IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Civil Revision No. 267 of 2017
Date of Decision: 06.01.2025

M/s Bhushan Power & Steel Ltd. ...Petitioner.

Versus

Assistant Excise & Taxation Commissioner and another ...Respondents.

Coram

Hon'ble Mr Justice Tarlok Singh Chauhan, Judge.

Hon'ble Mr Justice Rakesh Kainthla, Judge.

Whether approved for reporting?[1]

For the Petitioner : Mr. Vishal Mohan, Senior Advocate, with M/s Aditya Sood & Varun Gupta, Advocates.

For the Respondent : Mr. I.N. Mehta, Senior Additional Advocate General, with Ms. Sharmila Patial, Additional Advocate General.

Tarlok Singh Chauhan, Judge (Oral):

Heard.

2. Admittedly, none of the authorities below has satisfied itself with regard to the applicability of provisions of sub-section (4) of Section 16 of HP VAT Act, 2005 before invoking sub-section (7) thereof. Section 16 reads as under:-

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[1] Whether reporters of Local Papers may be allowed to see the judgment? Yes.

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

(2) The State Government may, in public interest and subject to such conditions as it may deem fit, accept from any class of dealers in lieu of the amount of tax payable under this Act for any period, by way of composition, a lumpsum to be determined and to be paid at such intervals and in such manner as may be prescribed, or the lumpsum amount may be calculated at a fixed rate on the taxable turnover, as may be prescribed in respect of such class of dealers and for this purpose a simplified system of registration, maintenance of accounts, filing of returns may also be prescribed which shall remain in force during the period of such composition.

(3) Such dealers as may be required so to do by the Assessing Authority by notice served in the prescribed manner and every registered dealer shall furnish such returns 1 [manually of electronically] by such dates and to such Authority as may be prescribed.

(3a) The State Government may, by notification, exempt any class of dealer from filling of return, subject to such restrictions and conditions, such limit of turnover and for such period, as may be prescribed, and tax, if any, deducted at source, shall be deemed to be final payment of tax and such dealer shall not be liable to assessment for that period.

(4) Before a registered dealer furnishes the return required by sub-section (3), he shall, in the prescribed manner, pay [manually or electronically] into a Government Treasury or the Scheduled Bank which is a treasury bank, or at the office of the Assistant Excise and

Taxation Commissioner or Excise and Taxation Officer-in-charge of the District, the full amount of tax due from him under the Act according to such returns and shall furnish along with the returns a receipt from such treasury, bank or office of the Assistant Excise and Taxation Commissioner or Excise and Taxation Officer-in-charge of the District showing the payment of such amount:

Provided that no payment of such amount shall be accepted at the office of the Assistant Excise and Taxation Commissioner or Excise and Taxation Officer-in-Charge of the District save through a crossed cheque or bank draft payable at a local branch of a Scheduled Bank in favour of the Assessing Authority:

Provided further that when a dealer makes payment through a Scheduled Bank other than the treasury bank, he shall obtain from such bank a certificate, as may be prescribed, to the effect that the bank has remitted the amount of tax to the treasury bank on the dealer's directions and on production of such certificate to the Assessing Authority the dealer shall be deemed to have paid the tax on the date following the date on which such certificate is issued by such bank:

Provided further that in case of payment through a Scheduled Bank which is located at a station other than that of the treasury bank, the dealer shall need to procure the prescribed certificate from the concerned bank, as mentioned under the preceding proviso, at least three days before the expiry of the due date prescribed under sub-section (2) for filing the return and only in that case the dealer shall be deemed to have made the payment by due date:

Provided further that where the payment is made through a crossed cheque, such crossed cheque must be delivered in the office of the Assessing Authority concerned, not less than ten clear days before the expiry of the due date prescribed under sub-section (3) for filing the return, and the dealer shall be deemed to have made the payment on the date on which such crossed cheque, after its presentation in the bank, is actually credited into the Government account and necessary receipt is issued by the bank in favour of the dealer:

Provided further that where the payment is made through a crossed cheque and the cheque is dishonoured, the dealer shall be deemed to have not made the payment and shall be liable to any action which may be taken for not making payment under this Act or the rules framed there under.

Explanation. For the purposes of this sub-section —Scheduled Bank means a bank included in the Second Schedule to the Reserve Bank of India Act, 1934.

