
(2015) 02 BOM CK 0186

In the Bombay High Court

Case No : Sales Tax Reference No. 17 of 2003

Commissioner of Sales Tax

APPELLANT

Vs

New Standard Engineering Co. Ltd.

RESPONDENT

Date of Decision : 26-02-2015

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 14, 22, 33, 33(3), 35
Central Sales Tax Act, 1956 — Section 9(2), 9(2A)

Citation : (2015) 82 VST 446

Hon'ble Judges : S.P. Deshmukh, J.; S.C. Dharmadhikari, J.

Bench : Division Bench

Advocate : V.A. Sonpal, Special Counsel, for the Appellant; Nikita Badheka, Advocates for the Respondent

Judgement

S.P. Deshmukh, J.—The two questions which have been referred pursuant to the provisions of Section 61 of the Bombay Sales Tax Act, 1959 are as under :

1. Whether, on the facts and circumstances of the case, and in the true and correct interpretation of Explanation-I to sub-section (2) of Section 36 of the Bombay Sales Tax Act, 1959, the Tribunal was justified in holding that the onus lies on the revenue to establish, for invoking the said Explanation-I, that there was gross or willful neglect on the part of the assessee ?

2. Whether on the facts and in the circumstances of the case, and on the true and correct interpretation of clause (c) of sub-section (2) of Section 36 of the Bombay Sales Tax Act, 1959, read with Explanation-I thereunder, the Tribunal was correct in deleting the penalty levied under the said clause read with the said Explanation-I in view of the Bombay High Court decision in the case of Indoswe Engineers (P.) Ltd. Vs. State of Maharashtra, ?

2. Undisputed factual position in the present appeal appears to be as under :

The respondent is a dealer under the Bombay Sales Tax Act, 1959 as well as the Central Sales Tax Act, 1956 (hereinafter respectively referred to as "the Bombay

Act" and "the Central Act"). The respondent was a manufacturer of textile machinery and its spare parts, iron and steel hammers, M.S.Flats etc.. The respondent -Company had been referred to Board for Industrial and Financial Reconstruction (BIFR, for short) and came to be declared sick w.e.f. 28.6.1991 and various financial concessions were given to the respondent by the Board. It also appears that the Company had been granted installments.

3. The assessee filed returns for financial years 1982-83 and 1989-90 under Bombay Act as well as Central Act. The Assessing Authority has assessed the respondent Company, the assessee, for tax under Section 33(3) of the Bombay Act as well as under Section 9(2) of the Central Act read with Section 33(3) of the Bombay Act for both the financial years. For the year 1982-83 the assessing authority levied penalty under section 36(3) of the Bombay Act at Rs. 1,16,715/- and penalty under section 36(2)(c) Explanation-I of the Bombay Act at Rs. 5,00,000/-under the Bombay Act. Under the Central Act by a separate order passed under section 9(2) of the Central Act read with section 36(2)(c) Explanation I of the Bombay Act, the penalty was levied at Rs. 4,00,000/-and penalty under Section 36(3) of the Bombay Act was levied at Rs. 1,61,162/-. For 1989-90 the Assessing Officer levied a penalty under Section 36(3)(a) of the Bombay Act at Rs. 5,92,000/-and under Section 36(3)(b) of the Bombay Act at Rs. 5,15,000/-. Pursuant to Section 36(2)(c) Explanation-I of the Bombay Act, a penalty of Rs. 1,20,000/- was also levied under a separate order. Under the Central Act interest under Section 36(3)(a) of the Bombay Act read with Section 9(2A) of Central Act was levied at Rs. 14,80,000/-as also under Section 36(3)(b) of Bombay Act Rs. 3,96,115/-. By a separate order penalty under section 36(2) (c) Explanation-I of Bombay Act read with Section 9(2A) of Central Act was levied at Rs. 2,00,000/-.

4. The appellant being aggrieved by aforesaid orders had been before the first appellate Authority. The Appellate Authority granted some relief in penalty and interest for 1982-83, however, did not grant relief in penalty and interest for the period 1989-90 as the appellant had failed to attend, and upheld the orders passed by the Assessing Officer. Second Appeals bearing Nos.977/1992, 978/1992, 32/1995 and 33/1995 were preferred before the Tribunal, requesting the Tribunal to delete the penalty under Section 36(2)(c) Explanation-I and interest under Section 36(3)(a) and 36(3)(b) of the Bombay Act and the Central Act. The Tribunal had granted some remission in the interest. As far as penalty is concerned, the Tribunal held that the appellant had filed the returns late but as the appellant having complied with production of books of accounts and no discrepancy has been found and book results have been accepted, the penalty under Section 36(2)(c) read with Explanation-I of the Bombay Act was deleted referring to the decision of the High Court in the case of M/s. Indoswe Engineers Pvt. Ltd..

