
(1981) 02 BOM CK 0038

In the Bombay High Court

Case No : Sales Tax Reference No. 22 of 1978

Commissioner of Sales Tax

APPELLANT

Vs

Empico Traders

RESPONDENT

Date of Decision : 09-02-1981

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 11, 13, 32, 33, 36(2)

Citation : (1981) 47 STC 426

Hon'ble Judges : Sujata V. Manohar, J; D.P. Madon, J

Bench : Division Bench

Judgement

Madon, J.—The respondents were at all material times registered as dealers under the Bombay Sales Tax Act, 1959 (hereinafter referred to as "the Act"). For the period 1st April, 1969, to 31st March, 1970, the respondent filed their periodic returns before the Sales Tax Officer as required by section 32 of the Act. Along with the returns the respondents filed receipted chalangis showing prior payment into the Government treasury of the tax payable by them according to such returns as required u/s 38 of the Act. For the said period the respondents thus paid into the Government treasury an aggregate sum of Rs. 21,114.28 as tax. In the returns they also claimed credit in respect of the set-off allowable to them under rule 43 of the Bombay Sales Tax Rules, 1959. The Sales Tax Officer assessed the amount of tax payable by the respondents at Rs. 32,874.39 and further allowed the respondents set-off, which, according to the statement of the case was in the sum of Rs. 5,493.99, but as shown in the order of assessment was in the sum of Rs. 7,670.99. The Sales Tax Officer further held that the amount of tax paid by the dealer into the Government treasury was less than eighty per cent of the amount of tax assessed by him and, therefore, under the explanation to sub-section (2) of section 36 the respondents should be deemed to have concealed the turnover or knowingly furnished inaccurate turnover liable to tax, and levied upon the respondents a penalty under clause (c) of the said sub-section in the sum of Rs. 7,600. He negatived the respondents' contention that in calculating the amount of tax paid by them before assessment, the

amount of set-off allowed to them should be taken into account. In appeal the Assistant Commissioner of Sales Tax confirmed the imposition of penalty but reduced the amount to Rs. 3,500. The respondents then went in second appeal to the Sales Tax Tribunal. The Tribunal allowed the appeal and deleted the penalty u/s 36(2)(c) of the Act imposed upon the respondents. The Tribunal has not given any reason in its order for arriving at this decision.

2. At the instance of the Commissioner of Sales Tax, the Tribunal has stated this case and referred to this High Court the following question :

"Whether, on the facts of this case and on a proper interpretation of the expression "tax paid" appearing in explanation (1) to section 36(2)(c) of the Bombay Sales Tax Act, 1959, the Tribunal was justified in holding that this expression cannot be restricted to only the amount of Rs. 21,114.28, being the tax paid in the Government treasury but will also include the amount of set-off of Rs. 5,493.99 granted to the assesseees under rule 43 of the Bombay Sales Tax Rules, 1959 ?"

3. Before us, Mr. Jetly, the learned counsel for the applicant, has submitted that the amount in respect of which a set-off is allowed to a dealer at the time of assessment cannot be equated with the tax paid by a dealer. In Mr. Jetly's submission, the expression "the total amount of tax paid by the dealer" in explanation (1) to section 36(2)(c) of the Act means the total amount of tax paid by the dealer into a Government treasury. Mr. Jetly further contended that the expression "assessed" in the said explanation meant the amount of tax assessed after deducting from the total amount of tax found payable in the assessment order the amount in respect of which the set-off is allowed to a dealer. Mr. Joshi, the learned counsel for the respondents, on the other hand, argued that the total amount of tax is assessed by an order of assessment without deducting therefrom any amount by way of set-off which would be allowed to a dealer and, therefore, the expression "the total amount of tax paid by the dealer" includes the amount in respect of which credit was given in the assessment order to a dealer by way of set-off in respect of taxes recovered from him by the selling dealer.

