
(1991) 06 GUJ CK 0005
In the Gujarat High Court
Case No : Sales Tax Reference No. 1 of 1984

Chaise Products	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 19-06-1991

Acts Referred:

Gujarat Sales Tax Act, 1969 — Section 40, 41, 44, 45, 45(6)

Citation : (1991) 06 GUJ CK 0005

Hon'ble Judges : Sharad D. Dave, J;A.P. Ravani, J

Bench : Division Bench

Advocate : R.D. Pathak, for S.L. Modi, for the Appellant; Rekha Doshit, for Chhatrapati and Co., for the Respondent

Judgement

A.P. Ravani, J.—This is a reference u/s 69(1) of the Gujarat Sales Tax Act, 1969 (hereinafter referred to as "the Act") at the instance of the assessee.

2. The applicant-assessee is a partnership firm. It was engaged in reselling interior decorating materials and was registered as a dealer under the appropriate provisions of the Act. It was assessed to sales tax by the Sales Tax Officer, Ahmedabad, as per order dated August 31, 1977, for the period 1974-75. During the assessment it was found that the assessee had not paid tax due for the first three quarters of the year. However, before the assessment was made, the amount of first three quarters was paid. But the amount due for the fourth quarter of the year was not paid even till the date of completion of the assessment. In view of this position, the Sales Tax Officer served notice upon the assessee-firm calling upon it to show cause as to why penalty should not be levied for non-payment of tax. The assessee replied and pleaded critical financial condition for non-payment of the amount of tax. The Sales Tax Officer did not accept the plea raised by the assessee-firm and imposed penalty of Rs. 33,601 under the provisions of section 45(6) of the Act. Since the assessee-firm failed to pay the tax due and also contravened the provisions of rule 31 of the Gujarat Sales Tax Rules, 1970 (hereinafter referred to as "the Rules"), it was prosecuted

for the quarters ended September 30, 1974, December 31, 1974 and March 31, 1975, as provided under rule 78 of the Rules. The concerned Metropolitan Magistrate at the conclusion of the trial convicted the assessee-firm and imposed a fine of Rs. 200 on each count.

3. The assessee-firm filed appeal before the Assistant Commissioner of Sales Tax against the order of penalty imposed by the Sales Tax Officer. In appeal the assessee-firm failed. The matter was carried before the Tribunal where also the assessee-firm failed. Thereafter the assessee submitted an application for making reference to this Court. The Tribunal has drawn the statement of facts and as per its order dated February 3, 1983, has referred the following five questions for the opinion of this Court. Our answers to the questions are indicate in the column opposite to the questions :

Questions Answers 1. Whether, on the facts and in the In affirmative, in circumstances of this case, the favour of the Revenue Tribunal was right in law in and against the holding that the remedy of assessee. resorting to imposition of penalty u/s 45(6) of the Gujarat Sales Tax Act, 1969, was available to the sales tax authorities even though prosecution had been launched under the Gujarat Sales Tax Rules, 1970, for contravention of the provisions contained in rule 31 of the said Rules ? 2. Whether, on the facts and in the In affirmative, in circumstances of this case, the favour of the Revenue Tribunal was right in law in and against the holding that the judgment of the assessee. Supreme Court in the case of Commissioner of Sales Tax v. Radhakisan [1979] 43 STC 4 did not affect the decision of the Gujarat High Court in the case of Shri Laxminivas Brijlal Rungta v. O.C. Shah, Assistant Commissioner of Sales Tax (Adm.), Ahmedabad (Special Civil Application No. 42 of 1964 decided on December 1, 1964) ? 3. Whether, on the facts and in the In affirmative, in circumstances of this case, the favour of the Revenue Tribunal was right in law in and against the holding that even though the assessee. amount of tax payable as per returns for the first three quarters of the year 1974-75 was paid before the assessment was taken up, provisions of section 45(6) of the Gujarat Sales Tax Act, 1969, could be invoked in order to impose penalty ? 4. Whether, on the fact and in the In affirmative, in circumstances of this case, the favour of the Revenue Tribunal was right in law in and against the holding that the first proviso assessee. to section 45(6) of the Gujarat Sales Tax Act, 1969, did not apply to the applicant's case for restricting the penalty for the period of 18 months for all the four quarters of the year 19074-75 ? 5. Whether, on the facts and in In affirmative, in the circumstances of this case, favour of the Revenue the Tribunal was right in law and against the in holding that the financial assessee. stringency could not be pleaded as reasonable cause for not making payment of tax due in respect of all the four quarters of the year 1974-75 ?

