
(1995) 02 BOM CK 0054

In the Bombay High Court

Case No : Sales Tax Application No. 67 of 1991

Hindustan Apparel Industries

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 23-02-1995

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 33(3), 33(4A), 36(2), 36(3), 55
Central Sales Tax Act, 1956 — Section 9, 9(2), 9(2A)

Citation : (1995) 02 BOM CK 0054

Hon'ble Judges : D.K. Trivedi, J; B.P. Saraf, J

Bench : Division Bench

Advocate : B.C. Joshi, for the Appellant; N.T. Saraf, for the Respondent

Judgement

Dr. B.P. Saraf, J.—By this reference u/s 61(1) of the Bombay Sales Tax Act, 1959, read with section 9(2) of the Central Sales Tax Act, 1956, the Maharashtra Sales Tax Tribunal ("the Tribunal") has referred the following questions of law to this Court for opinion at the instance of the assessee :

"(i) Whether, on the facts and circumstances of the case, the levy of penalty u/s 9(2A) of the Central Sales Tax Act read with section 36(3) of the Bombay Sales Tax Act was valid ?

(ii) Whether the limitations provided u/s 33(4A) of the Bombay Sales Tax Act are applicable to the levy of such penalty ?"

2. The assessee, who is a registered dealer under the Central Sales Tax Act, 1956 ("the Central Act"), was assessed by the Sales Tax Officer, Thane, u/s 9(2) of the Central Act read with section 33(3) of the Bombay Sales Tax Act, 1959 ("the Bombay Act" or "the Act") for the period January 1, 1969 to December 31, 1969, vide his assessment order dated July 30, 1977. In the above order of assessment, it was observed :

"Action to levy penalty u/s 36(3) (of the Bombay Sales Tax Act, 1959), read with section 9 and u/s 9(2) (of the Central Sales Tax Act, 1956), read with section

36(2)(c) of the Bombay Sales Tax Act, 1959, is being followed-up respectively."

Thereafter a penalty of Rs. 1,10,514 was levied by the Sales Tax Officer u/s 9(2) of the Central Act read with section 36(2)(c) and 36(3) of the Bombay Act. The assessee filed an appeal against the above order of the Sales Tax Officer to the Assistant Commissioner of Sales Tax (Appeals). On the said appeal being dismissed, the assessee went in further appeal to the Maharashtra Sales Tax Tribunal. One of the grounds of challenge to the levy of penalty before the Tribunal was that it was levied without giving a reasonable opportunity of hearing to the assessee. The Tribunal accepted the above contention of the assessee, and by its judgment and order dated April 7, 1984, set aside the impugned order of penalty and allowed the appeal of the assessee.

3. Thereafter, the Sales Tax Officer issued a show cause notice to the assessee proposing to levy penalty for the very same cause and after hearing the assessee, by his order dated November 19, 1985, levied a penalty of Rs. 1,15,262 u/s 9(2) of the Central Act read with section 36(3) of the Bombay Act. The assessee challenged the above order of the Sales Tax Officer before the Assistant Commissioner of Sales Tax (Appeals). The challenge was on two counts : First, the power of the Sales Tax Officer to initiate penalty proceedings afresh and to reimpose penalty, after the order imposing the penalty had been set aside by the Tribunal; second, the quantum of penalty. The Assistant Commissioner did not accept the contention of the assessee that once the order of penalty is set aside by the appellate authority, the Sales Tax Officer cannot pass a fresh order and reimpose the same. He, however, reduced the quantum of penalty from Rs. 1,15,262 to Rs. 87,000. The assessee went in second appeal to the Tribunal. The Tribunal confirmed the order of the Assistant Commissioner in regard to the power of the Sales Tax Officer to impose the penalty but further reduced the quantum of penalty to Rs. 57,000. The assessee being not satisfied by the finding of the Tribunal in regard to the power of the Sales Tax Officer to pass a fresh order to reimpose the penalty after its order had been set aside by the Tribunal, applied to the Tribunal u/s 61(1) of the Bombay Act to refer the question of law arising out of its above order to this Court. Hence this reference by the Tribunal at the instance of the assessee.

4. The learned counsel for the assessee submits that once an order of penalty is set aside by the appellate authority, the Sales Tax Officer cannot reimpose penalty by passing a fresh order. Reliance is placed in support of this contention on the decision of this Court in Writ Petition No. 2555 of 1984, *Balaji Cotton Company v. Sales Tax Officer* [1995] 97 STC 613 , rendered by the Nagpur Bench of this Court on August 28, 1992. According to the counsel for the assessee, the controversy in this case stands concluded in favour of the assessee by the above decision of this Court. The learned counsel for the Revenue Mr. N. T. Saraf does not dispute the above contention of the counsel for the assessee. He, however, submits that he above decision of this Court requires reconsideration because of its reaching implications. That, in our opinion, is no ground to justify

reconsideration of a decision. Mr. Saraf also referred to a recent decision of the Supreme Court in Commissioner of Income Tax, Shillong Vs. Assam Travels Shipping Service, Dibrugarh, . On a careful perusal of the same, we find that the above decision in no way affects the ratio of the decision of this Court in Balaji Cotton Company [1995] 97 STC 613. It rather supports the same. In the above case, the controversy before the Supreme Court related to the scope and ambit of the powers of the Income Tax Appellate Tribunal u/s 254(1) of the Income Tax Act, 1961, in deciding the appeals before it. Section 254(1) is as under :

"254 (1). The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit."

