
(2001) 2 ILR (P&H) 603 : (2002) 125 STC 18

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Writ Petition No. 12124 of 2000

Haryana Agro
Industries Corporation
Limited

APPELLANT

Vs

State of Haryana and
Others

RESPONDENT

Date of Decision: May 18, 2001

Acts Referred:

Haryana General Sales Tax Act, 1973 "Section 31, 40

Citation: (2001) 2 ILR (P&H) 603 : (2002) 125 STC 18

Hon'ble Judges: Nirmal Singh, J; G.S. Singhvi, J

Bench: Division Bench

Advocate: R.P. Sawhney and Kishan Singh, for the Appellant; Jaswant Singh, D.A.G., for the Respondent

Final Decision: Allowed

Judgement

G.S. Singhvi, J.

This is a petition for issuance of a writ in the nature of certiorari for quashing orders, annexures P3, P3/A and P3/B passed

by the Deputy Excise and Taxation Commissioner (1)-cum-Authority, Karnal (respondent No. 2) and order, annexure P4, dated August 6, 1999

passed by Sales Tax Tribunal, Haryana (for short, "the Tribunal").

2. The petitioner is a Haryana Government undertaking. It is registered as a dealer under the Haryana General Sales Tax Act, 1973 (for short, "the

Act") as well as the Central Sales Tax Act, 1956. It filed returns for the years 1985-86, 1986-87 and 1987-88 on due dates. The Assessing

Authority, Panipat, finalised the assessment vide orders annexures P1, dated March 14, 1990, P1/A dated October 31, 1991 and P1/B dated

March 23, 1992. After almost four years from the finalisation of assessment for the year 1985-86, three years from the date of finalisation of

assessment for the year 1986-87 and almost two years from the finalisation of assessment for the year 1987-88, respondent No. 2 issued notices

dated February 18, 1994 u/s 40 of the Act proposing suo motu revision of the assessment orders on the ground that the amount received by the

petitioner in the form of hiring and service charges had escaped levy of tax at the hands of Assessing Authority. The petitioner challenged the

jurisdiction of respondent No. 2 to initiate action u/s 40 of the Act by contending that the assessment orders did not suffer from any impropriety or

illegality. On merits, it contested the notices by asserting that the so-called hiring and services cannot be treated as covered by the definition of

sale"" because there was no transfer of property in goods either for cash or deferred payment. The petitioner also asserted that tractors, etc., were

made available to the farmers with its own drivers/labour and mechanical staff for harvesting their crops, etc., without allowing them even to touch

the machines. After considering the reply filed by the petitioner, respondent No. 2 passed orders, annexures P3, P3/A and P3/B, and revised the

assessment orders for all the three years. Appeals filed by the petitioner u/s 39(1)(c) of the Act were dismissed by the Tribunal by a common

order dated August 6, 1999 (annexure P4). Review petitions filed by it u/s 41 of the Act were also dismissed by the Tribunal by a common order

dated April 24, 2000 (annexure P5).

3. The petitioner has challenged the orders, annexures P3, P3/A, P3/B and P4, on the following grounds :

1. The proceedings initiated by respondent No. 2 for revising the assessment orders were ultra vires to Section 40 of the Act because the notices

issued under that section did not speak of any illegality or impropriety in the orders passed by the Assessing Authority and the case of escaped

assessment do not fall within the jurisdiction of Revisional Authority.

2. The notice issued by respondent No. 2 was time-barred qua assessment year 1985-86.

3. The orders passed by respondent No. 2 and the appellate order passed by the Tribunal are vitiated by error of law apparent on the face of the

record because neither of them considered the petitioner's plea in a correct perspective.

4. While holding the petitioner liable to tax in lieu of hiring and service charges collected from the farmers, respondent No. 2 and the Tribunal did

not take into consideration the peculiar nature of the operation undertaken by it.

4. The respondents have defended the impugned orders by contending that the Assessing Authority had, while passing the orders of assessment,

overlooked the evidence available on record regarding hiring and service charges.

According to them, the absence of the words "illegality" or

impropriety" in the notices issued by respondent No. 2 cannot be made basis for quashing the revisional orders. They have also averred that the

activities of the petitioner fall within the definition of "sale" as amended by Haryana Act No. 11 of 1984.

