appealable, the petitioners must necessarily be confined to their ordinary remedy by way of appeal. Merely because they had chosen not to resort to the same or had allowed the said remedy to become time-barred by preferring the present writ petition after more than four months of the order which was passed in the presence of one of the partners of the petitioners is no ground for affording them extra-ordinary remedy or the writ jurisdiction merely because of their own default.

(8) This apart, it is evident that the end-result of the impugned order is that the whole issue has been remanded back to the Assessing Authority. Undoubtedly there is a hierarchy of appeals and revisions provided by the statute against the original order of assessment. There are even further remedies provided by the culminating reference from the Sales Tax Tribunal to this Court. In this context the petitioners are disentitled to any relief at the hands of the writ Court and are relegated to their ordinary statutory remedies which may as yet be available to them in law. The writ petition appears to us as misconceived and is hereby dismissed with costs.

(9) Mr. R. N. Narula has fairly stated that the position in the connected Civil Writ Petitions Nos. 2382 to 2386 of 1975 is identical and all of them shall be governed by this judgment. All these writ petitions are accordingly dismissed with costs.

N.K.S.

Before S. S. Sandhawalia, C.J. and S. S. Dewan, J.

FAIRDEAL AGENCIES (REGD.) AMBALA CANTT.,—*Petitioner.*

versus

STATE OF HARYANA and others,—*Respondents.*

Civil Writ No. 1177 *of* 1976

August 8, 1978.

Haryana General Sales Tax Act (20 *of* 1973)—*Sections* 1(3), 49 *and* 65(1)—*Constitution of India* 1950—*Seventh Schedule, List II, Entry* 54—*Section* 49 *of the Haryana Act—Whether beyond the competence of the legislature—Legislature—Whether competent to give a retrospective effect to the provision—Penalty under section* 49—*Whether cannot be imposed in view of the saving provision made in the proviso to section* 65.

Held, that the enactment of section 49 of the Haryana General Sales Tax Act, 1973 is well within the area of ancillary or incidental power of the legislature under Entry 54 of List II (taxes on sale and purchase of goods) of the Seventh Schedule of the Constitution of India 1950 and is a competent piece of legislation. (Para 8).

Held, that the power of the legislature to enact a law with reference to the topic entrusted to it is unqualified, subject to a limitation imposed by the Constitution and that in exercise of such a power, it is competent for the legislature to enact a law which is either prospective or retrospective. Consequently section 49 of the Act is not *ultra vires* the powers of the legislature on the ground that it operates retrospectively. (Para 10).

Held, that the proviso to section 65(1) of the Haryana Act is intended to preserve such rights as the repealed Act had conferred. Since no immunity from imposition of penalty for excess collection of tax had been granted to an assessee by or under the repealed Act consequently, no such right accrues to the assessee under the Haryana Act and therefore penalty under section 49 of the Act can be imposed. (Para 12).

Writ Petition under Articles 226/227 *of the Constitution of India praying that this Hon'ble Court may be pleased to grant the petitioner firm the following reliefs* :—

(a) *to issue a writ of* Certiorari *directing the respondents to transmit the entire record pertaining to this case to this Hon'ble Court with a view to enabling it to examine and scrutinise the legality, validity and propriety of the impugned notice Annexure* P-2, *and after a perusal of the same to quash the impugned notice Annexure* P-2;

(b) *to issue an* ex parte *and interim stay order staying further proceedings before respondent No.* 2 *till the final decision of the writ petition;*

(c) *to dispense with the service of notices of motion of this writ petition on the respondents since an* ex parte *stay order has been prayed for;*

(d) *to declare sections* 49, 65 *and* 1(3) *of the new Act as* ultra vires *of the Constitution of India;*

(e) *to dispense with the filing of the certified copy of Annexure* P-1;

(f) *to award costs of this petition to the petitioner firm; and*

(g) *such other relief as this Hon'ble Court may deem just and expedient on the facts and circumstances of this case to which the petitioner firm is found entitled to may also be granted.*

S. C. Sibal, Advocate.

R. P. Sawhney, Advocate with him, *for the Petitioner.*

S. C. Mohunta, Advocate General Haryana and Shri Naubat Singh, Senior D. A. G., *for the Respondents.*

JUDGMENT

S. S. Dewan, J.—

(1) Two Civil Writ Petition Nos. 1177 of 1976, *M/s Fairdeal Agencies (Regd.) Ambala Cantt.* v. *The State of Haryana and others* and 1471 of 1977 *M/s Shiv Kumar Hari Parkash, Hissar* v. *The State of Haryana and another,* are being disposed of together by this judgment.