5. In the present Reference, we would be required to look into relevant provisions as have been prevailing then particularly Section 36 of the Bombay

Act. Section 36 reads thus:

36. Imposition of penalty in certain cases and bar to prosecution.-- (1) Where any person, dealer or Commission agent purchases any taxable goods under declaration given by him under section 8A, 11, 12 or under any notification issued under section 41, and fails to comply with the conditions, recitals or undertakings of such declaration, then the Commissioner may, after giving such person, dealer or commission agent a reasonable opportunity of being heard by order in writing, impose on him, in addition to any tax payable a sum by way of penalty not exceeding twice the amount of tax :

Provided that, no penalty under this sub-section shall be levied, if the person, dealer or the Commission agent has included the purchase price of such goods in the turnover of purchases as required by sub-section (1) or (2) of section 14 or by sub-section (2) of section 41 and has paid the tax thereon.

(2) If while assessing or re-assessing the amount of tax due from a dealer under any provisions of this Act or while passing any order in any appeal, revision or rectification proceedings it appears to the Commissioner or the Tribunal that such dealer has, -

(a) failed to apply for registration as required by section 22 or has carried on business as a dealer without being registered in contravention of section 22; or

(b) failed without reasonable cause to comply with any notice in respect of the proceedings under section 33, 35, 49 or 57; or

(c) concealed the particulars of any transactions or knowingly furnished, inaccurate particulars of any transactions liable to tax,

then, the Commissioner or, as the case may be, the Tribunal, may, after giving the dealer an opportunity of being heard, by order in writing, impose upon the dealer by way of penalty, in addition to any tax assessed or re-assessed or found due in the appeal or revision or rectification proceedings, as the case may be, -

(i) in the case covered by clause (a), a sum not exceeding the amount of the tax payable by the tax dealer for the period during which he carried on business as a dealer without being registered in contravention of section 22;

(ii) in the case covered by clause (b), a sum not exceeding rupees ten thousand; and

(iii) in the case covered by the clause (a), a sum not exceeding the amount of the tax found payable under the said clause.

Explanation I.-- Where a dealer has been assessed under section 33 or under section 41, or reassessed under section 35, or in whose case an order has been passed under section 55, 57 or 62, and the total amount of tax paid by the dealer with returns for any period is found to be less than eighty per cent of the amount of tax so assessed or reassessed or found due in appeal or revision or

rectification, then, for the purpose of clause (c) he shall be deemed to have failed to disclose such transaction of sale or purchase unless he proves to the satisfaction of the Commissioner or, as the case may be, the Tribunal, that the payment of a lesser amount of tax was not due to neglect on his part;

Explanation II.--Where the dealer fails of furnish returns in respect of any period by the prescribed date, then for the purpose of clause (c), he shall be presumed (until the contrary is proved) to have failed to disclose the whole turnover of sales or purchases as assessed or reassessed or determined in an order passed under section 55, 57 or 62.

(2A)

(2B)

(3)(a) If a dealer or a person does not pay the tax within the time he is required by or under the provisions of this Act to pay it, then he shall be liable to pay by way of simple interest, in addition to the amount of such tax, a sum equal to two per cent, of the amount of such tax, for each month or for part thereof after the last date by which he should have paid such tax :

Provided that, in the case of tax referred to in sub-clauses (ii) and (iii) of clause (a) of sub-section (4) of section 38 no interest shall be payable under this clause for a period commencing on the date immediately following the date of order of assessment or, as the case may be, re-assessment and ending on the date specified in the notice served under the said sub-section (4).

Explanation

(b)"

6. Looking at the circumstances, while taking the decision in the matter the Tribunal appears to have relied on the judgment rendered in Indoswe Engineers (P.) Ltd. Vs. State of Maharastra, . The Tribunal appears to have considered that presumptions as occurring under the explanation I are rebuttable ones and further that onus of rebuttal appears to have been discharged by the record. The Tribunal has also taken stock of the amendment to Section 36(2)(c) and explanations under it.

7. It would be appropriate to consider the case referred to by the Tribunal viz. Indoswe Engineers (P.) Ltd. Vs. State of Maharastra, . The questions that had fallen for consideration in the case of Indoswe (supra) were as under :

"(i) Whether, on the facts and under the circumstances of the case and upon true and correct interpretation of section 55(6)(b) and section 36(2)(c) of the Bombay Sales Tax Act, 1959, the Tribunal was justified in holding that the first appellate authority can invoke rule of evidence contained in Explanation (II) to section 36(2)(c) and confirm the penalty levied by the Sales Tax Officer under section 36(2)(c) of the Act ?

