

(1981) 12 GUJ CK 0007
In the Gujarat High Court
Case No : Sales Tax Reference No. 13 of 1979

Hemchandbhai and Co.

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 08-12-1981

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 32(1), 36, 55, 74
Central Sales Tax Act, 1956 — Section 9(1), 9(2)

Citation : (1982) 50 STC 274

Hon'ble Judges : P.D. Desai, J;B.K. Mehta, J

Bench : Division Bench

Advocate : Harshad M. Thakore, for the Appellant; J.R. Nanavati, instructed by Bhaishanker Kanga and Girdharlal, for the Respondent

Judgement

Desai, J.—The assessee was a dealer registered under the Bombay Sales Tax Act, 1959 (hereinafter referred to as "the Bombay Act"), and the Central Sales Tax Act, 1956 (hereinafter referred to as "the Central Act"). It carried on the business of oil-seeds, jira, variali, etc., at Patan in Mehsana District. By an order made on 4th January, 1967, in exercise of the power conferred by section 32(1) of the Bombay Act read with rules 24 and 29 of the Bombay Sales Tax Rules, 1959 (hereinafter referred to as "the Bombay Rules"), the competent authority permitted the assessee to furnish, with effect from the date of the said order, returns in form 18 for the periods specified in column 1 of the schedule forming part of the order (in lieu of the quarterly returns) on or before the dates specified in column 2 of the said schedule on the condition that the assessee should pay the amounts specified in column 3 of the said schedule on or before the date specified in column 4 thereof. The said schedule, which has a bearing on the decision of this case, is reproduced hereunder :

SCHEDULE -----							
Period of return payment	Last date of towards	Amount to be paid returns	Last date for submission of tax	1	2	3	4

----- 1st April, to 30th November. (a) Rs. 451.00 or 31st August. Asho Vad Amas. the tax due according to the dealer's account from 1st April, to Asho Vad 30. (b) Tax due 30th November. according to the dealer's account for the period from 1st April, to Ashvin Vad 30, less the tax already paid under item (a). Kartak Sud 1 30th April. (c) Rs. 451.00 or 28th February or the tax due 29th to 31st March. according to the dealer's accounts for the period from Kartak Sud 1 to Posh Vad Amas. (d) Tax due according to the dealer's account for the period from Kartak Sud 1 to 31st March, less the tax already paid under item (c).

2. The Bombay Act was in force up to 5th May, 1970. On and with effect from 6th May, 1970, the Gujarat Sales Tax Act, 1969 (hereinafter referred to as "the Gujarat Act"), came into force. Section 88 of the Gujarat Act repealed the Bombay Act.

3. On 4th May, 1970, the State Government amended the Bombay Rules by inserting rule 23A in the said Rules in exercise of the powers conferred by section 74 of the Bombay Act. According to the department, the effect of the enactment of the said rule read with rule 22 of the Bombay Rules, so far as the assessee is concerned, was that for the the assessment period from April, 1970, to 5th May, 1970, it was required to furnish the return and to pay the tax due according to such return on or before 30th June, 1970. The Tribunal has stated in its order that the assessee was required to furnish such return on or before 6th June, 1970. However, at this stage, the department does not dispute that the return was required to be furnished not before 6th June, 1970, but before 30th June, 1970. The department's stand has been that the permission granted under the Bombay Act to the assessee on 4th January, 1967, requiring him to furnish the return for the period from 1st April, to Asho Vad Amas on or before 30th November, and to pay tax in the sum of Rs. 451 or the tax due according to the assessee's account from 1st April, to Asho Vad 30 on or before 31st August, stood superseded as aforesaid by the enactment of rule 23A read with rule 22 of the Bombay Rules.

4. Be it stated at this stage that it is not in dispute that the benefit of the permission granted on 4th January, 1967, under the Bombay Act enured in favour of the assessee even with regard to the furnishing of the return and the payment of tax under the Central Act. Similarly, according to the department, the legal consequences following upon the enactment of rule 23A were operative even as regards the furnishing of the return and the payment of tax under the Central Act. Therefore, the department's stand is that for the period from 1st April, 1970, to 5th May, 1970, the assessee was required to furnish the return and to pay the tax due according to such return under the Central Act on or before 30th June, 1970.

