

(1957) 01 BOM CK 0007

In the Bombay High Court

Case No : Civil Reference No. 27 of 1956

Bombay Cycle Stores Co. Ltd.

APPELLANT

Vs

The State of Bombay

RESPONDENT

Date of Decision : 17-01-1957

Acts Referred:

Bombay Sales Tax (Amendment) Act, 1953 — Section 34

Bombay Sales Tax Act, 1946 — Section 11, 11A, 2(2), 2(5)

Citation : (1957) 8 STC 455

Hon'ble Judges : Shah, J;B.N. Gokhale, J

Bench : Division Bench

Advocate : R.J. Joshi and Dikshit Maneklal and Co, for the Appellant; P.N. Bhagwati and Little and Co., for the Respondent

Judgement

Gokhale, J.—This is a reference made by the Bombay Sales Tax Tribunal at the instance of the applicants, Messrs Bombay Cycle Stores Co. Ltd., and two questions have been referred to us, viz., (1) whether the petitioner is a dealer within the meaning of section 2(c) of the Bombay Sales Tax Act, and (2) whether sub-section (5) of section 11 or section 11A of the Act was the proper provision to be applied in this case. There is no dispute that the Sales Tax Act referred to in these questions is the Bombay Sales Tax Act, 1946. The applicant assessee wanted the Tribunal to refer to us two other questions which are mentioned by the Tribunal in its judgment in the application for reference. But the Tribunal refused to refer those questions on the ground that no question of law could be said to arise in respect of those questions out of the order of the Tribunal. Against this part of the Tribunal's order the assessee has filed an application u/s 34 of the Bombay Sales Tax Act, 1953, but that application has not been numbered and is clearly beyond limitation. The order of the Tribunal was made on 20th August, 1956, whereas the application made by the assessee is dated 11th December, 1956. It is, therefore, not necessary for us to consider that application and that application will have to be rejected. But as notice has not been served on the respondents there will be no order as to costs in that

application.

2. Now the few facts which must be stated in order to appreciate the questions referred to us are these. The assessee is a private limited company doing business of importing and selling cycles and accessories at Mahal, Nagpur. During the relevant period from 1st June, 1947, case of the assessee that the duty of that clearing agent was to clear imported goods at the Bombay harbour and to deliver them to customers in the State of Bombay including the city of Bombay or to despatch the same as per instructions of the assessee who resided in Nagpur. Now it appears that business on a large scale was carried on by the assessee in this manner through his clearing agent in Bombay. The assessee was registered as a dealer for the first time in 1952 and there is no dispute about this fact. It seems that the Board of Revenue of the State of Madhya Pradesh had ordered that the delivery of cycles which was given by the assessee to customers directly in Bombay should be excluded from the turnover of the assessee in Madhya Pradesh, and it was the case of the Sales Tax Authorities in Bombay that for the period from 1st June, 1947, to 31st March, 1949, a sum of Rs. 33,644-7-0 and for the period from 1st April, 1949, to 31st October, 1952, a sum of Rs. 11,54,509-10-0 were allowed by the Sales Tax Authorities in Madhya Pradesh on the ground that the sales were made directly at Bombay. It was the case of the Bombay Sales Tax Authorities that these sales having escaped taxation at Nagpur and information having been received about them in Bombay, the Sales Tax Authorities made detailed enquiries and as a result the Sales Tax Officer assessed the assessee to sales tax here in respect of those transactions.

