

(1982) 10 GUJ CK 0008
In the Gujarat High Court
Case No : Sales Tax Reference No. 22 of 1980

Jethalal Mulchand

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 04-10-1982

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 36(3)

Gujarat Sales Tax Act, 1969 — Section 40, 40(1), 41, 44, 45

Citation : (1983) 52 STC 420

Hon'ble Judges : V.V. Bedarkar, J; P.D. Desai, J

Bench : Division Bench

Advocate : R.D. Pathak and S.L. Modi, for the Appellant; J.U. Mehta, Assistant Government Pleader, instructed by H. V. Chhatrapati of Bhaishanker Kanga and Girdharlal, for the Respondent

Judgement

Desai, J.—The Gujarat Sales Tax Tribunal (hereinafter referred to as "the Tribunal") has referred the following question of law for the opinion of this Court u/s 69(1) of the Gujarat Sales Tax Act, 1969 (hereinafter referred to as "the Act") :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the proper section to impose penalty in this case was section 45(5) and not section 45(6) of the Gujarat Sales Tax act, 1969 ?"

2. The assessee is a dealer registered under the relevant provisions of the Act. At the material time, the assessee carried on business of reselling cotton bales. The assessee had filed four quarterly returns in respect of the accounting period S.Y. 2030. There was, however, failure on the part of the assessee to pay the whole amount of tax due along with the returns filed in respect of all the four quarters. The assessee made only part-payment of the tax due along with each return. The assessee made only part-payments of the tax due along with each return. The assessee was thereupon served with a notice for the imposition of penalty u/s 45(5) of the Act.

3. In response to the notice, the assessee pleaded that the default on its part to pay the whole amount of tax due was not without reasonable cause within the meaning of section 45(5) of the Act. The Sales Tax Officer rejected the explanation furnished by the assessee and imposed penalty as follows for the default in respect of the different quarters :

Rs. 1,365 first quarter. Rs. 26,040 second quarter. Rs. 23,357 third quarter. Rs. 11,633 fourth quarter. ----- Rs. 62,395 -----

4. The assessee carried the matter in appeal and the Assistant Commissioner of Sales Tax who heard the appeal dismissed it. The assessee carried the matter in further appeal before the Tribunal. In addition to urging that the failure to pay the whole amount of tax was not without reasonable cause, and that therefore, the provisions of section 45(5) were not attracted, the assessee urged that the penalty, if any, was leviable not u/s 45(5) but u/s 45(6) of the Act. The assessee, therefore, pleaded that the imposition of penalty u/s 45(5) was not legal and valid.

5. The Tribunal rejected both the aforesaid contentions. In rejecting the second contention as regards the applicability of second 45(6), the Tribunal relied upon an unreported decision of this Court in Special Civil Application No. 1645 of 1972 decided on 8th August, 1973 (Hiranand Shyamdas v. Assistant Commissioner of Sales Tax) (since reported as an appendix at page 426 infra). The Tribunal, however, remitted the penalty from Rs. 62,395 to Rs. 40,000 on the ground that it was enough to meet the ends of justice. At the instance of the assessee, however, the Tribunal raised and referred to this Court the question of law set out at the commencement of the judgment.

6. In the present case, we are concerned with the relevant provisions of the Act as applicable in 1973-74. The reference to the different provisions of the Act herein made is to such provisions.

7. Section 40, sub-section (1), inter alia, enjoins upon every registered dealer to furnish returns for such period, by such dates, and to such authority, as may be prescribed. Sub-section (3), provides for the furnishing of a revised return under certain circumstances and within the time limited. Rule 25 of the Gujarat Sales Tax Rules, 1970 (hereinafter referred to as "the Rules"), as in force at the material time requires to be read along with the relevant provisions of section 40. The said rule, inter alia, provides that every registered dealer shall furnish in duplicate a return in form 27 duly signed by him or by a person authorised by him in form 15, to the Sales Tax Officer within whose jurisdiction his place or places of business, as specified in his certificate of registration, is or are situated. The annual return for the current year is required to be filed within one month and ten days from the end of that year. The quarterly returns, whenever such returns are required or opted to be furnished, must be filed within one month and ten days from the end of the respective quarter.

