

(1991) 07 GUJ CK 0030
In the Gujarat High Court
Case No : Sales Tax Reference No. 2 of 1985

Jayant Extraction Industries	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 04-07-1991

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 14(1)
Gujarat Sales Tax Act, 1969 — Section 13, 16, 16(1), 16(4), 27

Citation : (1992) 85 STC 3

Hon'ble Judges : Sharad D. Dave, J; A.P. Ravani, J

Bench : Division Bench

Advocate : R.D. Pathak, for S.L. Modi, for the Appellant; Kamal M. Mehta, Assistant Government Pleader, for H.V. Chhatrapati and Co., for the Respondent

Judgement

A.P. Ravani, J.—This is a reference u/s 69 of the Gujarat Sales Tax Act, 1969. The applicant is a registered dealer and it also holds recognition u/s 32 of the Act. It manufactures groundnut oil, solvent extraction groundnut oil and hydrogenated vegetable oil. For manufacturing hydrogenated vegetable oil (popularly known as vegetable ghee), it uses (a) solvent extracted oil obtained from the oil-cakes, (b) groundnut oil extracted from oil-seeds purchased by it, and (c) other edible oil including groundnut oil purchased from the market. There are certain purchases of oil made from unrecognised dealers. Some purchases are from registered dealers against declaration in form 19. The end-product, i.e., vegetable ghee, is sold in the State and is also sold in the course of inter-State trade and commerce. Certain part of the vegetable ghee is also consigned to places outside the State for sale there.

2. The Sales Tax Officer while making the assessment for samvat year 2031 (from November 14, 1974 to November 13, 1975) found that, out of the total sales of Rs. 65,22,29,781 branch transfer sales outside the State were to the extent of Rs. 1,63,32,377. The Sales Tax Officer also found that there was breach of declaration given in form 19 to some extent. In form 19, a dealer

makes a declaration to the effect that the goods purchased by him shall be used as raw material, processing material or consumable stores in the manufacture of taxable goods and that the taxable goods shall not be sold outside the State. In view of such declaration at the time of purchase, the dealer is not required to pay the purchase tax. The Sales Tax Officer found that there was breach of declaration made in form 19 to certain extent. Therefore he assessed the turnover of such breach to the extent of Rs. 1,02,533 and ordered to levy tax of Rs. 9,077.15. He also imposed penalty of Rs. 100 as provided u/s 45(1) of the Act.

3. The Assistant Commissioner of Sales Tax examined the record of the applicant-dealer by way of audit. He found that the dealer had purchased goods worth Rs. 84,91,811 against declarations in form 19, and also on the strength of recognition. It was found by the Assistant Commissioner that the dealer sold vegetable ghee manufactured by it outside Gujarat State and also consigned vegetable ghee outside the State. The extent of such goods was 60 per cent of the total production. He felt that the breach of declaration in form 19 found by the Sales Tax Officer to the extent of Rs. 1,02,533 was little over one per cent only. The Assistant Commissioner thought it fit to call upon the dealer to produce certain documents before him and exercise his power u/s 59 of the Act and issued notice in form 45 calling upon it to produce the account register, stock register, etc. On examination of the record, prima facie, it was found that the order passed by the Sales Tax Officer was not in accordance with law.

4. Therefore, he in exercise of his revisional powers u/s 67 of the Act issued notice in form 49 and called upon the dealer to show cause as to why order of the Sales Tax Officer should not be revised. Before the Assistant Commissioner of Sales Tax, it was the case of the dealer that it could manufacture hydrogenated vegetable oil by using any of the raw materials, that is - (a) solvent extracted oil obtained from the oil-cakes, (b) groundnut oil extracted from oil-seeds purchased by it from the market and (c) other edible oils including groundnut oil purchased from the market. That it was not necessary for it to use all or any of the raw materials in specified proportion at a time. That it had maintained a register showing as to when which particular raw material was used in the manufacture of hydrogenated vegetable oil. It was contended that this register should be believed and the method of finding out user of each and every raw material on pro rata basis of inter-State sales and intra-States sales should not be adopted. The Assistant Commissioner did not accept the contention and revised the order of the Sales Tax Officer and held that the purchases of Rs. 36,86,728 were not used in terms of the declaration in form 19. As the Sales Tax Officer had only considered the purchase turnover of Rs. 1,02,533 as taxable, he held that difference of Rs. 35,84,193 was exigible to purchase tax at the rate of 5 per cent and on that basis he assessed purchase tax of Rs. 1,79,209.65. The Assistant Commissioner also held that the Sales Tax Officer had imposed a penalty of Rs. 100 u/s 45(1) of the Act on the ground that the contravention of certificates in form 19 was insignificant. But the Assistant Commissioner held

