

Before Hon'ble G. C. Mittal & G. S. Chahal, JJ.

M/S BALWANT RAI KAUSHAL,—Petitioner.

versus

STATE OF HARYANA AND ANOTHER,—Respondents.

C.W.P. No. 5190 of 1989

3rd December, 1990

Haryana General Sales Tax Act, 1973—Section 26, Rule 39-A—Provision for payment of lump sum tax—Scope of said provision—Rule prescribing rate in which lump sum tax to be paid—Validity of the Rule.

Held, that Section 26 of the Act, it is enabling provision for the benefit of the assessee and they are not bound to pay lump sum tax. Rules are framed under Section 64 read with Section 26 of the Act. It would be open to the class of dealers for whom the rules would be made to opt for payment of lump sum by way of composition instead of payment of sales tax on the basis of return. It would be open to the assessee to opt for the payment of lump sum instead of on the **basis of return**, and if he does not opt for the payment of lump sum by way of composition, then he would not be governed by that rule and would be governed by the provisions of Section 6 of the Act for imposition of tax on the basis of return.

(Para 6)

Further held, that Rule 39-A of the Rules goes beyond the scope of Section 26 of the Act. Section 6 of the Act is the charging section under which sales tax is payable on the basis of turnover if it exceeds the taxable quantum. Under Section 26 of the Act power has been delegated to the State Government to make provision for lump sum payment by way of composition at the option of the assessee. Pursuant to the provisions of Section 26 of the Act read with rule making power contained in Section 46, Rule 39-A has been framed for collection of lump sum tax on the turnover of brick kiln owners. Once Section 6—a charging Section is there in the Act there cannot be any other section to levy a different tax on the same turnover except by giving choice to the assessee. That is why Section 26 clearly provides that it would be the option of the assessee to pay tax in lump sum, as may be prescribed, instead of paying tax under Section 6 on the turnover. Therefore, it is clear that Rule 39-A inasmuch as it imposes obligation on a brick kiln dealer to pay lump sum tax is clearly beyond the scope of Section 6 as well as Section 26 of the Act.

(Para 11)

Rajesh Bindal, for the Petitioners.

S. C. Mohunta, A.G. Haryana with S. K. Sood, D.A. Haryana,
for the Respondents.

JUDGMENT

Gokal Chand Mital. J.

(1) M/s Balwant Rai Kaushal was carrying on business of manufacturing bricks in the State of Haryana since January, 1986 and was registered under the Haryana General Sales Tax Act, 1973 (hereinafter called 'the Act'). It is pleaded that it closed the brick kiln from 19th June, 1987 as the clay of the area was not fit for making bricks, and applied for cancellation of the registration certificate.

(2) The dealer received order from the Assessing Authority dated 30th September, 1988, Annexure P2, imposing sales tax, interest on the amount not paid upto 30th September, 1988 and penalty. The tax was imposed not on the basis of returns filed by the assessee but on the basis of the notification dated 19th October, 1988, copy of which is Annexure P1, by which the Haryana General Sales Tax Rules, 1975 framed under the Act, (for short the 'Rules'), were amended and chapter 5-A was inserted, whereunder rule 39-A (1) provided for payment of lump sum amount in lieu of sales tax with reference to Section 26 of the Act.

(3) The assessee came to this Court to challenge the vires of Section 26 of the Act as also of rule 39-A of the Rules, and on this basis challenged the validity of the assessment order Annexure P2. Other similar cases were also filed by the other assessees and those were ordered to be heard alongwith this writ petition. Facts of those cases need not be reiterated as we are basically concerned with the vires of the provisions and those cases would also stand disposed of with the case in hand.

(4) The argument raised is that Section 26(1) of the Act does not give guideline nor gives the limit for charging lump sum amount in lieu of sales tax, and, therefore, is vague and arbitrary, and deserves to be struck down. In order to appreciate the argument the provision of Section 26(1) to (3) are reproduced hereunder :—

"26(1) Payment of lump sum in lieu of sales tax.