5. The assessee failed to furnish the return and pay the tax under the Central Act for the period 1st April, 1970, to 5th May, 1970, on or before 30th June, 1970.

The return for the said period was furnished and the tax due according to such return was paid on 5th December, 1970. Thereupon, proceedings for imposition of penalty u/s 9(1) of the Central Act read with section 36(3) of the Bombay Act were initiated against the assessee by the Sales Tax Officer. In the course of penalty proceedings, the case of the assessee, inter alia, was that it was under a bona fide impression that the permission granted on 4th January, 1967, under the Bombay Act was still operative because it was not informed about the enactment of rule 23A and its consequences by the service of a notice. The Sales Tax Officer rejected the contentions advanced on behalf of the assessee, including the one mentioned above, and he imposed upon the assessee a penalty in the sum of Rs. 2,695.26. The assessee preferred an appeal before the Assistant Commissioner of Sales Tax. The appeal was dismissed. The assessee carried the matter in second appeal before the Gujarat Sales Tax Tribunal (hereinafter referred to as "the Tribunal"). The Tribunal found that having regard to the enactment of rule 23A, which superseded the permission granted on 4th January, 1967, under the Bombay Act, the return for the period 1st April, 1970, to 5th May, 1970, was required to be furnished and the tax due according to such return was required to be paid on or before 6th June, 1970 (sic 30th June, 1970), and the tax having not been paid within the said time-limit, the assessee was liable to be visited with penalty u/s 9(1) and (2) of the Central Act read with section 36(3) of the Bombay Act. The Tribunal rejected the contention of the assessee that on the facts and in the circumstance of the case, it was required to be inferred that the failure to pay tax within the time aforesaid was not without "reasonable cause" and that, therefore, the penalty provisions were not attracted. However, the Tribunal held that since the assessee had not paid "the aforesaid amount of tax within time upon its bona fide though wrong belief of the existence of the continued validity of its above permission or on account of its bona fide misunderstanding of the provisions of rule 23A of the Bombay Rules, the assessee was entitled to the benefit of "reasonable cause" in so far as the reduction of penalty is concerned". Accordingly, the Tribunal reduced the penalty from Rs. 2,695.26 to Rs. 1,890.

6. The assessee, feeling aggrieved by the decision of the Tribunal, required it to state a case in respect of the following two question to this Court and the request was granted by the Tribunal :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the permission granted to the applicant by the sales tax authorities to file six monthly returns instead of quarterly returns u/s 32(1) of the Bombay Sales Tax Act, 1959, read with rule 22 of the Bombay Sales Tax Rules, 1959, no longer remained valid or operative after the enforcement of rule 23A of the Bombay Sales Tax Rules, 1959, and that, therefore, the applicant was required to file the relevant return and to pay tax payable thereon latest by 6th June, 1970 ?

(2) Whether, on the facts and in the circumstances of this case, the Tribunal was

right in law in retaining the penalty of Rs. 1,890 as imposed u/s 36(3) of the Bombay Sales Tax Act, 1959, read with section 9(2) of the Central Sales Tax Act, 1956 ?"

7. In view of the mistake in mentioning the date 6th June, 1970, instead of 30th June, 1970, in the course of the order of the Tribunal, the first question referred for our opinion is reframed as under with the consent of the parties :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the permission granted to the applicant by the sales tax authorities to file six monthly returns instead of quarterly returns u/s 32(1) of the Bombay Sales Tax Act, 1959, read with rule 22 of the Bombay Sales Tax Rules, 1959, no longer remained valid or operative after the enforcement of rule 23A of the Bombay Sales Tax Rules, 1959, and that, therefore, the applicant was required to file the relevant return and to pay tax payable thereon latest by 30th June, 1970 ?"

8. In the present case, on the view which we are inclined to take on the second question, it is not necessary for us to answer the first question. We shall proceed to deal with the second question on the assumption that the permission granted to the assessee under the Bombay Act on 4th January, 1967, no longer remained valid or operative after the enactment of rule 23A and that the assessee was required to furnish the return and pay the tax due under the Central Act in respect of the period from 1st April, 1970, to 5th May, 1970, on or before 30th June, 1970.

