

(1980) 01 RAJ CK 0020
In the Rajasthan High Court
Case No : Sales Tax Reference No. 18 of 1970.

Vijai Hosiery Mills

APPELLANT

Vs

The State of Rajasthan

RESPONDENT

Date of Decision : 07-01-1980

Acts Referred:

Rajasthan Sales Tax Act, 1954 — Section 16(1)(i)

Citation : (1980) 45 STC 345 : (1980) WLN 52

Hon'ble Judges : C.M. Lodha, C.J.;N.M. Kasliwal, J

Bench : Division Bench

Advocate : V.K. Singhal, for the Appellant; J.S. Rastogi, Government Advocate, for the Respondent

Judgement

C.M. Lodha, C.J.—This is a reference u/s 15(3A) of the Rajasthan Sales Tax Act, 1954 (which will hereinafter be referred to as "the Act"), by the Board of Revenue for Rajasthan, Ajmer, in pursuance of the order of this Court dated 30th September, 1969, passed in D.B. Civil Misc. Application (Sales Tax) No. 44 of 1969.

2. The question that has been referred to us reads as follows:

Whether, after the amendment of Section 5 of the Rajasthan Sales Tax Act by Section 6 of the Rajasthan Amending Act (Act No. 13 of 1964), sales tax could be levied by the State of Rajasthan on the goods sold by the petitioner during the period from 14th May, 1964, to 31st December, 1964, by virtue of Notification, Excise and Taxation Department, No. F. 5(40) FD (R & T)/63-XIII dated 2nd March, 1963, issued by the Government of Rajasthan and penalty could be imposed on it u/s 16(l)(i) of the said Act?

3. For a correct appreciation of the contentions advanced by the learned counsel for the parties, we may refer to a few facts giving rise to the reference. The petitioner, M/s. Vijai Hosiery Mills, is a registered dealer under the Act. The period for assessment under consideration is from 1st January, 1964, to 31st

December, 1964. The assessee showed a turnover of Rs. 1,79,214 on account of sale of "banians", but did not deposit the tax at the time of filing the return on the ground that the sale of "banians" was exempt from payment of sales tax by virtue of Notification No. F. 5(99) E & T/60 dated 26th March, 1962. The Commercial Taxes Officer, Circle B, Jaipur, however, did not accept the petitioner's contention and held that "banians" did not fall within the definition of the term "garments" but were a hosiery product and, consequently, liable to be taxed. He also levied a penalty of Rs. 10,752.84, an amount equal to the amount of tax. Aggrieved by the order of the assessing authority, the petitioner filed an appeal before the Deputy Commissioner (Appeals), Commercial Taxes, Jaipur II, but was unsuccessful. Thereafter, the petitioner filed a revision application before the Board of Revenue for Rajasthan, Ajmer, but that too was dismissed. The petitioner then made an application u/s 15(1) of the Act to the Board for making a reference to this Court, but that application was not decided within the prescribed period. Consequently, the petitioner approached this Court u/s 15(2) of the Act and this Court by its order dated 30th September, 1969, required the Board to state a case and refer the question of law arising out of its revisional order. The question has already been extracted above.

4. The learned counsel for the petitioner stated at the very outset that the petitioner had challenged the vires of the notification dated 26th March, 1962, of the State Government, which deals with the question of exemption by a writ petition before this Court, but the same was dismissed and thereupon the petitioner filed an appeal by certificate before the Supreme Court. The judgment of the Supreme Court is reported as Jaipur Hosiery Mills (P.) Ltd. v. State of Rajasthan [1970] 26 S.T.C. 34 (S.C.). It is submitted that though the Supreme Court in agreement with this Court upheld the validity of the notification dated 26th March, 1962, yet observed that the question whether "banians" were included in the term "hosiery products" should have been left to be decided in each individual case by the assessing authority. It is submitted that the aforesaid judgment was delivered by the Supreme Court on 27th April, 1970, whereas the reference in question had been made by the Board of Revenue before that, i. e., on 31st March, 1970. It is further submitted by the learned counsel for the petitioner that the petitioner would have moved the taxing authorities over again to determine the question whether "banians" are included in the term "hosiery products" in the light of the Supreme Court's order, but now, since the petitioner-firm has closed its business, the petitioner does not want to make any grievance regarding the levy of sales tax on the sale of banians by the assessee. In this view of the matter, the learned counsel submitted that he does not want to press the question of taxability on banians. The first part of the question, therefore, need not be answered.