5. Shri R.P. Sawhney, Senior Counsel for the petitioner, argued that the impugned orders should be declared illegal and quashed because

respondent No. 2 did not have the jurisdiction to initiate proceedings u/s 40 of the Act on the premise that the amount received by the petitioner

from hiring and service charges had escaped levy of tax at the hands of Assessing Authority. He further argued that power u/s 40 of the Act can be

exercised by the competent authority only for the purpose of satisfying itself as to the legality or propriety of any proceedings or of any order made

therein and not for dealing with the cases of escaped assessment. Learned counsel pointed out that the cases of "escaped assessment" are covered

by Section 31 of the Act under which power can be exercised only by the Assessing Authority within three years from the date of final assessment

order. He then referred to the contents of notices issued by respondent No. 2 to show that the only ground on which the said respondent had

proposed revision of assessment orders was that the amount received by the petitioner from hiring and service charges had escaped levy of tax at

the hand of Assessing Authority and not on the ground that those orders were vitiated by any illegality or impropriety. In supports of his argument,

Shri Sawhney relied on the following decisions :

1. State of Kerala Vs. K.M. Charia Abdullah and Co., .
2. Hari Chand Rattan Chand and Co. Vs. The Deputy Excise and Taxation Commissioner (Additional), Punjab,
3. Deputy Commissioner of Agricultural Income Tax and Sales Tax, Quilon Vs. Dhanalakshmi Vilas Cashew Co., .
4. Bidar Sahakar Sakkare Karkhane Ltd. Vs. The State of Karnataka, .
6. Shri Jaswant Singh, Deputy Advocate-General, Haryana, controverted the arguments of Shri Sawhney and submitted that the revisional orders

cannot be quashed on the ground of so-called defect in the notices issued u/s 40 of the Act. He submitted that the cases of ""escaped assessment

are also covered by the terms legality or propriety used in that section and, therefore, initiation of proceedings for revision of the assessment orders

cannot be invalidated on the ground that the expression referred to in Section 31 was used in the notices. He further argued that the petitioner"s

case was not the one of the escaped assessment but was a case of omission on the part of the Assessing Authority to properly appreciate the

nature of the works executed by it and, therefore, respondent No 2 had the jurisdiction to take action u/s 40 of the Act.

7. We have given serious thought to the respective arguments. Sections 31 and 40 of the Act, which have bearing on the decision of the issue

relating to legality of the proceedings initiated by respondent No. 2 and the impugned orders read as under :

Section 31 : Reassessment of tax.--If in consequence of definite information which has come into his possession, the Assessing Authority

discovers that the turnover of the business of a dealer has been under-assessed, or has escaped assessment in any year, the Assessing Authority

may, at any time within three years from the date of final assessment order and after giving the dealer a reasonable opportunity, in the prescribed

manner, of being heard, proceed to reassess the tax payable on the turnover which has been underassessed or has escaped assessment.

Section 40 : Revision.--(1) The Commissioner may on his own motion call for the record of any case pending before, or disposed of by any

officer appointed under Sub-section (1) of Section 3 of the Act to assist him or any Assessing Authority or Appellate Authority, other than the

Tribunal, for the purposes of satisfying himself as to the legality or to propriety of any proceedings or of any order made therein and may pass such

order in relation thereto as he may think fit :

Provided that no order shall be so revised after the expiry of a period of five years from the date of the order :

Provided further that the aforesaid limitation of period shall not apply where the order in a similar case is revised as a result of the decision of the

Tribunal or any court of law :

Provided further that the assessee or any other person shall have no right to invoke the revisional powers under this sub-section.

(2) The State Government may, by notification, confer on any officer the powers of the Commissioner under Sub-section (1) to be exercised

subject to such conditions and in respect of such areas as may be specified in the notification.

(3) No order shall be passed under this section which adversely affects any person unless such person has been given a reasonable opportunity of

being heard. (See Rule 60).

