

(2009) 03 P&H CK 0259
In the Punjab And Haryana At Chandigarh
Case No : G.S.T.R. No"s. 5 and 6 of 2004

Swastik Pipes Ltd.

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision : 17-03-2009

Acts Referred:

Central Provinces and Berar Sales Tax Act, 1947 — Section 11
Haryana General Sales Tax Act, 1973 — Section 28, 28(1), 28(2), 28(3), 28(4)
Haryana General Sales Tax Rules, 1975 — Rule 26, 26(1), 26(2)

Citation : (2011) 40 VST 72

Hon'ble Judges : M.M. Kumar, J;H.S. Bhalla, J

Bench : Division Bench

Advocate : Avneesh Jhingan, for the Appellant; Sanjeev Kaushik, A.A.G., for the Respondent

Judgement

M.M. Kumar, J.—At the instance of the dealer-Assessee, a Division Bench of this Court, vide order dated November 11, 2003 passed in S. T. C. No. 22 of 2002, directed the Haryana Tax Tribunal, Chandigarh (for brevity, "the Tribunal"), to refer the following question of law for opinion of this Court, which has emerged from the order dated July 31, 2000, passed by the Tribunal in respect of assessment years 1987-88 and 1988-89:

Whether, in the facts and circumstances of the case, a second/ separate show-cause notice is mandatory for the levy of purchase tax u/s 28(5) of the Haryana General Sales Tax Act, 1973?

2. Brief facts of the case are that the dealer-Assessee is engaged in the business of manufacture and sale of steel tubes, which are partly sold from within the State and partly from its depots situated outside the State. The dealer-Assessee used to purchase the raw materials and consumable stores required for manufacture of tubes partly from within the State without payment of tax and partly from outside the State against form C. It is conceded position that the dealer-Assessee has filed sales tax returns in form ST 9 for the assessment years

1987-88 and 1988-89 but did not file any returns regarding purchase tax, which were required to be filed in form ST 10. The Assessing Authority issued notices in form ST 25 u/s 28(2) of the Haryana General Sales Tax Act, 1973 (for brevity, "the Act") asking it to produce documents/evidence in support of the returns for the purpose of finalising the assessment order u/s 28 of the Act. The dealer-Assessee raised objection that without issuing a statutory notice or a notice u/s 28(5) of the Act, purchase tax assessment cannot be finalised. On January 7, 1991 and April 5, 1991, the Assessing Authority finalised the assessment of purchase tax in respect of the assessment years 1987-88 and 1988-89.

3. Feeling aggrieved, the dealer-Assessee filed appeals but the same were dismissed by common order dated November 25, 1997 passed by the Joint Excise and Taxation Commissioner (Appeals), Rohtak. Further appeal was also dismissed by the Tribunal vide order dated July 31, 2000.

4. The Tribunal rejected the arguments that any other notice u/s 28(5) of the Act was required to be served on the dealer-Petitioner. The Tribunal followed the judgment of the Supreme Court in the case of Anandji Haridas and Co. (P.) Ltd. v. S. P. Kushare, Sales Tax Officer, Nagpur (1968) 21 STC 326. The view of the Tribunal is discernible from the concluding para of judgment:

I have considered the matter carefully and have also seen the facts on record and the judgments referred to above by the counsel for the Appellant and relief upon by the lower authorities. In the present case, the said point for consideration before the Tribunal is whether the Appellant could be assessed for purchase tax in the absence of any notice in form ST 27 prescribed under the Rules. This issue is fully covered with the ratio of the judgment reported as State of Madras Vs. A. Habibur Rehman Sons, and Anandji Haridas and Co. (P.) Ltd. Vs. S.P. Kushare, S.T.O. Nagpur and Others, wherein their Lordships have clearly held that for initiation of proceedings u/s 12(5) of the Orissa Sales Tax Act, 1947, notice is not mandatory if a reasonable opportunity of being heard is offered to the dealer during the proceedings. In the present case it is not denied that the dealer was not given due opportunity. Rather the case was finalized with the co-operation of the Appellant himself which were burnt during the anti-Mandal commission agitation. In fact the notice prescribed under the rules is only to afford an opportunity to the dealer of being heard and if an assessment is framed with his consent or in his presence, no prejudice is caused to him by not issuing a notice in the prescribed form. Regarding double credit of payment of tax liability assessed it is a matter of record that the dealer not adjusted of payment of worth Rs. 1.40 lacs in March, 1990 against its purchase tax for both the years 1988-89 and 1989-90 which could not be allowed twice and as such Joint Excise and Taxation Commissioner (A) was fully justified to disallow such a double credit which was wrongly allowed by the assessing authority.