5. The only point, the learned counsel for the petitioner has pressed before us, is that in any view of the matter even if it be held that the sale of banians was taxable in the light of the notification dated 26th March, 1962, no penalty could have been imposed on the petitioner u/s 16(I)(i) of the Act, inasmuch as the

petitioner did not fraudulently evade or avoid the payment of tax or conceal its liability to tax. This point is undoubtedly covered by the second part of the question, namely, whether penalty could be imposed on the petitioner u/s 16(1) (i) of the Act. We shall, therefore, proceed to examine this question.

6. Section 16(1)(i) of the Act, as it stood at the relevant time, reads as under:

16. Offences, penalties and prosecutions, etc. -- (1) If any person...

(i) fraudulently evades or avoids the payment of tax or conceals his liability to tax; or...

the assessing authority may direct that such person shall pay by way of penalty

7. The learned counsel urges that the petitioner had shown a turnover of Rs. 1,79,214 on account of the sale of banians, which has been found to be correct. It has been further mentioned in the return itself that the sale in question was exempt from payment of sales tax as it was covered by the notification dated 26th March, 1962, whereby the sale of garments, the value of which does not exceed Rs. 4 in single piece, was excluded. It is argued that the notification, no doubt, says that such garments excluding hosiery products would be exempt, but the petitioner was under a bona fide belief that banians are garments and not hosiery products and, that is why it claimed the sale of banians as exempt from payment of sales tax.

8. The question for consideration, therefore, is whether in the facts and circumstances of the case, it can be said that the petitioner is guilty of fraudulently evading or avoiding the payment of tax or of concealing its liability to tax. In *Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax, Indore* 1979 Tax World 92, decided by the Supreme Court on 30th October, 1979, the Supreme Court observed that where the assessee does not include a particular item in the taxable turnover under a bonafide belief that he is not liable so to include it, it will not be right -to condemn the return as a false return inviting imposition of penalty. Again in *Hindustan Steel Ltd. v. State of Orissa* [1970] 25 S.T.C. 211 it was held by the Supreme Court 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 bonafide belief that the offender is not liable to act in the manner prescribed by the statute. It is crystal clear that Section 16 of the Act provides for imposition of penalties and prosecutions and is consequently penal in character and unless the non-payment of the tax is accompanied by a guilty mind, it would not be proper to invoke the provisions of Section 16 for imposing penalty.

9. We have, therefore, to see whether, in the present case, it can be said that the petitioner claimed exemption and did not pay the tax under a bonafide belief that it was not liable to do so. In this connection, our attention has been invited to

Pareek Hosiery Products v. Deputy Commissioner of Sales Tax (Appeals), Jaipur [1962] 13 S.T.C. 722, wherein a question arose as to what is meant by the word "garment" and the learned Judges observed as follows:

The word "garment" in Webster's New 20th Century Dictionary (1956 Edition) means:

1. (a) any article of clothing: (b) (pl.) clothes, costume.
2. Covering."

In Oxford Dictionary, the word "garment" has been stated to mean: "Any article of dress; in sing, esp., an outer vestment, in pl. clothes.

10. It is true that no distinction was drawn between "garment" and "hosiery goods" in that case, inasmuch as the hosiery products were not at all mentioned in the notification under consideration in that case, but the argument advanced on behalf of the department that garment meant only an outer covering as distinguished from an underwear, was not accepted. Be that as it may, this case could have given rise to a reasonable belief in the mind of the assessee that banian is a garment. It may be pointed out at this stage that the notification dated 26th March, 1962, exempted sale of garments, the value of which does not exceed Rs. 4 in single piece, excluding hosiery products from payment of any tax under the Act. The relevant question, therefore, was whether banian is a garment or a hosiery product, and the petitioner took it to be a garment. It may not be out of place here, to refer to the observations of their Lordships of the Supreme Court in the Jaipur Hosiery Mills (P) Ltd., Jaipur Vs. The State of Rajasthan and Others, wherein the court said that the High Court should not have proceeded to decide whether the banians are included in the term "hosiery products" and such a decision should have been left to the assessing authorities dealing with each individual case. Thus, the question whether banians were included in the term "hosiery products" was not ex facie answered against the assessee, but was left open.

11. Taking all the circumstances into consideration, we are inclined to hold that it cannot be said that there was any mens rea or guilty intention on the part of the petitioner when it claimed exemption on the sale of banians on the ground that banian is a garment and not a hosiery product. It cannot, therefore, be said that the petitioner fraudulently evaded or avoided payment of tax or concealed its liability to tax.

12. Having come to the conclusion that there was no mala fide or mens rea on the part of the petitioner, we must hold that the taxing authorities were not justified in imposing penalty on the petitioner u/s 16(I)(i) of the Act. Hence, we answer the question of imposition of penalty in favour of the assessee, i. e., in the negative. There will be no order as to costs.