that the extent of contravention was about 43 per cent and hence he decided to impose 10 per cent of the total amount of purchase tax payable by the dealer as penalty. Thus he ordered to impose a penalty of Rs. 18,830 instead of Rs. 100 only.

5. The dealer preferred revision application before the Tribunal. The Tribunal after hearing the parties dismissed the revision application and confirmed the finding arrived at by the learned Assistant Commissioner except as regards the rectification of certain mistakes indicated in para 21 of its judgment.

6. The dealer submitted an application to the Tribunal for making reference in relation to eight different questions mentioned in the application. However, the Tribunal raised only three questions and referred the same to this Court for its opinion. The questions referred to and our answer are as follows :

Question Answer 1. Whether, on the facts and in the In affirmative, in circumstances of the case, the favour of the Revenue Tribunal was right in law in and against the holding that the suo motu revision assessee. powers were rightly invoked and exercised by the Assistant Commissioner of Sales Tax ? 2. Whether, on the facts and in the In affirmative, in circumstances of the case, the favour of the Revenue Tribunal was right in law in and against the holding that the pro rata method assessee. adopted by the learned Assistant Commissioner estimating the breach of declarations in form 19, for the purpose of levy of purchase tax u/s 16 of the Gujarat Sales Tax Act, 1969, was legal and proper ? 3. Whether, on the facts and in the In affirmative, in circumstances of the case, the favour of the Revenue Tribunal was right in law in and against the holding that the burden under assessee. section 16(4) of the Act of proving that the purchase price of the goods purchased against certificates in form 19 given under section 13 of the Act is not liable to be included in the turnover of purchase of the applicant under section 16(1) of the Act has not been discharged by the applicant ?

7. Question No. 1 : The revisional powers are conferred upon the Commissioner of Sales Tax and upon the Tribunal under the provisions of section 67 of the Act. The Commissioner is empowered to call for and examine the record of any order passed by any officer appointed u/s 27 of the Act. After examining the record, he is further empowered to pass such order thereon as he thinks just and proper. This power of revision conferred upon the Commissioner could be delegated by the Commissioner to the Assistant Commissioner. On this point there is no dispute. However, it is contended that the Assistant Commissioner could not have exercised the power for collecting the material and looking at the same and exercise his power u/s 67 of the Act. It is contended that in this case, the Assistant Commissioner has looked into new material which did not form part of the assessment record. Therefore, he could not have invoked the suo motu powers of revision u/s 67 of the Act.

8. It is an admitted position and it is also borne out from the record, that after

the Sales Tax Officer passed order on December 31, 1977, during the course of audit, the Assistant Commissioner called for certain material from the dealer in exercise of his power u/s 59 by issuing notice in form 45. Section 59 empowers the Commissioner to require any dealer to produce before him any accounts or documents or to furnish any information relating to stocks of goods, or as regards the sales, purchase and deliveries of goods by the dealer. This section also empowers the Commissioner to call for any other information relating to his business as may be necessary for the purposes of the Act.

9. It was not contended before the Tribunal that the Assistant Commissioner invoked the powers wrongly, nor it was contended that the Assistant Commissioner while invoking the powers looked into any record which did not form part of the assessment record. All that was contended before the Tribunal was that the Assistant Commissioner has exercised his revisional powers wrongly. Therefore, in the entire judgment and order passed by the Tribunal, there is no reference to the question as to whether the Assistant Commissioner had wrongly invoked his revisional powers. Therefore, the question as to whether the Assistant Commissioner wrongly invoked his revisional powers u/s 67 of the Act does not arise out of the order of the Tribunal. It is true that the question referred to this Court is a comprehensive one. The expression used is "invoked and exercised". Therefore one may say that by necessary implication the question as regards the correctness or otherwise of the invocation of the revisional powers by the Assistant Commissioner is also required to be answered by this Court. In our opinion, since the question has not been argued, nor it has been dealt with by the Tribunal, the question as regards the invocation of the revisional powers cannot be said to be arising out of the order of the Tribunal. Even so, since the question is comprehensive one, we would examine the question.

