

**BEFORE THE HIMACHAL PRADESH TAX TRIBUNAL, DHARAMSHALA, CAMP
AT SHIMLA**

Appeal No. : 71/2017
OMA No. : 49/2017
Date of Institution : 26-10-2017
Date of order : 23-07-2024

In the matter of:

M/s Essel Propack Limited, Village Bhatian, Tehsil Nalagarh, distt. Solan, HP.

.....Appellant

Vs

- i) Addl. ETC-cum-Appellate Authority, SZ, HP, Shimla.
- ii) AETC cum Assessing Authority, BBN, Baddi, (HP).

.....Respondents

Parties represented by:-

Sh. Varun Gupta, & Sh. V K Gupta Advocates for the Appellant.

Sh. Sandeep Mandyal, Sr. Law Officer, of the department for the Respondents.

**Appeal under Section 45 (2) of the Himachal Pradesh, Value Added Tax Act,
2005**

Order

1. The present appeal has been filed by M/s Essel Propack Limited, Village Bhatian, Tehsil Nalagarh, distt. Solan, HP against the order of the Addl. ETC-cum-Appellate Authority, SZ, Shimla Himachal Pradesh, dated 30-11-2016 vide which the appeal filed by the applicant for the year 2008-09, against the order of the Assessing Authority BBN Baddi, (Respondent Number 2) vide which an additional demand of Rs. 5,25,160/- was created against the appellant for the year 2008-09 was upheld.
2. The brief facts are that M/s Essel Propack Limited, Village Bhatian, Tehsil Nalagarh, distt. Solan, Himachal Pradesh (hereinafter referred to as 'Appellant') is an industrial unit holding

TIN 02030300695 and is engaged in manufacturing and trading of multilayer plastic laminated tubes, co-extruded tubes, plastic films and other packing products. The impugned order dated 30.11.2016 which is under challenge by the Appellant, the Appellate Authority has confirmed the findings of Assessment order passed by the Assessing Authority-cum-AETC, BBN at Baddi ('Assessing Authority') confirming the additional demand for Rs. 5251600/- for the Assessment Year 2008-09. The Appellate Authority also upheld the interest on the amount of tax found due on account of disallowance of ITC for one year which was charged by the Assessing authority.

3. Aggrieved by the order of Ld. Appellate Authority the appellant has filed the appeal before this Tribunal on the following grounds:-

- i) *The order of the assessing Officer is a non speaking order as it has not been mentioned that whether the required mandatory notice was issued or not.*
- ii) *It was explained that the Cheque for the due tax was prepared by the Company on 23-09-2008 Rs. 3053337/- vide Cheque No. 037885 dated 23-09-2008 and the same was submitted in the Office of the Excise & Taxation Officer, Nalagarh, HP. Due to ongoing strike of all the Banks on 24th and 25th of Sep, 2008 the tax amount was not credited into the Government Treasury by 30-09-2008 and the payment got delayed by three days. That there existed a sufficient cause i.e. Bank strike due to which the payment got delayed without there being any fault on the part of the Appellant Company.*
- iii) *That perusal of the Order shows that penalty imposed is against the provisions of the Act, 2005 and without any logical reasoning. That the penalty is imposed u/s 16(7) of the HP VAT Act, when a dealer fails without sufficient cause to comply with the requirements of the provisions of Section 16(4), the Commissioner "may" after giving such dealer a reasonable opportunity of being heard, direct him to pay penalty the prescribed penalty.*

That in the above provisions the Legislature has specifically used the word "may" which shows the provisions are directory in nature and not mandatory and that the Commissioner can exercise his discretion judiciously before levying the penalty. The intention of the legislature to use the word "may"

instead of "shall" shows that if a dealer provides for a sufficient cause for delay in payment of tax for example strike in banks and there is a trivial delay of two or three days and the Commissioner or the person appointed by him can dispensed with the penalty by exercising their discretionary power. Therefore the penalty levied under such circumstances where the Appellant had prepared and furnished the cheque well before the due date but got credited after the date, due to strike in banks is unwarranted and needs to be deleted.

iv) Reliance is placed upon the recent judgment of Himachal Pradesh Tax Tribunal in the case of Satluj Motors Luna Pani V/s Dy. Excise and Taxation Commissioner-cum-appellate Authority (CZ), Mandi, HP, decided on 14-10-2015. The Hon'ble HP Tax Tribunal followed the judgment of M/s Bhadur Motors v/s Commissioner of Trade Tax (1999) 15 NTN 614 in which it was held-

"It is settled principle that the law does not take into account trifles for such trifle no penalty can be levied. The delay of one day in that case as considered not to be a fit case for imposition of penalty. In the case in hand there was Sunday intervening between March 20, 1992, and March 24, 1992. Therefore, the delay is practically of 2-3 days and the default was very trivial. Penalty under Section 15-A (1) (a) is not mandatory and it has been repeatedly held by this court that for such trifle no penalty to be levied."

