

(1995) 02 BOM CK 0039

In the Bombay High Court

Case No : Sales Tax Reference No. 10 of 1992 in Reference Application No. 15 of 1991

Bharat Industries

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 17-02-1995

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 55, 56, 57, 60, 61(1)

Citation : (1995) 02 BOM CK 0039

Hon'ble Judges : D.K. Trivedi, J;B.P. Saraf, J

Bench : Division Bench

Advocate : P.V. Surte, for the Appellant; N.T. Saraf, for the Respondent

Judgement

Dr. B.P. Saraf, J.—By this reference u/s 61(1) of the Bombay Sales Tax Act, 1959, the Maharashtra Sales Tax Tribunal has referred the following question of law to this Court for opinion at the instance of the assessee :

"Whether, the Tribunal was justified in law in holding that there is no question of giving any reasonable opportunity for the amendment of the memorandum of appeal by furnishing the grounds of appeal as envisaged under rule 60(1) read with rule 58 of the Bombay Sales Tax Rules, 1959, as a memorandum of appeal not containing any grounds of appeal filed u/s 55 of the Bombay Sales Tax Act, 1959, is not an appeal in the eye of law ?"

2. As is obvious from the above question, the sole controversy in this case pertains to the right of the assessee to amend the memorandum of appeal by furnishing the grounds of appeal and/or the right of the appellate authority to summarily reject an appeal under rule 60(1) of the Bombay Sales Tax Rules, 1959 ("the Rules"), for the failure of the appellant to set out the grounds of appeal in the memorandum of appeal filed u/s 55 of the Act. The facts giving rise to this controversy may be briefly stated thus :

The assessee filed an appeal u/s 55 of the Bombay Sales Tax Act, 1959 ("the

Act"), before the Deputy Commissioner of Sales Tax (Appeal-Mofussil), Nagpur ("the Deputy Commissioner") on April 4, 1989, against a revisional order passed by the Assistant Commissioner of Sales Tax (Admn.), Nasik Division, Range II, Dhule, u/s 57 of the Act. The Deputy Commissioner issued a notice to the assessee on July 11, 1989, wherein it was pointed out that the memorandum of appeal filed by him was incomplete in the following respects :

"(i) the memorandum of appeal does not bear the court-fee stamp of the prescribed denomination, i.e., of Rs. 2.50. It is short by the court-fee stamp of Rs. 2.50.

(ii) Court-fee of the denomination of Re. 1 is not affixed on the certified copy/copies of assessment/appeal/any other order appealed against.

(iii) The proof of payment or dues as per demand notice/appeal order is not attached."

By the above notice, the assessee was called upon to appear before him on the date specified thereunder when the matter of admitting the appeal would be decided. In pursuance of the above notice, the assessee appeared before the Deputy Commissioner at Nasik on November 17, 1989, while he was holding camp at Nasik and removed all the defects specified in the above notice. The Deputy Commissioner at that stage pointed out to the advocate for the assessee that the appeal petition filed by the assessee was not tenable as it was without any grounds. It was brought to the notice of the counsel that column No. 7 in the memorandum of appeal had been left completely blank and no grounds had been set out in the said column. He, therefore, held the appeal to be not tenable and hence rejected the same as "not tenable". Against the above order rejecting the appeal in limine as "not tenable" on the ground of failure of the assessee to set out the grounds of appeal in the memorandum of appeal against column 7 of the prescribed form (form No. 37), the assessee appealed to the Maharashtra Sales Tax Tribunal ("the Tribunal"). Before the Tribunal, it was contended by the counsel for the assessee that the omission to mention the grounds of appeal in the memorandum of appeal was not brought to the knowledge of the assessee by the Deputy Commissioner in his notice issued on July 11, 1989, to enable him to rectify the same. The case of the assessee was that had it been pointed out, it could have also been rectified immediately. The rejection of the appeal on that ground without giving any opportunity to the assessee to rectify the omission, according to the assessee, was wholly illegal and without jurisdiction. The case of the Revenue before the Tribunal, on the other hand, was that failure to fill up column No. 7 in the memorandum of appeal was fatal to the maintainability of appeal and hence the Deputy Commissioner was justified in dismissing the appeal in limine on that count. The Tribunal dismissed the appeal of the assessee following an earlier decision of its Special Bench where it had been held that the grounds of appeal did not constitute particulars envisaged under rule 58 of the Rules and hence omission to furnish the grounds of appeal along with the memorandum of appeal within the period of limitation was not an omission

envisaged under rule 60(1) of the Bombay Sales Tax Rules, 1959, so as to attract the application of the proviso requiring the appellate authority to give a reasonable opportunity to the appellant for the amendment of appeal by furnishing the grounds of appeal. Hence this reference at the instance of the assessee.

3. We have heard the learned counsel for the parties and perused the relevant provisions of the Act and the Rules dealing with appeals. Section 55 of the Act provides for an appeal from every original order passed under the Act by the Assistant Commissioner to the Deputy Commissioner.