8. Section 47, sub-section (1), provides that tax shall be paid in the manner

therein provided, and at such intervals as may be prescribed. Sub-section (2) provides, inter alia, that a registered dealer furnishing returns as required by sub-section (1) of section 40 shall first pay into a Government treasury, in the manner prescribed, the whole amount of tax due from him according to such return along with the amount of any penalty payable by him u/s 45. Sub-section (3), inter alia, provides that a registered dealer furnishing a revised return in accordance with sub-section (3) of section 40, which revised return shows that a larger amount of tax than already paid is payable, shall first pay into a Government treasury the extra amount of tax. Rule 31, which is required to be read along with the relevant provisions of section 47, inter alia, provides that every dealer required to furnish a monthly, quarterly or annual return shall, within a period of one month and seven days immediately succeeding the month, quarter or as the case may be, the year for which any such return is required to be furnished, pay into the Government treasury the tax due and payable for such month, quarter or as the case may be, year, along with the amount of any penalty payable by him under sub-section (5) of section 45 and shall within three days of such payment submit to the Sales Tax Officer one copy of the receipted chalan in form 33. Similarly, every dealer furnishing a revised return, which shows that a larger amount of tax than already paid is payable is required to pay into a Government treasury the extra amount of the tax due and payable as per such revised return within one month and seven days from the end of three months following the month, quarter or as the case may be, year to which such return relates and is required to submit to the Sales Tax Officer one copy of the receipted chalan in form 33 within three days of such payment.

9. Section 45 of the Act relates to imposition of penalty in certain cases and bar to prosecution. We are, in the instant case, concerned with sub-sections (5) and (6) of the said section and shall confine our attention to those provisions only. Sub-sections (5) and (6) read as follows :

"(5) 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 (4) of section 65, 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 65 may, remit the whole or any part of the penalty payable in respect of any period.

(6) Where a dealer has failed to pay the whole of the amount of tax as required by sub-section (2) of section 47 or the whole of the extra amount of tax as required by sub-section (3) of that section or where in the case of a dealer, the

amount of tax assessed or reassessed for any period u/s 41 or section 44 exceeds the sum already paid by a dealer in respect of such period prior to such assessment or reassessment by more than twenty per cent of the sum so paid, the dealer shall be deemed to have failed to pay the tax to the extent of the difference between the amount payable as aforesaid and the amount paid and the dealer shall pay by way of penalty on the amount of difference a sum calculated in accordance with the provisions of sub-section (5) and the provisions of sub-section (5) shall, so far as may be, apply hereto :

Provided that where in assessing the amount of tax from any dealer u/s 41 in respect of any period the time taken for making an order of assessment exceeds eighteen months from the date of expiry of the time prescribed for the payment of tax u/s 47, the Commissioner shall remit the amount of penalty payable by the dealer for the period between the date of expiry of the said period of eighteen months and the date of payment of tax specified in the notice under sub-section (4) of section 47 :

Provided further that where the Commissioner is satisfied that the difference between the amount payable as assessed or reassessed and the amount paid, has taken place not without a reasonable cause, the Commissioner may remit the whole or the part of the penalty, payable in respect of any period by any dealer."

10. Under sub-section (5) a dealer, who does not, without reasonable cause, pay tax within the time he is required by or under the provisions of the Act to pay it, is made liable to pay by way of penalty, in addition to the amount to tax, a sum at the rate specified in the said sub-section. The liability, however, is subject to the provisions of sub-section (4) of section 65 and the Commissioner, subject to such conditions as may be prescribed, and an appellate authority, in an appeal, is empowered to remit the whole or any part of the penalty payable in respect any period. Under sub-section (6), a penalty becomes payable by a dealer under any one or more of the following situations :

(a) Whether he has failed to pay the whole of the amount of tax as required by sub-section (2) of section 47, or

(b) Where he has failed to pay the whole of the extra amount of tax as required by sub-section (3) of section 47, or

(c) Where, in his case, the amount of tax assessed or reassessed for any period u/s 41 or section 44 exceeds the sum already paid by him in respect of such period prior to such assessment or reassessment by more than twenty per cent of the sum so paid.