In view of these observations the orders of the Joint Excise and Taxation Commissioner (A) do not warrant any interference and accordingly the appeals are dismissed.

5. Thereafter, the dealer-Assessee filed an application for referring questions of law for opinion of this Court. The Tribunal declined the application vide order dated May 31, 2001, against which the dealer-Assessee preferred S. T. C. No. 22 of 2002 in this Court u/s 42(2) of the Act for directing the Tribunal to draw up the statement of the case and refer the questions of law arising out of the order dated July 31, 2000. The Tribunal in compliance with the direction issued by this Court vide order dated November 11, 2003 has referred the aforementioned question of law for opinion of this Court.

6. Mr. Avneesh Jhingan, learned Counsel for the Assessee-Petitioner, has argued that in the absence of a specific notice u/s 28(5) of the Act, it could not be said that any proceeding u/s 28(5) of the Act stood validly initiated and therefore the best judgment assessment cannot be regarded to have been initiated by the Assessing Authority. In that regard he has placed reliance on a judgment of learned single judge of this Court in the case of *Gopal Oil Mills v. Assessing Authority, Ludhiana* (1984) 57 STC 314.

7. Mr. Sanjeev Kaushik, learned State counsel, has on the other hand submitted that the matter is squarely covered by the judgment of the Supreme Court in the case of *Anandji Haridas and Co. (P.) Ltd.* (1968) 21 STC 326. The learned State counsel has supported the order passed by the Tribunal and has argued that mechanical application of principles of natural justice should be avoided.

8. Having heard learned Counsel for the parties and perusing the record, it may first be appropriate to notice the provisions of Section 28 of the Act which reads thus:

(1) If the Assessing Authority is satisfied without requiring the presence of dealer or the production by him of any evidence that the returns furnished in respect of any period are correct and complete, he shall assess the amount of tax due from the dealer on the basis of such returns.

(2) If the Assessing Authority is not satisfied without requiring the presence of the dealer who furnished the returns or production of evidence that the returns furnished in respect of any period are correct and complete, he shall serve on such dealer a notice in the prescribed manner requiring him, on a date and at a place specified therein, either to attend in person or to produce or cause to be produced any evidence on which such dealer may rely in support of such returns.

(3) On the day specified in the notice or as soon afterwards as may be, the Assessing Authority shall, after hearing such evidence as the dealer may produce and such other evidence as the Assessing Authority may require on specified points, assess the amount to tax due from the dealer.

(4) If a dealer, having furnished returns in respect of a period, fails to comply with the terms of a notice issued under Sub-Section (2), the Assessing Authority shall, within five years after the expiry of such period, proceed to assess to the best of his judgment the amount of the tax due from the dealer.

(5) If a dealer does not furnish returns in respect of any period by the prescribed date, the Assessing Authority shall, within five years after the expiry of such period, after giving the dealer a reasonable opportunity of being heard, proceed to assess, to the best of his judgment, the amount of tax, if any, due from the dealer.

