

(1957) 10 BOM CK 0012

In the Bombay High Court

Case No : Special Civil Application No. 1805 of 1957

C.J. Vaidya

APPELLANT

Vs

S.G. Barve, Sales Tax Office, Sholapur District

RESPONDENT

Date of Decision : 30-10-1957

Acts Referred:

Business Profits Tax Act, 1947 — Section 11, 14
Sales Tax Act, 1946 — Section 11(5), 11A

Citation : (1958) 9 STC 128

Hon'ble Judges : P.V. Dixit, J; G.B. Badkas, J

Bench : Division Bench

Advocate : S.P. Mehta and H.K. Shah, for the Appellant; G.N. Joshi and R.J. Joshi, for the Respondent

Judgement

Dixit, J.—The petitioner in this case carries on business at Akluj in the Sholapur district as the sole proprietor under the name and style of "Shrikant Aushadhi Bhandar" since prior to the 1st April, 1946. The respondent to the petition is the Sales Tax Office, Sholapur, district at Pandharpur, who has jurisdiction over dealers carrying on business within the Sholapur district. The period, which is material, is a period between the 1st of October, 1946, and the 31st of March, 1954. In respect of this period, the respondent served various notices upon the petitioner. In that way, a notice was issued against the petitioner in respect of the period between the 1st of October, 1946, and the 31st of October, 1952; another notice in respect of the period between the 1st of November, 1952, and the 31st of March, 1953, was issued against the petitioner; and a third notice was issued against the petitioner in respect of the period between the 1st of April, 1953, and the 31st of March, 1954. In regard to the first period, the notice was issued under the Sales Tax Act, 1946; in regard to the second period, it was issued under the Sales Tax Ordinance of 1952; and in respect of the third period, the notice was issued under the Sales Tax Act, 1953. The contention of the petitioner is that these notices are out of time, having regard to section 11A of the Sales Tax Act, 1953. Now, the action taken by the respondent is an action

taken u/s 11(5); but the contention of the assessee is that the action could be taken only u/s 11A, and not u/s 11(5). So far as this question is concerned, it has two aspects. The first is : Does section 11(5) apply ? or does section 11A apply ? Mr. Mehta appearing for the applicant contends that the proper provision to apply is section 11A, and not section 11(5). But Mr. Mehta very fairly, and we think properly, conceded that in view of a decision of this Court given in *Bombay Cycle Stores Co., Ltd. v. The State of Bombay* [1957] 8 S.T.C. 455 (Civil Reference No. 27 of 1956 on the 17th of January, 1957), it is not open to him to contend that the proper provision to apply is section 11A. He concedes that the proper provision to apply is section 11(5).

2. Mr. Mehta, however, says that even if section 11(5) applies, the notices issued against the petitioner are without jurisdiction, because they are all issued beyond a period of three years from the 31st of March, 1954. Now, the notices were issued on the 3rd of April, 1957, and if section 11(5) applies, it would appear that these notices were beyond three years from the 31st of March, 1954. But Mr. Mehta goes further, and he says that the rule of limitation enacted in section 11A must be incorporated into section 11(5). Now, section 11(5) provides :-

"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, assess, 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."

3. It is evident that section 11(5) does not in terms contain any rule of limitation. But Mr. Mehta says that although section 11(5) does not, in itself, contain rule of limitation, as is the case u/s 11A, we should import into the language of section 11(5) the rule of limitation enacted in section 11A; and in support of this contention, he relies upon a decision of this Court, *Commissioner of Income Tax, Bombay City-I, Bombay Vs. Narsee Nagsee and Co.*, . There, the High Court was dealing with a case arising under the Business Profits Tax Act. The sections which are material are section 11 and section 14. Section 11 of the Business Profits Tax Act did not, in itself, contain any rule of limitation; while section 14 of that Act contains a rule of limitation of 4 years. The argument on behalf of the assessee was that although section 11 did not contain a rule of limitation, the rule of limitation which is contained in section 14 should be incorporated into section 11; and this Court held that though section 11 did not prescribe any period for issuing a notice calling for a return, the Act must be construed as a whole, and in view of the provision contained in section 14 that a notice for re-assessment should be issued within 4 years from the end of the chargeable accounting period, a notice, which was issued, after the expiry of four years from the end of

the chargeable accounting period could not be treated as a valid notice, and the assessment, therefore, was invalid. Now prima facie, this view supports the contention of Mr. Mehta. But Mr. G. N. Joshi for the respondent contends that the principle laid down in Commissioner of Income Tax, Bombay City-I, Bombay Vs. Narsee Nagsee and Co., cannot apply to the facts of this case. He says that section 11 and section 14 of the Business Profits Tax Act deal with what I may call, for the sake of convenience, identical set of facts, whereas section 11(5) and section

