

(2003) 08 BOM CK 0102
In the Bombay High Court
Case No : Sales Tax Application No. 4 of 2002

Controller of Stores

APPELLANT

Vs

Commissioner of Sales Tax

RESPONDENT

Date of Decision : 14-08-2003

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 2(11), 36, 61(2)

Citation : (2004) 1 BomCR 703

Hon'ble Judges : V.C. Daga, J; J.P. Devadhar, J

Bench : Division Bench

Advocate : P.V. Surte, for the Appellant; M. Kajle, for the Respondent

Final Decision : Dismissed

Judgement

V.C. Daga, J.—This application u/s 61(2) of the Bombay Sales Tax Act, 1959 ("BST Act" for short) is at the instance of the applicant, Central Railway who is one of the departments of the Government of India engaged in the transportation of goods and passenger traffic. The catering department of the Railway serves food and non-alcoholic drinks to the travelling passengers.

2. The Catering Department was holding Sales Tax RC No. NIA 10101 up to 28th November, 1962. Tax was being paid regularly till then. The Deputy Commissioner of Sales Tax by his order passed u/s 52 bearing No. 1068/76/B.5932 dated 24th October, 1968 held that the Railway Catering Department is not liable to pay sales tax. On this basis R.C. registered certified stood cancelled and, accordingly, Catering Department of the Railway stopped collecting and depositing sales tax.

3. One of the officers of the Central Railway by designation the controller of stores was entrusted with the work of disposing of old, obsolete and scrap materials of the Railway. Till 14th January, 1975, the Railway was not registered as "Dealer" u/s 2(11) of the B.S.T. Act.

4. On 15th January, 1975, definition of "business" was introduced in section 2(5-

A) and the Controller of Stores filed an application dated 6th September, 1975 requesting the Commissioner to determine as to whether scrap sold by the Controller of Stores would attract tax. The Deputy Commissioner by his order dated 31st January, 1979 held that the Controller is liable to pay tax on sale of scrap material. Therefore, the Controller obtained registration certificate and started collecting and depositing tax on sale of scrap material.

5. By Maharashtra Act No. IX of 1985 an explanation is added to the definition of "dealer" (section 2(11)) from 16th August, 1985; wherein it was explained reading as under:

Explanation.---For the purposes of this clause.---

(i) each of the following persons and bodies who dispose of any goods including goods as unclaimed or confiscated or as unserviceable or as scrap, surplus, old, obsolete or discarded material or waste products whether by auction or otherwise, directly or through an agent for cash, or for deferred payment, or for any other valuable consideration, shall, notwithstanding anything contained in Clause (5-A) or any other provision of this Act, be deemed to be a dealer, to the extent of such disposals, namely:-

(a)

(b)

(c) Railway administration as defined under the Indian Railway Act, 1890;

(d) to (k)

(ii)

(iii)

On the basis of the aforesaid explanation, the Central Railway disputed its liability for the period from 15th January, 1975 to 15th August, 1985. This Court in the case of Controller of Stores, Central Railway v. Commissioner of Sales Tax 1995(99) S.T.C. 222, ruled that the Indian Railways, represented by the Controller of Stores, is a dealer within the meaning of section 2(11) read with section 2(5-A) of the BST Act liable to pay sales tax on the sales of unserviceable materials, scrap-iron etc. effected by it by public auction. The Railway accepted this decision and continued to deposit tax on sale of scrap material. It appears that for the period from 1st April, 1989 to 31st March, 1990 of the Assistant Commissioner of Sales Tax (Assessment) 38. "A" ward, Unit VIII, Mumbai by order dated 18th March, 1993 made assessment under the BST Act and raised the demand of around Rs. 1.25 crore rejecting the contention of the applicant that the catering unit of the railways is not liable to pay sales tax so far as their catering activities are concerned. The applicant, catering unit of the Central Railways relying on the explanation to section 2(11) was contending that the liability of Railways was restricted to extent of sale of scrap material and catering was immune from tax liability. The said submission did not find favour of the

Assessing Officer as stated hereinabove.

6. Being aggrieved by the aforesaid assessment order, the applicant preferred first appeal before the Deputy Commissioner of Sales Tax (Appeals), Mumbai contending therein that levy of sales tax on sales of foods etc. effected by the applicant's catering unit as also the levy of purchase tax u/s 13 on the purchases effected from unregistered dealer may be deleted and the assessment order to that extent be quashed and set aside. Prayer was also made for remission in the interest levied u/s 36(3)(a) and 36(3)(b) of the BST Act. However, contention of the applicant did not find favour with the Deputy Commissioner of Sales Tax (Appeals) and the appeal came to be dismissed by order dated 9th February, 1994.

7. Aggrieved by the aforesaid order in appeal, the present applicant filed second appeal being Second Appeal No. 632 of 1994 before the Tribunal. It was argued before the Tribunal that in view of explanation to the term "dealer" u/s 2(11) of the BST Act the liability of the applicant is restricted only to the sales of scrap of discarded materials and that it is not legally liable to pay tax on any other transactions. It was also contended that the applicant is doing public utility service and since it has not collected any tax, remission in interest may be granted. The Tribunal decided the second appeal vide its judgment dated 15th January, 2000. The contention canvassed by the applicant did not find favour of the Tribunal. It was held by the Tribunal that applicant has been held to be a "dealer" by this Court in the case of Controller of Stores, Central Railway (supra), as such the contention sought to be canvassed on the basis of the explanation was held to be misplaced. The Tribunal, therefore, levied sales tax on sales of foods etc. and also levied purchase tax on the purchases effected from unregistered dealer. Tribunal also rejected prayer for remission in interest.