9. A perusal of the aforesaid provision shows that in a case where the dealer furnishes a return and the Assessing Authority is satisfied with its correctness then the assessment is framed u/s 28(1) of the Act without requiring the presence of the dealer. However, if the Assessing Authority has expressed dissatisfaction with the returns then he has to issue statutory notice u/s 28(2) in form ST 25 calling upon the dealer to produce evidence to prove the correctness of the return. If the dealer produces some evidence in response to the notice issued by the Assessing Authority, then the assessment is framed u/s 28(3) of the Act. But if the dealer fails to respond to the notice the Assessing Authority can frame assessment on best judgment basis u/s 28(4) of the Act. It is proved that Sub-Section (5) of Section 28 provides for giving the dealer a reasonable opportunity of being heard. The question is would there be any requirement in the facts and circumstances of this case to grant such an opportunity or the opportunity would be deemed to have been granted when notice u/s 28(2) of the Act has been issued. It would first be appropriate to examine the rule which deals with framing of assessment and issuance of notice. In that regard reference may be made to Rule 26 of the Haryana General Sales Tax Rules, 1975. The relevant portion of the rule read thus:

(1) When the appropriate assessing authority considers necessary to make an assessment u/s 28 or Section 29 or reassessment u/s 31 in respect of a dealer it shall serve a notice in form ST 25,--

(a) calling upon him to produce his books of account and other documents which such authority wishes to examine together with any objection which the dealer may wish to prefer and any evidence which he may wish to produce in support thereof ; and

(b) stating the period or the return period or periods in respect of which assessment or reassessment is proposed, and he shall fix a date ordinarily not less than ten days after the date of the service of the notice for producing such accounts and documents and for considering any objection which the dealer may prefer.

(2) A dealer who has been served with a notice under Sub-rule (1) may prefer an objection in writing personally or through an agent. No fee shall be payable in respect of any such objection.

(3) The assessing authority may make such enquiries, in respect of the objection made under Sub-rule (2), as it may deem fit and record a finding thereon.

10. A perusal of the aforesaid rule would show that when the Assessing Authority

deems it necessary to frame assessment, inter alia, u/s 28 of the Act in respect of a dealer it is obliged to serve a notice in form ST 25, as it stood in the year 1988-89 contemplated a notice u/s 28 of the Act or other sections. In Clause (a) of form ST 25 the Assessing Officer records his dissatisfaction calling upon the dealer-Assessee to appear before him for the purpose of framing of assessment u/s 28(3) of the Act. The facts of the present case reveal that the assessment has been finalised with the co-operation of the dealer. The aforesaid factual position is revealed from the order of the Joint Excise and Taxation Commissioner (Appeals), Rohtak vide order dated November 25, 1997 which reads thus:

23. It is seen from the facts stated above that all the necessary ingredients of Section 28(5) to frame assessment validly were present at the relevant time when the assessments for the year 1987-88 and 1988-89 were originally finalized. It was clearly in the notice of the Appellant-company that its case for assessment of purchase tax had been taken up and was under process with the Assessing Authority. It knew of the dates of hearing of the case (it mentioned to the High Court that the Assessing Authority is going to finalize the assessment for the assessment year 1987-88 on March 22, 1990 and for the assessment year 1988-89 on January 21, 1991 and sought to restrain him to proceed further in the matter) ; it was given a reasonable opportunity of being heard as the assessments for the years 1987-88 and 1988-89 were finalized on January 8, 1991 and April 5, 1991, respectively, by associating the company with the assessment proceeding. The Appellant-company supplied all the relevant information necessary for the quantification of purchase tax liability to the Assessing Authority. The record of the Assessing Authority was burnt to ashes in the fire on August 22, 1990 and he had solely to depend on the Appellant for information. The Appellant-company even filed statements before the Assessing Authority quantifying its purchase tax liability for the two years. It may also be noted that if the Assessing Authority proceeds to assess a dealer in the absence of returns and the dealer fully co-operates, there is no occasion for the Assessing Authority to make any guess to estimate the turnover liable to tax. He can and should depend upon the records produced by a co-operative Assessee unless he has evidence to believe that the records produced before him are not reliable. It is perfectly legal in an assessment proceedings started in the absence of returns to depend upon the regular accounts produced by the Assessee. And if the Assessee has co-operated thus, he cannot turn around and say that the assessment was bad because he had no notice of the assessment proceeding. In the present case, the assessment for financial year 1987-88 was finalized within three years and that for financial year 1988-89 within two years of the end of the respective financial years. This was quite within the time-limitation of five years laid down under Sub-Section 28(5) for proceeding to assess the dealer to tax. All the requirements of the Sub-Section were, thus, fully met and, hence, the challenge to the original proceedings as also to the subsequent ones taken up in pursuance of the order of the appellate authority on the ground of lack of notice must fail.

