Ward 8, Balasore I Circle (opposite party No. 2) passed the order dated August 30, 1980, in annexure 2 imposing penalty of Rs. 741 being fifty per cent of the tax due u/s 13(5) of the Act. The petitioner moved the Commissioner of Sales Tax in revision against the said order. The Additional Commissioner of Sales Tax, opposite party No. 1, dismissed the revision petition by order dated February 20, 1982, as per annexure 4. In the meanwhile the petitioner being unsuccessful in challenging the order of assessment of tax before the first appellate authority filed second appeal before the Sales Tax Tribunal on August 29, 1980. On the same day he also filed an application before the Commissioner for stay of realisation of tax u/s

23 of the Act. The Commissioner granted stay of realisation of tax by order dated December 31, 1980. It is stated at the Bar that the second appeal has been dismissed and the order of assessment of tax has become final. The petitioner has filed this petition under Articles 226 and 227 of the Constitution of India to quash the order of the Sales Tax Officer imposing penalty as per annexure 2 and the revisional order of the Additional Commissioner confirming the said order as per annexure 4.

3. Shri R.B. Roy, learned counsel for the petitioner, contended that since the realisation of the tax had been stayed by the Commissioner on the application filed by the petitioner, he (petitioner) could not be said to have defaulted in payment of the tax and, therefore, no penalty should have been imposed on him. The learned counsel further submitted that the revisional authority having failed to consider this material fact, his order is vitiated.

4. Before proceeding to consider the contentions raised by Shri Roy on their merit, it will be convenient to refer to the relevant provisions in the statute. Section 13 of the Act makes provision for payment and recovery of tax and penalty. Sub-section (4) of the said section provides under Clause (c) that the tax assessed under Sub-section (5) or Sub-section (8) of Section 12 together with the penalty directed to be paid under any of the said sub-sections, and the penalty, if any, imposed under Sub-section (3) of Section 11 shall be paid by the dealer or the person, as the case may be, into a Government treasury within thirty days from the date of service of the notice issued by the Commissioner for the purpose. Under Sub-section (5) it is provided that if any amount is not paid in pursuance of a notice issued under Sub-section (4), the Commissioner may direct that the dealer or the person, as the case may be, shall, in addition, pay by way of penalty a sum not exceeding one-half of the total amount due within thirty days from the date of service of notice upon the dealer or the person in this behalf. Under Clause (b) to the second proviso to Sub-section (5) it is laid down that when the dealer or person, as the case may be, has presented an appeal under Clause (a) of Sub-section (3) of Section 23, the Commissioner may, on an application in that behalf filed by such dealer or person within sixty days from the date of receipt by him of the appellate order made under Sub-section (2) of the said section, in his discretion, stay the recovery of the amounts due from such dealer or person as a result of such appellate order or any portion thereof for such period and subject to such conditions as the Commissioner may think fit. The third proviso to Sub-section (5) provides that where as a result of an order passed in an appeal, revision or reference--(1) the assessment with or without penalty u/s 12 or 12-A, (a) is annulled, the penalty imposed under the sub-section shall be refunded or (b) is reduced, the penalty imposed under the sub-section shall be proportionately reduced and the excess amount shall be refunded and all such refunds shall be made in the manner provided u/s 14. It is also agreed by the counsel for the parties that Section 13(5) makes provision regarding stay of realisation of tax only and there is no provision in the statute for stay of realisation of penalty imposed u/s 13(5).

From the facts discussed earlier, it is manifest that the petitioner had failed to pay the amount of tax demanded from him within the stipulated period of thirty days. Long thereafter on August 30, 1980, the Sales Tax Officer passed the order u/s 13(5) of the Act imposing penalty on the petitioner for his default in paying the tax. By that date the petitioner had not obtained any order of stay of realisation of the amount. Indeed the order of stay was passed by the Commissioner on December 31, 1980, long after the imposition of penalty was made. It cannot therefore be said that on August 30, 1980, when the penalty order was passed there was any order of the Commissioner staying realisation of the tax from the petitioner. No plea was therefore available to the petitioner that the amount of tax had not become due from him. In these circumstances, no exception can be taken to the order passed by the Sales Tax Officer u/s 13(5) of the Act in annexure 2 on any ground.

Coming to the revisional order passed by the Commissioner (annexure 4) the contention of the learned counsel is that the authority did not consider the effect of the order of stay while confirming the order of imposition of penalty. In the circumstances, as noticed earlier, the order of stay was not relevant since in fact it was not in existence by the date the Sales Tax Officer passed the order u/s 13(5) and the Commissioner was considering the question whether the order of the Sales Tax Officer was sustainable or not. Viewed from any angle also the order of stay is of little consequence so far as the proceeding u/s 13(5) is concerned. The order of stay meant to postpone realisation of the tax from the petitioner by coercive measures. It did not ipso facto operate to postpone the due date of payment of tax or the jurisdiction of the Sales Tax Officer to impose penalty u/s 13(5) of the Act. The matter might have stood differently if the order of stay of realisation of tax had been passed before expiry of the due date for payment of tax. Since such is not the position in the present case, we need not consider the question that in such a case whether the petitioner could have been benefited or not.

