

(1990) 01 BOM CK 0016
In the Bombay High Court
Case No : Sales Tax Reference No. 74 of 1980

Avery India Ltd.

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 08-01-1990

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 32, 36, 36(3), 38, 38(2)

Citation : (1990) 01 BOM CK 0016

Hon'ble Judges : T.D. Sugla, J; Sujata V. Manohar, J

Bench : Division Bench

Advocate : R.V. Patel and P.C. Joshi, for the Appellant; G.S. Jetley and S.G. Surann, for the Respondent

Judgement

Smt. Sujata Manohar, J.—The applicants, M/s. Avery India Limited, are duly registered under the Bombay Sales Tax Act, 1959. They have a head office at Bombay. They were duly registered for their head office at Bombay under R.C. No. NIA-1706. They opened a sales office at Pune with effect from 1st April, 1966. An application for registration for the Pune office was made on 11th May, 1970, and registration with effect from 11th May, 1970, was granted to the applicants in respect of their Pune Office. An application was made by the applicants to the Deputy Commissioner of Sales Tax for condoning the delay in applying for registration. This application was granted and the registration certificate in respect of Pune Office was made effective from 1st April, 1966, that is to say, the date of opening of the Pune branch.

2. In the meanwhile the applicants were furnishing returns at Bombay by including the turnover of sales at their Pune branch in the Bombay returns. This position was regularised for the period from 1st April 1966, to 31st December, 1970, by giving formal permission to the applicants for filing a consolidated return at Bombay.

3. In the return submitted to the Sales Tax Officer at Bombay by the applicants for the period 1st January, 1971, to 31st March, 1971, the applicants included

the turnover of the Pune branch and paid tax accordingly.

4. As the permission for consolidation was only up to 31st December, 1970, when the Sales Tax Officer at Bombay took up the assessment for the period 1st January, 1971, to 31st December, 1971, some time in 1973, he removed the turnover of Pune branch for the period 1st January, 1971, to 31st March, 1971, from the taxable turnover of the applicants. As a consequence of this assessment the applicants were granted on 11th June, 1973, a refund of Rs. 46,890.95 which included a sum of Rs. 36,370.08 being tax in respect of the sales of the Pune branch.

5. On 25th June, 1973, the Bombay Sales Tax Officer also informed the Sales Tax Officer, Pune, to complete assessment after including in the turnover of the Pune branch, the turnover for the period 1st January, 1971, to 31st March, 1971. This assessment however, was completed by the Sales Tax Officer at Pune only on 7th January, 1977. Prior to the completion of the assessment, the assessee on 5th January, 1977, paid tax of Rs. 36,370 at Pune in respect of the sales for the period 1st January, 1971, to 31st March, 1971.

6. The Sales Tax Officer, Pune, held that the applicants had failed to pay the tax due for the quarter ended 31st March, 1971, till 5th January, 1977. He levied a penalty of Rs. 47,761 u/s 36(3) of the Bombay Sales Tax Act, 1959.

7. The applicants preferred an appeal before the Assistant Commissioner of Sales Tax. The Assistant Commissioner requantified the penalty and reduced it to Rs. 32,734.

8. The applicants preferred a second appeal before the Sales Tax Tribunal. The Tribunal held that having regard to the peculiar facts and circumstances the assessee deserved certain remission. The Tribunal observed that the extra demand and the entire delay had arisen due to technicalities. It held that there was no mala fide intention on the part of the assessee to evade or to delay the payment of any tax. The Tribunal however, granted a remission only of penalty in excess of Rs. 20,000. Hence the present reference before us u/s 61(1) of the Bombay Sales Tax Act, 1959.

9. The question referred to us for determination is :

"Whether, on the facts and circumstances of the case, the Tribunal was justified in law in upholding the levy of penalty u/s 36(3) of the Act ?"

10. u/s 36(3) "if a dealer does not, without reasonable cause, pay tax within the time he is required by or under the provisions of this Act to pay it, the Commissioner may, after giving the dealer an opportunity of being heard, by an order in writing, impose upon the dealer by way of penalty, in addition to the amount of tax a sum equal to -

(a) one per cent of the amount of tax for each month for the first three months, after the last date by which the dealer should have paid that tax, and

(b) one and one-half per cent of the amount of tax for each month thereafter, during the time the dealer continues to make default in the payment of tax :

Provided that, the Commissioner, or any appellate or revisional authority, may remit the whole or any part of the penalty payable in respect of any period :"

Penalty provision is therefore attracted if the dealer does not pay the tax within the time prescribed under the Act.