11. The dealer in such a case is deemed to have failed to pay the tax to the extent of the difference between the amount payable as aforesaid and the amount paid and he is required to pay by way of penalty on the amount of difference a sum calculated in accordance with the provisions of sub-section (5) and the

provisions of sub-section (5) shall apply to such a situation, so far as may be. There are two provisions to the sub-section which provide for remission of the amount of penalty under certain circumstances. Since the question of remission is not before us, we need not analyse those provisions. The question referred for our decision depends for its determination on a true construction of sub-sections (5) and (6) of section 45, viewed in the context of the other provisions of the Act and the Rules referred to earlier.

12. Now, the main hurdle or obstacle in the way of the assessee's plea as to the applicability of sub-section (5) to a situation such as the one obtaining in the present case is that the question is not *res integra*. There is an unreported decision of a Division Bench of this Court rendered in Special Civil Application No. 1645 of 1972 (*Hiranand Shyamdas v. Assistant Commissioner of Sales Tax*) (since reported as appendix at page 426 *infra*) decided on 8th August, 1973, which directly concludes the issue against the assessee. One of the questions for consideration before the court in that case was whether a registered dealer who made a default in making payment of the whole amount of tax at the time of furnishing return and made only part-payment of the tax due with the return was liable to be visited with penalty under sub-section (3) or sub-section (3A) of section 36 of the Bombay Sales Tax Act, 1959 (hereinafter referred to as "the Bombay Act"). The Division Bench, upon a consideration of the scheme of the Bombay Act, took the view that in a case where the amount of tax is partly paid, that is to say, when the dealer makes default in paying the whole of the tax due at the time of furnishing the return and makes only a part-payment of the tax, the case would fall within the provisions of sub-section (3) of section 36. Sub-section (3A) of section 36 would be attracted only when the dealer fails to pay the whole amount of tax or the whole of the extra amount of tax which he is required to pay at the time of furnishing the return or revised return, as the case may be. In terms, it was held that sub-section (3A) would not cover the case where the amount of tax is paid in part at the time of furnishing the return. It is not in dispute that the provisions of sub-sections (3) and (3A) of section 36 of the Bombay Act are in *pari materia* with sub-sections (5) and (6) of section 45 of the Act and that the scheme of the other relevant provisions of both the Acts is similar. Under the circumstances, there is no escape from the conclusion that in a situation like the present, the penalty will be imposable under sub-section (5) and not sub-section (6) of section 45 of the Act. The Tribunal was, therefore, right in taking the view that it did on this issue.

13. A strenuous attempt was made on behalf of the assessee to persuade us to take the view that the decision in *Hiranand Shyamdas*'s case based upon the interpretation of sub-sections (3) and (3A) of section 36 of the Bombay Act was not correct and that upon a true construction of those provisions, the view that was required to be taken there was that sub-section (3A) applied to cases of part-payment and sub-section (3) applied where there was a default in paying the whole amount of tax. The attempt, in other words, was that the correct view was the one exactly contrary to the view taken in *Hiranand Shyamdas*'s case. Since

the decision in Hiranand Shyamdas's case directly governs the issue arising for our decision herein, an impassioned appeal was made to us to refer the matter to a larger Bench in order that the question whether sub-section (5) or sub-section (6) of section 45 applies in a situation like the one obtaining in the present case might be correctly decided.

14. We are unable to accept the submission. Even assuming that another view is possible or preferable, the question which requires serious consideration in such cases is, whether having regard to the fact that for such a length of time the rights of the parties have been regulated in accordance with the said decision we should readily concede to the request that the matter should be referred to a larger Bench so that the decision which is stated to have erroneously decided the issue can be reconsidered and reviewed. It could be said without fear of contradiction that the revenue must have concluded many assessments of penalty following the decision in Hiranand Shyamdas's case. If a contrary view is now taken, all those assessments will run the real risk of being rendered invalid. Such a consequence may subject both the department as well as the assessee to undue harassment and hardship which may arise on account of fresh proceedings for penalty being undertaken, if permissible. Under these circumstances, we see no reason to refer the matter to a larger Bench for reconsideration and review of the decision in Hiranand Shyamdas's case. We are reinforced in our view by the circumstance that it is not shown that in this very Court or in any other High Court a contrary view has been taken as regards the same or similar provisions. Besides, it is not shown that the decision in Hiranand Shyamdas's case is given per incuriam. Even assuming that certain aspects of the question were not brought to the notice of the court which decided the said case, it would still be proper to decline to enter upon a reconsideration of the question since the decision has unquestionably been followed by the Tribunal and the lower authorities in other cases.

