
(1992) 09 GUJ CK 0037
In the Gujarat High Court
Case No : Sales Tax Reference No. 10 of 1988

Elecon Engineering

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 16-09-1992

Acts Referred:

Gujarat Sales Tax Act, 1969 — Section 16(1), 32, 45(1), 45(6), 65

Citation : (1992) 09 GUJ CK 0037

Hon'ble Judges : M.B. Shah, J;B.S. Kapadia, J

Bench : Division Bench

Advocate : J.S. Joshi and S.L. Modi, for the Appellant; Kamal M. Mehta, AGP, for the Respondent

Judgement

B.S. Kapadia, J.—The Sales Tax Tribunal has referred the following two questions to this Court u/s 69(1) of the Gujarat Sales Tax Act, 1969 :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the ground of appeal in respect of the levy of purchase tax u/s 16(1) of the Gujarat Sales Tax Act, 1969, in respect of purchase of packing materials against certificates in form 19, was not entertainable ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the ground regarding they levy of penalty u/s 45(1) and 45(6) of the Gujarat Sales Tax Act, 1969, in respect of the purchase tax u/s 16(1) of the Act levied on the packing materials purchased against form 19, was not entertainable ?"

2. The facts leading to the aforesaid reference in brief can be stated as under :

3. The applicant is a limited company engaged in the business of manufacturing and selling conveyors and elevators and other machines in the township of Vallabh Vidyanager. The applicant-company also undertakes job-work and is a dealer registered under the Gujarat Sales Tax Act, 1969 (hereinafter referred to as "the Act"). In the year 1974 the applicant sold some of its manufactured

goods to the Gujarat Electricity Board free of tax against certificate in form C and to new industry against certificate in form "Z" without charging any tax on such sales. The applicant is a holder of recognition granted u/s 32 of the Act and as such it purchased certain goods free of tax on the strength of certificate in form 19 and used some of them in the manufacture of goods so sold by it to the Gujarat Electricity Board and new industry. In using the goods so purchased against certificates in form 19 in such a manner the applicant had committed breach of recitals of the said certificates in form 19 and therefore, it had exposed itself to the levy of purchase tax as provided in section 16(1) of the Act.

4. The Sales Tax Officer thereafter levied purchase tax amounting to Rs. 1,09,741 in so far as the breach related to relevant sales made to the Gujarat Electricity Board as also to new industry. On account of utilisation of the goods purchased against certificates in form 19 in job-work executed by the applicant, purchase tax levied in assessment u/s 16(1) of the Act amounted to Rs. 6,947. The last category of purchase tax in assessment related to purchase of wooden sizes made by the applicant against certificates in form 19 and used them as packing materials of the goods so manufactured and sold by it. This purchase tax amounted to Rs. 18,087. Aforesaid levies of purchase tax put together came to Rs. 1,34,775 and together with other levy made in assessment augmented the tax liability of the applicant so as to attract penalty u/s 45(6) of the Act. The Sales Tax Officer therefore imposed penalty on that count amounting to Rs. 40,898. The Sales Tax Officer also invoked section 45(1) of the Act and an additional penalty of Rs. 9,434.25 was imposed by him under that section while finalising the assessment order on October 23, 1978.

5. The applicant-assessee preferred an appeal before the learned Assistant Commissioner against the aforesaid order of assessment. In view of the ratio of the decision of this Court in the case of *Nowroji N. Vakil & Co. v. State of Gujarat* [1979] 43 STC 238, the learned Assistant Commissioner held that there being clear breach of recitals in using goods purchased on the tax-free basis in job-work, purchase tax of the second category was attracted positively u/s 16(1) of the Act. Similarly, the learned Assistant Commissioner did not accept the applicant's contention regarding the sales made to the Gujarat Electricity Board as also to new industry.

6. It appears that before the learned Assistant Commissioner in appeal the learned advocate appearing for the applicant-assessee gave in writing the following submission on August 13, 1979 :

"The question of going into the factual as well as legal aspects of the matter in so far as it related to the purchase tax of tax of this category, as well as a question of sitting on judgment in that respect did not therefore, arise before the learned Assistant Commissioner in appeal."

7. Therefore, the learned Assistant Commissioner considered that the applicant-assessee did not contest the point regarding purchase tax of the third category,

viz., one imposed on the purchase of wooden sizes (packing materials) and therefore, confirmed the order passed by the Sales Tax Officer on that point.

