
(1974) 01 OHC CK 0037
In the Orissa High Court
Case No : S.J.C. No's. 209 to 211 of 1972

State of Orissa

APPELLANT

Vs

Kalinga Automobiles Ltd.

RESPONDENT

Date of Decision : 16-01-1974

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 11(3)

Citation : (1974) 33 STC 565

Hon'ble Judges : R.N. Misra, J;B.K. Ray, J

Bench : Division Bench

Advocate : D.P. Mohanti and P.K. Mohanti, for the Respondent

Judgement

R.N. Misra, J.—On the application of the revenue, the Sales Tax Tribunal has stated these cases and has referred the following questions for determination of this court u/s 24(1) of the Orissa Sales Tax Act, 1947 (hereafter referred to as "the Act"):

(1) Whether the Member, Sales Tax Tribunal, is correct in holding that the expression "tax due" in Sub-section (3) of Section 11 does not refer to the admitted tax payable by the dealer as per his return?

(2) Whether the Member, Sales Tax Tribunal, is right in observing that order u/s 11(3) cannot be passed imposing one-tenth per centum of the tax due till the assessment u/s 12 of the Act is completed?

(3) Whether, in the circumstances of the case, the Member, Sales Tax Tribunal, is justified in holding that the highest penalty leviable according to first part of Section 11(3) of the Act is Rs. 5 per day?

2. The assessee is a registered dealer under the Act. For the quarters ending 31st December, 1965, 31st March, 1966, and 30th June, 1966, with which we are concerned, the assessee defaulted to comply with the requirement of making a return as required u/s 11(1) read with Rule 20 as per the details indicated

below:

Quarter ending Period of delay Amount of admitted tax 1. 31-12-1965 28 days Rs. 23,642 2. 31-3-1966 90 days Rs. 56,208 3. 30-6-1966 60 days Rs. 33,199

The Sales Tax Officer imposed penalties u/s 11(3) of the Act of Rs. 660, Rs. 5,058 and Rs. 1,980 for the defaults. The first appellate authority dismissed the appeals, but in second appeals by the assessee, the Tribunal held:

. . . As regards the excessiveness of the penalty a legal plea was advanced that there is difference between "tax due" and "tax payable". In other words, it was contended that two kinds of penalties are contemplated u/s 11(3) of the Act, one at the rate of Rs. 5 for every day of delay and the other one-tenth per centum of the tax due whichever is higher and, in this case, no tax being due, the first part of the penalty provision applied to this case and the maximum penalty that could be imposed thereunder is Rs. 5 per day of delay. There are judicial pronouncements differentiating "tax due" from "tax payable". It is said in that context that a tax due is always quantified or determined and thereafter demand notice to pay is issued and then only it becomes a debt and, therefore, a "tax due". But a "tax payable" does not possess the above virtues. I think there is much substance in this contention. Their Lordships of the Allahabad High Court in the case of M.A. and Co. v. Assistant Commissioner (Judicial), Sales Tax, Farrukhabad [1964] 15 S.T.C. 487, have observed:

"Sales tax becomes payable when liability to pay tax arises, and liability to pay tax arises by the happening of the taxable event.... There is a distinction between the expressions "tax payable" and "tax due". Tax is due when it becomes a debt owed to the taxing State; it becomes a debt when it has been determined by assessment and quantified, and a notice of demand has been issued intimating the amount of tax and demanding payment."

4. Accordingly, in the context of the facts of this case, it cannot be said that there was any tax due. It was only a tax payable. Consequently, the maximum penalty that could be imposed is Rs. 5 for every day of delay in failing to submit the return. In this case, I see the justification of imposing highest penalty according to the first part of Section 11(3), which is Rs. 5 per day, and so calculated for the number of days of delay, referred to above, the penalty amount comes to Rs. 140, Rs. 450 and Rs. 300 respectively for the three quarters....

3. Learned standing counsel contends that the view adopted by the Tribunal is on a misconception of the legal position under the Act. Section 11 making provision for returns states:

(1) Such dealer as may be required so to do by the Commissioner by notice served in the prescribed manner and every registered dealer shall furnish such returns by such dates and to such authority as may be prescribed....