The State Government may, in the public interest and subject to such conditions as it may deem fit, accept from any class

of dealers, in lieu of the tax payable under this Act, for any period by way of composition, a lump sum to be determined by the State Government and to be paid at such intervals and in such manner, as may be prescribed, and thereupon during the period such composition remains in force, the provisions of this Act and the rules made thereunder relating to the filing of returns and the maintenance of accounts by such dealers shall not apply to them.

- (2) Notwithstanding anything to the contrary contained in this Act, a contractor liable to pay tax under this Act may, in lieu of the tax payable under this Act, at his option, exercisable in the manner prescribed, pay on the total value of a works contract being executed by him, a sum at such interval and in such manner, as may be prescribed, calculated at such rate not exceeding ten per centum, as the State Government may, keeping in view the nature and class of the works contract and subject to such conditions, by notifications, specify :

Provided that a contractor exercising option under this subsection shall not be entitled to make purchase of any goods without payment of tax on the authority of his registration **certificate for use in the execution of the works contract** nor shall he be entitled to make adjustment or claim of refund of tax paid at any preceding stage, or deduct turnover of purchase of such goods :

Provided further that the option once exercised shall not be revoked till the expiry of three years from the end of the year in which such option is exercised nor a works contract under execution shall be split on such reservation.

- (3) A contractor exercising option under sub section (2) shall, so long as the option remains in force, not be required to maintain accounts of his business under this Act or the rules made thereunder except record of payment received or receivable in relation to the works contract executed or under execution."

(5) A reading of the sub-sections to Section 26 of the Act clearly goes to show that the State Government can prescribe for the conditions, which may be deemed fit for accepting lump sum in lieu of

sales tax payable under the Act, for any period, by way of composition from any class of dealers to be paid at such intervals and in such manners. This clearly gives enough guidelines for framing the rules to the Rule Making Authority under Section 64 of the Act.

(6) As we read Section 26 of the Act, it is enabling provision for the benefit of the assessee and they are not bound to pay lump sum tax. Rules are framed under Section 64 read with Section 26 of the Act. It would be open to the Class of dealers for whom the rules would be made to opt for the payment of lump sum by way of composition instead of payment of sales tax on the basis of return. The words "accept from any Class of dealers" in Section 26(1) the words "a Contractor.....at his option" in Section 26 (2), the words "Contract exercising option" in the I proviso and the words "option once exercised shall not be revoked" in II proviso to Section 26(2), and the words "contractor exercising option so long as the option remains in force", clearly go to indicate that as and when rules are made, it would be open to the assessee to opt for the payment of lump sum instead of on the basis of return, and if he does not opt for the payment of lump sum by way of composition, then he would not be governed by that rule and would be governed by the provisions of Section 6 of the Act for imposition of tax on the basis of return. Therefore if a dealer is prepared to accept the concession, he may do so and in case he does not want to accept, then he cannot be forced to pay lump sum instead of payment of sales tax on the basis of returns. Therefore, viewing the matter from any angle, we do not find that the provisions of Section 26 of the Act are arbitrary or provide no guidelines for accepting lump sum payment in lieu of sales tax.

(7) The next challenge is to the vires of rule 39-A of the Rules, on the ground that it goes beyond the scope of Section 26 of the Act. In highlighting it is argued that a reading of rule 39-A shows that every brick-kiln owner is bound to pay lump sum tax by virtue of this rule and no option is left to him to pay on the basis of actual turnover. In order to appreciate the argument, we have again to consider the provisions of Section 26 of the Act alongwith rule 39-A of the Rules. Section 26 of the Act has already been reproduced above and rule 39-A of the Rules reads as under :