The Supreme Court constructed the above provision, particularly the expression "pass such orders as it thinks fit", and held :

"The expression "as it thinks fit" is wide enough to include the power of remand to the authority competent to make the requisite order in accordance with law in such a case even though the Tribunal itself could not have made the order enhancing the amount of penalty. The power of the Appellate Assistant Commissioner u/s 251(1)(b) includes the power even to enhance the penalty subject to the requirement of sub-section (2) of section 251 of a reasonable opportunity of showing cause against such enhancement being given to the appellant-assessee. This could have been done in assessee's appeal itself filed in the present case. The power of the Tribunal to make an order of remand in such a situation is well-settled in Hukumchand Mills Ltd. Vs. Commissioner of Income Tax, Central Bombay and Others, ."

This was also the position u/s 55(6) of the Bombay Sales Tax Act, 1959, as it stood prior to its substitution by Maharashtra Act 42 of 1971. It then read :

"(6) Subject to such rules of procedure as may be prescribed, an appellate authority may pass such order on appeal as it deems just and proper."

Under the above provision the appellate authority had the power "to pass such order as it deems just and proper". The expression "pass such order as it deems just and proper" was wide enough to include the power of remand to the authority which had made the order to make a fresh order in accordance with law. But this position got changed with the substitution of sub-section (6) by the following with effect from December 1, 1971, by Maharashtra Act 42 of 1971 :

"(6) Subject to such rules of procedure as may be prescribed, every appellate authority (both in the first appeal and the second appeal) shall have the following powers :

(a) in an appeal against an order of assessment, it may confirm, reduce, enhance or annul the assessment; or it may set aside the assessment and refer the case back to the assessing authority from making a fresh assessment in accordance with the direction given by it and after making such further inquiry as may be necessary; and the assessing authority shall thereupon proceed to make

such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such fresh assessment;

(b) in an appeal against an order imposing a penalty, or interest the appellate authority may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty or interest;

(c) in any other case, the appellate authority may pass such orders in the appeal as it deems just and proper.

Provided that"

5. In *Balaji Cotton Company* [1995] 97 STC 613, this Court considered both these provisions. Referring to sub-section (6), as it stood prior to its substitution by the Maharashtra Act 42 of 1971, it observed :

"Thus, prior to 1971, the powers of the appellate authority were expressed in widest possible terms. No distinction was made on the basis of the nature of the order appealed against."

This Court then referred to the provisions of sub-section (6), which came into force with effect from 1971, and observed :

"But in the existing sub-section (6) which applies since 1971, the various powers that can be exercised in appeal against an order of assessment and an order of penalty have been separately set out in clear terms. In an appeal against an order imposing a penalty, the appellate authority has been conferred with the powers to confirm, or cancel such order or vary it so as either to enhance or reduce the penalty. No power has been given, as in case of an appeal against the order of assessment, to set aside the order of penalty and refer the case back to the authority which passed the order for making a fresh order in accordance with the direction given by it or after making such further enquiry as may be necessary. There is thus a clear distinction in the power of the appellate authority in an appeal against an order of assessment and in appeal against an order of penalty. While dealing with an appeal against an order of assessment it has been specifically conferred with the power to set aside the assessment and refer the case back to the assessing authority for making a fresh assessment in the manner specified therein but no such power is there while deciding an appeal against an order of penalty. The omission of this power of setting aside and referring back for fresh order is not accidental but deliberate. The Legislature has given to the appellate authority while dealing with an appeal against an order of penalty, in addition to the power to confirm or cancel such order, also the power to vary it so as either to enhance or reduce the penalty. Similar is the position in case of an appeal against interest. It is, therefore, clear that the appellate authority while disposing an appeal against an order of penalty cannot set aside the penalty and refer the case back to the assessing authority to make a fresh order of penalty."

Referring to the powers of the appellate authority in cases falling under clause

(c) sub-section (6), which empowers the appellate authority to pass such order in the appeal "as it deems just and proper", this Court observed :

"The powers in the third category, unlike the earlier two categories, have been couched in broadest possible terms to take care of all eventualities that may arise depending on the nature of the order that might be subject-matter of appeal. But that wide power is not available in case of appeals against assessment and orders of penalty or interest where the powers have been specified in clear terms. That being the position, no power of remand can be inferred in case of appeal against order of penalty."

The power of the appellate authority in deciding appeals orders of penalty was summed up thus :

"..... An order of penalty can be either confirmed or cancelled or varied. It cannot be remanded to the original authority for making a fresh order after making fresh enquiries. The setting aside of a penalty order by the appellate authority under the circumstances can only mean cancellation and the authority which imposed the penalty shall have no power to take up the matter again and to pass a fresh order of penalty."

6. Thus on a proper construction of sub-section (6) of section 55 of the Act (as substituted by Maharashtra Act 42 of 1971), in particular clause (b) thereof, it is clear as held by this Court in *Balaji Cotton Company* [1995] 97 STC 613 that the appellate authority has no power to set aside the penalty to enable the assessing authority to make a fresh order or to initiate the proceedings afresh. In the context of clause (b) of section 55(6) of the Act, setting aside of an order of penalty can only mean cancellation of the penalty. That being the legal position, the authority which imposed the penalty cannot reimpose the same by passing a fresh order.

7. In view of the above, we answer the question No. 1 in the negative and in favour of the assessee.

In view of the above answer to question No. 1 question No. 2 has become academic. We, therefore, do not answer the same.

The reference is disposed of accordingly.

In the facts and circumstances of the case, we make no order as to costs.

8. Reference disposed of accordingly.