

(1991) 07 GUJ CK 0006
In the Gujarat High Court
Case No : Sales Tax Reference No. 1 of 1985

Chudgar Ranchhodlal Jethalal

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 05-07-1991

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 35, 35(1), 61(1), 7(3)
Central Sales Tax Act, 1956 — Section 15
Gujarat Sales Tax Act, 1969 — Section 3, 3(1), 41, 6, 69(1)

Citation : (1991) 07 GUJ CK 0006

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

Bench : Division Bench

Advocate : R.D. Pathak, for the Appellant; Kamal M. Mehta, Assistant Government Pleader, for the Respondent

Judgement

S.D. Dave, J.—Before coming to the questions referred to this Court, we would like to say the facts of the case somewhat in detail.

2. The applicant-dealer was carrying on the business of selling cotton on wholesale basis and was registered as a dealer both under the Bombay Sales Tax Act, 1959, and under the Gujarat Sales Tax Act, 1969. The dealer was holding a licence under the abovesaid Acts and was assessed under the Acts by the Sales Tax Officer, Ahmedabad for Samvat Year 2026 on March 18, 1971, November 30, 1971 and May 31, 1974 respectively. It appears that a surprise visit was paid to the applicant's place of business on April 24, 1974 and certain account books, etc. for Samvat Year 2024 to Samvat Year 2028 were impounded. Relying upon the impounded materials the sales tax officials had come to the conclusion that the sales made by the dealer to M/s. Vijay Traders against certificate in form 16 were wrongly allowed as deduction in the assessment on the ground that M/s. Vijay Traders did not hold any licence under the Bombay Act, but it posed as a licensed dealer and had consequently issued fake certificates in form 16 to the dealer. It was also noticed that the abovesaid certificates were given under the signature of different persons. Such transactions of sale were of Rs. 14,85,738 in

Samvat Year 2024, and of Rs. 3,12,581 in Samvat Year 2025, and of Rs. 5,70,322 for the period from Kartik Sud 1 to Chaitra Vad 30 of Samvat Year 2026. The Sales Tax Officer had reassessed the assessee u/s 35 of the Bombay Act under his orders dated January 21, 1976, and in this reassessment the transactions of sales made to M/s. Vijay Traders were subjected to tax. However, the Sales Tax Officer had excluded those transactions from taxation where the goods were repurchased by the dealer from M/s. Vijay Traders and were resold by the applicant dealer eventually. So far as Samvat Year 2028 is concerned the Sales Tax Officer while assessing the dealer for the first time on January 21, 1976 u/s 41 of the Gujarat Act, had disallowed the sales made by the dealer to M/s. Vijay Traders, M/s. Sadhana Traders, M/s. Nishitkumar M. Sheth and M/s. Sanjivani Textile Traders who did not hold licences at all under the Gujarat Act. Certain defects were noticed in respect of certificates issued by M/s. Sadhana Traders and M/s. Nishitkumar M. Sheth to the applicant-dealer. Against the abovesaid orders of reassessment and assessment as the case may be, the dealer had preferred first appeals before the Assistant Commissioner of Sales Tax without any gain. The applicant-dealer assessee thereafter had carried the matter before the Tribunal in second appeals being Second Appeals Nos. 51, 52 and 53 of 1979 filed under the Bombay Act and Second Appeal No. 56 of 1979 filed under the Gujarat Act.

3. The Tribunal had decided the aforesaid second appeals by common judgment and order dated September 10, 1981, which was in respect of the Second Appeals Nos. 51, 52 and 53 of 1979. So far as the Second Appeal No. 56 of 1979 is concerned it was decided by separate order bearing the same date. It requires to be appreciated at this juncture that since some errors of facts apparent from the record were noticed in those orders of the Tribunal, such errors were set right by rectification orders passed by the Tribunal on March 29, 1982.