10. It is contended that the Assistant Commissioner has looked into some material which did not form part of the assessment record. The argument is based on the circumstance that the Assistant Commissioner had called for certain materials from the dealer in exercise of his power u/s 59 by issuing notice in form 45. Thereafter on examination of this material, he found that there was, prima facie case for interference in the order passed by the Sales Tax Officer. Therefore, he issued notice in form 49 in exercise of his revisional power u/s 67 of the Act. From this much factual basis a jump is taken. It is contended that the Assistant Commissioner has looked into the new material. For such an inference, there is no factual basis. Not only that, it is against the very case of the dealer before the Tribunal.

11. Be it noted that section 59 empowers the Commissioner to call for the record from the dealer. It could be (1) any accounts, (2) any documents, (3) any information relating to stocks of goods, (4) any information relating to sales, purchases and deliveries of goods, or (5) any other information relating to the business of the dealer. It was not the case of the dealer that when the Assistant

Commissioner called for the information from the dealer by issuing notice in form 45 in exercise of his power u/s 59 of the Act, he called for any material which did not form part of the assessment record. This point has never been raised either before the Tribunal or before the Assistant Commissioner. In reference, this point is sought to be raised for the first time that the Assistant Commissioner relied upon some material which did not form part of the assessment record. Strictly speaking, such a point cannot be permitted to be raised because it would require examination of facts which in exercise of reference jurisdiction this High Court is not required to embark upon.

12. However, this contention is also against the very case of the dealer pleaded before the Tribunal. It was the case of the dealer that the Assistant Commissioner had no other additional material than the material which was before the Sales Tax Officer. It was on the basis of the same material that both the authorities, i.e., the Sales Tax Officer as well as the Assistant Commissioner of Sales Tax, exercised their powers and passed different orders. It was this circumstance which was pressed in service by the dealer. The dealer contended that the exercise of revisional powers by the Assistant Commissioner was wrong because the Assistant Commissioner did not bring on record any other material except that was produced and examined by the Sales Tax Officer. The contention raised before the Tribunal by the learned counsel for the dealer may be reproduced :

"We shall first take up Shri Mody's challenge regarding the wrong exercise of revisional jurisdiction by the learned Assistant Commissioner. It was contended that the learned Assistant Commissioner did not bring on record any other material except what was produced before and examined by the learned Sales Tax Officer. At best he adopted a different method to alter the finding of the learned Sales Tax Officer."

The aforesaid contention raised before the Tribunal indicates that the Assistant Commissioner even after calling for the record in exercise of his powers u/s 59 did not call for any other material than which was before the Sales Tax Officer. It was on the basis of the same material that the Assistant Commissioner has also proceeded further. Therefore, even if we are called upon to answer the question which did not arise out of the order of the Tribunal, but which is erroneously referred by the Tribunal, our answer is that the revisional powers were rightly invoked.

13. The question as to whether new material has been taken into consideration does not arise at all because it was an admitted position that the material which has been taken into consideration by the Assistant Commissioner was the same material which was before the Sales Tax Officer. In this view of the matter, we do not think it necessary to refer to and discuss the decision of this High Court in the case of State of Gujarat v. Chelabhai Bhanabhai Prajapati reported in [1974] 33 STC 147, wherein it appears to have been held that the material collected by the Assistant Commissioner pursuant to search and seizure of account books and

which did not form part of the assessment record could not have been taken into consideration for invocation of revisional powers u/s 67 of the Act.

