
(2010) 05 BOM CK 0020

In the Bombay High Court

Case No : Sales Tax Reference No. 1 of 2003 in Reference Application No. 73 of 2001

Killick Nixon Limited

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 06-05-2010

Acts Referred:

Central Sales Tax (Registration and Turnover) Rules, 1957 — Rule 12(5)
Central Sales Tax Act, 1956 — Section 13, 13A, 2, 4, 6
Constitution of India, 1950 — Article 286
Sales Tax Act, 1959 — Section 16, 36(3), 55, 57, 61(1)

Citation : (2010) 32 VST 470

Hon'ble Judges : V.C. Daga, J; K.K. Tated, J

Bench : Division Bench

Advocate : N.R. Badheka, for the Appellant; Iman Calcuttawala, Additional Government Pleader, for the Respondent

Judgement

K.K. Tated. J.

1. The Maharashtra Sales Tax Tribunal, Mumbai by its order dated August 9, 2002 referred the following questions of law u/s 61(1) of the Bombay Sales Tax Act, 1959 for determination by this Court.

Whether upon a true and correct interpretation of Section 55 of the Bombay Sales Tax Act, 1959, the Tribunal was justified in upholding the order of the first appellate authority in disallowing the claim of branch transfers of Rs. 60,45,032 which was already allowed u/s 6A of the Central Sales Tax Act, 1956 when there was no appeal pending under the Central Sales Tax Act, 1956 ?

2. The applicant is a public limited company registered under the Bombay Sales Tax Act, 1959 and Central Sales Tax Act. The applicant is a manufacturer of engineering goods and re-seller in paints.

3. The period under consideration is April 1, 1992 to March 31, 1993. The

applicant was assessed under the Bombay Sales Tax Act and Central Sales Tax Act on March 25, 1996.

4. The applicant preferred separate appeals against both the orders of assessment on June 10, 1996. The appeal against the order under the Bombay Sales Tax Act is registered as DC/Appeal-VI/A-40/96-97 whereas the appeal against the order under the Central Sales Tax Act was registered as DC/Appeal-VI/CA-40/96-97.

5. On August 7, 1999 a show-cause notice for reduction of set-off under Rule 41D and enhancement in tax, interest and penalty was given to the applicant by the Deputy Commissioner of Sales Tax, Appeal VI. The applicant filed its reply dated August 21, 1999 to the said show-cause notice.

6. In the meanwhile, the Government of Maharashtra by notification announced Maharashtra Rajya Kar Vivad Nivaran Yojana, 1999. One of the terms for availing of the benefits of the said scheme was to withdraw the appeal, if filed, unconditionally. Therefore, on September 1, 1999 the applicant in terms of the said Scheme of 1999 applied for withdrawal of the appeal under the Central Sales Tax Act. The Deputy Commissioner of Sales Tax (Appeal VI) who had earlier issued the show-cause notice granted permission to the applicant to withdraw the appeal. He passed the withdrawal order dated September 30, 1999. Thereafter the applicant approached the competent authority under the Maharashtra Rajya Kar Vivad Nivaran Yojana, 1999 and settled the matter.

7. The appeal filed under the Bombay Sales Tax Act, was not withdrawn by the applicant as the applicant did not wish to have the benefit of the amnesty scheme under the Bombay Sales Tax Act. Thus, though the applicant filed appeals both under the Central Sales Tax Act and Bombay Sales Tax Act separately on the same day, the appeal under the Central Sales Tax Act was disposed of as withdrawn in September, 1999 and thereafter the appeal under the Bombay Sales Tax Act was decided on the merits on November 29, 1999.

8. The Assistant Commissioner of Sales Tax has assessed the applicant for the period from April 1, 1992 to March 23, 1993 on March 25, 1996. Being aggrieved by the said order of the assessing authority, the applicant had challenged the order before the first appellate authority on June 10, 1996. The issues raised before the first appellate authority were determination of taxable sales and allowance of the claim of sales against form 15. While working out the claim of the applicant, the first appellate authority has noticed that there were certain discrepancies in the original assessment order. Therefore, a show-cause notice was issued on August 7, 1999 to the applicant to explain the discrepancies. In reply to the said show-cause notice, the applicant submitted its written contentions on August 21, 1999. After taking into account the contentions submitted by the applicant, the first appellate authority has partly allowed the appeal on November 29, 1999. The claim of the applicant of sales against different forms was allowed. However, purchase tax under Sections 13 and 13A

was levied first time in the first appeal. The claim of the labour charges and branch transfers was also disallowed. Consequently, interest u/s 36(3)(b) of the Bombay Act was levied in the first appeal. As a result of this first appeal, the applicant was required to pay balance dues of Rs. 14,95,805.

9. Aggrieved by the order of the first appellate authority dated November 29, 1999, the applicant preferred Second Appeal No. 120 of 2000 before the Second Bench of the Maharashtra Sales Tax Tribunal at Mumbai. In the second appeal, the Tribunal by its judgment dated January 31, 2001 the action of the first appellate authority disallowing the claim of branch transfers and labour charges was confirmed by the Tribunal.

10. Being aggrieved by the judgment dated January 31, 2001 passed by the Second Bench of the Maharashtra Sales Tax Tribunal at Mumbai the applicant preferred reference application u/s 61(1) of the Bombay Sales Tax Act, 1959 referring the question mentioned in paragraph 1 (supra) to this Court u/s 61(1) of the Bombay Act.