8. The applicant filed an appeal before the Tribunal raising two contentions. The first contention raised by the applicant was in respect of purchase tax u/s 16(1) of the Act on the purchase of variety of goods made by the applicant against certificates in form 19 without paying any tax thereon. However, Mr. S. L., Modi, learned advocate for the applicant-assessee, did not press the point regarding purchase tax amounting to Rs. 1,09,741 in respect of the goods manufactured therefrom by the applicant for the job-work and also those sold to the Gujarat Electricity Board free of tax against certificate in form "C" as well as goods supplied to new industry free of tax against certificate in form "Z" in view of the decision of the Supreme Court in the case of Hindustan Brown Boveri Ltd. v. State of Gujarat [1981] 47 STC 376 and he accepted the decision of the lower authority. However, so far as the levy of purchase tax on the purchase of wooden sizes made by the applicant on the strength of certificates in form 19 was concerned Mr. Modi attempted to challenge the same on the ground that wooden sizes particularly for packing materials, were consumable stores used in the manufacture of goods and for that purpose he placed reliance on the judgment of this Court in the case of Vasuki Carborundum Works v. State of Gujarat [1979] 43 STC 294.

9. The second contention raised by the applicant-assessee before the Tribunal was regarding levy of penalty u/s 45(1) and 45(6) of the Act in respect of purchase tax u/s 16(1) of the Act on the wooden sizes. However both questions were not entertained by the Tribunal in appeal.

10. So far as the levy of penalty u/s 45(1) of the Act in respect of purchase tax amounting to Rs. 1,09,741 was concerned, that was ordered be removed for the reasons mentioned for penalty u/s 45(6) of the Act. Except the removal of penalty u/s 45(1) of the Act which related to purchase tax amounting to Rs. 1,09,741 which worked out at Rs. 7,680 the rest of the order passed by the Assistant Commissioner was confirmed by the Tribunal.

11. Hence the applicant-assessee made an application u/s 69(1) of the Act for making a reference and accordingly, aforesaid questions have been referred to this Court by the Tribunal.

12. Mr. J. S. Joshi, learned advocate for the applicant-assessee, has submitted before us that both the questions are on the point of entertaining the applicant's contention regarding purchase tax u/s 16(1) of the Act in respect of purchase of packing materials and particularly, wooden sizes as also regarding penalty u/s 45(1) and 45(6) of the Act is the submission made in the alleged writing dated August 13, 1979 which has been quoted hereinbefore.

13. It is submitted by Mr. Joshi that said writing dated August 13, 1979 refers to purchase tax of this category. The question as to whether purchase tax on the packing materials like wooden sizes in the manufacture will be attracted or not,

would certainly be a question of law. He therefore, submits that if at all there is any erroneous concession on the point of law made by the advocate, the same would not be binding to the parties and the Tribunal would not be estopped from considering the question on merits. It is submitted by Mr. Joshi that so far as the point regarding penalty u/s 45(1) and section 45(6) of the Act relating to packing materials, namely wooden sizes is concerned, there was no such specific concession given on behalf of the applicant-assessee.

14. Mr. K. M. Mehta, learned AGP appearing for the opponent-State, has submitted before us that once when the concession is given before the Assistant Commissioner that point cannot be raised again before the Tribunal. It may be stated that similar argument was made before the Tribunal by the Government agent and the Tribunal found substantial weight in the said argument/submission inasmuch as the appellant (assessee) announced in specific terms that it had no objection to the levy of purchase tax on the aforesaid purchases made by it. It is also observed by the Tribunal that "evidently the tone and the contents of the said written submission indicate unequivocally that the appellant had abandoned the pursuit of its contention in this itself, if any, before the learned Assistant Commissioner in first appeal". Therefore, the reaction of the learned Tribunal was that it cannot be other than one of not entertaining the same.

15. The levy of penalty under sections 45(1) and 45(6) of the Act would depend upon the liability of the applicant-assessee to pay the purchase tax. When there is no such concession regarding penalty and when an erroneous concession regarding liability of purchase tax is given, the Tribunal has to decide the matter justly and properly as required u/s 65(6) of the Act. In absence of the decision of the Tribunal on the point of liability of the applicant-assessee to pay purchase tax, point regarding the applicant's liability to pay penalty arising from the purchase tax cannot be decided. The Tribunal is empowered to decide the appeal u/s 65 of the Act. The very section (section 65) confers powers on the Assistant Commissioner, the Commissioner and the Tribunal, for hearing the appeal. There are no restrictions on the Tribunal in hearing the appeals. The Tribunal has wide powers to decide the questions of facts as well as law while deciding the appeals filed before it. It is open to the appellant to prefer appeal either before the Commissioner or before the Tribunal against the order passed by the Assistant Commissioner. Once when the appeal is preferred before the Tribunal it is within its jurisdiction to decide the same as per the provisions of section 65(6) of the Act.