8. A conjoint reading of the provisions quoted above shows that while Section 31 speaks of reassessment of tax, Section 40 provides for revision.

u/s 31, the Assessing Authority can reassess the tax payable on the turnover which has been under-assessed or has escaped assessment. This

power can be exercised within three years from the date of finalisation of assessment and subject to the giving of notice and reasonable opportunity

of hearing to the dealer. Section 40(1) empowers the Commissioner to suo motu call for the record of the case pending before, or disposed of by,

any officer appointed u/s 3(1) to assist him or any Assessing Authority or Appellate Authority for the purposes of satisfying himself as to the legality

or to propriety of any proceedings or of any order made therein and pass such order in relation to said proceedings or order as he may think fit.

The period of limitation prescribed for exercise of power under this sub-section is five years from the date of the order. Sub-section (2) of Section

40 empowers the State Government to issue notification conferring on any officer the powers of the Commissioner under Sub-section (1). Sub-

section (3) of Section 40 represents embodiment of the rule of hearing. It provides that no order u/s 40 can be passed adversely affecting any

person unless such person is given a reasonable opportunity of being heard.

9. The above analysis of Sections 31 and 40 shows that the Legislature has conferred powers upon the Assessing Authority and the Commissioner

to deal with different types of cases and has prescribed different periods of limitation for exercise of powers under the two sections. While the

Assessing Authority can undertake the exercise for reassessment if it discovers that the turnover of the business of a dealer has been under-

assessed or escaped assessment, the Commissioner has been vested with the power to call for the record of pending as well as decided cases to

satisfy himself as to the legality and/or propriety of any proceedings or of any order and then pass appropriate order. In our opinion, the use of

different phraseology in the two sections is clearly indicative of the Legislature's intention to confer powers upon different authorities to deal with

different situation and, therefore, the power exercisable by one authority cannot be exercised by another authority. In other words, the power

vested in the Commissioner to suo motu call for the record of pending proceedings or decided cases to satisfy himself as to the legality and/or

propriety of the pending proceedings or final order cannot be used for dealing with a case of escaped assessment which is the exclusive preserve

of the Assessing Authority. In view of this, we are inclined to agree with Shri Sawhney that the notices issued by respondent No. 2 u/s 40 of the

Act were ultra vires of the powers of the said respondent and on that ground alone the impugned orders are liable to be quashed.

10. In KM. Cheria Abdulla's case [1965] 16 STC 875, their Lordships of the Supreme Court considered the scope of Sections 12(2) and 19 of

the Madras General Sales Tax Act, 1939 and Rule 14-A of the Madras General Sales Tax Rules, 1939 and held as under :

The words of Section 12(2) of the Madras General Sales Tax Act, 1939, that the Deputy Commissioner "may pass such order with respect

thereto as he thinks fit" means such order as may in the circumstances of the case for rectifying the defect be regarded by him as just. Power to

pass such order as the revising authority thinks fit may in some cases include power to make or direct such further enquiry as the Deputy

Commissioner may find necessary for rectifying the illegality or impropriety of the order, or irregularity in the proceeding. It is therefore not right

baldly to propound that in passing an order in the exercise of his revisional jurisdiction, the Deputy Commissioner must in all cases be restricted to

the record maintained by the officer subordinate to him, and can never make enquiry outside that record. Therefore conferment of power under

Rule 14-A of the Madras General Sales Tax Rules, 1939, to make further enquiry in cases where after being satisfied about the illegality or

impropriety of the order or irregularity in the proceeding, the revising authority thinks it just for rectifying the defect to do so does not amount to

enlarging the jurisdiction conferred by Section 12(2). The power to make such inquiry as the appellate or the revising authority considers necessary

can manifestly be invested by Clauses (k) and (1) of Section 19, Sub-section (2), and if such power is invested the rule authorising the making of

enquiry is not ultra vires. But the power conferred by Rule 14-A by the use of the expression "making such enquiry as such appellate or revising

authority considers necessary" must be read subject to the scheme of the Act. It would not invest the revising authority with power to launch upon

enquiries at large so as either to trench upon the powers which are expressly reserved by the Act or by the Rules to other authorities or to ignore

the limitations inherent in the exercise of those powers. Neither Section 12 nor Rule 14-A authorises the revising authority to enter generally upon

enquiries which may properly be made by the assessing authority and to reopen assessment.