The Hon'ble HP Tax Tribunal following the above, held that a delay of two days in crediting the tax due cannot justify a penalty, the same is harsh and arbitrary. No doubt procedures as per law do mandate payment and certification by the bank, prior to the date of last payment, however it is equally correct that the bank being any agent of the tax collecting the state, has to debit the amount from the account of the dealer.

Therefore applying the above judgments of the case where there is a trifle delay of three days in crediting the tax, due to the strike in banks and no fault of the Appellant, penalty imposed under such circumstances is harsh, arbitrary and unjustified.

v) That perusal of the order shows that the Ld. Officer has mechanically imposed the penalty without considering the facts and circumstances of the case. Reliance is

placed upon the judgment of the Allahabad High Court in the case of M/s Premier Vinli Flooring Ltd. v/s Commissioner of Sales Tax (2204) 137 STC 366 (All) whereby the Hon'ble Court followed the cases of Western Indian Match Company Ltd. v/s Commissioner of Sales Tax (1990) 76 STC 421 (All), East Indian Transformers & Switch Gear (P) Ltd. v/s Commissioner of Sales Tax (1993) UPTC 212 and Triveni Sheets Glass Works v/s Commissioner of Income Tax (1999) NTN 42 and held that trifling delay of two to three days in filing of return and payment of tax does not warrant penalty. Being a prudent, tax complaint and law abiding citizen the Appellant has rightly deducted the tax and had rightly deposited the tax deducted via DD/ cheques well in time (prior to due date) and penalty cannot be imposed for no fault of the Appellant merely on the fact that the same were credited/ cleared after the due date into the Government Treasury.

vi) That the perusal of the Order shows that the assessing officer was bent upon imposing the penalty and had arbitrarily levied the penalty. Reliance can be placed upon the Judgment of Madras High Court in the case of Viking Ware Housing, Chennai v/s Commercial Tax Officer, (2008) 13 VST 559 (Mad) whereby the Hon'ble High Court accepted the submissions of the Petitioner that once the tax has been paid even before the issuance of the show cause notice, the Assessing Authority does not possess the powers to levy penalty.

4. The Ld. Counsel Sh. Varun Gupta for the Appellant prayed that the appeal be accepted and the impugned order be quashed. He has stated that before imposing penalty a separate show cause notice has to be issued which is in addition to notice for assessment meaning thereby that first a notice for assessment has to be given to the assessee and thereafter during the assessment proceedings a separate show cause notice for initiation and for levying of penalty has to be issued. Assessment proceedings and penalty proceedings are entirely different and separate notices have to be issued. Thus no opportunity of being heard was allowed to the assessee before imposition of penalty.

Section 16(7) penalty can only be imposed when dealer fails without sufficient cause to make payment. The strike in the banks is sufficient cause and penalty cannot be imposed. Moreover the assessee is not a habitual defaulter. Only one return filed late out of 12 returns.

The Hon'ble Supreme Court in the case of Hindustan Steel Ltd., v/s. State of Orissa (1970)25 STC-211 has held: "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 also not be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is matter of discretion of the authority to be exercise judicially or on a consideration of all relevant circumstances." It is also seen that the Excise and Taxation Officer by accepting the cheque on 23-09-2008 used his inherent discretion and as such waived the condition of ten clear days as stipulated in section 16(4). The assessee always had an alternate remedy to make payment by cash or through demand draft if the E&T officer had not accepted the cheque. It is pertinent to mention that in Satluj Motors case decided by the HP Tax Tribunal, the concerned authority used its discretion and extended the date for payment by 12 days. It also pleaded that the interest cannot be charged for one year on the disallowance of ITC on closing stock is minimal i.e. Rs. 2,12,773/- whereas total ITC for the year is Rs. 27,16,469/- and the closing stock is sold within two or three months. Hence charging of interest for one full year is illegal and arbitrary.

It is clear that there was no intention on the part of the appellant to delay the payments of the tax due. It was only on account of procedure that the two branches of the bank credited the money late into the Government Treasury. If any delay has occurred, it is due to the time taken by the banks for clearing cheques due to bank holidays etc.

5. Sh. Sandeep Mandyal Sr. Law officer of the department stated that the VAT assessment for the Financial Year 2008-09 was framed by the Assessing Authority Baddi, and penalty under section 16(7) equal to amount of Rs. 305335/- was imposed to the dealer in lieu of late deposition of VAT payment (for the month of August). As per HP VAT Act, 2005 under section 16(4) and 16(7) the due payment should be deposited in next 30 days, but in this case the Vat payment of Rs. 305337/- for the month of August, was credited in to Govt. Treasury on 03-10-2008, which was found 3 days late. For which penalty i.e. 10% of Rs. 305335/- was imposed/levied by the then Assessing Authority. It has been duly verified that no cheque of above amount had been received by the department on or before 30 September, 2009 as

prayed by the appellant in his appeal. It is pertinent to mentioned here that the above amount is return liability, for which there was delay at the end of dealer. There is not any record/ receiving basis which dealer is pleading that the cheque was deposited before due date to the government treasury. The fault of late payment was also discussed with the representative of dealer at the time of assessment and also depicted in the Assessment order, and accordance with section 16(7) of HP VAT Act, the reasonable opportunity had also been provided to the dealer, then after Assessing Authority was rightly been imposed penalty.