4. 11A of the Sales Tax Act deal with different situations. In a case arising u/s 11(5), it is case of a person, who is a dealer but who has not applied for registration. In a case arising u/s 11A, it is a case of a registered dealer upon whom a notice has been already issued and assessment has been made but his turnover has escaped assessment. Mr. Joshi, therefore, argues that while the principle in Commissioner of Income Tax, Bombay City-I, Bombay Vs. Narsee Nagsee and Co., may be accepted with regard to the facts of that case, the principle is inapplicable to a case arising u/s 11(5); and in this connection, he draws our attention to a decision also given by this Court in a reference arising under the sales tax. That decision was given on 17th January, 1957, in the case of Bombay Cycle Stores Co. Ltd. v. The State of Bombay [1957] 8 S.T.C. 455. In that case, as in this case, the question was whether the case fell within section 11(5) or within section 11A; and this Court held that the case fell within section 11(5) and not within section 11A. It is because of this case that Mr. Mehta has conceded that he will not contend that the proper provision to apply is section 11A and not section 11(5). Now, in the course of the judgment in that case, it was observed :-

"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".

5. It is evident, I think, that the Court noticed the difference between section 11(5) and section 11A, that is, while section 11(5) did not contain any period of limitation, section 11A did; and dealing specifically with the case before them, it was observed :-

"Now, it is obvious that sub-section (5) of section 11 deals with the specific case in respect of any dealers 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 that in this case prior to 1952 there was such a failure on the part of the assessee."

6. There, the lower Court was dealing with the case of an assessee who had not applied for registration prior to 1952, a case exactly similar to the present one in

which also the assessee prior to 1956 did not apply for registration. There can, therefore, be no doubt that section 11(5) deals with the case of a dealer who, though required to be registered under the Sales Tax Act, has not applied for registration.

7. Mr. Mehta argues that this Court was not called upon to decide this question of period of limitation. Mr. Mehta may be right or may not be right. But there can be no doubt that the Court made a distinction and intended to make a distinction between the case of a person who is a registered dealer and the case of a person who, though a dealer, has not applied for registration. That, I think, is a vital difference between the provisions of section 11(5) and those contained in section 11A.

8. The question, then arises, is whether, when section 11(5) does not in itself contain a period of limitation, we should accede to Mr. Mehta's contention that we should read into section 11(5) the rule of limitation enacted in section 11A and having incorporated it into section 11(5) we should hold that these notices were beyond time. Now, the Sales Tax Officer had power u/s 11(5) to issue a notice. He had such a power, because he was dealing with the case of a person, who was not a registered dealer. On that admitted position, the Sales Tax Officer had jurisdiction to issue a notice. The further question whether the notices were out of time is to be answered not by reference to section 11(5), as indeed section 11(5) does not, in itself, contain any rule of limitation, but by reference to section 11A. Can it, therefore, be said that the Sales Tax Officer had no jurisdiction to issue a notice, or that the Sales Tax Officer was acting in excess of jurisdiction, in issuing a notice. Speaking for myself, I would find some difficulty in holding that the Sales Tax Officer had no jurisdiction to issue a notice. Section 11(5), on the face of it, does not prescribe any period of limitation. To accept Mr. Mehta's argument, one has to go further and successfully incorporate into section 11(5) the rule of limitation contained in section 11A; but, I think, when such is the situation, it is difficult to say that the Sales Tax Officer's action was without jurisdiction, or in excess of jurisdiction. On the question of limitation, Mr. Mehta may be right or may not be right. In the Sales Tax Act a machinery is provided. If, after the assessment, the applicant feels aggrieved, he can take the matter in appeal. He can next go to the Sales Tax Tribunal. If there is a machinery provided under the law, it would be difficult, if not impossible, for this Court to entertain this application especially when the Sales Tax Officer is, in my view, acting within jurisdiction. On the further question raised by Mr. Mehta, about the question of limitation, we express no opinion on the point. It would be open to Mr. Mehta to agitate the question before the authorities competent to deal with the question. On this ground, I think, the application must fail; and the rule will be discharged with costs.

9. Application dismissed.