4. Our reasons for the aforesaid answers are as follows :

Question No. 1 : This question is covered by a decision of this Court in the case of Shri Laxminivas Brijlal Rungta v. O. C. Shah, Assistant Commissioner of Sales

Tax (Administration), Ahmedabad (Special Civil Application No. 42 of 1964 decided on December 1, 1964). Therein identical Provisions of the Bombay Sales Tax Act, 1959, came up for consideration. After examining the relevant provisions of the said Act, this Court came to the conclusion that even though the prosecution was launched for the contravention of the provisions of the rule in question, penalty could be imposed under the relevant provisions of the Act. In view of the fact that the question is already covered by the decision of this High Court, we do not think it necessary to give further reasons.

5. Question No. 2 : The Tribunal has rightly distinguished the decision of the Supreme Court in the case of Commissioner of Sales Tax v. Radhakisan [1979] 43 STC 4. In the appropriate provisions of the sales tax law applicable in the State of Madhya Pradesh, there was separate provision for the levy of penalty for the failure to pay tax in time. There was also alternative provision for prosecution for such failure. The constitutional validity of these provisions was challenged before the Supreme Court on the ground that the Commissioner could choose either of the two provisions and pursue one of them at his discretion. It was alleged that while conferring this discretion on the Commissioner, no guidelines were provided. The Supreme Court held that simply because the guidelines are not provided, the discretion conferred on the Commissioner cannot be held to be invalid. The Supreme Court further held that in case the Commissioner exercised the discretion improperly, on that ground the action could be invalidated, but the provisions conferring the discretion cannot be held to be invalid. This was the question decided by the Supreme Court in the case of Commissioner of Sales Tax v. Radhakisan [1979] 43 STC 4. While in the case of Shri Laxminivas Brijlal Rungta v. O. C. Shah, Asst. Commissioner of Sales Tax (Adm.), Ahmedabad, decided in Special Civil Application No. 42 of 1964 on December 1, 1964 by this High Court, the facts were altogether different. It was a case in which prosecution was launched for contravention of the provisions of the rules relating to the payment of tax in time. There was separate provision for imposition of penalty under the provisions of the Act itself. On examination of the provisions of the Act and the Rules, the High Court held that for contravention of the provisions of the rule, prosecution could be launched and penalty also could be imposed if the relevant provisions of the Act were not complied with. Thus the distinction made by the Tribunal is just and proper. No infirmity is shown to us in the reasoning adopted by the Tribunal. We are broadly in agreement with the reasons given by the Tribunal and therefore, we do not think it necessary to discuss this question in further detail.

6. Question No. 3 : It was contended before the Tribunal that as per the provisions of section 45(6) of the Act as it was in force at the relevant time, penalty could be levied on the sum outstanding at the time of assessment. It was contended that when the assessment was made, the amount of tax for the first three quarters was paid and therefore the provisions of section 45(6) could not have been invoked. However, the Tribunal negated this contention by referring to the provisions of section 45(6) as it stood then. The provisions of section

45(6), as it stood then, read as follows :

"45(6). Where a dealer has failed to pay the whole of the amount of tax as required by sub-section (2) of section 47 or the whole of the extra amount of tax as required by sub-section (3) of that section or where in the case of a dealer, the amount of tax assessed or reassessed for any period u/s 41 or section 44 exceeds the sum already paid by a dealer in respect of such period prior to such assessment or reassessment by more than twenty per cent of the sum so paid, the dealer shall be deemed to have failed to pay the tax to the extent of the difference between the amount payable as aforesaid and the amount paid and the dealer shall pay by way of penalty on the amount of difference a sum calculated in accordance with the provisions of sub-section (5) and the provisions of sub-section (5) shall, so far as may be, apply thereto;"

On a bare reading of the aforesaid provisions it is evident that the provisions of section 45(6) were attracted inasmuch as the assessee had failed to pay the whole of the amount of tax as provided u/s 47(2) of the Act. Section 47(2) as it then existed reads as follows :

"47(2). A registered dealer furnishing declarations or returns as required by sub-section (1) of section 40, shall first pay into a Government treasury, in the manner prescribed, the whole amount of tax due from him according to such declaration or return along with the amount of any penalty by him u/s 45."