5. The view expressed above gains support from the decision of the Gujarat High Court in the case of *State of Gujarat v. Mukhi Stores* reported in [1969] 23 STC 334, wherein it was held that penalty can be validly imposed on an assessee u/s 16(4) of the Bombay Sales Tax Act, 1953, during the period covered by the stay orders issued by the appellate and revisional authorities against the recovery of the balance of the tax payable by the assessee. The reason given by the court was that in the context in which the word "default" occurs in Section 16(4), it means nothing more than non-payment. The stay orders granted by the appellate and revisional authorities have the only effect of staying the coercive machinery for the recovery of tax u/s 16(6). They do not exonerate an assessee from the payment of penalty u/s 16(4) during such period as the tax remains unpaid. No decision taking a different view was brought to our notice. In the present case, as pointed out earlier, the order of stay was not even in existence by the date the order imposing penalty u/s 13(5) was passed.

6. Next I may refer to a few decisions relied upon by the learned counsel for the petitioner. In the case of Om Prakash Agarwal Vs. Income Tax Officer, , the Allahabad High Court considering the provisions of Sections 221 and 220(6) of the Income Tax Act, 1961, observed that while determining the question whether the assessee is in default or is deemed to be in default in making payment of the tax, the officer must consider not only whether the amount specified in the notice of demand has been paid within the time-limit but also whether the assessee has preferred an appeal and whether the circumstances of the case are such that the assessee should be treated as not being in default, particularly when the assessee has filed an application u/s 220(6) for being treated as not being in default. Even after coming to the finding that the assessee is to be deemed to be in default by reason of Section 220(4), the officer must yet arrive at a further finding whether the assessee is to be treated as not being in default notwithstanding the default contemplated by Section 220(4). The court held that both these steps are necessary before the officer can come to the decision that the assessee is in default and a penalty should be imposed on him. Relying on these observations the counsel for the petitioner contended that the revisional authority erred in not considering the fact that the petitioner had obtained an order of stay of realisation of tax from the Commissioner during pendency of the second appeal. On careful perusal, I find that the decision has no application at all to the present case. Section 220(4) of the Income Tax Act provides that if the amount is not paid within the time-limit under Sub-section (1) or extended under Sub-section (3), as the case may be, at the place and to the person mentioned in the said notice the assessee shall be deemed to be in default. Section 220(6) of the Act was to the effect that where an assessee has presented an appeal u/s 246, the Income Tax Officer may, in his discretion, and subject to such conditions as he may think fit to impose in the circumstances of the case, treat the assessee as not being in default in respect of the amount in dispute in the appeal, even though the time for payment has expired, as long as such appeal remains undisposed of. The provision for imposing a penalty upon an assessee in default is enacted in Section 221, Sub-section (1) of which provides that when an assessee is in default or is deemed to be in default in making a payment of tax, he shall, in addition to the amount, of the arrears and the amount of interest payable under Sub-section (2) of Section 220, be liable to pay by way of penalty, an amount which, in the case of a continuing default, may be increased from time to time, so, however, that the total amount of penalty does not exceed the amount of tax in arrears. In view of the specific provision in Section 220(6) vesting discretion in the Income Tax Officer to treat the assessee as not being in default in respect of the amount in dispute in appeal even though time for payment has expired, the court held that before passing the order imposing penalty the authority must give a finding whether in the facts and circumstances of the case not only the amount has been paid or not, but also whether the assessee who has preferred an appeal should be treated as not being in default. There is no such provision *pari materia* to Section 220(6) in the Orissa Sales Tax Act. Therefore this decision is of little assistance to the question arising in the

present case.

Learned counsel for the petitioner also relied on the decision in the case of Abdul Shakur Umar Sahigara & Co. v. Commercial Tax Officer reported in [1968] 21 STC 77, where the Mysore High Court considering the provisions in Section 3A of the Mysore Sales Tax Act, 1957, read with Section 13 held that the period of time within which the petitioner could pay the tax without committing default was that fixed by the Government and in consequence the notice of the Commercial Tax Officer stood superseded by the order made by Government and instead of the tax becoming due on the expiry of twenty-one days specified in the notice, it became due when the instalments allowed by Government became due. The court further held that although the period of twenty-one days specified in the notice issued by Commercial Tax Officer had expired before Government made their order, the grant of instalments by Government effaced the default emanating from non-compliance with the officer's demand and extended the time for payment. It was only when the payment by instalments allowed by Government was not made, that a default would come into being. On the ratio of this decision, the counsel for the petitioner submitted that in the present case the petitioner could not be held to be in default for the period during which the order of stay was operative, I have carefully perused the decision. I am afraid, it is not possible for the petitioner to draw any support from this decision. In the Mysore Sales Tax Act, provisions whereof were being considered by the court, there was a provision vesting jurisdiction in the State Government to permit an assessee to pay the amount of tax under demand in instalments. In the decided case, the assessee had made such an application to the State Government to permit him to pay tax in monthly instalments ; the State Government made an order directing the Commercial Tax Officer to allow the petitioner to pay the arrears of tax in six instalments and the petitioner paid the entire arrears of tax within the time allowed by Government. In this background the court held that the period of twenty-one days fixed by the Commercial Tax Officer for payment of the arrear tax had been superseded by the order of the Government permitting the assessee to pay the arrears in instalments and the assessee having cleared all the arrears within the time stipulated in the Government order he could not be held to be a defaulter in payment of tax. In the present case, there is neither any statutory provision nor is there any order from which it is possible to infer that the date fixed by the Sales Tax Officer for payment of tax had been postponed. As such the principles laid down in the decided case are of no assistance for deciding the present case.

7. From the analysis and the discussions made in the preceding paragraphs, it is manifest that in the facts and circumstances of the case the petitioner was rightly held to be in default of arrears of tax dues and the order of imposition of penalty was legal and justified. There is, therefore, no scope to interfere in the impugned orders. The writ petition is accordingly dismissed, but in the circumstances of the case, without any order for costs.

J. Das, J.

8. I agree.