

(1983) 01 BOM CK 0018
In the Bombay High Court
Case No : Sales Tax Reference No. 75 of 1980

Bata India Limited

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 31-01-1983

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 2(29), 2(36), 3, 37, 37(1)

Citation : (1983) 53 STC 132

Hon'ble Judges : D.P. Madon, C.J.; Sujata V. Manohar, J

Bench : Division Bench

Judgement

Madon, C.J.—The applicants, Bata India Limited, are registered as dealers under the Bombay Sales Tax Act, 1959. The applicants carry on business in footwear. At the relevant time, entry 24 in Schedule A to the said Act and entry 21 in Schedule C to the said Act dealt with footwear. Under entry 24 in Schedule A footwear made by hand without using power at any stage when sold at a price not exceeding Rs. 15 per pair was exempted from tax. As the footwear sold by the applicants was not made by hand without use of power, entry 24 had no application to the case of the applicants. Entry 21 in Schedule C at the relevant time provided as follows :

"Serial Description of goods Rate of Rate of No. sales tax. purchase tax.
----- 21. Footwear -
(a) other than that specified Five paise Five paise in entry 24 in Schedule A, in
the rupee. in the rupee. when sold at a price not exceeding Rs. 15 per pair; (b)
other than that specified in sub-entry (2) of entry 24 in Schedule A, - (i) when
sold at a price Ten paise Ten paise exceeding Rs. 15 but not in the rupee. in the
rupee. exceeding Rs. 30 per pair; (ii) when sold at a price Fifteen paise Fifteen
paise exceeding Rs. 30 but not in the rupee. in the rupee. exceeding Rs. 45 per
pair; (iii) when sold at a price Twenty paise Twenty paise exceeding Rs. 45 per
pair; in the rupee. in the rupee."

2. The applicants had entered into an agreement on 26th August, 1977, with Messrs. K. M. Dohadwala of Bombay, wholesalers, for sale of their footwear to them. In pursuance of the said agreement the applicants sold to the said Messrs. K. M. Dohadwala one pair of Anjan shoes. The price of the said pair was Rs. 15.80, but the applicants, in pursuance of the said agreement gave a trade discount of Rs. 1.34, that being the discount at the rate of 8.5 per cent which they gave to wholesalers who purchased from them. Thus the net price charged by them to the said Messrs. K. M. Dohadwala was Rs. 14.46. In respect of the said sale, the applicants issued to the said Messrs. K. M. Dohadwala their invoice dated 7th February, 1978. In the said invoice, they charged the said Messrs. K. M. Dohadwala Re. 0.73 by way of sales tax at the rate of five paise in the rupee. The aggregate amount shown in the said invoice was Rs. 15.19. Earlier by their letter dated 18th January, 1978, the applicants had applied to the Commissioner of Sales Tax u/s 52(1)(c) to determine the sale price in cases such as these upon which tax was payable by the applicants. By his order dated 16th February, 1978, the Deputy Commissioner of Sales Tax held that the sale price in the case of goods supplied by the applicants to their wholesalers was to be calculated after deducting from the gross price the amount allowed by way of trade discount and that accordingly on the above transaction the sale price would be Rs. 14.46 and not Rs. 15.80

3. On 18th April, 1978, the Maharashtra Sales Tax Tribunal held in the case of Messrs. Advani Brothers being Second Appeal No. 234 of 1976 that the element of sales tax whether collected separately or included in the sale price should be taken into consideration for determining the total sale price for deciding the rate of tax applicable to footwear falling under the said entry 21 of Schedule C. By a trade circular No. MIA-1078/ADM-5/71 dated 1st June, 1978, the Commissioner of Sales Tax brought the said decision of the Tribunal to the notice of the trade in general and the dealers dealing in footwear in particular. Thereafter on 28th June, 1978, the Commissioner of Sales Tax issued a notice to the applicants to show cause why he should not suo motu revise the aforesaid order of the Deputy Commissioner and hold that the sale price in respect of the aforesaid transaction was Rs. 15.19, that is, Rs. 14.46 plus the sum of Re. 0.73 collected by way of sales tax by the applicants. By his order dated 29th January, 1979, the Commissioner of Sales Tax revised the said order of the Deputy Commissioner of Sales Tax and determined the sale price in respect of the said transaction at Rs. 15.59. Against the said decision of the Commissioner, the applicants unsuccessfully went in appeal to the Tribunal. It is from the said judgment and order of the Tribunal that the present reference u/s 61(1) of the said Act has been made at the instance of the applicants. In this reference the following question of law has been submitted by the Tribunal to this Court for its determination :

"Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that the sales tax collected by the dealer from customers and shown separately in the invoice forms part of the "sale price" ?"