14. The learned counsel for the dealer submitted that the Sales Tax Officer had adopted one basis and on the same material the Assistant Commissioner of Sales Tax had adopted another basis. In short it was submitted that one guess-work made by the Sales Tax Officer has been substituted by another guess-work made by the Assistant Commissioner of Sales Tax. If the basis of the guess-work made by the Sales Tax Officer was in accordance with law, it was not open to the Assistant Commissioner of Sales Tax to exercise his revisional jurisdiction. Therefore, the exercise of revisional powers by the Assistant Commissioner is wrong. This argument takes within its sweep the assumption that the Sales Tax Officer while passing the order adopted some basis. The Tribunal has found that the order passed by the Sales Tax Officer did not disclose any basis whatsoever for examining and assessing the correctness or otherwise of the production register maintained and relied upon by the dealer. We ourselves have also gone through the order passed by the Sales Tax Officer. We also do not find that any basis whatsoever has been referred to and relied upon by the Sales Tax Officer.

15. However, it was contended that in the case of this very dealer, assessment order was passed by the Sales Tax Officer for the samvat year 2027. That was carried in appeal and the order passed by the Sales Tax Officer was reversed. It was submitted that the basis adopted in appeal was the same as adopted by the Sales Tax Officer. Therefore, it was incumbent upon the Sales Tax Officer to follow the same basis which was approved by the appellate authority. There is nothing on the record to show that the Sales Tax Officer had adopted the pro rata basis while passing the assessment order for the year 2027 and that the same was reversed in appeal. The Tribunal has proceeded on the assumption that it might have happened so. But it is indicated in para 15 of the judgment and order of the Tribunal that the assessment order passed for the samvat year 2027 has been taken in revision by the Deputy Commissioner of Sales Tax. Even assuming for a moment that in the case of assessment for the samvat year 2027, the appellate authority had adopted the method and manner of examining the account books as adopted by the Sales Tax Officer in the present case, then also the said circumstance carries the case of the dealer nowhere. That case is also carried in revision and matter is at large. This is so observed in para 15 of the judgment and order passed by the Tribunal.

16. On merits it was submitted that the dealer has maintained the production register wherein it has indicated the figures of day-to-day production of vegetable oil. The stock of raw material such as groundnut oil, cotton-seed oil, sun flower oil, solvent extracted groundnut oil and such other edible oil is shown. It was contended that on the basis of the production register it should be believed that in the manufacture of vegetable oil (ghee) on different dates different ingredients have gone into manufacture of the end-product. It may be theoretically possible to manufacture hydrogenated vegetable oil only from the

groundnut oil and/or cotton-seed oil. Other ingredients may not be required to be added. Or it may even be possible to manufacture vegetable oil (ghee) from one ingredient only, i.e., groundnut oil. Therefore it is pointed out that once a dealer maintains production register and makes entry in the same indicating that on a particular date only some of the ingredients had gone into manufacture of end-product, the same should be taken as valid. This argument has not been accepted by the Assistant Commissioner as well as by the Tribunal. It was contended that this argument was accepted by the Sales Tax Officer. But as indicated hereinabove, the order of the Sales Tax Officer does not disclose any basis whatsoever for arriving at his conclusion. Even assuming for a moment that the Sales Tax Officer adopted the method suggested by the dealer, can it be said that the Assistant Commissioner was wrong in not accepting the same ?

17. In our opinion, it cannot be said that the Assistant Commissioner acted wrongly in exercising his revisional jurisdiction and in applying the principles of pro rata basis of user of raw materials purchased against declaration in form 19 and sales of taxable goods outside the State. Before the Tribunal, reliance was placed on two decisions of the Tribunal. In both the cases, the dealers were mixing up the taxable goods - one lot of taxable goods was purchased from registered dealers and another lot of taxable goods was purchased from unregistered dealers. Be it noted that the taxable goods purchased is the same. There is no question of mixing up the taxable goods and manufacturing another article from it. In such cases when taxable goods of two different lots - one purchased from registered dealers and another purchased from unregistered dealers - had got mixed up and at the end of the day if it could be shown that stock which remained was equal to the stock which was sold, the dealer could very well say that the stock of the taxable goods which were sold or which remained with him was that of either from amongst the articles purchased from registered dealers or from amongst the articles purchased from unregistered dealers. It was contended on the basis of the aforesaid decision that the Sales Tax Officer had accepted the method adopted by the dealer just as in the case of the finished goods one lot of which purchased from the registered dealers and another lot of which purchased from unregistered dealers could be mixed and then the dealer could say that what was sold was either of the two. In the same way it should be open to the dealer who manufactures commodity to say that not the goods purchased against declaration in form 19, but other goods which were in stock with him were used in the manufacture of the taxable goods. The Assistant Commissioner as well as the Tribunal has refused to extend this principle to the manufacturing activity of taxable goods.