Sub-section (1) thereof reads :

"55. Appeals. - (1) An appeal, from every original order, not being an order mentioned in section 56 passed under this Act or the Rules made thereunder, shall lie -

(a) if the order is made by a Sales Tax Officer, or any other officer subordinate thereto, to the Assistant Commissioner;

(b) if the order is made by an Assistant Commissioner, to the Deputy Commissioner;

(c) if the order is made by a Deputy Commissioner, Additional Commissioner, or Commissioner, to the Tribunal."

Sub-section (4) of section 55 lays down limitation of 60 days for filing an appeal. It reads :

"(4) Subject to the provisions of section 60, no appeal shall be entertained unless it is filed within sixty days from the date of the communication of the order appealed against."

Sub-section (6) of section 55 deals with the powers of the appellate authority. It reads :

"(6) Subject to such rules of procedure as may be prescribed, every appellate authority (both in the first appeal and the second appeal) shall have the following powers :

(a) in an appeal, against an order of assessment, it may confirm, reduce, enhance or annul the assessment; or it may set aside the assessment and refer the case back to the assessing authority for making a fresh assessment in accordance with the direction given by it and after making such further inquiry as may be necessary; and the assessing authority shall thereupon proceed to make such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such fresh assessment;

(b) in an appeal against an order imposing a penalty, the appellate authority may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;

(c) in any other case, the appellate authority may pass such orders in the appeal as it deems just and proper :

Provided that the appellate authority shall not enhance an assessment or a penalty or reduce the amount or drawback, set-off or refund of the tax, unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction."

Section 60 enables the appellate authority to admit an appeal even after the period of limitation, if the appellant satisfies it that he had sufficient cause for not preferring the appeal within such time.

Rule 58 of the Rules deals with the procedure of submission of appeals. This rule, so far as relevant, reads :

"58. Submission of appeals or application for revision. - (1) Every first or second appeal and every application for revision shall -

- (a) be in writing,
- (b) specify the name and address of the appellant or applicant,
- (c) specify the date of the order against which it is made,
- (d) contain a clear statement of facts,
- (e) state precisely and in brief the relief prayed for, and
- (f) be signed and verified by the appellant or the applicant or by an agent duly authorised by him in writing in that behalf, in the following form, namely :

"I agent appointed by the appellant/applicant named in the above memorandum of appeal/application for revision do hereby declare that what is stated herein is true to the best of my knowledge and belief.

....." (Signature)

(2) The memorandum of appeal or the application for revision shall be accompanied by either the order in original against which it is made or duly authenticated copy thereof, unless the omission to produce such order or copy is explained at the time of the presentation of the appeal or application for revision, to the satisfaction of the appellate or revising authority.

(3) An appeal against an order of assessment or a second appeal against such order passed in appeal, shall as far as possible, be in accordance with form 37."

Sub-rule (3) of rule 58 thus provides that the appeal against an order of assessment should as far as possible be in accordance with form No. 37. Under form 37, an appellant is required to furnish informations sought for therein in different columns. Column 7 thereof reads :

"7. (Enter here the grounds relied on for the purpose of this appeal)."

Relief sought for in the appeal is to be specified in column 8 which is in the following terms :

"8. The appellant, therefore, prays -

that he may be assessed accordingly or that he may be declared not to be chargeable under the said Act or that the assessment may be cancelled and/or remanded to for reassessment or that the order(s) of the imposing a penalty of Rs. u/s and of Rs. u/s upon your petitioner or that the order of the forfeiting Rs. u/s or that the order of the imposing a fine of Rs. u/s may be set aside.

The appellant named above, does hereby declare that what is stated herein true to the best of his knowledge and belief."

From a conjoint reading of section 55, rule 58 and form 37, it is clear that the appellant should set out the particulars required under rule 58 of the Rules. "Grounds of appeal" have not been specified in the said rule. On the other hand, it requires the appellant under clause (e) of sub-rule (1) to "state precisely and in brief the relief prayed for" which is reflected in column 8 of form No. 37. So far as form 37 is concerned, obviously it is directory and not mandatory which is evident from the fact that sub-rule (3) of rule 58 provides that the appeal "shall as far as possible be in accordance with form 37". Though, in our opinion, the entire procedure of submission of appeals contained in rule 58 is directory, having regard to the language of rule 58, in particular sub-rule (3) thereof, there can be no dispute about the fact that the furnishing of appeal in form 37 is definitely not mandatory. It does not even say that the appeal should be "in form 37". It merely says that it should as far as possible be "in accordance with form 37".

Form 37 is thus merely a model form, on the lines of which appeals should be filed.

4. This view of ours also gets full support from rule 60 of the Rules which provides for summary rejection of an appeal for omission to state any of the particulars required under rule 58 in the memorandum of appeal or on any other ground. Even in that case, it is incumbent on the part of the appellate authority to give a reasonable opportunity to the assessee to amend the memorandum of appeal before rejecting it summarily under sub-rules (1) and (2) of rule 60. Rule 60 reads :

"60. Summary rejection. - (1) If the memorandum of appeal or the application for revision omits to state any of the particulars required under rule 58 or is not accompanied with the order against which it is made or a duly authenticated copy thereof, the appeal or the application for revision may be summarily rejected :

Provided that, no appeal or application for revision shall be summarily rejected under this sub-rule unless the appellant or the applicant is given a reasonable

opportunity to amend the memorandum of appeal or the application for revision, as the case may be.