4. The main contention of the dealer before the Tribunal was that that section 9(4) of the Gujarat Act read with section 15 of the Central Sales Tax Act, 1956, does not contemplate subsequent stage of the sale of declared goods but subsequent levy in point of time, and that if the general sales tax is already levied it becomes final in the hands of another licensed dealer, the same cannot be assessed on the dealer. The abovesaid contention was sought to be made good on the interpretation of sub-section (4) of section 9 of the Gujarat Act read with section 15 of the Central Act. The abovesaid contentions raised on behalf of the dealer were sought to be repelled by the Revenue by urging that the so-called double taxation in the dealer's case is not due to any flaw in section 9 of the Gujarat Act which is in conformity with section 15 of the Central Act but because the dealer itself had chosen to sell the items of declared goods to the non-licensed dealers thereby making itself the last stage at which the tax was legally liable and has been rightly levied in the instant case. It was also contended on behalf of the Revenue that the chain or channel of trade through which the declared goods would normally pass was not adhered to by the dealer and therefore the dealer was required to be blamed for being in predicament for its

sale being at the last stage for the levy of the General Sales Tax Act.

5. The Tribunal had considered the rival contentions advanced in support of the assessee and the Revenue and ultimately had come to the conclusion that it is true that regard being had to section 15 of the Central Act and section 9 of the Gujarat Act the subsequent sale cannot be taxed. But in the instant case the stage set for the levy of general sales tax is when a licensed dealer sells the goods to a dealer who was not holding a licence, and therefore in the instant case the dealer was liable to be taxed as the last dealer. Taking the abovesaid view the Tribunal had preferred to dispose of all the second appeals by the orders dated September 10, 1981. Later on the dealer-assessed had made the necessary application for making a reference of certain questions to this High Court which came to be granted by the Sales Tax Tribunal and ultimately the following questions have been referred to this High Court u/s 61(1) of the Bombay Act :

"(1) Whether, on the facts and in the circumstances of this case, the Tribunal was right in law in holding that since the applicant-firm suppressed material particulars relating to sales made by it to M/s. Vijay Traders, provisions contained in section 35(1)(b) of the Bombay Sales Tax Act, 1959, were rightly resorted to by the sales tax authorities and on that basis limitation of eight years provided in that section was applicable ?

(2) Whether, on the facts and in the circumstances of this case, the Tribunal was right in law in holding that the applicant-firm was estopped from denying the genuineness of sales made by it to M/s. Vijay Traders as evidenced by the returns filed by it, as also from contending before the Tribunal that such transactions of sales were mere halava transactions or accommodation sales entered into for purposes of accommodating the profit of the applicant-firm ?

(3) If the answer to question No. (2) is in the affirmative, whether on the facts and in the circumstances of this case, the Tribunal was right in law in holding that deductions admissible u/s 7(2)(iii) of the Bombay Sales Tax Act, 1959, in respect of sales made by the applicant-firm to M/s. Vijay Traders were rightly disallowed ?

(4)(a) Whether, on the facts and in the circumstances of this case, the Tribunal was right in law in holding that if a licensed dealer made the first sale of declared goods to a dealer not holding licence, and in the series of sales of the same goods at the later stage, such goods again passed in the hands of another licensed dealer, then the protection as provided in section 7(3) of the Bombay Sales Tax Act, 1959, read with section 9(4) of the Gujarat Sales Tax Act, 1969, was not available to the transactions of first sale made to a dealer not holding licence, even if at the later stage in the series, another licensed dealer had sold the same goods and levied tax on such sales ?

(b) Also whether under such circumstances the Tribunal was right in holding that the applicant-firm being the first licensed dealer who has sold the goods to a

dealer not holding licence was rightly assessed to tax ?"

6. The abovesaid questions referred to this High Court are related to the assessment proceedings for Samvat Year 2024, Samvat Year 2025, and the period from Kartik Sud 1 of Samvat Year 2026 to Chaitra Vad 30 of Samvat Year 2026.