Thus a registered dealer is required to pay in Government treasury in the manner prescribed the whole amount of tax due as per the return to be filed by him. In the instant case, it is an undisputed position that the assessee had failed to comply with the requirements of sub-section (2) of section 47 of the Act inasmuch as it had not paid the whole amount of tax due according to the returns. Therefore, it is obvious that the provisions of sub-section (6) of section 45 were attracted. Simply because the assessee paid the amount due for the first three quarters before the actual date of assessment, the position did not alter. In this view of the matter, we are of the opinion that the Tribunal has correctly decided this question.

7. Question No. 4 : It was contended that the first proviso to sub-section (6) of section 45 was attracted to the case of the assessee and, therefore, the Tribunal ought to have limited the penalty to the extent of dues of 18 months only. However, the proviso is attracted only in the circumstances in which the penal provisions of sub-section are attracted in respect of an excess amount of the tax assessed or reassessed by more than 20 per cent of the sum already paid along with the returns or otherwise prior to the date of assessment or reassessment. In the instant case, penalty has been imposed upon the assessee not on the ground that the amount of tax to which the assessee-firm was assessed exceeded the amount already paid by more than 20 per cent. The penalty was imposed on account of the failure to pay tax on the date on which the tax was initially due. In this view of the matter, the Tribunal has correctly held that the

benefit of the first proviso to sub-section (6) of section 45 was not available to the assessee-firm.

8. Question No. 5 : The Tribunal, in the facts of the case, held that the alleged financial difficulty of the assessee was not a reasonable cause for not making payment of the amount of tax dues. The learned counsel for the assessee submitted that during the course of the judgment the Tribunal has observed as follows :

"Be that as it may, financial stringency cannot be pleaded as a reasonable cause for not making payment due to a public authority."

In his submission, by this proposition, the Tribunal has stated that in no case financial stringency can be advanced as a reasonable cause for not making the payment due to the public authority. However, if the aforesaid sentence is read in the proper context, it would be clear that the Tribunal has not laid down the aforesaid proposition as a proposition of law of universal applicability. The Tribunal had pointedly asked the learned counsel for the assessee as to whether the assessee had collected the amount of tax on the relevant sales made by it to its customers. The learned counsel for the assessee was not in a position to state as to whether the amount of tax was so collected or not. Therefore, the Tribunal inferred that as per the normal business practice the amount of tax would have been collected on sales by a dealer. Therefore it was inferred that in failing to pay the tax due in time, the assessee-firm was making use of the money already collected by way of tax from its customers for its business purposes. Thereafter, the Tribunal stated as follows :

"Be that as it may, financial stringency cannot be pleaded as a reasonable cause for not making payments due to a public authority. In fact, it would be commonsense to hold that where the demands of a number of persons compete with each other, the dues of a public authority should have precedence over those of others since the requirements of the public in general concerns the whole community as against the self-interest of an individual. The learned Government Agent has rightly pointed out that the alleged difficult financial position of the appellant did not debar it from allowing its depositors to withdraw their deposits freely; in these circumstances there were greater reasons why the appellant-firm should not have failed in paying its due to the Government."

9. If the aforesaid portion of the reasoning of the Tribunal is read in proper context, it would be clear that the Tribunal has not stated the aforesaid proposition as a proposition of universal applicability. It is obvious that as to whether the financial stringency can or cannot be considered a reasonable cause would depend upon the facts and circumstances of each case. Ordinarily when a dealer has collected the amount of tax from the public and has not paid the amount to the Government, the taxing authority concerned would be justified in saying that such an assessee cannot advance the cause of financial stringency. If such dealers are permitted to raise the plea of financial stringency, it would

amount to permitting them to use public money for their private gains. It is in this context that the Tribunal has made the aforesaid observations. In our opinion, the Tribunal has correctly held that in the facts of the case the plea of financial stringency was not available to the assessee.

10. For the aforesaid reasons, the reference is answered accordingly with no order as to costs.

11. Reference answered in the affirmative.