(ii) Whether, on the facts and circumstances of the case, the Tribunal erred in holding that the presumption of deemed concealment was not rebutted even after acceptance of the closed and adjusted books of accounts by the Sales Tax Officer ?

(iii) Whether, on the facts and circumstances of the case, the Tribunal was justified in holding that even when the assessment of the applicant was made on the basis of returns, which were filed late, still Explanation (II) to section 36(2)(c) is attracted and the appellate authority could invoke that Explanation for confirming the penalty levied by the Sales Tax Officer under section 36(2)(c) of the Act ?"

8. In that case, in the course of assessment proceedings the Sales Tax Officer had found that the assessee had filed the returns late and taxes were paid late and the amount of tax paid along with returns was less than 80% of the amount of tax assessed and as such penalty proceedings pursuant to Section 36 ensued particularly with reference to section 36(3) and Section 36(2)(c) read with Explanation I of the Act. Notices were replied by the assessee. It was explained that the assessee could not pay the taxes within time due to financial difficulties caused by various reasons and further that tax under the Bombay Act was wrongly paid under the Central Act, the levy of tax on sale of assets was not free from doubt and levy of purchase tax under Section 14 was also not free from doubt. As such, the tax with respect to those was not paid. It was argued that if the payment by oversight under the Central Act would be taken into consideration along with the set-off allowed, then the difference between the tax assessed and the tax paid would be less than 20% and no penalty would be leviable under Section 36(2)(c).

The Sales Tax Officer accepted the reasons for dropping the proceedings for levy of penalty under Section 36(3), however, he considered the circumstances to be a default for imposing penalty under Section 36(2)(c) of the Bombay Act.

Aggrieved by the said order of the Sales Tax Officer levying penalty under Section 36(2)(c) of the Bombay Act, the assessee had been in appeal before the Assistant Commissioner. The Assistant Commissioner considered that if the amount of set off was considered as tax paid with the returns, the total payment made by the assessee would be more than 80% and with reference to the decision in the case of Commissioner of Sales Tax Vs. Empico Traders, wherein expression "tax paid" appearing under explanation I was held to be not restricted only to the amount of tax paid by the dealer but would also include set off of amount granted to the dealer. As such the Assistant Commissioner held that explanation I of Section 36(2)(c) is not attracted and penalty could not be levied with the aid of said explanation.

The Assistant Commissioner, however, considered that assessee having filed return beyond the prescribed date, the case would be governed by rule of evidence contained in explanation II and penalty can be imposed with reference

to the same. He accordingly issued a show cause notice to the assessee. The assessee explained that since tax paid by him is not less than 80% of the tax assessed no penalty is leviable under Section 36(2)(c) and explanation-II cannot be looked into for imposition of penalty and he had no jurisdiction for the same. It was further explained that the assessment was pursuant to Section 33(3) of the Bombay Act with reference to the returns filed by the assessee, those may have been late, however, explanation-II would not be attracted. The Assistant Commissioner did not accept the contentions and confirmed the penalty with reference to said explanation-II albeit reducing the quantum of the same.

In the appeal from aforesaid order of Assistant Commissioner, before the Tribunal, it was contended that the Assistant Commissioner had no power to resort to explanation-II to impose the penalty. The Commissioner had no jurisdiction to do so under Section 55(6)(b) of the Bombay Act.

The Tribunal did not find favour with the submissions advanced on behalf of the assessee and as such the questions referred hereinabove were being considered by the Division Bench of this Court under a reference from the decision of the Tribunal. The Division Bench has elaborately considered the matter on the facts and law.

According to the Division Bench there is no limitation on the powers of the High Court that the Reference should be limited to only those aspects which may be argued and considered where the questions involve more than one aspect, making reference to a Supreme Court judgment in the case of Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., ". In the judgment following extract of observations of the Supreme Court had been reproduced

"..... If such power is not conceded to the High Court, the result would be that the answer given by the High Court may equally be erroneous in law. Such a situation cannot certainly be countenanced. It would not be in the interest of law or justice."

The Division Bench has further quoted the following observations of the Supreme Court in the case of Hindustan Steel Ltd. Vs. State of Orissa, :

".....An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute....."

The Division Bench further quoted the observations of the Supreme Court in the case of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, ".....It appears to have been taken as settled by now in the sales tax law that an order imposing penalty is the result of quasi-criminal proceeding."