7. The Tribunal has referred the following questions to this High Court u/s 69(1) of the Gujarat Act, 1969, relating to the proceedings for Samvat Year 2028 :

"(1) Whether, on the facts and in the circumstances of this case, the Tribunal was right in law in holding that the applicant-firm was estopped from denying the genuineness of sales made by it to M/s. Vijay Traders and M/s. Sanjivani Textile Traders as evidenced by the returns filed by them and from contending before the Tribunal that such transactions of sales were mere havala transactions or accommodation sales entered into, in order to accommodate the profit of the applicant-firm ?

(2) If the answer to question No. (1) is in the affirmative, whether on the facts and in the circumstances of this case, the Tribunal was right in law in holding that deductions admissible u/s 8(iii) of the Gujarat Sales Tax Act, 1969, in respect of sales made by the applicant-firm to M/s. Vijay Traders and Sanjivani Textile Traders were rightly disallowed ?

(3)(a) Whether, on the facts and in the circumstances of this case, the Tribunal was right in law in holding that if a licensed dealer made the first sale of declared goods to a dealer not holding licence, and in the series of sales of the same goods at a later stage, such goods again passed in the hands of another licensed dealer, then the protection as provided in section 9(4) of the Gujarat Sales Tax Act, 1969 was not available to the transactions of first sale made to a dealer not holding licence, even if at the later stage in the series, another licensed dealer had sold the same goods and levied tax on such sales ?

(b) Also whether on the facts and in the circumstances of this case, the Tribunal was right in law in holding that the applicant-firm being the first licensed dealer who had sold the goods to a dealer not holding licence was rightly assessed to tax on such transactions of sales ?"

8. Mr. R. D. Pathak the learned counsel appears on behalf of the dealer, while the Revenue has been represented by the learned Assistant Government Pleader, Mr. Kamal M. Mehta.

9. The contention raised by Mr. Pathak before us is that in the instant case looking to the facts and circumstances of the transactions, though the dealer can be said to be the last dealer, there was a subsequent sale and that, therefore the licensed dealer who again purchased from the unlicensed dealer also becomes the last dealer and that the tax has been levied and collected from the abovesaid licensed dealer; and, therefore, the tax could not have been levied or collected from the dealer. It is broadly on these grounds that Mr. Pathak has urged that the

questions referred to this High Court should be decided and answered in favour of the assessee. But Mr. Mehta, the learned counsel appearing for the Revenue has urged that it is an admitted position that the dealer had become the last dealer because it had sold the goods to unlicensed dealers and, therefore, the dealer would be liable to pay the tax. Mr. Mehta has pointed out that there is nothing like the "second last dealer" and therefore the contention raised by the learned counsel Mr. Pathak in this respect cannot be accepted.

10. So far as the facts of the case on hand are concerned, there is no dispute. It is clear that the dealer was carrying on the business of selling cotton on wholesale basis and that the material collected during the surprise visit has shown that the dealer had made certain sales in favour of M/s. Vijay Traders against certificate in form 16 but it was found out and established that said M/s. Vijay Traders did not hold any licence under the Bombay Act, but it posed as a licensed dealer and had consequently issued false certificates in form 16 to the applicant-dealer firm. Because of this position the Sales Tax Officer had excluded the transaction of sales in respect of Samvat Years 2024, 2025 and for a period from Kartik Sud 1 of Samvat Year 2026 to Chaitra Vad 30 of Samvat Year 2026. It is in the background of this undisputed fact that Mr. Pathak has tried to urge that though the dealer can be said to be a last dealer there is a scope for a subsequent last dealer also because in the instant case the dealer had sold the goods to unlicensed dealers but again those unlicensed dealers had sold the goods to the licensed dealer and they had sold the goods to the textile mills company where the goods ultimately came to be consumed. It is in the background of these facts that Mr. Pathak has further contended that when the licensed dealer had purchased the goods from unlicensed dealer he becomes a second last dealer.