15. In this connection, it will be pertinent to refer to the decision in Commissioner of Income Tax, West Bengal III Vs. Balkrishna Malhotra, where the question was as to what was the true meaning of the word "assessment" in section 34(3) of the Indian Income Tax Act, 1992. In that context, the Supreme Court observed as follows at page 762 :

"As long back as September 24, 1953, the High Court of Madras in RM. P.R. Viswanathan Chettiar Vs. Commr. of Income Tax, Madras, came to the conclusion that the word "assessment" in the proviso to section 34(3) means not merely the computation of the income of the assessee but also the determination of the tax payable by him. No other High Court has taken a contrary view. The revenue must have in all these years acted on the basis of that decision of the Madras High Court. Interpretation of a provision in a taxing statute rendered years back and accepted and acted upon by the department should not be easily departed from. It may be that another view of the law is possible but law is not a mere mental exercise. The courts while reconsidering decisions rendered a long time

back particularly under taxing statutes cannot ignore the harm that is likely to happen by unsetting law that had been once settled. We may also note that the Act has been repealed by the Income Tax Act, 1961. The corresponding provisions of the 1961 Act are materially different from the provisions referred to earlier. Under these circumstances we do not think that we would be justified in departing from the interpretation placed by the Madras High Court in *RM. P.R. Viswanathan Chettiar Vs. Commr. of Income Tax, Madras*, though a different view of the law may be reasonably possible."

16. It is significant to note that this was the approach adopted by the Supreme Court in the context of the decision of a High Court which was under review before it. The note of caution sounded and weighty reasons given by the Supreme Court for not disturbing the judgment of the High Court which was delivered nearly 18 years back must apply with still greater force when the court which seeks to review an earlier decision is the same court or a court of co-ordinate jurisdiction. It is true that in the case before the Supreme Court, the Madras view had held the field for nearly 18 years and that in the new Act the corresponding provision was materially different. In the case before us, the view taken in *Hiranand Shyamdas's* case has held the field for nearly a decade. The time which has elapsed since the decision of which review is sought was delivered is thus shorter herein than that in the case before the Supreme Court. However, it cannot be gainsaid that even this shorter period is sufficient to attract the applicability of the principle of stare decisis. In *Special Civil Applications Nos. 1005 and 1531 of 1965* decided on 14th April, 1971, by a Full Bench of this Court, Bhagwati, C.J. (as he then was), speaking for the court, rejected the contention of the petitioners in that case to review a decision rendered by the Bombay High Court about 15 years earlier although it was felt that if the point had arisen for decision before this Court for the first time, it would have been most certainly inclined to accept the view canvassed by the petitioners. In *Anandji Haridas & Co. Ltd. v. State* (1977) 18 GLR 271 speaking for another Full Bench, one of us (myself) expressed the view that a practice which had been prevalent in this Court in the matter of taxing of costs for nearly a decade should be adhered to. It would thus appear that even a period of a decade or a decade and half has been considered sufficient to invoke the principle of stare decisis particularly when it appears that numerous cases have been decided following the earlier decision.

17. Having regard to these various factors, in our opinion, it would not be proper to accede to the request made on behalf of the assessee for a reconsideration of the decision in *Hiranand Shyamdas's* case. We have, under the circumstances, declined to hear the learned counsel for the assessee any further on this aspect of the matter.

18. In view of the foregoing discussion, we answer the question referred to us in the affirmative, that is to say, in favour of the revenue and against the assessee. In view of the special facts of the case, there shall be no order as to costs.