4. Both the Commissioner and the Tribunal in their respective orders have relied upon two decisions of the Supreme Court, namely, *George Oakes (P.) Ltd. Vs. State of Madras*, and *Delhi Cloth and General Mills Co. Ltd., etc. Vs. The Commissioner of Sales Tax, Indore*,

5. Mr. Dada, learned counsel for the applicants, has submitted before us that these two decisions were under different Sales Tax Acts, and they have no application to a case arising under the Bombay Sales Tax Act, 1959. Mr. Dada also relied upon two other decisions of the Supreme Court and two decisions of this High Court in support of his submission. The two decisions of the Supreme Court relied upon by Mr. Dada were *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, and *Anand Swarup Mahesh Kumar Vs. Commissioner of Sales Tax*, . The two decisions of the Bombay High Court relied upon by Mr. Dada were *Commissioner of Sales Tax v. Poona Municipal Corporation* [1977] 40 STC 468 and *Mahalakshmi Glass Works Pvt. Ltd. v. Commissioner of Sales Tax* [1977] 40 STC 488. Miss Sikandar, learned counsel for the respondents, relied upon the very same two decisions of the Supreme Court upon which the Commissioner and the Tribunal based their respective decisions.

6. In order to appreciate what the above authorities have laid down, it is necessary to set out first the relevant provisions of the Bombay Sales Tax Act, 1959. Clause (29) of section 2 defines the expression "sale price". The material part of that definition is as follows :

"sale price" means the amount of valuable consideration paid or payable to a dealer for any sale made"

7. Clause (36) of section 2 defines the expressing "turnover of sales". The material part of that definition is as follows :

"turnover of sales" means the aggregate of the amounts of sale price received and receivable by a dealer in respect of any sale of goods made during a given period"

8. Sub-sections (1) and (2) of section 46 provides as follows :

"46. Prohibition against collection of tax in certain cases. - (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 :

Provided that, this sub-section shall not apply where a person is required to collect such amount of the tax separately in order to comply with the conditions

and restrictions imposed on him under the provisions of any law for the time being in force."

9. u/s 37, if a registered dealer collects any amount by way of tax in excess of the tax payable by him, he becomes liable to pay a penalty of an amount not exceeding Rs. 2,000 and in addition any sum collected by him by way of tax in contravention of section 46 is to stand forfeited to the Government. Further, under the same section if a person who is not a dealer liable to pay tax under the Act collects any sum by way of tax or otherwise collects tax in contravention of the provisions of section 46, he becomes liable to a penalty of an amount not exceeding Rs. 2,000 or double the sum collected by way of tax, whichever is less. u/s 63 of the Bombay Sales Tax Act, 1959, whoever without reasonable excuse contravenes the provisions of section 46 commits an offence punishable with imprisonment as also fine. Bearing in mind the above statutory provisions, we will now examine the authorities cited at the Bar.

10. The question before the court in the case of *George Oakes (P.) Ltd. Vs. State of Madras*, was of the constitutional validity of the Madras General Sales Tax (Definition of Turnover and Validation of Assessments) Act, 1954. Prior to the passing of the impugned Act, several assessments had been made under the Madras General Sales Tax Act, 1939, in which the amount of tax collected by a dealer was treated as forming part of the sale price. In *Deputy Commissioner of Commercial Taxes, Coimbatore Division v. M. Krishnaswami Mudaliar & Sons* [1954] 5 STC 88, the Madras High Court held that the amount collected by a registered dealer from the consumer by way of sales tax and paid over to the Government should not be included in the turnover of the registered dealer as part of the sale price of the goods sold and was not liable to be taxed again. It was to get over the effect of this decision that the impugned Act was passed. Section 2 of the impugned Act provided that in the case of sales made by a dealer before 1st April, 1954, amounts collected by him by way of tax under the Madras General Sales Tax Act, 1939, should be deemed to have formed part of his turnover. Section 3 of the impugned Act validated all assessments and collections made on the basis that the amounts collected by a dealer by way of tax formed part of the turnover of the dealer. The Madras General Sales Tax Act did not contain any definition of the term "sale price" though it defined the terms "sale" and "turnover". The term "turnover" was defined as meaning the aggregate amount for which goods were either bought or sold by a dealer. The contention was that the State Legislature went beyond its legislative competence in enacting the impugned Act prescribing that the amounts collected by a dealer by way of tax should be deemed to have formed part of the turnover. u/s 8-B of the Madras Act, if a person who was not a registered dealer collected any amount by way of tax except in accordance with such conditions and restrictions as may be prescribed, he was to pay over the same to the State Government and u/s 15 of the Madras Act, a contravention inter alia of the provisions of section 8-B made a person contravening such provision liable to penalty. The Supreme Court held that there was nothing in the provisions of the Madras Act which would