11. The abovesaid contentions raised by Mr. Pathak requires to be scrutinised in view of certain provisions of the Central Act as well as certain provisions of the Gujarat Act. Section 15 of the Central Act says very clearly that the tax payable in respect of any sale or purchase of the taxable goods inside the State shall be levied only in respect of (one stage, in this case) the last sale or purchase inside the State. Therefore from a bare reading of this provision contained u/s 15 of the Central Act, it becomes clear that (in the present case) the tax becomes payable only in respect of the last sale or purchase made inside the State. The other and further provisions contained u/s 15 of the Central Sales Tax Act are in respect of the rate in respect of the sale or purchase. We are not concerned with the abovesaid provisions contained under the abovesaid section of the Central Act. As noticed above much would depend upon section 9 of the Gujarat Act, 1969. Before proceeding further to analyse the abovesaid provisions, a passing reference is required to be made to the provisions contained u/s 3 and section 6 of the Gujarat Act. Section 3 of the Gujarat Act is in respect of the incidence and levy of tax. This section finds its place under Chapter-II which is in respect of the incidence and levy of tax. Section 3 says very clearly that the incidence of tax would be on a dealer whose turnover either of all sales or of all purchases made

during a particular period had exceeded or exceeds certain relevant limits, he will be liable to pay tax under the Act on his turnover of sales. Therefore section 3 of the Gujarat Act makes it abundantly clear that the incidence of tax is on a dealer who is liable to pay the tax regard being had to his sales and purchases during a particular period. This section also further says that the incidence or the liability to pay tax under the Act is on his turnover of sales. Therefore section 3 of the Act is abundantly clear regarding the person who has to pay the tax and regarding the transaction on which the tax is leviable. In short u/s 3 of the Act the dealer is liable to pay tax and his liability to pay tax depends upon his turnover of sales or purchases as the case may be. Section 6 of the Gujarat Act speaks of the taxes payable by a dealer. This provision says that the taxes shall be payable or paid by every dealer who is liable to pay tax under the Act and the tax or taxes as the case may be, will be leviable in accordance with the provisions of that particular Chapter under which section 6 finds its place. Therefore again on a plain reading of section 6 it becomes clear that the taxes under the Act are to be paid by a dealer in accordance with the provisions of the Act.

12. That takes us to the provisions contained u/s 9 of the Gujarat Act. It is in respect of the stage of levy of sales tax, general sales tax or purchase tax on declared goods. Clause (b) of sub-section (1) of section 9 of the Gujarat Act says that in the case of levy of general sales tax u/s 8, the stage would be of sale of such goods by the last dealer liable to pay such tax under the Act. It therefore becomes clear from section 9(1)(b) that in respect of the levy of the abovesaid taxes the stage of levy of such tax would be the last dealer. It is not in dispute and Mr. Pathak, learned counsel appearing on behalf of the dealer, has never contended before us that the dealer would not be a last dealer. It therefore becomes clear that under the provisions contained u/s 9(1)(b) of the Gujarat Act the assessee or the dealer who has requested the Tribunal for making reference of the abovesaid questions to this High Court is the last dealer within the meaning of the abovesaid provisions. When it is an admitted position that the dealer before us is the last dealer within the meaning of the abovesaid provisions of the Gujarat Act a detailed reference to the provisions contained under Explanation II of the abovesaid section, namely, section 9 of the Gujarat Act does not become necessitous. It therefore becomes clear that the dealer before us is the last dealer within the meaning of the provisions contained u/s 9 of the Act. In view of this position it becomes clear that the assessee-company/dealer would be the last dealer and therefore he would be liable to pay the tax.

13. Mr. Pathak, the learned counsel appearing on behalf of the assessee, has tried to urge that no doubt the dealer before us would be the last dealer but looking to the nature of the transactions the licensed dealer who purchases the same commodity from the unlicensed dealers would also become a second last dealer. We are afraid that the abovesaid contention can never be accepted because there is no concept like a second last dealer, which would become clear referring to the scheme of the Act. It appears very clearly that the dealer before

us had sold the textile goods to certain persons who were posing themselves to be the licensed dealers and ultimately it was established that they were unlicensed dealers. Looking to this scheme of the Act, as noticed above, the dealer before us had become the last dealer who will be liable to pay the tax. Merely because the unlicensed dealers who had posed to be the licensed dealers and had issued false or incorrect certificates had preferred to sell the goods to some licensed dealers and again those licensed dealers had passed on the goods to the textile mills company for the ultimate consumption, it cannot be said that there is a scope of the second last dealer. In view of this provision it becomes eloquently clear from the provisions contained u/s 9 of the Gujarat Act that the contention raised by Mr. Pathak, the learned counsel appearing on behalf of the dealer, cannot be accepted.