9. For the purpose of levy of penalty for non-payment of tax under the Central Act within the specified time, the provisions of section 36 of the Bombay Act will require to be considered. The material provision is sub-section (3) of section 36 which, at the relevant time, read as under :

"If a dealer does not, without reasonable cause, pay tax within the time he is required by or under the provisions of this Act to pay it, he shall, subject to the provisions of sub-section (5) of section 55 pay by way of penalty, in addition to the amount of tax, a sum equal to -

(a) one per cent of the amount of tax per month for the first three months, after the last date by which he should have paid that tax, and

(b) one and one-half per cent of the amount of tax per month thereafter, during the time he continues to make default in the payment of tax :

Provided that, the Commissioner may, subject to such conditions as may be prescribed, and an appellate authority in an appeal u/s 55 may, remit the whole or any part of the penalty payable in respect of any period."

10. The position of law in regard to the penalty proceedings is no longer in doubt. In Hindustan Steel Ltd. Vs. State of Orissa, it was held that an order imposing penalty for failure to carry out a statutory obligation is the result of a

quasi-criminal proceeding, and that penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or is guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. The liability to pay penalty does not arise merely upon proof of default. 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.

11. A Full Bench of this Court in Addl. Commissioner of Income Tax, Gujarat Vs. I.M. Patel and Co., had an occasion to consider the question of imposition of penalty u/s 271(1)(a) of the Income Tax Act, 1961, which authorises the levy of penalty if the Income Tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under the Act, is satisfied that "any person has without reasonable cause failed to furnish the return of total income which he was required to furnish". It was there held that failure "without reasonable cause" to furnish the return is an ingredient of the offence u/s 271(1)(a) and that penalty is attracted thereunder when the assessee has either acted deliberately in defiance of law or is guilty of conduct contumacious or dishonest, or acted in conscious disregard of his obligation. The legal burden is on the department to establish by leading some evidence that prima facie the assessee has, without reasonable cause, failed to furnish the return within the time specified in section 271(1)(a) read with the other relevant sections referred to in that section. Once this initial burden, which may be slight, has been discharged by the department, it is for the assessee to show, as in a civil case, on balance of probabilities, that he had reasonable cause for failing to file the return within the time specified. Mere falsity of the explanation furnished by the assessee cannot help the department in establishing its case against the assessee at the time of imposition of penalty. The principles laid down in the Full Bench decision in the context of section 271(1)(a) of the Income Tax Act will apply with full force to the penalty proceedings u/s 36(3) of the Bombay Act because the material words, namely, "without reasonable cause" find place in both the statutory enactments and the nature of proceedings is the same or similar.

12. Against the legal background set out above, the question which arises for consideration is whether, on the facts and in the circumstances of the case, the assessee was liable to be visited with the penalty imposed upon it.

13. Now, we must, at the outset, observe that the Tribunal has failed to decide the question under consideration by taking into account all the relevant factors and by applying the correct legal tests. The Tribunal ought to have appreciated that the liability to pay penalty does not arise merely upon the proof of default in

payment of tax within the prescribed time-limit and that penalty will not ordinarily be imposed unless the assessee was shown to have acted deliberately in defiance of law or was found to be guilty of conduct contumacious or dishonest or was proved to have acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Besides, the Tribunal was specifically called upon to consider the question whether penalty was leviable at all in the instant case because it could not be said that the assessee had without reasonable cause failed to pay the tax within the prescribed time. While considering the question, the Tribunal was required to bear in mind that failure without reasonable cause to pay the tax is an ingredient of the penalty provisions and that the legal burden was on the department to establish, by leading some evidence, that prima facie that assessee had without reasonable cause failed to furnish the return within the time limited by law. It is only when this initial burden, howsoever slight, was discharged by the department that the assessee could have been called upon to show that he had reasonable cause in not paying the tax within the time specified and the explanation offered by the assessee in that behalf was required to be tested on probabilities as in a civil case. We find that the Tribunal has nowhere applied its mind to these relevant factors and that it appears to have treated the very factum of default in payment of tax within the time limited as itself sufficient to attract penalty. Indeed, while considering the assessee's submission that it was prevented by "reasonable cause" within the meaning of sub-section (3) of section 36 of the Bombay Act in not filing the return and in not paying the tax payable in accordance with the return within the prescribed time because of its erroneous belief that the permission granted under the Bombay Act to file two periodical returns for the accounting period in question and to pay tax in accordance with the conditions imposed in the permission still continued to operate, the observations which the Tribunal made clearly disclose that it was not at all conscious of the approach which it was required to adopt in a quasi-criminal proceeding such as the one with which it was concerned. The Tribunal, in this connection, observed as follows :