(3) If a registered dealer fails, without any reasonable cause, to furnish any

return within a fortnight of the due date, the Commissioner may direct that the dealer shall, by way of penalty, pay a sum not exceeding one-tenth per centum of the tax due or five rupees whichever is higher for every day after the due date during which the dealer fails to submit the required returns.

Explanation. -- A return unaccompanied by a receipt from the treasury showing full payment of the admitted tax or composition money or by a crossed bank draft or crossed cheque covering the admitted tax or composition money, as the case may be, shall not be deemed to be a return for the purposes of this section...

Rules 20 and 21 provide:

20. Returns. -- Within one calendar month of the expiry of each quarter of a year, every registered dealer shall furnish to the Assistant Sales Tax Officer or the Sales Tax Officer, as the case may be, within whose jurisdiction his place or places of business are located a return in form IV showing particulars in respect of the sales tax payable by him for that quarter.

Provided...

21. Penalty for non-submission of return. -- (1) If a registered dealer fails to furnish a return within a fortnight of the due date as provided in Rule 20, the Commissioner may serve on such defaulting dealer a notice in form V calling on him to show cause by a date to be specified in the notice why a penalty should not be levied on him under Sub-section (3) of Section 11.

(2) If after considering the explanation of the dealer and giving him a personal hearing if necessary, the Commissioner is not satisfied that the default was due to reasonable cause, he shall pass an order levying a penalty in accordance with the provisions of Sub-section (3) of Section 11 and serve it on the dealer together with a notice of demand in form X.

The statutory form X throws some light on the point in controversy. As far as relevant, the form is as given below:

Please take notice that for the quarter/year ending...a sum of Rs.... has been determined as the dues payable by you under the Orissa Sales Tax Act, 1947, as detailed below:

Rs. Np. Penalty u/s 11(3) as per order dated Tax due as per order dated Penalty u/s 12(5)/12(8) as per order dated Composition money payable under Rule 90-A 2. ... 3. ... 4. If you are dissatisfied with my order imposing the penalty or assessment (and penalty) you may present an appeal to the Additional/Deputy/ Assistant Commissioner of Sales Tax...within 30 days from the date of receipt by you of the said order.

An analysis of these provisions would thus clearly show that:

(i) Every registered dealer has to make a return in the prescribed form within

one calendar month of the expiry of each quarter or year.

(ii) If such return is not made within a fortnight of the expiry of the calendar month, the dealer becomes liable to be visited with penalty.

(iii) The return has to be accompanied by a treasury receipt showing full payment of the admitted tax or bank draft or cheque paying the same, failing which the return shall not be a valid one.

(iv) In case of default the dealer becomes liable to a penalty which shall not exceed one-tenth per centum of the tax due or five rupees, whichever is higher, for every day of default.

4. In the face of such clear statutory provisions, we see no justification to get into a consideration of "tax due" and "tax payable". There may be -- nay, there is -- distinction between these two, but so far as Section 11 and the relatable rules are concerned, there is no scope to proceed on the basis of such distinction. In the concept of "admitted tax" a process of self-assessment is involved. The dealer is required by law to calculate his tax liability and is given a time to pay the same along with the return. It is quite possible that by the ultimate assessment the tax due may vary -- be more or even less -- but at the stage of making of the return, obligation has been cast on the dealer to pay the admitted tax. Under the scheme of the Orissa Act, admitted tax is due at the time the return is due, i.e., within a calendar month of the end of the quarter or year, as the case may be, and a grace period of a fortnight thereafter is allowed failing which penalty becomes exigible. Construing similar provisions in Sections 14(2) and 14(3a) of the Bihar Sales Tax Act, the Patna High Court in *Commissioner of Sales Tax v. Ganga Prasad Jai Prakash* [1961] 12 S.T.C. 716 has said:

It is, therefore, manifest in the present case that the assessee is liable to be saddled with penalty u/s 14(3a) of the Bihar Sales Tax Act because he has failed to make the payment of the admitted tax due from him at the time of the submission of the return.