14. Mr. Pathak has placed heavy reliance upon the provision contained u/s 9(4) of the Act. The abovesaid provision runs thus :

"If under this Act or any earlier law, any tax has been levied or is leviable on the sale or purchase of any declared goods, at any stage, then no further tax shall be levied under this Act at any subsequent stage on the sale or purchase thereof."

15. Placing reliance upon the abovesaid provision, Mr. Pathak has urged that in the instant case before us, the tax had become leviable and had already been levied and is recovered from the licensed dealer, and therefore the tax on the same commodity cannot be levied or collected at a subsequent stage from the dealer before us. But the very text of the abovesaid provision would go to show that what is meant by Legislature is that if any tax has been levied or has become leviable under the Act, on the sale or purchase of the goods, at any stage then, no further tax shall be levied under the Act on any subsequent stage on the sale or purchase of the same goods. It requires to be appreciated that in the instant case when the dealer before us had sold the goods to unlicensed dealers the tax had become already leviable. In view of this position when the tax had already become leviable it could not have been levied at a subsequent stage. But we are not concerned with that aspect of the case. In our view the abovesaid provision on which Mr. Pathak had placed heavy reliance would on the contrary disprove his contention before us. The plain meaning of section 9(4) would go to show that when the dealer before us had sold the goods to unlicensed dealer the tax had become leviable. In view of this position it cannot be urged that the concept of a second last dealer has a legally permissible recognition.

16. At this juncture reference also requires to be made to the Supreme Court decision in Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., . In this decision while considering the scope and true meaning of the word "levy" the Supreme Court has stated thus at paragraph 20 at page 2571 :

"The term "levy" appears to us to be wider in its import than the term

"assessment". It may include both "imposition" of a tax as well as assessment. The term "imposition" is generally used for the levy of a tax or duty by legislative provisions indicating the subject-matter of the tax and the rates at which it has to be taxed. The term "assessment", on the other hand, is generally used in this country for the actual procedure adopted in fixing the liability to pay a tax on account of particular goods or property or whatever may be the object of the tax in a particular case and determining its amount.

The Division Bench appeared to equate "levy" with an "assessment" as well as with the collection of a tax when it held that "when the payment of tax is enforced, there is a levy". We think that, although the connotation of the term "levy" seems wider than that of "assessment", which it includes, yet, it does not seem to us to extend to "collection". Article 265 of the Constitution makes a distinction between "levy" and "collection". We also find that in *N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd.*, this Court made a distinction between "levy" and "collection" as used in the Act and the Rules before us. It said there with reference to rule 10 :

"We are not inclined to accept the contention of Dr. Syed Mohammad that the expression "levy" in rule 10 means actual collection of some amount. The charging provision section 3(1) specifically says. "There shall be levied and collected in such a manner as may be prescribed the duty of excise" It is to be noted that sub-section (i) uses both the expressions "levied and collected" and that clearly shows that the expression "levy" has not been used in the Act or the Rules as meaning actual collection."