16. As stated above, it is the duty of the Tribunal to decide the matter in a just and proper manner. Appeal lies to the Tribunal against the order of the Assistant Commissioner. Therefore, what is to be seen is the subject-matter of the appeal before the Assistant Commissioner. It is not the case of the opponent that point regarding purchase tax and penalty thereon was not raised before the Assistant Commissioner in appeal. Once when the said point was raised before the Assistant Commissioner certainly the said point can be raised before the Tribunal.

17. On this point judgment of the Full Bench of this Court in the case of the Commissioner of Income Tax, Gujarat-I Vs. Cellulose Products of India Ltd., was cited before us. In the said case on page 512 the Full Bench has observed as under :

"We understand these decisions to lay down certain principles which appear to us to clear beyond doubt. When an assessee files an appeal against an assessment order, he may object to the amount of income assessed, he may object to the amount of tax determined, to the amounts of loss computed, to the status under which he is assessed or he may object to his liability to be assessed. The range of appeal extends to the entire range of questions that could be raised at the stage of assessment. The assessee may not be aggrieved with certain of the decisions taken by the ITO and, hence, naturally the appeal would not relate to those decisions. Though the entire range of assessment is open to challenge in the appeal and all the decisions taken by the ITO are liable to be challenged in the appeal, the assessee may confine his objection to the assessment to certain only of the decisions taken by the ITO, expressly or impliedly. The subject-matter of the appeal may be limited to some part of other of the assessment order to which the assessee really takes objection. Therefore, he would be seeking relief in regard to that matter in relation to which he has objection in the matter of assessment. The scope of relief sought by the assessee in appeal determines the subject-matter of the appeal. That may have to be inferred since the assessee may not indicate in specific terms what the scope of the relief that he seeks in the appeal is. This has quite often to be understood from the range of attack made on the assessment order as reflected in the grounds of appeal. The contours of the challenge, as so reflected, would determine the scope of the subject-matter of the appeal. In regard to such subject-matter, if he chooses to make a challenge on grounds other than those raised by him, it would be open to him to seek to urge such grounds. Indeed, it may be possible that he seeks and obtains relief sought by him in the appeal, by a different approach, an approach not reflected in his appeal memorandum. Whether he should be allowed to make that approach or not, is not a matter of jurisdiction. It is a matter of discretion which should be understood as distinct from the jurisdiction. It is open, in the exercise of discretion, to an appellate authority vested with powers of accepting or rejecting fresh ground to entertain a fresh ground or not. Of course, he has to act judicially, but this discretion is distinct from the jurisdiction with which alone we are concerned here. It might happen that before he came to the Tribunal, the assessee had not viewed the question urged by him for the purpose of seeking the relief in the appeal from the proper perspective, a perspective from which he could have successfully mounted an assault on the order of assessment. In all these situations, in an appeal before the Tribunal, he is free to make a fresh approach, present his case from a different perspective and raise new grounds in support of the relief sought by him. The fact that he has failed to make that approach before the first appellate authority should not stand in the way of his making the new approach. But all this must be related to the same subject-

matter as was in appeal before the first appellate authority. If the subject-matter remains the same, the new case presented by him to obtain relief sought in respect of such subject-matter should be permitted. If it is made in the first instance in the appeal memorandum before the Tribunal, there is no question of exercising discretion at that stage. When such a plea is not before the Appellate Tribunal, when the appeal is filed, but is raised later, the question whether it should be allowed or not is a matter of discretion as mentioned. The fact that the assessee had failed to make the approach which he makes before the Tribunal before the first appellate authority should not in any way preclude him from making that approach."

On the point of subject-matter the Full Bench has observed as under in the said judgment :

"Speaking of subject-matter, it may happen that substantially a claim is urged by an assessee assuming that he is entitled to that claim under a certain provision of law indicated by him. It may be that he is entitled to relief in respect of such claim or part of it not because of that provision, but of some other provision of law. For the mere reason that he does not refer to or advert to the provision appropriately applicable will be no reason to deny him the right to urge his case, since, in such a case also, the subject-matter will not change by reason of allowing the question to be raised."