11. In *Hari Chand Rattan Chand and Co. v. Deputy Excise and Taxation Commissioner* [1969] 24 STC 258 a Full Bench of this Court

considered the scope of Section 11-A and Section 21(1) of the Punjab General Sales Tax Act, 1948. The Full Bench relied upon the proposition

in *State of Kerala Vs. K.M. Charia Abdullah and Co.*, and held as under :

Section 11-A empowers the Assessing Authority to reassess a dealer in respect of any turnover which had escaped assessment or which had

been under-assessed in consequence of any definite information which comes into his possession after the original order of assessment was made.

This power cannot be exercised either by the appellate authority or the revisional authority. The revisional authority is entitled to call for the record

of any case decided by the Assessing Authority or any appellate authority in order to see whether the order passed is proper or legal. Similarly he

can call for the record of any proceedings pending before any Assessing Authority or appellate authority in order to determine the legality or

propriety of the proceedings. But, before he decides to exercise this power, he must come to the conclusion that the order or the proceedings

suffer from the vice of impropriety or illegality and for this conclusion he has to confine himself to the record which is called for by him and which

was before the lower authority, as the lower authority can be presumed to have applied his mind only to that record. He cannot take into

consideration any fresh material in order to come to this conclusion. After having come to that conclusion, he will be entitled to scrutinise the

proceedings and the order passed in order to determine the correct turnover which should have been assessed to tax on the basis of that record.

He cannot, however, bring to tax, in the purported exercise of revisional powers, any turnover which had not been disclosed to the Assessing

Authority by the dealer or which was not discovered by him during the course of assessment and which has come to the notice of the revising

authority after the expiry of three years following the close of the year to which the turnover proposed to be taxed relates. That is the function of

the Assessing Authority u/s 11-A and cannot be exercised by the revising authority.

12. In Deputy Commissioner of Agricultural Income Tax and Sales Tax, Quilon v. Dhanalakshmi Vilas Cashew Co. [1969] 24 STC 491 a three

Judges Bench of the Supreme Court interpreted Section 15(1)(i) of the Kerala General Sales Tax Act and Rule 33 of the Kerala General Sales

Tax Rules, 1950 and held that the revisional jurisdiction u/s 15(1)(i) cannot be exercised to deal with the case of escaped turnover. Some of the

observations made in that decision are extracted below :

The revisional jurisdiction u/s 15(1)(i) is quite distinct and separate from the one created under Rule 33 to tax escaped turnover. The Deputy

Commissioner while exercising revisional jurisdiction u/s 15(1)(i) would be restricted to the examination of the record for determining whether the

order of assessment was according to law. Rule 33, which confers power to assess escaped turnover, is normally to be exercised in matter de hors

the record of assessment proceedings.

13. In Bidar Sahakar Sakkare Karkhane Ltd. v. State of Karnataka [1985] 58 STC 65, a division the Bench of Karnataka High Court interpreted

Sections 12-A and 21(2) of the Karnataka Sales Tax Act, 1957 and held as under :

The revisional power cannot be exercised in respect of a matter which falls within the power to reassess escaped turnover. The revising authority,

in other words, should not trench upon the powers which are expressly reserved to the assessing authority u/s 12-A of the Karnataka Sales Tax

Act, 1957. The Deputy Commissioner, in exercise of his revisional jurisdiction, should not ignore that limitation. It is clear from the provisions of

Section 12-A of the Act that the reason for the turnover escaping assessment is immaterial. It might be by oversight, mistake or by design. If the

record reveals no application of mind by the assessing authority in respect of a part of the turnover, then it must be deemed to have escaped

assessment. It would therefore be a clear case falling within the exclusive jurisdiction of the assessing authority for reassessment, no matter whether

that part of the turnover was in or outside the record of assessment. If, on the other hand, the assessing authority has applied his mind and

erroneously excluded any part of the turnover, then certainly it would be a case for the revisional authority to revise the assessment.

Where the assessee, a co-operative institution having a sugarcane factory, included harvesting charges incurred in the purchase of sugarcane to the

factory, the assessing authority without applying his mind omitted to include those expenses in the taxable turnover, and the Deputy Commissioner

in exercise of his powers u/s 21(2) of the Karnataka Sales Tax Act set aside the assessment and directed the assessing authority to redo the

assessment by including in the purchase turnover, the harvesting charges incurred by the assessee.