4. Before we deal with the rival contentions, it may be convenient to mention that if the department's contentions were to be accepted, the tax paid into the Government treasury by the respondents would fall short of eighty per cent of the amount of tax assessed by Rs. 790, while if the contention of Mr. Joshi were to be accepted, the amount of tax paid by the respondents would exceed eighty per cent of the amount of tax assessed by Rs. 308.27. Assuming for the sake of argument that the department's contentions were correct, it was by a misinterpretation of the relevant provisions of the Act on the part of the respondents which made them pay a sum of Rs. 790 less than eighty per cent of the tax assessed. For such misinterpretation an imposition of penalty either in the sum of Rs. 7,600 or Rs. 3,500 seems to us to be shocking. We are, however, not concerned with this aspect of the matter in the present reference.

5. During the relevant period explanation (1) to section 36(2)(c) was amended with effect from 1st September, 1969. Both the learned counsel are agreed that the amendments are not relevant for the purpose of deciding this reference and as the material part of the explanation prior to the amendment remains unaffected by the amendment, we may for the purpose of the present reference refer to it only. That explanation is as follows :

"Explanation. - (1) Where a dealer furnishing returns has been assessed by the Commissioner under sub-section (3) or (4) of section 33, or reassessed under clause (b) of sub-section (1) of section 35 and the total amount of tax paid by the dealer for any year is found to be less than eighty per cent of the amount of tax as so assessed or reassessed then, for the purpose of clause (c), he shall be deemed to have concealed the turnover, or knowingly furnished inaccurate turnover liable to tax, unless he proves to the satisfaction of the Commissioner that the payment of a lesser amount of tax was not due to gross or wilful neglect on his part."

6. u/s 36(2)(c) where a dealer has concealed the particulars of any transaction or knowingly furnished inaccurate particulars of any transaction liable to tax, the assessing authority may, after giving him an opportunity of being heard, by order in writing, impose upon the dealer by way of penalty in addition to any tax assessed u/s 33, a sum not exceeding one and one-half times the amount of the tax assessed. The explanation, therefore, must be read in conjunction with clause (c) of section 36(2). What the explanation does is to raise a presumption against a dealer, and throws upon him the burden of satisfying the assessing authority that the payment of a lesser amount of tax by him was not due to gross or wilful neglect on his part. The respondents were assessed under sub-section (3) of section 33. The first thing that falls for our consideration is what was the amount of tax assessed in the case of the respondents. To answer this question we must turn to the Bombay Sales Tax Rules, 1959, and particularly to rule 36 thereof. Under the said rule an order of assessment u/s 33 has to be in form 30. Form 30, as it stood at the relevant time, showed that an order of assessment was divided into seven parts. Part I dealt with turnover of sales; Part II with levy of sales tax under sections 7(1), 8 and 10(1); Part III with levy of general sales tax under sections 7(2), 9 and 10(2); Part IV with levy of retail sales tax payable by the dealer covered by section 10(3); Part IV-A with levy of reduced rate of sales tax u/s 11; Part V with levy of purchase tax u/s 13 or 14 or 15; and Part VI with the final result with respect to the amount of tax found payable according to Parts II to V. It would be convenient to reproduce the relevant columns in Part VI at the material time :

"(30)(i) Amount of sales tax payable as per item 7 (Part II). (ii) Amount of general sales tax payable as per item 11 (Part III). (iii) Amount of retail sales tax payable as per item 13 (Part IV). (iv) Amount of sales tax payable as per item 15 (Part IV-A). (v) Amount of purchase tax payable as per item 29 (Part V). ----- Total ... ----- (31) Less - set-off admissible by