17. Therefore looking to the abovesaid observation of the Supreme Court it becomes clear that the term "levy" appears to be wider in its import than the term "assessment". The term "levy" may include both the imposition of a tax as well as the assessment. Looking to this wider meaning of word "levy" it can be said without any hesitation that in the instant case the tax had become leviable on the sale by the dealer before us, to the unlicensed dealer. Before parting with this point a reference also requires to be made to rule 25 and rule 31 of the Gujarat Sales Tax Rules, 1970. A bare reading of the above said rules would go to show that it is the liability rather the obligation of the assessee to submit the returns and declarations periodically and pay up the tax within the stipulated period. Rule 31 which is in respect of the time fixed for payment gives the exact time during which the payment of the tax, for the month or the quarter as the case may be, for which any return or declaration is required to be furnished, is to be made. It therefore becomes clear that looking to the abovesaid rules the tax had become payable by the dealer before us within the stipulated period from the date of transaction on which the dealer before us had sold the goods to the unlicensed dealers. The tax had actually therefore become leviable. In view of this position it cannot be urged taking the shelter u/s 9(4) of the Gujarat Act, that the dealer before us is being taxed at a subsequent stage which is not

permissible. In view of this position the main contention raised by the learned counsel Mr. Pathak fails.

18. The other questions which are merely incidental to the abovesaid position now requires to be taken up for examination and reply. So far as question No. (1) is concerned it becomes clear that the dealer-firm had suppressed material particulars relating to the sales made by it to M/s. Vijay Traders. It is also very clearly borne out that it was shown to the satisfaction of the taxing authorities that the abovesaid firm in whose name the sales were effected had issued certain certificates but ultimately it was noticed that they were not the licensed dealers. In other words they were unlicensed dealers and, therefore, the Tribunal was right in holding that in view of this position the limitation of 8 years provided in the relevant provision was applicable.

19. So far as the question No. (2) is concerned it is clear that it was the case of the dealer before us and the taxing authority that they had sold the textile goods to M/s. Vijay Traders. The necessary returns had also shown the same position. Later on the dealer could not have taken up a contrary contention by saying that they were havala transactions. Therefore it appears that, so far as this question is concerned the Tribunal was perfectly justified in coming to the conclusion that the dealer was estopped from denying the genuineness of the sales made by it.

20. Coming to the question No. (3) it requires to be noticed that the Tribunal has held that the deductions admissible under the relevant provisions of the Bombay Sales Tax Act were required to be disallowed. It appears that in view of the aforesaid finding, the Tribunal was right in holding that the deductions were not legally permissible and admissible and therefore the Tribunal was justified in disallowing the abovesaid deductions.

21. Coming to question No. (4)(a) it appears that the Tribunal was right in holding that if a licensed dealer had made the first sale of declared goods to a dealer not holding the licence then the protection provided u/s 7(3) of the Bombay Sales Tax Act, 1959, read with section 9(4) of the Gujarat Act, 1969, was not available. It appears that in the light of the view which we have taken as aforesaid the Tribunal was perfectly justified in holding so. The same would be the position in respect of the question No. (4)(b). In view of this position the abovesaid question in the first set requires to be replied and answered in affirmative, against the assessee and in favour of the Revenue.

22. So far as the second set of questions regarding Samvat Year 2028 is concerned it becomes clear that on the same analogy the dealer was estopped from denying genuineness of sale made by it to M/s. Vijay Traders and others and they were not entitled to contend before the Tribunal that the said transactions were mere havala transactions. In the same way the Tribunal was right in law in holding that the deductions granted to the dealer before us in respect of the abovesaid transactions in favour of M/s. Vijay Traders and others were required to be disallowed. In the same way, further the Tribunal was

justified in coming to the conclusion that when licensed dealer had made the first sale of declared goods to a dealer who was not holding a valid licence then the protection as provided u/s 9(4) of the Gujarat Act, 1969 was not available. In the same way it further becomes clear that the Tribunal was right in law in holding that the dealer being the last licensed dealer who had sold the goods to a dealer not holding the licence, was rightly assessed to the tax on such transactions of sales. In view of this position all the questions in the second set also require to be answered and replied in affirmative, against the assessee and in favour of the Revenue.

23. Therefore we hereby accordingly reply and answer all the abovesaid questions referred to this High Court in two sets in "affirmative, against the assessee and in favour of the revenue" with no order as to costs.

24. Reference answered in the affirmative.