6. I have heard the Ld. Counsel and the Ld. Govt. Counsel for the respondent in detail and perused the record as well. The point of contention is mainly 'is the question of imposition of penalty for late payment of tax' is right or not. In the interest of justice and given the fact that the matter pertains to the year 2008-09 I am convinced that the present appeal should be rejected in view of the following reasons:-

- i) As per the admission of the appellant before the Respondent No.2 the appellant had admitted his VAT liabilities. It means the appellant had not disputed the figure of VAT liability determine by the assessing authority which shows that there is merit in the action of Assessing Authority. Moreover in the appeal they have not disputed the incidence of Taxation provided under section 4 of HP VAT Act, 2005 which the basis to determine VAT liability on the appellant.

The provision of Section 16(4) of HP VAT Act, 2005 underlines that:
"Provided further that where the payment is made through a crossed cheque, such cheque must be delivered in the office of Assessing Authority concerned, not less than ten clear days before the expiry of the due date prescribed under sub-section (3) for the filing of 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 Govt. Account and the necessary receipt issued by the bank in favour of the dealer."

It would be pertinent to mention Section 16(4) and 16(7) of the HP VAT Act according to which the due payment should be deposited in next 30 days, but in the present case the VAT payment of Rs. 3053337/- for the month of August, was credited in to Govt. Treasury on 03-10-2008. The disputed amount has been credited into the Govt. Treasury three days late from the due date. The section



16(4) of HP VAT Act clearly specifies that the **dealer should deposit/ deliver the cheque ten days before the expiry of the due date**. Also, the rule 40(1) of HP VAT Rules 2005 gives 30 days time from the expiry of each month/ quarter of the financial year and filing of return.

Thus, the appellant has failed to fulfil the statutory obligations and hence penalty has been accordingly rightly imposed.

The penalty and interest has been levied under the provisions of Section 16(7), 16(6), 50 (2) and 19 of the HP VAT Act, which are binding on the tax assessing authority wherever the Assessing Authority has identified the dealer who have not paid the tax as prescribed under the act. There is no discretion with this authority or lower authority to consider any such concession/ waiver of interest and penalty. The law enunciated by the Hon'ble Supreme Court in the case of **State of Rajasthan and another Vs. D. P. Metals (2001) STC 611 (SC)** supports the imposition of penalty and hence the same is being relied upon.

- ii) The Ld. Counsel of the Appellant has placed reliance upon judgment of Himachal Pradesh Tax Tribunal in the case of *Satluj Motors Lunapani V/s Dy. Excise and Taxation Commissioner cum appellate Authority (CZ), Mandi, HP, decided on 14-10-2015*. It is categorically stated that the aforesaid judgment is not applicable in the context of the present case as the facts and circumstances of the case are different. In the *Satluj Motors case* it was observed that delay in depositing the cheque occur due to the time taken by the banks for clearing cheques due to bank holidays etc. There was no bonafide intention on the part of the appellant to delay the payments due. Whereas, in the present case the report produced by the Ld. Counsel of appellant shows two days bank strike which was reported to be on September 24th and 25th, 2008 which shows that the appellant had remaining three more days to deposit his payment of tax due (except Saturday & Sunday). The benefit of doubt cannot be given to the appellant as the dealer fails without sufficient cause to show reasons in such delay.
- iii) Further, it is seen that the impugned order dated 30-11-2016 cannot be held to be a non speaking order as it is a very detailed order. As per section 11 of the HP VAT Act, 2005 ITC can only be avail on local purchase of goods that has been

sold during the tax period. ITC involved in unsold stock cannot be claimed which is thus rightly rejected by the orders of the Assessing Authority. On the contrary of the facts, the dealer has not calculated his liability as per provision of section 11(3) of the HP VAT Act, 2005 rather has divide his own formula as per his own suitability which has caused loss to the state exchequer. Also, it was founded that the dealer has not maintain the correct position of stock in his account books. In my considered view, interest in the amount of tax found due on account of disallowance of ITC for one year has been rightly charged by the Assessing Authority.

7. For the aforesaid reasons, the appeal does not merit consideration and is dismissed. The impugned order of the Assessing Authority dated 23-02-2016 and the order of the Appellate Authority 30-11-2016 are upheld.
8. Copy of this order is sent to the parties concerned. File after due completion be consigned to the record room.




Priyatu Mandal
Chairman,
HP Tax Tribunal, Dharamshala,
Camp at Shimla

Endst. No. HPTT/CS/2024 - 88

Dated: 23.07.2024

Copy forwarded for information to:-

1. The Commissioner State Taxes & Excise, Himachal Pradesh, Shimla-09.
2. DCST&E Cum Assessing Authority, BBN Baddi, Distt. Solan (HP).
3. M/s Essel Propack Limited, Village Bhatian, Tehsil Nalagarh, distt. Solan, (HP).
4. Sh. Varun Gupta, Advocate for the Appellant.
5. Sh. Sandeep Mandyal, Sr. Law Officer, HQ.


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