"39 A. *Lump sum payment in lieu of Sales tax.* [Section (26)]—Every brick-kiln owner shall pay for the period from the 1st April, 1988 to 31st March, 1990 lump sum in lieu of sales-tax on the sale of bricks within the State in the manner specified in sub-rule (4) of rule 29, at the rate

in accordance with the capacity of his brick-kiln as under :—

Sr. No.	Capacity of brick-kiln	Category	Annual rate lump sum payable in lieu of sale tax			
1.	Brick-kiln of capacity of 28 ghoris or more of kachi briks	A	Rs. 54,000			
2.	Brick-kiln of capacity of 22 to 27 ghoris of kachi bricks	B	Rs. 45,000			
3.	Brick-kiln. of capacity of below 22 ghoris of kachi bricks	C	Rs. 36,000			
4.	Brick-kiln not fired during the year in which stock in and outside the kiln as on the 1st April, does not exceed five lakh. of bricks of all categories.	D	Rs. 10,000			
<i>Explanation</i> :						
	1.	xx	xx	xx	xx	xx
	2.	xx	xx	xx	xx	xx"

(8) We have already dealt with Section 26 of the Act. That gives an option to the assessee to pay tax in lump sum. The State Government has no power by way of delegated legislation to impose lump sum tax in lieu of tax payable under the Act on the basis of actual turn over of sales. However, it can make rules for lump sum payment subject to option being exercised by a dealer. But a reading of rule 39-A of the Rules shows that every brick-kiln owner has to pay for the period from 1st April, 1988 to 31st March, 1990 lump sum tax in lieu of sales tax on the sale of bricks at the rates in accordance with the capacity of the brick-kiln as shown in the table of the rule. Two explanations have been added to the rule below the table, which elaborate the procedure etc.

(9) The first stand taken by the State about rule 39-A is that the President of the Haryana brick-kiln owners Association had

requested the State Government to frame rules for payment of lump sum in lieu of tax under Section 26 of the Act, and on that basis draft rules were framed for a period of two years starting from 1st April, 1988 to 31st March, 1990, and after these were approved by the Association, the rules were published. On the basis it is urged that every brick kiln owner has to pay lump sum tax and question of option by each such dealer is not necessary in law. The other argument raised was that the brick-kiln owners including the assessee opted for payment of lump sum in lieu of sales tax payable under the Act, and thus are estopped by their own conduct in challenging the notification. Regarding the assessee it is alleged that he opted,—*vide* Annexure R 3 and thus stands estopped from challenging the validity of the notification.

(10) It may be that the President of the association of brick-kiln owners requested the State Government for framing rules for payment of lump sum but such a request cannot be considered as an option of each assessee. After State Government makes provision for lump sum payment it will be open to each dealer to opt for it and this would be a question of fact in each case and we decline to go into this question, and is left open to be gone into by the Assessing and the Appellate Authorities under the Act. Here, we are only concerned with the question whether rule 39-A of the Rules goes beyond the provision of Section 26 of the Act and if it does, to what extent the provision of rule 39-A of the Rules deserves to be struck down if it cannot be construed in a reasonable way to bring it subject to the provisions of Section 26 of the Act.

(11) On a consideration of the matter, we are of the view that Rule 39-A of the Rules goes beyond the scope of Section 26 of the Act. Section 6 of the Act is the charging section under which sales tax is payable on the basis of turnover if it exceeds the taxable quantum. Under Section 26 of the Act power has been delegated to the State Government to make provision for lump sum payment by way of composition at the option of the assessee. Pursuant to the provisions of Section 26 of the Act read with rule making power contained in Section 46, Rule 39-A has been framed for collection of lump sum tax on the turnover of brick-kiln owners. Once Section 6 a charging section is there in the Act there cannot be any other section to levy a different tax on the same turnover except by giving choice to the assessee. That is why Section 26, clearly provides that it would be the option of the assessee to pay tax in lump sum, as may be prescribed, instead of paying tax under Section 6 on the turnover. Therefore, it is clear that Rule 39-A inasmuch as it

imposes obligation on a brick-kiln dealer to pay lumpsum tax is clearly beyond the scope of Section 6 as well as Section 26 of the Act. If we were to accept the argument on behalf of the State Government, then there are two charging provisions. One in Section 6 and the other is Rule 39-A of the Rules. It will be the option of an assessee to be governed by Section 6 or Rule 39-A and Rule 39-A cannot be imposed on an unwilling assessee if he likes to be governed by Section 6 of the Act.