(2) The appeal or application for revision may also be summarily rejected on grounds other than those specified in sub-rule (1) which the appellate or revising authority may consider sufficient and which shall be reduced to writing by the appellate or revising authority :

Provided that before an order summarily rejecting an appeal or an application for revision under this sub-rule is passed, the appellant or applicant concerned shall be given a reasonable opportunity of being heard.

(3) If within thirty days from the date on which any appeal or application for revision is summarily rejected under sub-rule (1) or (2), the appellant or, as the case may be, the applicant makes an application to the appellate or revising authority for setting aside the order of summary rejection and satisfies it that the notice under the proviso to sub-rule (1) to amend the memorandum of appeal or application for revision or of a hearing under the proviso to sub-rule (2) was not duly served on him, or that he was prevented by sufficient cause from amending the memorandum of appeal or application for revision or from appearing when the appeal or application for revision was called on for hearing, the said authority shall make an order setting aside the summary rejection and restore the appeal or, as the case may be, the application for revision to its file."

It is thus clear that even failure to state the particulars specifically required to be stated under rule 58, including failure to state the relief prayed for, to annex the copy of the order appealed against or to make verification can be rectified by the appellant, by amending the memorandum of appeal. It is only on the failure of the assessee to do so despite reasonable opportunity being given to him, that the appeal can be summarily rejected. The same is the position in respect of defects or omissions falling under sub-rule (2) of rule 60. In such a situation, we fail to understand how an appeal can be dismissed in limine or summarily for failure to set out the grounds relied on for the purpose of appeal in the memorandum of appeal without giving an opportunity to the appellant to amend the memorandum of appeal by furnishing the same.

5. We are therefore of the clear opinion that an appeal cannot be summarily rejected for failure of the appellant to set out the grounds of appeal in its memorandum of appeal or for any other defect or omission without giving a reasonable opportunity to the appellant to amend the memorandum of appeal and to rectify the defects or fill up the omissions. This can be done at any time. It has nothing to do with the period of limitation for filing the appeal.

6. In view of the above legal position, in our opinion, the Tribunal was not correct in saying that the amendment of the memorandum for setting out the grounds of appeal can be carried out only within the period of limitation for filing an appeal. Such a construction runs counter to the scheme and purpose of the relevant provisions of the Act and Rules relating to appeals. Moreover, it would render rule

60 wholly nugatory.

7. We are, therefore, clear in our mind that the period of limitation applies only to the filing of appeal. If the appeal is filed within time, omission to furnish any of the particulars or informations required under the rules or under the form may be rectified by the appellant at any time thereafter. If the appellate authority finds out any such omission, it is incumbent on its part to give an opportunity to the appellant to amend the memorandum of appeal to supply the omissions or to rectify the defects. It is only on the failure of the appellant to do so, despite opportunity being given for that purpose, that the appellate authority gets the power to reject the appeal summarily. Summary rejection of appeal for any defect or omission in the memorandum of appeal without giving an opportunity is specifically prohibited by the proviso to sub-rules (1) and (2) of rule 60. Even otherwise, it would have been obligatory on the part of the appellate authority to give such an opportunity before summarily rejecting the appeal to meet the requirements of principles of natural justice. Rejection of appeal without giving such an opportunity would be violative of principles of natural justice.

8. Sub-rule (3) of rule 60 makes it further clear that no summary rejection of appeal is contemplated except on the failure of the appellant without reasonable cause to amend the memorandum of appeal and to remove the defect, if any found therein. It permits an appellant even after summary rejection of an appeal under sub-rule (1) or (2), to make an application to the very same authority for setting aside the order of summary rejection and on such application being made, the appellate authority is required to set aside the same and restore the appeal if it is satisfied that the notice under the proviso to sub-rule (1) to amend the appeal was not duly served on the appellant or that he was prevented by sufficient cause from amending the memorandum of appeal when the appeal was called on for hearing.

9. In view of the above, we hold that the Tribunal was not justified in law in holding that a memorandum of appeal not containing the grounds of appeal is not an appeal in the eye of law and hence question of giving reasonable opportunity for amendment of the memorandum of appeal by furnishing the grounds of appeal did not arise. We are of the clear opinion that the appeal did not cease to be an appeal in the eye of law because of the omission to set out the grounds of appeal in the memorandum of appeal. It was at the most an irregularity which could have been cured by the appellant. Such omission clearly falls under rule 60. It was, therefore, incumbent on the appellate authority to allow the appellant to amend the memorandum of appeal and supply the omission.

10. In the result, the question referred to us is answered in the negative and in favour of the assessee.

11. In the facts and circumstances of the case, we make no order as to costs.

12. Reference answered in the negative.