18. In our opinion, the Tribunal has rightly held that the principle laid down by it in case of purchase of finished goods from registered dealers and unregistered dealers and mixing up of the same cannot be applied to the manufacturing activity. However, on the facts found by the Assistant Commissioner and the Tribunal, even if one were to extend this principle to the manufacturing activity also, the same would not be available to the dealer in the instant case.

19. The Tribunal has found that the entries of manufactured goods in the register in question and which have been bifurcated as available for sale in Gujarat and outside the State of Gujarat are notional. In view of this finding, the conclusion is irresistible that the maintenance of the production register is not actual, but it is notional, meaning thereby it is a creation of imagination of the dealer. Once it is found on the facts of the case that the material reflected on the production register is nothing but figment of imagination of the dealer, it cannot be relied upon to indicate that a particular raw material was used in the manufacture of vegetable oil on a particular date. Except this production register, no other material is relied upon in support of the case put forth by the dealer. Once this register is held to be notional, the only reasonable method of calculating the user of goods purchased against declaration in form 19 and the sales outside the State (as well as inside the State) is the pro rata basis method, which is the one adopted by the Assistant Commissioner of Sales Tax and confirmed by the Tribunal. While arriving at this conclusion, the Tribunal has relied upon a decision of the Bombay High Court in the case of Commissioner of Sales Tax v. Berar Oil Industries reported in [1975] 36 STC 473. That was also a case of a dealer manufacturing hydrogenated vegetable oil. The dealer did not keep separately the stock of raw materials purchased against certificates issued in form 15 (similar to declaration in form 19) of the Bombay Sales Tax Rules, 1959 and the products manufactured out of such stock. Therefore, it was impossible for the dealer to prove that the raw materials purchased against the certificates in form 15 were utilised only in the manufacture of products which were sold in accordance with the declaration contained in such certificates. In such circumstances, the question arose - as to how much of the purchase price of the goods purchased by the dealer should be included in the turnover of purchases and made liable to purchase tax u/s 14(1) of the Bombay Sales Tax Act, 1959 ? The Sales Tax Officer raised a presumption that the raw materials purchased by the dealer against declaration in form 15 were the raw materials utilised in the manufacture of products which were sold in conformity with the declaration contained in the certificates. Therefore, he ordered to levy purchase tax only on 3 per cent of the total purchases made by the dealer against the certificates. The Assistant Commissioner of Sales Tax, took the matter in suo motu revision. He did not raise presumption. According to him since the "non-qualifying sales" were 44 per cent of the total sales and since the purchase of raw materials made against certificates in form 15 were 59 per cent of the total purchases, the turnover of purchases on which the purchase tax u/s 14(1) of the Act was leviable on pro rata basis, i.e., 44 per cent of 59 units or 26 per cent of the total purchases and not 3 per cent as held by the Sales Tax Officer. The Deputy commissioner approved the order of the Assistant Commissioner of Sales Tax. But the Tribunal set aside the order of the Deputy Commissioner and restored the order of the Sales Tax officer. On reference, the Bombay High Court restored the judgment and order passed by the Assistant Commissioner of Sales Tax and approved by the Deputy Commissioner of Sales Tax. The Bombay High Court held that the formula adopted by the Assistant Commissioner and approved by the

Deputy Commissioner was proper and rational formula to be applied in estimating the turnover of purchases in such cases. We are in respectful agreement with the reasons given and conclusion arrived at by the learned Judges of the Bombay High Court.