(12) There can be no doubt that Section 26 was enacted for the benefit of certain assesseees but that would be applicable only if an assessee opts to be governed by the rules framed pursuant to Section 26. Section 26 in terms provides that it will be the option of the assessee and therefore Rule 39-A which has been framed pursuant to Section 26, if it goes beyond Section 26 it would clearly be *ultra vires* the provisions of the Section.

(13) In case, we reasonably construe Section 26 and Rule 39-A then it can be clearly understood that Rule 39-A is subject to the provisions of Section 26. On a consideration of the matter, we hold that Rule 39-A is subject to the provisions of Section 26 and Rule 39-A would be applicable to those assesseees who give their option to pay lump sum tax instead of paying tax under Section 6 of the Act. Those who opt for being governed by Rule 39-A would be required to pay the lump sum in lieu of sales tax on the sale of bricks in accordance with the capacity of the brick-kiln as per details given in the table and follow the other procedures and matters contained in Rule 39-A. If a dealer otherwise covered by Rule 39-A does not opt to be governed by that rule he would be governed by Section 6 of the Act.

(14) In view of the aforesaid statement of law, the assessment order (Annexure P/2) cannot stand and is hereby quashed with a direction to the assessing authority to frame a fresh assessment and while doing so it will take into consideration whether assessee opted to be governed by Rule 39-A. This matter he will decide by appreciating each case and by giving a finding of fact in this behalf. Wherever he comes to the conclusion on facts that an assessee did not opt to be governed by Rule 39-A, he would proceed to frame assessment under Section 6 of the Act read with other provisions of the Act. Refund be given to the assessee in cases where assessment order is quashed.

(15) In certain cases before us the assesseees have come at the stage of show cause notice, that is, before assessment is framed. Each assessee would take its stand in reply to the show cause notice and the Assessing Authority will frame the assessment keeping in view the law laid down in this judgment.

(16) For the reasons recorded above, Civil Writ Petition Nos. 5190 of 1989, 818, 2509, 2510, 3197, 4510, 5260 to 5264, 6006, 6302, 7467, 7932, 8163, 8418, 9297, 10587 and 11584 of 1990 stands disposed of with no order as to costs.

S.C.K.

Before Hon'ble G. C. Mital, A.C.J. & H. S. Bedi, J.

M/S KENAPO TEXTILES PVT. LTD. & ANOTHER.—*Petitioners.*

versus

STATE OF HARYANA & OTHERS.—*Respondents.*

C.W.P. No. 4191 of 1989

16th April, 1991

Haryana General Sales Tax Act, 1984—Assessing Authority—Power to appoint such authority—Two authorities having started proceedings—Whether two separate proceedings can continue.

Held. that under the Act, the District Excise and Taxation Officer-cum-Assessing Authority, would have jurisdiction to make the assessment.

(Para 7)

Further held. that the State Government issues Notification in exercise of the powers conferred by Section 3 and clause (a) of Section 2 of the Act, the officer so appointed shall also have the jurisdiction to frame the assessment.

(Para 7)

Further held, that in case any one of the aforesaid two officers starts the assessment proceedings, the other officer shall not be entitled to start the same and the moment the officer who started the proceedings later on gets the information that the proceedings have already been started by the other officer, he will have to stay his hands. However, the authority named in Rule 7 will have the jurisdiction to transfer the pending proceedings to the other officer and until such an order is passed, the officer who started the proceedings