indicate that when the dealer collected any amount by way of tax that could not be part of the sale price. The Supreme Court also observed that when the seller passed on the tax and the buyer agreed to pay sales tax in addition to the price, the tax was really part of the entire consideration and the distinction between the two amounts - tax and price - lost all significance from the point of view of legislative competence. This case was distinguished by the Supreme Court in its later decision in *Anand Swarup Mahesh Kumar Vs. Commissioner of Sales Tax*, on the ground that in that case the court was construing the meaning of the expression "turnover" appearing in a statute in which there was no provision authorising the seller to recover the sales tax payable by him from the purchaser although the price of the goods realised by him included the sales tax payable by him and thus the seller has passed on his liability to be purchaser. In the case of *Delhi Cloth and General Mills Co. Ltd., etc. Vs. The Commissioner of Sales Tax, Indore*, , after examining the provisions of the Madhya Pradesh General Sales Tax Act, 1958, the Supreme Court held that there was no provision in the Act from which it could be gathered that the Act imposed any liability on the purchaser to pay the tax imposed on the dealer and if the dealer passed on his tax burden to his purchaser, he could only do it by adding the tax in question to the price of the goods sold and in that event the price fixed for the goods including the tax payable became the valuable consideration given for the goods purchased by him. The court observed (at p. 334) that section 7-A of the Madhya Pradesh Act prohibited a dealer from collecting any amount by way of sales tax or purchase tax from a person who sold agricultural or horticultural produce grown by himself. The Supreme Court held that it was not necessary to examine the relevance of that provision for deciding the appeals before them. The court further held that the said section 7-A did not give any statutory power to collect sales tax as such from any class of buyers. The Supreme Court, however, pointed out (page 334) :

"..... In some of the Sales Tax Acts power has been conferred on the dealers to pass on the incidence of tax to the purchasers subject to certain conditions. These provisions may call for different considerations"

11. In *Anand Swarup Mahesh Kumar Vs. Commissioner of Sales Tax*, , the Supreme Court pointed out that the basis of the decision in the *Delhi Cloth and General Mills Co. Ltd., etc. Vs. The Commissioner of Sales Tax, Indore*, was that there was no law empowering the dealer to collect the tax from his buyer. The court then referred to the English cases of *Paprika Ltd. v. Board of Trade* [1944] 1 KB 327 and *Love v. Norman Wright (Builders) Ltd.* [1944] 1 KB 484. The Supreme Court then held (page 483) :

"..... From the observations made in the decisions referred to above, it follows that where a dealer is authorised by law to pass on any tax payable by him on the transaction of sale to the purchaser, such tax does not form part of the consideration for purposes of levy of tax on sales or purchases but where there is not statutory provision authorising the dealer to pass on the tax to the purchaser,

such tax does form part of the consideration when he includes it in the price and realises the same from the purchaser. The essential factor which distinguishes the former class of cases from the latter class is the existence of a statutory provision authorising a dealer to recover the tax payable on the transaction of sale from the purchaser"

12. In *Anand Swarup Mahesh Kumar Vs. Commissioner of Sales Tax*, the court held that section 17(iii)(b)(1) of the U.P. Krishi Utpadan Mandi Adhiniyam 1964 (U.P. Act No. 25 of 1964), which provided that "if the produce is sold through a commission agent, the commission agent may realise the market fee from the purchaser and shall be liable to pay the same to the committee" entitled the commission agent statutorily to realise the market fee from the purchaser and therefore, such a tax or fee realised by him from the purchaser could not be treated as part of the turnover for purposes of levy of sales tax under the U.P. Sale Tax Act, 1948. The court further held that the use of the word "may" instead of the word "shall" in the said section 17(iii)(b)(1) was not of much consequence.