(2) The facts emerging from the petitions, which need be stated are these : Petitioners are carrying on business in the State of Haryana. They were registered as dealers under the Punjab General Sales Tax Act, 1948, the Central Sales Tax Act, 1956 and later on under the Haryana General Sales Act, 1973 (hereinafter referred to as the Punjab Act, Central Act and Haryana Act respectively). In respect of the year of assessment 1969-70, the petitioner in Civil Writ No. 1177 was assessed to sales tax under the Punjab Act as well as under the Central Act by order of the Assessing Authority, Ambala, dated 29th October, 1974. Assessment order for the year 1968-69 in the case of the petitioner in Civil Writ No. 1471 was made under both the Acts on 29th December, 1969 by the Assessing Authority, Hissar. Thereafter the Deputy Excise and Taxation Commissioner, Ambala, acting *suo moto* issued to the petitioner in Civil Writ No. 1177 a notice, dated 19th January, 1976, and thereby required the petitioner to appear in the proceedings intended to be taken with a view to determine the question of its liability for penalty in terms of section 49(3) of the Haryana Act on account of collection by it of the amount of tax in excess of the amount permissible under the Central Act. A similar notice dated 23rd February, 1977, was issued by the Assessing Authority, Hissar, to the petitioner in Civil Writ No. 1471 under section 9(2) of the Central

Act, read with section 49 of the Haryana Act. It appears that the petitioners chose not to appear in the proceedings so intended and instead approached this Court for quashing the notices in exercise of its extraordinary powers. The legality of the notice has been challenged in each case by the learned counsel and it is contended that :—

(i) Section 49 of the Haryana Act under which it is proposed to levy penalty is beyond the competence of the legislature;

(ii) Legislature was not competent to give retrospective effect to section 49, so as to operate with effect from 14th November, 1967;

(iii) Section 49 cannot be pressed into service so as to impose penalty in view of the saving provision made in the proviso to section 65 of the Haryana Act;

(iv) In the absence of a provision in the Central Act for imposing penalty for excess collection of the amount of tax thereunder recourse to Section 49 of the Haryana Act cannot be taken to penalise the petitioners for such collections.

These contentions are being dealt with hereunder :—

Section 49 of the Haryana Act of which the competency of the legislature to enact this was questioned is in these words:—

1. No person shall collect any sum by way of tax in respect of sale or purchase of any goods on which no tax is payable under this Act.

2. No person, who is not a registered dealer and liable to pay tax in respect of any sale or purchase, shall collect on the sale or purchase of any goods any sum by way of tax from any other person and no registered dealer shall collect any amount by way of tax in excess of the amount of tax payable by him under this Act.

3. If any person, not being a dealer liable to pay tax under this Act, collects any sum by way of tax, or being a registered dealer collects any amount by way of tax in excess of the tax payable by him or otherwise collects tax in contravention of the provisions of sub-sections (1) and (2), he shall be liable to pay, in addition to any tax for which he may be liable, a penalty of an amount not exceeding five hundred rupees, or double the amount so collected, whichever is greater.

(3) This section was given retrospective effect from 14th November, 1967 by the legislature by virtue of section 1(3) of the Act.

(4) Section 10(A) of the Punjab Act which was inserted in the Haryana Act by the Haryana Legislature to take effect from 14th November, 1967 to which reference will be made during the course of discussion of the question of competency reads thus :—

(1) No dealer, who is not liable to pay tax under this Act shall collect any amount by way of tax under this Act; nor shall a dealer liable to pay tax under this Act make any such collection, except in accordance with the provisions of this Act.

(2) If any dealer, who is not liable to pay tax under this Act, collects any amount purporting to be by way of tax under this Act, such dealer shall pay over to the State Government, within such time and in such manner as may be prescribed, the amount so collected.

(3) If any dealer liable to pay tax under this Act collects tax on any transaction not liable to tax under this Act or in excess of the tax leviable under this Act, such dealer shall pay over to the State Government in addition to the tax payable, the amount so collected within such time and in such manner as may be prescribed.

(4) If the amount of tax collected by any dealer under sub-section (2) or sub-section (3) is not paid to the State Government within the time, and in the manner, prescribed, it shall be recoverable as arrears of land revenue;

Provided that the payment of any claim to such amount made by the person who paid it to such dealer shall be the liability of the State Government."