20. The learned counsel for the dealer submitted that there are certain inherent limitation in exercise of the revisional power u/s 67 of the Act. The authority exercising revisional power cannot exercise the same so as to trench upon the powers reserved in any other authority. In his submission, the power exercised by the revisional authority would amount to reassessment. Therefore, the Assistant Commissioner should not and could not have exercised this power inasmuch as the power of reassessment is conferred upon the Sales Tax Officer. On little scrutiny it becomes evident that there is no substance in the argument. It is true that in the case of the State of Kerala v. K. N. Cheria Abdulla and Company [1965] 16 STC 875 and in the case of the Swastik Oil Mills Ltd. v. H. B. Munshi, Deputy Commissioner of Sales Tax [1968] 21 STC 383, the Supreme Court has indicated the scope of the revisional powers. From the aforesaid two decisions, the only limitation which could be spelt out are two - (1) that the revisional authority cannot exercise the power for the purpose other than that of the Act; (2) that the revisional authority cannot exercise this power which is expressly reserved by the statute to any other authority.

21. The limitation on the revisional powers indicated by the Supreme Court in the aforesaid decisions have to be understood in the proper context. It is not laid down by the Supreme Court that if reassessment could be done by the Sales Tax Officer in revisional jurisdiction the revising authority cannot make reassessment. If the argument is logically extended, it would mean that if an appellate authority can examine the facts and the law point, then the revising authority cannot examine the facts and the law points involved in the case while exercising its revisional powers. If one were to read such limitation on the revisional powers, it would render the conferment of the revisional powers nugatory. The limitation only means that if an appeal is pending and the appellate authority is exercising its appellate power, in such a case the revisional authority should not interfere in the exercise of the appellate power by the authority. Similarly if the reassessment proceedings are pending and the officer of authority upon whom the powers of reassessment are conferred, is exercising his powers of reassessment, then the revisional authority at that stage should not exercise its revisional powers and make reassessment. This is the only possible limitation which could be read. Limitation on the powers of the revisional authority as contended by the learned counsel for the dealer would lead to absurdity. The decisions of the Supreme Court are not to be read so as to lead to absurd results. Therefore, the contention is rejected.

22. Question Nos. 2 and 3 : These questions need to be examined from the view point of the declaration which a dealer makes in form 19. The dealer undertakes an obligation to use the goods purchased by him in manufacture of taxable

goods either as raw material or as a processing material or as consumable stores. He further undertakes an obligation to sell such goods within the State. Even if it is possible for the dealer to manufacture taxable goods without using the goods purchased by him against declaration in form 19, he may do so. There cannot be any fetter on his right to manufacture goods without using the goods purchased against declaration in form 19. But in that case he has to show by positive and unimpeachable evidence that he stands relieved from the obligation undertaken by him. By mere making entries in production register, he cannot get himself relieved of this obligation. In the instant case, the Assistant Commissioner of Sales Tax did not rely upon the account books and particularly the production register maintained by the dealer. The Tribunal arrived at a finding of fact that the production register reflected only the notional entries. It is required to be noted that the Tribunal in graceful language stated that the production register was nothing but the figment of imagination of the dealer. In other words, it could be said that the Tribunal arrived at a finding of fact that the production register maintained and relied upon by the dealer was fake and it did not reflect the reality. In view of this finding of fact, there is no escape from the conclusion that the pro rata basis adopted by the Assistant Commissioner was the only method available to the authorities. Moreover this is consistent with the obligation undertaken by the dealer. The dealer had not purchased the goods for storing the same. He had purchased the goods against form 19 for using the same in taxable goods. If he did not use the same, he has to show by positive evidence that the same were not used in the manufacture of taxable goods. As indicated by the Tribunal, the dealer has not maintained the production register indicating the different batches of the end-product. If a particular lot of vegetable oil contained only the groundnut and cotton seed oil as ingredients, then the lot which contained this ingredient alone has not been kept separate. It is neither kept separately nor it is indicated accordingly in the account books. Similarly on the tin containing vegetable oil, it is not indicated as to what are the ingredients of the vegetable oil. If the dealer wanted to get relieved of the obligation undertaken by him he ought to have produced positive and unimpeachable evidence showing the use of different ingredients in different lots of the end-product. As observed by the Bombay High Court, this may be impossible in a given case. But by saying so, the dealer cannot get relieved of the obligation. The dealer is never called upon to do something which is impossible. The dealer can adopt the other course, i.e., pay the tax.

23. No other contention is raised.

24. The reference is answered accordingly with no order as to costs.

25. Reference answered in the affirmative.