13. The question, therefore, which falls to be considered is whether under the Bombay Sales Tax Act the seller is authorised to collect the amount of tax which he becomes liable to pay to the Government. We have seen that u/s 2(29), "sale price" means the amount of valuable consideration paid or payable to a dealer for any sale made. This definition must be construed in the light of the provisions of sections 37, 46 and 63, which we have referred to earlier. If the amount of tax collected by a dealer from his purchaser were to form part of his sale price, the question of forfeiture u/s 37 of a part of sale price cannot possibly arise. A seller is entitled to charge what he likes to his purchaser unless the maximum price is statutorily fixed, and if he charges a higher price - whether he charges a lump sum price or item wise price by showing that a part of it is to reimburse him for the amount of tax which he would have to pay to the Government, he cannot be penalised for that. Similarly section 46 would also be meaningless if the amount collected by way of tax is to be treated as price. There could also be no prosecution u/s 63 for collecting any excess amount by way of tax because if the argument advanced by the department were to hold good, such excess amount would be part of the price and a dealer cannot be prosecuted for charging what price he likes. If these sections are to have any meaning and relevance, they must be construed as authorising the dealer to collect separately from the price the amount which he would have to pay to the Government on the particular transaction of sale. In *Commissioner of Sales Tax v. Poona Municipal Corporation* [1977] 40 STC 468, this Court considered the scheme of section 46 of the Bombay Sales Tax Act and the object underlying it. The court observed (page 472) :

"The scheme of the said Act is that persons, who carry on business of selling or buying goods, once their turnover exceeds the limits prescribed by section 3 of the said Act, become liable to get themselves registered as dealers and pay the tax under the said Act. The said Act also permits them to recoup from the

purchasers the amount which they would be liable to pay to the Government by way of tax provided their purchasers agree to so pay such amount to them. This is a facility given to a seller of goods, who is a dealer or, in other words, a permission or an authorisation granted to a seller to collect from his purchaser the amount of tax which the seller is liable to pay to the Government. This follows from section 46 of the said Act, which prohibits collection of tax except by certain persons The principle behind this section is thus clear. It is that a person who is not liable to pay tax to the Government in respect of the transaction in question should not be permitted to recoup such amount from his purchasers, and in respect of those who collect tax in contravention of these provisions, section 37 prescribes forfeiture of the amount of tax so collected as also a levy of penalty"

14. An argument similar to the one advanced before us was rejected by this High Court in these words in the case of Mahalakshmi Glass Works Pvt. Ltd. v. Commissioner of Sales Tax [1977] 40 STC 488 :

"The next submission of Mr. Sheth was that, in the present case, the amount collected by the assessee on account of general sales tax from the purchasers and which they were not entitled to collect could not be said to constitute "any amount by way of tax" within the meaning of that expression in sub-section (2) of section 46 of the said Act. It was urged by him that even if an excess amount was collected by the assessee on the footing that this would be the tax which the assessee would have to pay under the said Act, such excess amount would become part of the purchase price and the assessee was entitled to retain it. It was further urged by him that the expression "any amount by way of tax" used in sub-section (2) of section 46 could refer only to an amount which the assessee could lawfully collect as tax. It was submitted by him that in view of the definition of the term "tax" contained in the said Act, which is set out earlier, any amount in excess of the tax due collected by the assessee could not be said to be "tax" at all, and hence such collection would not amount to contravention of sub-section (2) of section 46 of the said Act. In our view, this contention is totally unsound. In the first place, to accept the construction put forward by Mr. Sheth would be to render the provisions of sub-section (1) of section 37 of the said Act relating to forfeiture nugatory to a large extent, and to that extent to nullify the effect of the provisions of section 46(2) of the said Act. In our opinion, on the other hand, the expression "any amount by way of tax in excess of the amount of tax payable by him under the provisions of this Act" used in sub-section (2) of section 46 of the said Act clearly shows that the legislature intended, inter alia, to deal with a situation where a registered dealer collects any amount from a purchaser on the ground that it represents the tax which the dealer would be liable to pay under the said Act when such amount or a part thereof is not so payable. It is significant that the expression used in section 46(2) is "any amount by way of tax" and not "any amount of tax"."

15. The view which this Court took of sections 37 and 46 has found favour with

the Supreme Court in R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, The Supreme Court after referring to sections 37, 63 and 46 held as follows (page 501) :

"Although there is no specific provision enabling the dealer to pass on the tax to the customer, there is a necessary implication in section 46 authorising such recovery, it being optional for him to do so or not. The primary liability to pay the tax is on the dealer but it is a well-established trade practice, which has received express or implied legislative cognisance, that the dealer is not prohibited from passing on the tax to the other party to the sale. Such a usage is implicit in section 46 of the Act although what is explicit in the provision is that nothing shall be collected by way of tax in respect of sale of any goods exempted u/s 5 and no registered dealer shall exact by way of tax any sum exceeding what is payable under the Act. Of course, one who is not a registered dealer, cannot collect any sum by way of tax from any other person. In short, there is a triple taboo writ into section 46. This prohibitory project is made operational, as stated earlier, by two other provisions, one sounding in criminal and the other in departmental proceedings."