the following rules :- (32) Net amount payable as tax (30 - 31) * * * (33) Less - (i) Amount paid with returns. (ii) Amount, if any, credited by refund adjustment order. (iii) Amount, if any, paid into the Government treasury as an advance payment of tax under sub-clause (v) of clause (aa) of sub-rule (2) of rule 22." 7. The form of the assessment order makes it abundantly clear that the total amount of tax which is assessed is the amount mentioned at the foot of column (30). Against the total amount of tax payable as per this column, there is given a credit for the amounts to which a dealer has become entitled by way of set-off. That amount is mentioned in column (31), and it is the result so arrived at, after deducting the amount of set-off, from the total amount of tax, that is shown as the net amount payable as tax. That is not the amount which is assessed. What is assessed is the amount found payable by way of sales tax, general sales tax, retail sales tax and purchase tax, the aggregate of which is brought under Part VI. The set-off is deducted in order to arrive at the amount which a dealer has to pay. Against such amount the dealer is given credit with respect to the amount paid with the return, the amount credited by any refund adjustment order and the amount of advance tax paid by him. The very first sub-item in column (34) is headed "Balance of tax due", that is, the balance due after deducting from the net amount payable as tax, the amount mentioned in column (33). This, therefore, clearly shows that so far as the assessing authority is concerned, the amount of set-off to which a dealer becomes admissible is taken as the amount of tax paid by him, and it is on this basis that the dealer is given credit for this amount by deducting such amount from the total amount of tax assessed and shown in column (30). This position is equally reflected in the form of return which a dealer is required to file, namely, form 18. Part V of the return is headed "Taxes payable". Under that head a dealer is to deduct the amount of set-off under the various rules claimed by him and the amount credited under refund adjustment order and the amount of advance tax paid by him, from the amount of total taxes payable by him and then to arrive at the net amount payable by or refundable to him. If any amount is payable by him, such amount is to be paid by him along with the chalan before furnishing the return. When according to the prescribed form of return a dealer is asked to deduct from the total tax payable by him the amounts admissible as set-off under various rules, the only conclusion that can emerge is that while prescribing the form of return the State Government has considered the amount to which a dealer is entitled by way of set-off as tax payable to the State Government. The Bombay Sales Tax Rules have been made by the State Government in pursuance of the power in that behalf conferred upon it by section 74. Under the Act the tax is to be paid to the State Government, and both by the form of return and by the form of assessment order prescribed the State Government has made it amply clear that it considers the amount to which the dealer would be found admissible by way of set-off as taxes paid by him. This position is further made clear when we look to the set-off rules and the section under which these rules have been framed. The material portion of section 42 is as follows :

"42. Drawback, set-off, refund, etc. - The State Government may by rules provide, that -

(a) in such circumstances and subject to such conditions as may be specified in the rules a drawback, set-off or refund of the whole or any part of the tax -

* * *

(ii) paid or levied or leviable in respect of any earlier sale or purchase of goods under this Act or any earlier law, be granted to the purchasing dealer."

"It is pertinent to note that the set-off in respect of which the State Government is authorised to make rules is in respect of the whole or any part of the tax paid or levied or leviable in respect of any earlier sale or purchase of goods. Rule 43 shows that the purchasing dealer becomes entitled to set-off in respect of the amount of tax which his selling dealer has recovered or collected from him. The whole basis of giving the set-off in these circumstances to a dealer is that a dealer does not become entitled to a set-off unless his vendor is a registered dealer and as such liable to pay tax to the State Government. The State Government, therefore, proceeds on the basis that the tax which is recovered would be paid to it by the collecting dealer. This is also clear if we turn to section 46 which prohibits a person from collecting any sum by way of tax in respect of any sale or purchase unless such person is a registered dealer and liable to pay tax on these transactions. It further prohibits a registered dealer from collecting any amount by way of tax in excess of the amount of the tax payable by him under the provisions of the Act. A breach of the prohibition contained in section 46 is made an offence u/s 63 of the Act.