3. Now, in the first instance, the assessee's contention was that he was not a "dealer" within the meaning of section 2(c) of the Bombay Sales Tax Act, because though the goods were delivered in Bombay the contracts in respect of those deliveries were entered into at Nagpur and the agent in Bombay was no more than a clearing agent in delivering the goods concerned. Now, all the lower authorities including the Tribunal have taken the view that the goods delivered by the assessee through his clearing agent in Bombay were in fact sold in Bombay to his customers. That would be a finding of fact, and if it is found that in respect of goods in which the dealer did business and which were delivered in Bombay the sales were effected in Bombay, it is difficult to see how the assessee cannot be a dealer within the definition u/s 2(c) of the Bombay Sales Tax Act. u/s 2(c) of the Act a dealer means any person who carries on the business of selling or supplying goods in the Province of Bombay, whether for commission, remuneration or otherwise and includes any society, club or association which sells or supplies goods to its members. Even assuming that the contracts in respect of the delivery of the goods were entered into at Nagpur and that the actual delivery was effected by the assessee through his clearing agent at Bombay, in view of the fact that the finding of all the lower authorities is that the sale took place in Bombay, we must uphold the finding of the lower authorities that the assessee was a dealer.

4. As regards the second question, the assessee wants to take advantage of section 11A of the Sales Tax Act. He says that the Sales Tax Authorities were in error in applying section 11(5) to his case and his contention is that the correct section to apply would be section 11A and if section 11A applies to his case, then, the assessee submits, he cannot be taxed because the claim of the taxing authorities, so far as this is concerned, would be beyond limitation. Mr. Joshi also urged that in fact the notices, which were issued against the assessee on 14th March, 1953, were under the Bombay Sales Tax Act, 1952, and not under the Bombay Sales Tax Act, 1946. We are not prepared to allow Mr. Joshi to raise that contention in this reference, because no such point was taken by the assessee in the lower courts.

5. Now, section 11(5) states :-

"If upon information which has come into his possession, the Collector is satisfied that any dealer has been liable to pay tax under this Act in respect of any period but has failed to apply for registration the Collector shall, after giving the dealer a reasonable opportunity of being heard, assessee, to the best of his judgment the amount of tax, if any, due from the dealer in respect of such period and all subsequent periods and in cases where such dealer has wilfully failed to apply for registration the Collector may direct that the dealer shall pay by way of penalty, in addition to the amount so assessed, a sum not exceeding one and a half times that amount."

6. Now, it is not disputed that the period with which we are concerned is prior to 1952 when for the first time the assessee got himself registered as a dealer. But it is the contention of the assessee that his case would fall u/s 11A because it would be a case of escaped assessment under that section. u/s 11A in consequence of any information which may come into the possession of the Collector, if he "is satisfied that any turnover in respect of sales or supplies of any goods chargeable to tax under this Act has escaped assessment in any year or has been under-assessed or assessed at a lower rate or any deductions have been wrongly made therefrom the Collector may, in any case where he has reason to believe that the dealer has concealed the particulars of such sales or supplies or deliberately furnished incorrect returns, at any time within five years, and in any other case, at any time within three years, of the end of that year, serve on the dealer liable to pay the tax in respect of such turnover notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 11" and thereafter may proceed to assess or re-assess the amount of tax from such dealer. Now, it is obvious that sub-section (5) of section 11 deals with the specific case in respect of any dealer who, though liable to pay tax under the Act in respect of any period, has failed to apply for registration and there can be no dispute the in this case prior to 1952 there was such a failure on the part of the assessee. The lower authorities held on the facts that the case of the assessee was governed by sub-section (5) of section 11 and we see no reason to take a different view. Besides, it seems from

the wording of section 11A that the assessee contemplated under that section is one who has escaped assessment or has been under-assessed or assessed at a lower rate, but the wording seems to imply that there has been a return made by the assessee. The five years period is provided for where the Collector has reason to believe that a dealer has concealed the particulars of sales or supplies or deliberately furnished incorrect returns, while the three years period seems to have been provided in cases where there has been no concealment or deliberate furnishing of incorrect returns. In our opinion, therefore, section 11A of the Sales Tax Act would be inapplicable to the case of the assessee.

7. In that view of the matter, we must answer the first question referred to us in the affirmative and the answer to the second question would be that sub-section (5) of section 11 of the Sales Tax Act would be the proper provision to be applied in this case. The assessee will have to pay the costs of the respondent.

8. Reference answered accordingly.