16. Thus it is clear that under the Bombay Act, the dealer is authorised to pass on to his purchaser the tax which he is liable to pay to the Government. Undoubtedly he can only do so with the consent of his purchaser. But this is or must be deemed to be by reason of a separate agreement express or implied with the purchaser, namely, that in addition to the price he will also pay to the dealer the amount of tax which he becomes liable to pay to the Government. Such separate agreement is shown when the bill or the invoice shows the amount of tax separately. It is, however, optional for the dealer to collect or not to collect the amount of tax from his purchaser. When he does not collect it, he bears the tax liability himself and does not reimburse himself in respect thereof. Even if he fixes his sale price by taking into consideration, the amount of tax which he would have to pay by charging a lump sum price and not showing separately the amount collected by way of tax, such lump sum price would be the price of the goods because it would be impossible to determine whether or not the dealer had taken into account the amount of tax which he would have to pay.

17. If there is any doubt in the matter, it is set completely at rest by rule 46-A of the Bombay Sales Tax Rules, 1959. The Bombay Sales Tax Act, 1959, came into force with effect from 1st January, 1960. Rule 46-A provides as follows :

"46-A. Reduction of sale price for levy of tax. - A registered dealer may in respect of any sale on which the sales tax or the general sales tax is payable by him either -

(i) exclude the amount, if any, collected by him separately by way of sales tax or, as the case may be, general sales tax from the sale price on which tax is livable, or

(ii) deduct from the sale price of the goods a sum calculated in accordance with the formula given in the table hereunder :-

TABLE The formula shall be as follows :-
$$\frac{\text{R Sale price multiplied by } 100}{100 + \text{R}}$$

"R" means the rate of tax (other than retail sales tax), applicable to the sale of goods, that is to say, where the sale price is liable only to sales tax, the rate of sales tax, and where it is liable only to general sales tax, the rate of general sales tax and where it is liable to sales tax and general sales tax both, the rates of both the taxes."

18. The said rule was inserted in the Bombay Sales Tax Rules by Government notification in the Finance Department No. STR 1059-G-1 dated 20th January, 1960. Under clause (i) of rule 46-A the dealer is entitled to exclude the amount collected by him separately by way of sales tax or general sales tax from the sale price on which the tax is leviable. This clearly shows that the amount so excluded is not to form part of the sale price and the tax which is leviable can only be on the amount charged to the customer less the amount collected separately by way of tax. If the amount that is chargeable to tax is the amount after excluding the amount of tax collected the rate at which the tax can be leviable can only be the rate applicable to the amount charged to the customer after the above exclusion. Clause (ii) would apply to a case where the amount by way of tax is not separately collected. This clause takes into account that the dealer who may not have collected separately any amount by way of tax would none the less in fixing his price take the tax element into consideration. The formula given in clause (ii) clearly shows that the lump sum sale price charged by him is to be multiplied by a fraction which includes the rate of tax. The rate of tax for the purpose of this formula can only be the rate of tax applicable to the lump sum price and even after the deduction the tax which would be payable would be at the rate applicable to the lump sum price. An argument was sought to be advanced on behalf of the department that the marginal note to the rule speaks of reduction of sale price, and therefore, the sale price would include the tax separately charged. It is now well-settled that the marginal note appended to a section cannot be used for construing a section (see Commissioner of Income Tax, Bombay Vs. Ahmedbhai Umarbhai and Co., Bombay, The same principle would apply to the marginal note appended to a rule. The rule expressly talks in clause (i) about excluding from the sale price the amount of tax separately collected while in clause (ii) it speaks of deducting from the sale price a sum calculated in accordance with the formula given in the table thereto.

19. For the reasons set out above, we hold that in respect of the impugned transaction the sale price in respect of which the applicants became liable to pay sales tax was Rs. 14.46 and not Rs. 15.19 and as the sale price was less than Rs. 15 the sales tax payable by the applicants was at the rate of five paise in the rupee and not at the rate of ten paise in the rupee.

20. In the result, we answer the question submitted to us in the negative, that is in favour of the assessee and against the department.

21. The respondents will pay to the applicants the cost of this reference. The applicants will be entitled to a refund of the fee of Rs. 100 paid by them.