"(5) If any dealer discovers any omission or other error in any return furnished by him, he may,-

(i) in the case of monthly and quarterly return, furnish a revised return before the date prescribed for filing of next return, and

(ii) in the case of annual return furnish a revised return within a period of sixty days from the last date prescribed for filing of annual return,

and if the revised return shows a greater amount of tax to be due against the tax shown in the original return, it shall be accompanied with a receipt showing payment of extra amount in accordance with sub-section(4)."

"(6) If a dealer fails without sufficient cause to furnish the returns by the prescribed date as required under

sub-section (3), the dealer shall be liable to pay, by way of penalty, a sum equal to 2 [Rs. 200/-] per day till the default counties, but such penalty shall not exceed Rs. 25000/-

"Provided that where the dealer is filing monthly returns, a sum equal to Rs. 1000/- per day shall be charged as penalty till the default continues, but such penalty shall not exceed Rs. 50,000/-:

Provided further that where a dealer has closed down his business or has left the business without getting his Registration Certificate cancelled, the Assessing Authority shall suspend his Registration Certificate immediately, and thereafter no further incremental penalty as applicable shall be imposed."

[1 (6-A) If a dealer fails without sufficient cause to furnish annual return by the prescribed date, he shall be liable to pay by way of penalty, a sum of Rs. 5000/-.]

(7) If a dealer fails without sufficient cause to comply with the requirements of the provisions of sub-section (4), 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 –

(i) equal to ten percentum, for the delay upto fifteen days,

(ii) equal to twenty five percentum, for the delay exceeding fifteen days but not exceeding thirty days and

(iii) equal to fifty percentum, for the delay exceeding thirty days, of the amount of tax to which he is assessed or is liable to be assessed under section 21, in addition to the amount of tax to which he is assessed or is liable to be assessed]

> *(8) If a dealer has maintained false or incorrect accounts 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 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, an amount 1[upto twice the amount of tax but which shall not be less than one hundred percentum of such tax amount] to which he is assessed or is liable to be assessed ."*

3. Obviously, in such circumstances, without there being a specific finding with regard to applicability of sub-section (4) of Section 16, the orders passed by the authorities below cannot sustain.

4. Accordingly, present revision petition is allowed and the matter is remitted back to the assessing authority to decide the case afresh and while doing the assessing authority shall take into consideration the ratio of the judgments laid down by the Hon'ble Supreme Court in ***Hindustan Steel Ltd. Vs. State of Orissa 1970 (xxv) Sales Tax Cases 211***, the judgment of Rajasthan High Court in ***Assistant Commissioner Tax Vs. Kamal Glass Bottle Supply Company 1999 (116) STC 606***, A Division

Bench judgment of Orissa High Court in ***Indian Paints and Chemical Ltd. Vs. Sales Tax Officer 1998 (109) SCC 227*** and the judgment of Hon'ble Supreme Court in ***Dayle De'Souza v. Union of India*, (2021) 20 SCC 135**, wherein it was observed:-

> **32.** The authorities bestowed with the duty to confirm compliance are often empowered to take stringent including penal action to ensure observance and check defiance. There cannot also be any quarrel on the need to enforce obedience of the rules as the beneficial legislation protects the worker's basic right to receive minimum wages. The rulebook makes sure that the workers are made aware of their rights and paid their dues as per law without unnecessary disputes or allegations as to absence, overtime payment, deductions, etc.
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> **33.** At the same time, initiation of prosecution has adverse and harsh consequences for the persons named as accused. In *Directorate of Revenue* v. *Mohd. Nisar Holia* [*Directorate of Revenue* v. *Mohd. Nisar Holia*, (2008) 2 SCC 370 : (2008) 1 SCC (Cri) 415] , this Court explicitly recognises the right not to be disturbed without sufficient grounds as one of the underlying mandates of Article 21 of the Constitution. Thus, the requirement and need to balance the law enforcement power and protection of citizens from injustice and harassment must be maintained. Earlier in *Hindustan Steel Ltd.* v. *State of Orissa* [*Hindustan Steel Ltd.* v. *State of Orissa*, (1969) 2 SCC 627] , this Court threw light on the aspect of invocation of penalty provisions in a mechanical manner by authorities to observe : (*Hindustan Steel case* [*Hindustan Steel Ltd.* v. *State of Orissa*, (1969) 2 SCC 627] , SCC p. 630, para 8)
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> > "8. Under the Act penalty may be imposed for failure to register as a dealer — Section 9(1) read with Section 25(1)(*a*) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in

> conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. 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 bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