Held, that since the assessing authority did not apply his mind to the disputed turnover, the revising authority could not have invoked the powers u/s

21(2) of the Act.

The argument of Shri Jaswant Singh that the expression ""legality or propriety"" used in Section 40(1) of the Act should be liberally construed so as

to include a case of escaped assessment sounds attractive but having regard to the scheme of the Act, we are unable to accept the same. If the

Legislature intended to invest the revisional authority with the jurisdiction and power to deal with all types of cases, then it would have incorporated

a non obstante clause in Section 40. In the absence of such clause, we are unable to interpret Section 40(1) as empowering the Commissioner or

other designated officer to exercise power conferred upon the Assessing Authority u/s 31.

15. We are further of the view that the expression ""legality or propriety"" would take within its folds all types of illegalities and improprieties which

may have crept in the proceedings pending before the Assessing Authority or which may have affected the final adjudication, but it cannot take

within its sweep, the cases of escaped assessment because in such cases there is no assessment/adjudication by the Assessing Authority or

Appellate Authority.

16. The matter deserves to be considered from another angle. A perusal of the notices dated February 18, 1994 shows that respondent No. 2 had

filled the blanks in the printed pro forma and called upon the petitioner to show cause against the proposed suo motu revision of the assessment

order. The printed portion of the notice and the blanks filled by handwriting are reproduced below :

From

Y.C. Aggarwal Printed

The Deputy Excise and Taxation Commissioner (Ins.)-

cum-Revisional Authority, Karnal.

To

Haryana Agro Industries Hand-

Panipat written

Re No. 715

Subject : Notice u/s 40 of the H.G.S.T. Act, Printed

1973 for the Assessment Year 1985-86

NOTICE Printed

I, Y.C. Aggarwal, Deputy Excise and Taxation Commis- Printed sioner (Inspector),
Karnal, vested with the powers of Revisional Authority u/s 40

of the H.G.S.T. Act, 1973, in suo motu examined your sales tax assessment record for the purpose of satisfying myself as to the legality and

propriety of the order passed by assessing authority for the assessment year 1985-86 on.... After examining the said record, I have found the

following discrepancies in the assessment order passed by the assessing authority.

Amount received by the company from hiring and services Hand-

has escaped levy of tax at the hands of the Assessing Authority written

which needs revision.

I, therefore, propose to take suo motu action in the said Printed

case for revision of the assessment order. Before I pass an

order in revision, you are hereby provided an opportunity of

being heard on February 28, 1994 in my office at 10.30 a.m.

and to produce account books/stock inventory/sufficient

evidence in support of your claim, if any.

Dy. Excise & Taxation Commissioner

(I)-cum-Revisional Authority, Karnal, Printed

18-2-1994.

17. A bare reading of the notice extracted above shows that while initiating action u/s 40 respondent No. 2 did not even advert to the relevant

provisions, else he would have indicated that proposed action was being taken on account of particular illegality or impropriety in the orders

passed by the Assessing Authority. In our opinion, this is sufficient to draw a conclusion that respondent No. 2 had mechanically issued the

impugned notices. In The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others, , a Constitution Bench interpreted the

expression ""if in the opinion of Central Government"" appearing in Section 237(b) of Companies Act, 1956 and held that for exercise of power

under that section, there must exist circumstances referable to the relevant statutory provisions. Their Lordships also held that an order passed in

the printed pro forma do not satisfy the requirement of formation of an objective opinion with reference to the relevant statutory provision.

18. For the reasons mentioned above, we hold that orders, annexures P3, P3/A and P3/B, passed by respondent No. 2 are ultra vires to Section

40 of the Act and liable to be quashed as such. Order, annexure P4, passed by the Tribunal is also liable to be quashed on that ground.

19. In view of the above conclusion, we do not consider it necessary to deal with other grounds of challenge raised by the petitioner.

20. In the result, the writ petition is allowed. The impugned orders are declared illegal and quashed. The respondents are directed to refund the

amount, if any, deposited by the petitioner in compliance of orders, annexures P3, P3/A and P3/B.