The Division Bench has observed at the end of the paragraph thus :

"It is also well-settled that provisions dealing with penalty should be construed strictly within the term and language of the particular statute and in case of doubt, in a manner favourable to the assessee. If the court finds that the language of a taxing provision is ambiguous or capable of more meaning than one, then the court has to adopt the interpretation which favours the assessee, more particularly so where the provision relates to imposition of penalty. The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd., and C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, ."

The Division Bench further has considered that taking into account the provisions under Section 36(2)(c) of the Bombay Act it is clear that the onus is on the Revenue to prove that the assessee had concealed the particulars of any transaction and for that matter knowingly furnished inaccurate particulars of any transaction liable to tax. The exceptions to the same are given in two explanations. The Division Bench has discussed the circumstances and fields in which two explanations would be operational. The Division Bench further considered that the presumptions are rebuttable on producing cogent and relevant material. If the assessee discharges the burden on him under the explanation, the onus of proof would shift to Revenue to produce further evidence and material to prove the ingredients of Section 36(2)(c) and if the Revenue fails, the penalty under Section 36(2)(c) will fail. The Division Bench has discussed and dealt with quite at some length both the explanations (I) and (II). In the facts and circumstances of the case and with reference to law found that penalty levied by the Sales Tax Officer pursuant to section 36(2)(c) with reference to explanation-I, can be considered for imposition by resort to and with the aid of explanation-II. The Division Bench has elaborately discussed said aspect in para-23 of the said judgment.

However, Division Bench has considered, though no fault can be found with resort to explanation II of Section 36(2)(c), in the facts and circumstances of the case the imposition of penalty could not be sustained. It was observed that the explanations to section 36(2)(c) are mutually exclusive. The Division Bench has further observed thus :

"..... It is well-settled that the onus of proof placed on the assessee under the Explanations is not of the nature of onus on the prosecution in a criminal trial. It can be discharged by giving plausible explanation. It is a burden more akin to that in a civil case where the determination is made on a preponderance of probabilities. Judging from the above standards, it is difficult to say that the

assessee failed to discharge the onus cast on him and rebut the presumption against him."

9. Taking into account aforesaid background, the observations as were occurring in the judgment of the Tribunal in second appeal appearing in para-9 which presumably give rise to question No. 1 as has been posed will have to be looked into. As has been considered by the Division Bench while deciding the Indoswe case (supra) the basic burden about concealment of the transactions or inaccurate furnishing of particulars of the transaction is on the Revenue and in case in the assessment it is found that the tax paid by the assessee is less than 80% of the tax assessed, the presumption with regard to failure to disclose such transaction of sale or purchase would arise. In the present case indisputably the books of accounts had been submitted have been accepted and not objected to at all. There is no evidence on record to show that the assessee in fact had failed to disclose any transaction of sale and purchase neither it was pointed out before the first Appellate Authority or for that matter before the second Appellate Authority.

10. The questions have to be answered taking into account effect of the provision on the facts of the matter. The Tribunal has assessed the situation on the basis of record and evidence as had been placed before it and while the Tribunal dismissed the matter, it did not purport to shift the burden on the revenue to establish aforesaid.

11. What emerges is that the books of accounts had been submitted had not been objected to and were accepted. It further comes on record that there was debit balance in the Companies account as on 31.12.1990 to the tune of Rs. 427.22 Lakhs showing that the company had been not faring well financially and had been incurring heavy losses resulting in erosion of capital. Thus it appears that the lesser payment of taxes is not attributable to a neglect by the company or for that matter a willful one at that.

12. Thus, the observations appearing in the judgment of the Tribunal can hardly be said to hold that the onus lies on the Revenue to establish in the facts and circumstances of the present case wherein the books of accounts which have been submitted have been accepted and not objected to and further that the assessee had been facing the financial difficulties and was considered to be a sick industry. In such an indisputable position the question No. 1 as has been framed as a matter of fact appears to have been erroneously framed as it does not appear to be the purport of the Tribunal's judgment to hold that the onus in the circumstances of the case lies on revenue and the narration was with respect to the circumstances. The second question has to be answered in the affirmative for it emerges that the Indoswe (Supra) judgment by the Division Bench of this Court gives an exposition on the scheme with regard to imposition of penalty under Section 36(2)(c) with reference to the explanations (I) and (II). On perusal of judgment and the facts and circumstances of the case involved in Indoswe case (supra) it cannot be said that it dealt with only explanation II as

has been sought to be urged on behalf of the Revenue. In the circumstances, the reference stands answered accordingly.

13. We consider, having regard to the aforesaid discussion and for the reasons as are given hereinabove, Tribunal is justified in deleting the penalty imposed on assessee under Section 36(2)(c) read with explanation-I of the Bombay Sales Tax Act, 1959.

14. In the facts and circumstances we direct the parties to bear their own costs.