11. u/s 32 of the said Act every registered dealer shall furnish returns for such period, by such dates, and to such authority, as may be prescribed. Under rule 22 of the Bombay Sales Tax Rules quarterly returns were required to be filed by the dealers. u/s 38(2) of the said Act a registered dealer furnishing returns as required by sub-section (1) of section 32, shall first pay into a Government treasury, in the manner prescribed, the whole of the amount of tax due from him according to such return along with the amount of any penalty payable by him u/s 36. The applicants were, therefore, required to pay the tax as per their returns before filing the quarterly returns.

12. The applicants had filed a consolidated return at Bombay for the quarter 1st January, 1971, to 31st March, 1971. Tax as per this return was also paid prior to filing the return. The Sales Tax Officer at Bombay, however, excluded the sales at Pune for the said period while completing the assessment. There was, therefore, no return filed by the petitioners at Pune in respect of the sales at Pune branch for the period 1st January, 1971, to 31st March, 1971 and hence there can be no question of paying tax as per return u/s 38 of the said Act in respect of the said quarter. The assessee, therefore, would be required to pay the tax on assessment. The assessee paid the tax at Pune prior to assessment at Pune. In such a situation the provisions of section 36, sub-section (3) cannot be applied.

13. In the case of State of Rajasthan and Others Vs. Ghasilal, , the Supreme Court considered similar provisions in the Rajasthan Sales Tax Act, 1954. u/s 16(1)(b) of the Rajasthan Sales Tax Act, penalty is leviable, inter alia, if any person has, without reasonable cause, failed to pay the tax due within the time allowed. The Supreme Court held, "According to the terms of section 16(1)(b) there must be a tax due and there must be a failure to pay the tax due within the time allowed But till the tax payable is ascertained by the assessing authority u/s 10, or by the assessee u/s 7(2), (which provides for payment of tax as per return before the filing of return) no tax can be said to be due within section 16(1)(b) of the Act, for till then there is only a liability to be assessed to tax". The present case falls squarely within the ratio of the Supreme Court decision.

14. In the case of Premier Automobiles Limited v. State of Maharashtra reported in [1981] 48 STC 552 (to which I was a party), the assessee had paid in full the amount of tax shown as payable according to the return prior to the filing of the return. The assessee had also applied for determination of the tax u/s 52 of the Bombay Sales Tax Act. On such determination and during the pendency of the

assessee's appeal to the Tribunal against the determination, the assessee paid the increased tax as per the determination u/s 52. The Court held that the provisions of section 36(3) were not attracted because the tax which was shown according to the return was paid in full. The amount which was subsequently paid could not be considered as under or towards the amount of tax due according to that return in question. It was an amount which was paid in anticipation of the amount of tax to which the assessee was going to be assessed in view of the determination by the Commissioner of Sales Tax. It was, therefore, tax paid in advance towards the tax which might be assessed. Hence section 36(3) was not applicable.

15. The ratio of both the above judgments applies to the present case. However, if the consolidated return filed before the Bombay Sales Tax Officer is treated as a return in respect of the said quarter for the sales by Pune branch then tax in accordance with it was paid before the filing of that return. If the assessee is considered as not having filed a return for the said period then there would be no question of his not paying the tax as per the return. He would then be liable to pay tax on assessment. We are not here concerned with any action being taken against the applicants for not filing a return. There are separate provisions under Bombay Sales Tax Act, 1959, in that behalf which have not been invoked.

16. Moreover, in any view of the matter, and even assuming that section 36(3) applies, it cannot be said that the assessee had not paid the tax without reasonable cause in the circumstances of the present case.

17. In the case of Hemchandbhai & Co. v. State of Gujarat reported in [1982] 50 STC 274 , the Gujarat High Court has followed the decision of the Supreme Court in the case of Hindustan Steel Ltd. Vs. State of Orissa, , and has held that penalty will not ordinarily be imposed unless the assessee is shown to have acted deliberately in defiance of law or is found to be guilty of conduct contumacious or dishonest or is proved to have acted in conscious disregard of its obligation. Failure without reasonable cause to pay the tax is an ingredient of the penalty provisions. In our view, looking to the circumstances of the present case, the assessee did have reasonable cause for not paying the tax within time (assuming that they did not pay tax within the time prescribed). Also, as the Tribunal itself has observed, the delay has arisen on account of technicalities and it cannot be said that there was any mala fide intention on the part of the assessee to evade or delay the payment of tax. In these circumstances in our view the Tribunal ought to have remitted the entire penalty payable in respect of the said period.

18. The question before us is, therefore, answered in the negative and in favour of the assessee. The amount of Rs. 100 to be refunded to the applicants

No order as to costs.

19. Reference answered in the negative.