34. Almost every statute confers operational power to enforce and penalise, which power is to be exercised consistently from case to case, but adapted to facts of an individual case [*B.* v. *Secy. of State for Work & Pensions*, (2005) 1 WLR 3796, para 43 : 2005 EWCA Civ 929, para 43 (CA)] . The passage from *Hindustan Steel Ltd.* [*Hindustan Steel Ltd.* v. *State of Orissa*, (1969) 2 SCC 627] highlights the rule that the discretion that vests with the prosecuting agencies is paired with the duty to be thoughtful in cases of technical, venial breaches and genuine and honest belief, and be firmly unforgiving in cases of deceitful and mendacious conduct. Sometimes legal provisions are worded in great detail to give an expansive reach given the variables and complexities involved, and also to avoid omission and check subterfuges. However, legal meaning of the provision is not determined in abstract, but only when applied to the relevant facts of the case [See *Bennion on Statutory Interpretation*, 6th Edn., Part VI at p. 371.] . Therefore, it is necessary that the discretion conferred on the authorities is applied fairly and judiciously avoiding specious, unanticipated or unreasonable results. The intent, objective and purpose of the enactment should guide the exercise of discretion, as the presumption is that the makers did not anticipate anomalous or unworkable consequences. The intention should not be to target and penalise an unintentional defaulter who is in essence law-abiding.

35. There are a number of decisions of this Court in which, with reference to the importance of the summoning order, it has been emphasised that the initiation of prosecution and summoning of an accused to stand trial has serious consequences [See — *Pepsi Foods Ltd.* v. *Special Judicial Magistrate*, (1998) 5 SCC 749 : 1998 SCC (Cri) 1400; *GHCL Employees Stock Option Trust* v. *India Infoline Ltd.*, (2013) 4 SCC 505 : (2013) 2 SCC (Cri) 414; *Krishna Lal Chawla* v. *State of U.P.*, (2021) 5 SCC 435 : (2021) 2 SCC (Cri) 601.] . They extend from monetary loss to humiliation and disrepute in society, sacrifice of time and effort to prepare defence and anxiety of uncertain times. Criminal law should not be set into motion as a matter of course or without adequate and necessary investigation of facts on mere suspicion, or when the violation of law is doubtful. It is the duty and responsibility of the public officer to proceed responsibly and ascertain the true and correct facts. Execution of law without appropriate acquaintance with legal provisions and comprehensive sense of their application may result in an innocent being prosecuted.

36. Equally, it is the court's duty not to issue summons in a mechanical and routine manner. If done so, the entire purpose of laying down a detailed procedure under Chapter XV of the 1973 Code gets frustrated. Under the Proviso (*a*) to Section 200 of the 1973 Code, there may lie an exemption from recording pre-summoning evidence when a private complaint is filed by a public servant in discharge of his official duties; however, it is the duty of the Magistrate to apply his mind to see whether on the basis of the allegations made and the evidence, a prima facie case for taking cognizance and summoning the accused is made out or not. This Court explained the reasoning behind this exemption in *National Small Industries Corpn. Ltd.* v. *State (NCT of Delhi)* [*National Small Industries Corpn. Ltd.* v. *State (NCT of Delhi)*, (2009) 1 SCC 407 : (2009) 1 SCC (Civ) 192 : (2009) 1 SCC (Cri) 513] : (SCC p. 415, para 12)

> "*12*. The object of Section 200 of the Code requiring the complainant and the witnesses to be examined, is to find out whether there are sufficient grounds for proceeding against the accused and to prevent issue of process on complaints which are false or vexatious or intended to harass the persons arrayed as accused. (See *Nirmaljit Singh Hoon* v. *State of*

> *W.B.* [*Nirmaljit Singh Hoon* v. *State of W.B.*, (1973) 3 SCC 753 : 1973 SCC (Cri) 521]) Where the complainant is a public servant or court, clause (*a*) of the proviso to Section 200 of the Code raises an implied statutory presumption that the complaint has been made responsibly and bona fide and not falsely or vexatiously. On account of such implied presumption, where the complainant is a public servant, the statute exempts examination of the complainant and the witnesses, before issuing process."

> The issue of process resulting in summons is a judicial process that carries with it a sanctity and a promise of legal propriety."

5. It shall be open to the assessing authority to take into consideration any other law or provision that may be cited before it by the Revenue and the same shall equally apply to the appellate authorities also.

6. The pending miscellaneous applications(s), if any, also stand(s) disposed of.

(Tarlok Singh Chauhan)
Judge

(Rakesh Kainthla)
Judge

6th January, 2025
(Nikita/Chander)