8. The applicant not being satisfied with the aforesaid judgment of the Tribunal chose to prefer reference application raising three questions for being referred to this Court for decision u/s 61(1) of the BST Act. Those questions are reproduced hereinbelow for immediate reference:

(a) Whether on the facts and in the circumstances of case and on true and correct interpretation of section 2(11), the Tribunal is justified in law in holding that the applicant is a dealer within the meaning of section 2(11) of the Bombay Sales Tax Act, 1959 qua it's activities of catering service, provided to the travelling passengers?

(b) Whether on facts and circumstances of the case the Tribunal is justified in not granting any remission in interest levied u/s 36(3)(a) and 36(3)(b) of the BST Act, 1959?

(c) Whether on the facts & circumstances of the case Tribunal is justified in upholding levy of purchase Tax u/s 13 of the BST Act, 1959?

9. The Tribunal for the reasons recorded in the judgment refused to make

reference except a question relating to levy of purchase tax on the purchases made by the applicant. The applicant not being satisfied by the aforesaid order of the Tribunal dated 8th February, 2002 preferred the present application u/s 61(2) of the BST Act contending therein that on reading the explanation to section 2(11) it is clear that the liability of the railway is restricted to the extent of disposal of scrap materials only and the catering unit of the applicant is not covered by levy of tax. In the present application the applicant claims that there is a question of law and the learned Tribunal be directed to refer this question.

10. The another question which the Tribunal refused to refer was regarding grant of remission in interest levied u/s 36(3)(a) & 36(3)(b) of the BST Act, 1959. The applicant relying on the proviso to said section contends that in view of the Apex Court judgment in the case of *State of Punjab v. Union of India* 1990(79) S.T.C. 437, the Railway Departmental Catering is immune from sales tax in view of Article 285(1) of the Constitution of India. The applicant further contends that this controversy is finally settled by the judgment of the Apex Court in the case of *Collector of Customs v. State of West Bengal* 1999(113) S.T.C. 167; wherein it was held by the Apex Court that the benefit of Article 285(1) is not applicable to the transaction of sale of goods. Thus, according to the applicant, right from 27th April, 1970 to 30th July, 1998 i.e. till the decision of the Apex Court in the case of *Collector of Customs v. State of West Bengal*, (supra) liability to pay tax on catering was debateable, as such catering department has not collected any tax nor paid the same. The Catering Unit of the Central Railway carried a bona fide impression that such activities are not carried on commercial basis but a service to the travelling passengers. In this backdrop, the learned Counsel for the applicant contended that remission in interest though is a discretionary but the same has to be exercised judiciously with proper application of mind and proper judicious approach in a fair, just and reasonable manner. He contends that the Tribunal did not adopt this approach while refusing to grant remission in interest. He relied on the observations of the Apex Court in case of *Hindustan Steel Ltd. v. State of Orissa* 1970(25) S.T.C. 211 in, support of his contention. He thus contended that remission in interest is also a question of law and the learned Tribunal be directed to refer the same to this Court for being decided in accordance with law on its own merits.

11. Per contra, learned Counsel for the respondents tried to support the order of the Tribunal and contended that in view of the judgment of the Apex Court referred to hereinabove, the issue sought to be raised is no longer open for debate. She, therefore, submits that the order of the Tribunal refusing to make reference to this Court is perfectly legal and valid. The applicant has no case on merits and, therefore, the application deserves to be dismissed with costs.

12. Having heard the parties at length, if one turns to the subsequent amendment made with effect from 1st April, 1989 by Maharashtra Act No. 9 of 1989 to the impugned explanation to section 2(11) of the BST Act, it is true that when this explanation was introduced on 16th August, 1985, the liability in

respect of various organisations specified therein was debatable as to whether or not the sale of unclaimed or confiscated or unserviceable or scrap, surplus, old obsolete or discarded material or waste products was exigible to sales tax under the BST Act. However, subsequent to the aforesaid amendment of the Act, the words "including goods" were inserted after the words "any goods". The effect of this amendment is that the particular organisations specified in the explanation are deemed to be the dealers to the extent of sales of all the goods including the discarded or scrap materials. In view thereof, the applicant was held liable to pay tax on all its sales including the sales of foods effected by its catering unit. It is thus clear that looking to the findings recorded by the Tribunal in the aforesaid legal canvas, no legal question can be said to have arisen warranting reference to this Court.

13. So far as remission in interest u/s 36(3)(a) and (b) is concerned, the Tribunal was also right in finding that no substantial question of law arises from the order warranting reference to this Court. The power to grant remission in interest is a discretionary power and in a given case whether to grant remission or not is left to the discretion of the authority. So long as the discretion is exercised bona fide and the reasons recorded for not granting remission are not perverse, it cannot be said that refusal to grant remission raises a question of law. In the aforesaid backdrop, we concur with the view taken by the Tribunal while rejecting reference of these questions sought to be prayed for by the applicant.

In this view of the mater, the application is rejected with no order as to costs.