Ultimately in the last paragraph of the said judgment the Full Bench has observed as under :

"..... The relief which the assessee may get in regard to the computation of capital, he may get to some extent even if a different approach is made to the computation of capital, viz., by permitting the plea that debts and liabilities ought not to be deducted. Therefore, the subject-matter would remain the same notwithstanding allowing such a ground to be raised. No doubt it is not easy always to delineate the contours of the subject-matter. Facts of each case will have to be taken into account for that purpose. In the case before us, we have to hold that the question referred to us has to be answered in the affirmative, that is, in favour of the assessee and against the Revenue. We do so."

18. Now reverting to the facts of the present case so far as the subject-matter of the appeal before the Assistant Commissioner is concerned, it was the entire assessment order passed by the Sales Tax Officer. The appeal was not pertaining to particular items only or challenging only particular part of the assessment order. However, during the course of hearing possibly on account of ignorance of the judgment in the case of Vasuki Carborundum Works [1979] 43 STC 294 the learned advocate who was appearing for the assessee erroneously gave the said concession on the point of purchase tax only. It is in fact not abandoning the entire claim on the point of penalty also. When penalty u/s 45(1) and 45(6) of the Act is to be determined it would be necessary to determine the question as to whether the applicant-assessee would be liable to pay purchase tax u/s 16(1)

of the Act. If the applicant-assessee has tried to canvass the said point before the Assistant Commissioner the assessee would be entitled to get the benefit of the judgment in the case of Vasuki Carborundum Works [1979] 43 STC 294 and the assessee would not be liable to pay purchase tax. Therefore, assessee would not be liable to pay penalty u/s 45(1) and 45(6) of the Act. Under the circumstances the said writing which was given by the advocate who was appearing for the assessee cannot be treated as abandonment of assessee's contention on the point of purchase tax as well as levy of penalty thereon. When the subject-matter of the appeal was the entire assessment order passed by the Sales Tax Officer, including the point regarding purchase tax and levy of penalty u/s 45(1) and 45(6) of the Act, not to permit the assessee to raise the said point before the learned Tribunal would be contrary to the aforesaid Full Bench judgment.

19. The Supreme Court has observed on the point of erroneous concession given by the advocate, in the case of Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius AIR 1954 SC 526, as follows :

"..... the concession made by the defendants" advocate requiring an ecclesiastical verdict as a condition precedent to voluntary separation also was obviously wrong and an erroneous concession of law made by the defendants" advocate could not be relied upon for saving the plaintiffs"

Even otherwise law on this point is well-settled that any concession on the point of law made by the advocate would not be binding. The aforesaid writing of the advocate is erroneous inasmuch as it was contrary to the judgment in the case of Vasuki Carborundum Works [1979] 43 STC 294.

20. It may be stated that judgment in the case of Vasuki Carborundum Works [1979] 43 STC 294 is of November 17, 1978 and the alleged concession was made by the advocate on August 13, 1979. It is rather interesting to note that the Assistant Commissioner who decided the appeal has relied on the judgment of this Court in the case of Nowroji N. Vakil & Co. v. State of Gujarat [1979] 43 STC 238 which was subsequently delivered, i.e., on November 27, 1979. Both the judgments, i.e., judgments in the cases of Vasuki Carborundum Works [1979] 43 STC 294 (Guj) and Nowroji N. Vakil & Co. [1979] 43 STC 238 (Guj) are reported in the same volume of Sales Tax Cases. However, no note of the judgment in the case of Vasuki Carborundum Works [1979] 43 STC 294 (Guj) was taken by the Assistant Commissioner while deciding the appeal.

21. As stated above when the questions referred to us were coming within the subject-matter of the appeal before the Assistant Commissioner, the Tribunal should have entertained those points and should not have held that they cannot be entertained in the appeal.

22. In view of this we are of the opinion that the view taken by the Tribunal on both the questions referred to us is not correct and our answers to those two questions are therefore, in the negative, i.e., in favour of the assessee and

against the Revenue. The reference is accordingly disposed of with no order as to costs. A copy of this judgment shall be sent under the seal of this Court and the signature of the Registrar to the Gujarat Sales Tax Tribunal, Ahmedabad.

23. Reference answered in the negative.