11. The aforesaid para reveals a tell-tale story. Once the aforesaid facts are clear then the issuance of notice u/s 28(5) of the Act would be rendered a mere formality because in sum and substance all the ingredients of Section 28(5) of the Act to frame a valid assessment were present. A reasonable opportunity of being heard was afforded to the Petitioner on March 22, 1990 and January 21, 1991. Thereafter the assessments were finalized on January 8, 1991 and April 5, 1991, respectively, by associating the dealer-Petitioner with the assessment proceeding. The dealer-Petitioner had supplied all the relevant information necessary for quantification of purchase tax liability to the Assessing Authority because the record of the Assessing Authority was burnt to ashes in the fire on August 22, 1990 on account of Mandal commission agitation. The Assessing Authority had to depend on the dealer-Petitioner for every information. There was no occasion for the Assessing Authority to make any guess about the turnover liable to be taxed. It was in these circumstances that the Supreme Court while interpreting the provisions of Section 11 of the Central Provinces and Berar Sales Tax Act, in *Anandji Haridas and Co. (P.) Ltd. case* (1968) 21 STC 326 has held that issuance of a notice in respect of a similar provision was not a condition precedent for initiating proceedings. The requirement of Section 28(5) of the Act extends only to ground of reasonable opportunity of hearing which stands satisfied.

12. The aforesaid principle laid down by the Constitution Bench in *Anandji Haridas and Co. (P.) Ltd. Vs. S.P. Kushare, S.T.O. Nagpur and Others*, has also been followed and applied in the case of *Commissioner of Sales Tax and Others Vs. Subhash and Company*, . After considering the various judgments, their Lordships of the Supreme Court have extracted four principles which read thus (page 106 in 130 STC):

(i) Non-issue of notice or mistake in the issue of notice or defective service of notice does not affect the jurisdiction of the assessing officer, if otherwise reasonable opportunity of being heard has been given.

(ii) Issue of notice as prescribed in the Rules constitutes a part of reasonable opportunity of being heard.

(iii) If prejudice has been caused by non-issue or invalid service of notice the proceeding would be vitiated. But irregular service of notice would not render the proceedings invalid ; more so, if the Assessee by his conduct has rendered service impracticable or impossible.

(iv) In a given case when the principles of natural justice are stated to have been violated it is open to the appellate authority in appropriate cases to set aside the order and require the assessing officer to decide the case de novo.

13. The first principle is fully applicable to the facts of the present case. Therefore, it has to be held that non-issuance of notice or mistake in the issuance of notice or defective service of notice does not affect the jurisdiction of the Assessing Officer to frame a valid assessment if otherwise reasonable

opportunity of being heard has been afforded. In the present case we are satisfied that neither any prejudice has been caused nor the provisions of Section 28(5) of the Act have been violated. Therefore, the answer to the question is liable to be given against the Assessee and in favour of the Revenue.

14. The arguments of learned Counsel for the dealer-Petitioner that in Gopal Oil Mills Vs. The Assessing Authority and Others, , the issuance of notice u/s 28(5) of the Act has been considered as mandatory does not come to his rescue because in that case there was no findings that reasonable opportunity of being heard was granted to the dealer. Moreover in that case assessment was framed after the expiry of period of five years which was impermissible. Therefore, the judgment of this Court rendered in Gopal Oil Mills" case (1984) 57 STC 314 does not apply to the facts of the present case.

15. For the reasons aforementioned the question is answered against the dealer-Petitioner and in favour of the Revenue.