(5) The learned Advocate General for the State of Haryana drew our attention to the recent judgment of the Supreme Court in the case of R. S. *Joshi, Sales Tax Officer Gujrat* v. *Aji Mills Ltd., and another* (1) and submitted that in view of what had been held therein the competency of the Legislature to enact section 49 was no longer open to challenge. Sections 46 and 37 of the Bombay Sales Tax Act (No. 51 of 1959), which fell for consideration from the point of view of their Legislative competence are in these terms:—

"46. (1) No person shall collect any sum by way of tax in respect of sales of any goods on which by virtue of section 5 no tax is payable.

(2) No person, who is not a registered dealer and liable to pay tax in respect of any sale or purchase, shall collect on the sale of any goods any sum by way of tax from any other person and no registered dealer shall collect any amount by way of tax in excess of the amount of tax payable by him under the provisions of this Act...."

"37. (1) (a) If any person, not being a dealer liable to pay tax under this Act, collects any sum by way of tax, or being a registered dealer collects any amount by way of tax in excess of the tax payable by him, or otherwise collects tax in contravention of the provisions of section 46, he shall be liable to pay, in addition to any tax for which he may be liable, a penalty as follows :

(1) where there has been a contravention referred to in clause (a), a penalty of an amount not exceeding two thousand rupees; ....and, in addition,...any sum collected by the person by way of tax in contravention of section 46 shall be forfeited to the State Government."

(1) (1977) 40 Sales Tax Cases, 497.

(6) The Supreme Court on a review of previous judgments of the Court upheld the competency of the State Legislature to enact these sections and observed thus:—

> "Sections 37(1)(a) and 46(2) of the Bombay Sales Tax Act (51 of 1959 as applicable to the State of Gujrat) are not *ultra vires* the State Legislature inasmuch as those provisions fall within the range of ancillary or incidental powers of the State Legislature under entry 54 read with entry 64 of List II of the Seventh Schedule of the Constitution of India. They also do not contravene Article 14 or 19(1)(f) of the Constitution. It is therefore permissible for the State Legislature to enact that sums collected by the dealers by way of sales tax but are not exigible under the State law and prohibited by it should be forfeited to the public exchequer punitively.
>
> The forfeiture clause in section 37(1) is a punitive measure to protect public interest in the enforcement of the fiscal legislation and it falls squarely within the area of implied powers. All real punitive measures, including the dissuasive penalty of confiscating the excess collections, are valid, being within the range of ancillary powers of the legislature competent to exact a sales tax levy. The fact that there is arithmetical identity between the figures of the illegal collections made by the dealers and the amounts forfeited to the State cannot create a conceptual confusion that what is provided is not punishment but a transference of funds. The notion that a penalty or a punishment cannot be cast in the form of an absolute or no-fault liability but must be preceded by *mens rea* is not correct. Therefore, the contention that section 37(1) fastens a heavy liability regardless of fault has no force in depriving the forfeiture of the character of penalty. The fact that in section 37(1) *mens rea* is excluded and the penal forfeiture can be enormous are germane to legislative policy, not for judicial compassion.
>
> In a developing country, with the mass of the people illiterate and below the poverty line, and most of the commodities concerned constitute their daily requirements, there is

sufficient nexus between the power to tax and the incidental power to protect purchasers from being subjected to an unlawful burden. Social justice clauses, integrally connected with the taxing provisions, cannot be viewed as a mere device or wanting in incidentality."

(7) Provisions of section 49 of the Haryana Act are analogous to those made in sections 46(1) (2) and 37(1)(a) of the Bombay Sales Tax Act.

(8) The view of the Supreme Court on the Legislative competence in relation to the provisions of the Bombay Act reproduced above, will therefore, aptly apply to section 49 of the Haryana Act so that it has to be held that the enactment of the section is well within the area of anciliary or incidential power of legislation under entry 54 of List II — (taxes on sale and purchase of goods) of the Seventh Schedule of the Constitution and is a competent piece of legislation.

(9) The judgments of the Supreme Court in *R. Abdul Quader and Co.* v. *Sales Tax Officer, Hyderabad* (2) and *Ashoka Marketing Ltd., v. State of Bihar and another* (3) on which the learned counsel relied to support their contention are wholly irrelevant in view of the obvious difference between the provisions of law which came for consideration in these cases and the provisions of section 49 of Haryana Act. The Sales Tax Act in each case made a provision exactly as in section 10A(3) of the Punjab Act reproduced above, to the effect that the amount of tax collection by a dealer in excess of the amount due under the Act shall be paid over to the government. The Supreme Court struck down the two sections holding that the ambit of ancillary or incidental power attaching to entry 54 of list II of the Constitution could not extend to permitting the Legislature to provide that though the excess amount collected by way of tax, is not exigible under the law made under the relevant taxing entry, it shall be paid over to the government as if it was a tax. The reason assigned by the Supreme Court for striking down the two sections cannot apparently apply to section 49 of the Haryana Act, which empowers imposition of penalty in the event of unauthorised collection of tax by a dealer. The contention fails.