"There is no dispute between the parties that the appellant was required to pay an amount of Rs. 35,937 as tax in respect of the above period and that the same was payable latest by 6th June, 1970, under the aforesaid rule 23A, but, instead, the appellant had paid that amount of tax on 6th December, 1970, which would mean a delay of about six months. Therefore, I do not accept the appellant's contention that I should remove the entire penalty on the ground of "reasonable cause"."

14. It would thus appear that the decision of the Tribunal on the question under consideration is vitiated on account of non-application of mind to the most relevant aspects.

15. The matter, however, does not rest merely at that. In the immediately succeeding paragraph the Tribunal proceeded to make the following further

observations :

"I am, however, inclined to accept the appellant's alternative prayer to reduce the amount of penalty on the ground that the appellant had not paid the aforesaid amount of tax within the time upon its bona fide though wrong belief of the existence of continued validity of its above permission or on account of its bona fide misunderstanding of the provisions of rule 23A of the Bombay Rules, so as to give the appellant the benefit of "reasonable cause" so far as the reduction of penalty is concerned."

16. It is difficult, if not impossible, to reconcile the above finding with the finding recorded by the Tribunal in the immediately preceding paragraph which has been extracted above. If the Tribunal reached the conclusion that the penalty was required to be reduced because the tax was not paid within time on account of the "bona fide though wrong belief" of the assessee as regards the continued validity of the permission granted under the Bombay Act or on account of the assessee's bona fide misunderstanding of the provisions of rule 23A, it is difficult to see how it could still have reached the conclusion that the penalty was leviable at all. If the assessee succeeded in establishing reasonable cause for the purpose of reduction of the penalty on the above ground, it is difficult to appreciate how the same ground would not have its play in determining the liability in respect of penalty, for the penalty is leviable only if the default in payment of tax is without reasonable cause. Sauce for the goose is sauce for the grander. The same set of circumstances, since they are held proved, must inevitably lead to the conclusion that the liability for penalty was not attracted at all, for the assessee entertained the erroneous but bona fide belief that the permission granted under the Bombay Act still remained operative, and that therefore, it was not liable to submit the return for the period from 1st April, 1970, to Asho Vad Amas 2026 before 30th November, 1970, and to pay the first instalment of tax on or before 31st August, 1970.

17. The overall impression left on our mind by the decision of the Tribunal, therefore, is that though it has failed to apply the correct test and has failed to take into consideration all the relevant aspects, it has ultimately reached the conclusion which operates in favour of the assessee and takes him out of the net of the penalty provision itself. Be it noted in this connection that the finding of the Tribunal on which the reduction of penalty is based is not challenged by the department by seeking a question. The finding has become final and conclusive. On that finding, it is clear that the Tribunal was satisfied that the tax was not paid by the assessee within the time limited on account of its bona fide though wrong belief as regards the continued validity of the permission or on account of its bona fide misunderstanding of the provisions of rule 23A. May be, as earlier pointed out, the said finding was recorded while considering the question of partial remittance of penalty. However, it is not possible to confine the finding merely to the aspect of remission of penalty. It is equally applicable, logically and legally, on the aspect whether the penalty is imposable for the Tribunal to have

reached the conclusion that on the facts and in the circumstances of the case, the penalty in the sum fixed by it was leviable on the assessee.

18. In view of the foregoing discussion, we answer the questions referred to us as follows :

Question No. (1) : Not answered.

Question No. (2) : In the negative, that is to say, in favour of the assessee and against the revenue.

19. There shall be no order as to the costs of this reference.

20. Reference answered accordingly.