5. In the case before us, even the Tribunal has held that the dealer is liable to be saddled with penalty, but, in its view, the quantum has to be not exceeding Rs. 5 for every day of default. We do not find any mandate in Section 11(3) of the Act for the distinction made by the Tribunal in the matter of levy of penalty, i.e., where it is only a tax payable and not a tax due (because there has been no assessment yet), the extent of liability is not exceeding five rupees for every day of default. As we have already said, the statute requires the admitted tax to be paid and that amount (admitted tax) is due at the time of making of the return within the time prescribed. In Section 11(3) of the Act two alternative rates of penalty are provided with a mandate that the higher of the two has to be imposed. There may be a case where one-tenth per centum for every day of default may work out to be less than five rupees per day while in another case the reverse may be the position. The alternatives with the mandate to fix the higher liability on the defaulting dealer are meant to meet every situation of

default. That provision has nothing to do with reference to completion of assessment and quantification of liability followed up by demand. The statutory provisions including form X contemplate of raising the demand of penalty even without completing the assessment. The working out of the penalty provision is not dependent upon completion of the assessment. No support is, therefore, available to the assessee from the decision of the Allahabad High Court in the case of *M.A. and Company v. Assistant Commissioner* [1964] 15 S.T.C. 487. The court was called upon to decide whether the assessee could have the composition provided for u/s 7-E of the U.P. Sales Tax Act and keeping the provisions of that in view the court decided that after the tax had been assessed and was due, benefit of Section 7-E could not be called in aid.

6. Counsel for both sides relied on a number of decisions to support their respective standpoints. We find no warrant to elongate the discussion by referring to them as, in our opinion, the Tribunal drew an unsustainable distinction by overlooking the statutory provisions under the Act.

7. After the judgment was reserved, Mr. Mohanti for the assessee relied on three more cases, namely, *Mahomed Tayoob Daruwala v. State of Bombay* [1960] 11 S.T.C. 612, *B.V. Aswathiah and Bros. v. Commercial Tax Officer* [1963] 14 S.T.C. 467 and *Viswa and Co. v. State of Gujarat* [1966] 17 S.T.C. 581, and wanted us to deal with them. The first and the last of these decisions relate to the Bombay Sales Tax Act and were concerned to find out when the assessee would be in default. The first case, *Mahomed Tayoob Daruwala v. State of Bombay* [1960] 11 S.T.C. 612, dealt with Section 16(4) of the Bombay Sales Tax Act, which provides:

If the tax is not paid by any dealer within the prescribed time, the dealer shall pay, by way of penalty in addition to the amount of tax, a sum equal to....

The court concerned itself as to what was the meaning of the prescribed limit. No support can be had by the assessee from that decision. The last of the cases dealt with the same Section 16 under the scheme of the Bombay Act. Where a return is furnished without payment of the full amount of tax due according to the return, Section 16(5) prescribes the time within which the amount of tax due according to the return or the balance thereof remaining unpaid should be paid by the assessee on pain of incurring penalty u/s 16(4) and recovery proceeding being initiated u/s 16(6). The discussion in the judgment at page 594 of the Reports shows that emphasis was again on the true meaning of "prescribed time" within the meaning of Section 16(4) of the Act. The scheme under the Bombay Act is somewhat different from the scheme under our Act. There is no provision in the Orissa Act for demanding the balance amount of admitted tax before the assessment itself is completed. If the entire admitted tax is not paid, on the other hand, the return itself becomes invalid.

9. The remaining one of the three cases is from the Mysore High Court. Facts show that it was a case where the admitted tax had been underestimated. The court was considering whether there was any provision in the Act to raise penalty

on the assessee until a final assessment was made whereunder only the under-estimate could be detected. This again provides no prop to the assessee's contention.

8. Our answers to the questions referred to us are:

(i) The learned Member, Sales Tax Tribunal, was not correct in holding that the expression "tax due" in Sub-section (3) of Section 11 does not refer to the admitted tax payable by the dealer on the basis of his return.

(ii) The learned Member was not right in holding that penalty at the rate of one-tenth per centum of the tax due cannot be imposed till assessment u/s 12 of the Act is completed.

(iii) In the facts and circumstances of the case, the learned Member was not justified in holding that the maximum penalty exigible under the Act was at the rate of rupees five per every day of default.

16. The revenue shall have costs of this proceeding. Consolidated hearing fee is assessed at Rs. 150 (one hundred and fifty).

B.K. Ray, J.

9. I agree.