(2) (1964) 15 STC 403.
(3) (1970) 26 STC 254.

Contention No. 2

(10) The contention that the legislature did not possess the power to give to section 49 of Haryana Act which came into force on March 5, 1973 retrospective effect from 14th November, 1967 does not bear scrutiny in view of position of law firmly settled by the Supreme Court that the power of the Legislature to enact a law with reference to the topic entrusted to it is unqualified subject to a limitation imposed by the Constitution and that in exercise of such a power, it is competent for the Legislature to enact a law which is either prospective or retrospective. In this situation of law when pointed, the learned counsel were unable to advance any argument in support of the contention raised. Consequently, it is held that section 49 of the Haryana Act is not *ultra vires* the powers of the Legislature on the ground that it operates retrospectively.

Contention No. 3

(11) Section 65(1) of the Haryana Act and the proviso to it on which the contention by the learned counsel is based, is in these terms :—

> "65. (1) The Punjab General Sales Tax Act, 1948 (hereinafter referred to as the repealed Act), is hereby repealed:
>
> Provided that such repeal shall not affect the previous operation of the repealed Act or any right, title, obligation or liability already acquired, accrued or incurred thereunder, and subject thereto anything done or any action taken, shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act, as if this Act were in force on the date on which such thing was done or action was taken, and all arrears of tax and other amounts due under the repealed Act, at the commencement of this Act, may be recovered as if they had accrued under this Act."

(12) The contention precisely stated is that in so far as the Punjab Act under which the assessment had been made did not provide for penalty for the excess collection of tax during the years of assessment, the petitioners had acquired their right under the proviso to section 65 of the Act, not to be so penalized. The argument

is totally misconceived and pressed upon an interpretation of the first part of the proviso which provides for saving of the rights accrued and the liability incurred under the repealed Act. Manifestly enough, the proviso is intended to preserve such rights as the repealed Act had conferred. Indisputably, no immunity from imposition of penalty for excess collection of tax had been granted to an assessee by or under the repealed Act. Consequently, no such right as is being contended for accrued or could possibly accrue, to the petitioners.

(13) The learned counsel relied upon two judgments of the Supreme Court to support the contention, one is the case of *State of Tamil Nadu* v. *M/s. Star Tobacco Co.*, (4), and another in the case *The Sales Tax Officer* v. *Hanuman Prasad*, (5) In *State of Tamil Nadu's case* (supra) assessment to sales tax in the case of respondent was made under the Madras General Sales Tax Act, 1939. But after coming into force of the Madras General Sales Tax Act, 1959, which by section 61 repealed the 1939 Act, the appeal against the assessment order was rejected by the appellate authority. In such situation, appellate authority was alone competent under the 1939 Act and rules framed thereunder to reopen the assessment. Instead, the Assessing Authority did so purporting to exercise his power vesting in him under the 1959 Act. Question arose whether he could reopen the assessment in view of the saving provision made in the proviso to section 61 of 1959 Act which is similar to the proviso of section 65 of the Haryana Act. The Supreme Court held that a valuable right accrued to the assessee under the proviso to have his case re-opened by the appellate authority and consequently the assessing authority was not competent to reopen the assessment.

(14) In the other case of *Sales Tax Officer* v. *Hanuman Prasad* (supra) the respondent was assessed to sales tax under the Central provisions and Berar Sales Tax, Act, 1947. Order in this behalf was made by the Authority some time after the enforcement of Madhya Pradesh General Sales Tax Act, 1958, which by section 52 repealed the 1947 Act. Proviso to section 52 was practically in the same words as the proviso to section 65 of the Haryana Act and it saved the rights accruing under the 1947 Act. Sometime after the lapse of 3 years

(4) AIR 1973 S.C. 1887.
(5) (1967) 19 S.T.C. 87.

the assessing authority commenced action so as to reassess the respondent on the ground that a part of his turnover had escaped assessment under the 1947 Act, the period within which the reassessment proceedings could be initiated was three years from the date of the assessment year. Consequently the respondent questioned the legality of the proceedings on the ground that they were time barred. It was contended on behalf of the Assessing Authority that the period for the assessment was 5 years under section 19 of the 1958 Act. The Supreme Court and earlier the High Court of Madhya Pradesh repelled the contention of the Assessing Authority and held relying upon the proviso to section 52 of the 1958 Act that the saving provision to be found in the proviso preserved the right of the respondent in respect of the period within which the re-assessment proceedings could be set afoot and hence the proceeding which had been initiated after the expiry of the said period was quashed.