The position becomes even clearer when we look more closely at the set-off rules. The rule under which the respondents were allowed the set-off is rule 43. The heading of the rule is "Drawback, set-off, etc., of tax paid on goods sold in the course of inter-State trade or commerce or of export". The opening words of the said rule are "In assessing the amount of tax payable in respect of any period by a registered dealer (hereinafter referred to in this rule as "claimant dealer"), the Commissioner shall grant him a drawback, set-off or, as the case may be, refund of the following amounts, that is to say :- (a)(i) the amount of sales tax or the general sales tax or, as the case may be, both recovered from him by a registered dealer". Rule 45 prescribes the conditions subject to which drawback, set-off or refund is to be granted to a dealer. The opening part of the said rule runs as follows :

"Save as otherwise provided by any rule, no drawback, set-off or refund under these rules shall be granted to a dealer in respect of any amount of tax recovered from him or of tax not collected from him separately or payable by him on the purchase of any goods".

8. Thereafter follow various conditions prescribed by the said rule. Sub-rule (3) of rule 45, omitting the proviso thereto which is not relevant for our purpose, is

as follows :

"(3) A dealer who by virtue of these rules, has, in any month or quarter, as the case may be, become entitled to drawback, set-off or refund may, subject to the provisions of sub-rule (1) of rule 46, set-off such sum against the tax payable for the period consisting of that month or quarter; and a dealer who is required to submit an annual return and has become entitled as aforesaid to a drawback, set-off or refund shall, subject to the provision of sub-rule (1) of rule 46, set-off such sum against the tax payable by him before furnishing the annual return which is due next thereafter."

9. Sub-rule (3) of rule 45 thus also shows that a dealer becomes entitled to drawback, set-off or refund as if the amount thereof stood on the same footing as tax paid by a dealer into the Government treasury. We have already seen that both in the form of return and in the form of assessment order various amounts other than the amount paid by a dealer into the Government treasury are treated as tax paid by a dealer. The set-off admissible is also placed in the same category and is treated on the same footing as if it were a tax paid by a dealer. It is pertinent to note that the explanation does not use the words "the total amount of tax paid by a dealer into a Government treasury" or the words "the total amount of tax paid by a dealer to the Government". We have seen that the relevant set-off rules speak of the amount of tax collected or recovered from a dealer by his vendor. The amount so recovered is itself treated both by the section and the rules mentioned above as the amount of tax. It is on this basis that the penal provision of clause (h) of section 63(1) has been enacted. In the Sales Tax Act, 1959, as in force in the State of Gujarat, sub-section (3A) of section 36 makes provisions similar to the explanation with which we are concerned. Though the language is different, the substance is the same, and under the said sub-section (3A), inter alia, where in the case of a dealer the amount of tax assessed for any period u/s 33 exceeds the sum already paid by him in respect of such period prior to such assessment by more than twenty per cent of the sum so paid, the dealer is deemed to have failed to pay tax to the extent of such difference. In considering the said sub-section (3A) a Division Bench of the Gujarat High Court in *State of Gujarat v. D. K. Patel & Co.* [1975] 35 S.T.C. 63 held that the expression "sum already paid" in section 36(3A) meant "sum already paid in any manner whatever" and not the sum paid into the Government treasury only. It further held that a set-off under rule 41 partially or totally extinguishes the tax liability of an assessee and such a set-off can legitimately be considered as "the sum paid". On the same reasoning, the amount paid by way of tax by a dealer to a registered dealer goes to extinguish his total or partial tax liability, and such a set-off can legitimately be considered as tax paid by a dealer.

10. Assuming that the language of the explanation is ambiguous or capable of more than one meaning, it is a well-settled principle of interpretation that in such a case the interpretation which favours the assessee should be adopted by the

court, more particularly where the provision relates to the imposition of penalty : see *The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd.*, . We may, however, add that we do not find the language of the explanation either ambiguous or capable of any interpretation other than the one which we have put in the context of the relevant sections of the Act and the Rules made under the Act and the scheme of the Act and the Rules.

11. In the result, we answer the question submitted to us in the affirmative, that is to say, in favour of the assesseees and against the department. The applicant will pay to the respondents the costs of this reference fixed at Rs. 300.

12. Reference answered in the affirmative.