(15) It will appear that in both these cases, right had come to vest in the assessee under the repealed Act which had been preserved by the repealing Act. No such position as has been observed above, exists in these petitions. The contention is absolutely devoid of substance and is rejected.

Contention No. 4

(16) In support of the contention that section 49 of the Haryana Act authorising imposition of penalty for excess collection of tax cannot be invoked unless a provision in that behalf was found in the Central Act, the learned counsel place reliance on judgment of the Supreme Court in the case of *Khemka and Co. (Agencies)* v. *State of Maharashtra* (6). The counsel submitted that no such provision exists in the Central Act. In *Khemka and Co.* case, the question arose whether the power residing in the State Authority by virtue of section 16 (4) of the State Act to penalize a dealer for delayed payment of the tax under the Act could be validly exercised by them against a dealer under the Central Act found guilty of such default. The State depended on section 9 of the Central Act which provides for levy and collection of tax and penalties, in defence of the action taken by the Authority for the purpose of imposing penalty under the Act. After examining the

(6) (1975) 33 STC 571.

scope of the section, the Court did not agree with the State and held :

> "There is no provision in the Central Sales Tax Act, 1956, for imposition of penalty for delay or default in payment of tax and the provision in the State Sales Tax Act imposing penalty for non-payment of tax within the prescribed time is not attracted to impose penalty on dealers under the Central Act in respect of tax payable under the Central Act. Consequently, it is not permissible for the authorities to invoke the provisions of section 16(4) of the Bombay Sales Tax Act, 1953, for imposing penalty for failure by the dealer to pay sales tax payable under the Central Act within the prescribed time."

(17) It follows that if section 9 of the Central Act stood as it was at the time the Supreme Court decided the aforesaid case, contentions raised by the learned counsel would be unanswerable and have to be accepted. But the position has completely changed since then in view of the legislative enactment namely the Central Sales Tax (Amendment) Act (No. 103 of 1976), which received the assent of the President on 7th September 1976. By section 6 of the Amending Act, a new sub-section namely sub-section 2(A) was inserted in section 9 of the Central Act. The said sub-section is as follows :—

> "All the provisions relating to offences and penalties (including provisions relating to penalties in lieu of prosecution for an offence or in addition to the penalties or punishment for an offence but excluding the provisions relating to matter provided for in section 10 and 10-A of the General Sales Tax Law of each State) shall, with necessary modifications apply in relation to the assessment, re-assessment, collection and the enforcement of payment of any tax required to be collected under this Act in such State or in relation to any process connected ment of payment as if the tax under this Act were a tax with such assessment, re-assessment, collection or enforce- under such sales tax law."

Section 9 of the Amendment Act is a validating section and makes the provision of sub-section 2(A) of section 9 inserted thereby to operate retrospectively with effect from 5th day of January, 1957.

(18) In view of the altered position of law as indicated, evidently no assistance can be sought by the learned counsel from the judgment in *Khemka and Co., case.* It will have thus to be held that there is no substance in the contention of the learned counsel. The impugned notices as also the action proposed to be taken in furtherance of them so as to levy penalty, are perfectly legal and unquestionable.

(19) In the result, both the writ petitions are meritless and are dismissed. There will be no order as to costs.

S. S. Sandhawalia, C.J.—I agree.

K.T.S.

Before S. S. Sandhawalia C.J. and S. S. Dewan, J.

BIRLA COTTON SPINNING AND WEAVING MILLS LTD. ETC.—

Petitioners

versus

STATE OF HARYANA ETC.,—*Respondents.*

Civil Writ Petition No. 1648 *of* 1976

August 9, 1978.

Haryana General Sales Tax Act (20 of 1973)—*Sections* 1(3) *and* 2(c)—*Definition of 'dealer' amended with retrospective effect—Goods not taxable under the pre-existing law made taxable thereby—Such retrospectivity—Whether constitutional—Retrospectivity to provisions of taxing statutes—Whether permissible only to clear ambiquities or fill up lacunae—Length of the period of retrospectivity—Whether relevant to determine its constitutionality.*

Held, that the retrospectivity given to the definition of 'dealer' in section 2(c) of the Haryana General Sales Tax Act, 1973 was an attempt to effectuate and to make clear what, according to the Legislature, was its true intent in imposing taxes on goods which it was undoubtedly