Submissions

11. Ms. Badheka, Learned Counsel appearing for the applicant submits that though the appeal under the Central Sales Tax Act was disposed of under the Maharashtra Rajya Kar Vivad Nivaran Yojana, 1999, the authority proceeded with the appeal filed under the Bombay Sales Tax Act and decided against the applicant. She submits that there are two distinct enactments, one is the Bombay Sales Tax Act, 1959 enacted by virtue of legislative powers under entry 54, List II to Schedule VII of the Constitution. The other is the Central Sales Tax Act, 1956 enacted by the Parliament by virtue of legislative powers under entry 92 of the first List. Both have their own set of rules. Both the powers are distinct and under separate legislation.

12. Central sales tax is levied by the Central Government but is administered for the purpose of assessment by the States concerned as specified in Section 9 of the Central Sales Tax Act.

13. Both the assessments under the Bombay Sales Tax Act and the Central Sales Tax Act were carried out by the assessing officer but the provisions of notice, assessment, appeal, etc., are separate and distinct. There is a separate set of Rules for the procedural aspects under the Bombay Sales Tax Rules, 1959 as also under the Central Sales Tax (Bombay) Rules, 1957.

14. The jurisdiction to determine the character of transactions whether the goods are sold in the State in terms of Section 4 of the Central Sales Tax Act or dispatched outside the State or in the course of inter-State sales is with the Central Government under the Central Sales Tax Act, 1956. Where the goods are dispatched to a branch outside the State and sold outside the State of Maharashtra and there are no sales in Maharashtra, therefore, no tax can be levied in Maharashtra State but a tax is levied in the State where goods are

dispatched and ultimately delivered and sold and used in the manufacture in that State. These sales disclosed while filing the returns under the Central Sales Tax Act, are scrutinized in the course of assessment for the Central Sales Tax Act and allowed or disallowed and tax u/s 6A of the Central Sales Tax Act, as the case may be, is levied. If the branch transfers and sales outside are not allowed, an appeal lies under the Central Sales Tax Act for which there is a different format and distinctly different proceedings.

15. The Learned Counsel appearing on behalf of the applicant submits that the assessee is permitted to lead evidence to show that the goods are dispatched to a branch. However, an easy mode of determination is provided by the Central Sales Tax Act u/s 6A and that is production of declaration in form F under Rule 12(5) of the Central Sales Tax (Registration and Turnover) Rules, 1957. These forms give full details of dispatch and transport data. The forms are issued by the respective State Governments and use of which and the disposal of the goods received under such form is verified during the assessment of the branch in that respective State. The fact of branch transfer can be proved by any other mode of proof such as books of accounts, branch accounts, certificate from branch, etc.

16. The Learned Counsel appearing on behalf of the applicant submits that though their case attained finality under the Central Sales Tax Act, the authority below proceeded against the same cause of action under the State Act and held against the applicant.

17. The Learned Counsel for the applicant submits that the authority wrongly cast upon the applicant burden of proving the transfer of their stock to their branch office by producing additional evidence other than form F. She submits that all the documents were produced in support of the transactions which were already verified by the assessing authority while allowing the same under the Central Sales Tax Act. She submits that the jurisdiction to determine the character of the transaction whether the goods are sold in the State in terms of Section 4 of the Central Act or are dispatched outside the State or are in the course of inter-State sales is with the Central Government under the Central Sales Tax Act. Where the goods are dispatched to a branch outside the State and sold outside the State of Maharashtra, there are no sales in Maharashtra State and, therefore, no tax can be levied. But the tax is levied in the State where the goods are dispatched and ultimately delivered and sold or used in manufacture in that State. These facts were considered by the authority at the time of considering the applicant's application for amicable settlement under the Maharashtra Rajya Kar Vivad Nivaran Yojana, 1999 and closed the matter. Against the said order of the settlement authority under the State Act, the Revenue has not taken any action challenging the same on the grounds available to them under the Act. She submits that once the matter is settled under the Central Sales Tax Act, the authority does not have any powers under the State Act to reopen the same and impose penalty and/or tax. The Learned Counsel

appearing on behalf of the applicant in support of her submissions relied upon the judgment of the apex court in the matter of *Ashok Leyland Ltd. v. State of Tamil Nadu* reported in (2004) 134 STC 473. In that case the apex court has held that once the assessing authority accepts form F and has held the transaction as branch transfer, that is final and no revision can lie against the same. Paragraph 61 of the judgment reads as under:

61. In the case at hand it has to be determined whether the sale in question is an inter-State one. If through the means of a legal fiction it is determined that this is not an inter-State sale, then it amounts to a transfer of stock. This finding is made by a statutory authority who has the jurisdiction to do so and there is no provision for appeal. Therefore, the order made by such authority is conclusive in that it cannot be reopened on the basis that there had been a mere error of judgment. It also cannot be reopened under another statute, for example, the Sales Tax Act of the State concerned, when the order had been made under the Central Act. Section 9(2) of the Act is subject to the other provisions of the Act which would include Sub-section (2) of Section 6A of the Act. "Subject to" is an expression whereby limitation is expressed. The order is conclusive for all purposes. It can only be reopened on a small set of grounds such as fraud, misrepresentation, collusion, etc.

18. The Learned Counsel appearing for the applicant further submits that under the Central Sales Tax Act before reopening of the assessment order, it is mandatory on the part of the authority to issue notice. In the present case the authority failed to give any notice to the applicant for reopening the assessment under the Central Sales Tax Act. She relies upon the judgment of this Court (to which one of us, (i.e., Shri Justice V.C. Daga) was a party) in the matter of *K. Mohan and Co. (Exports) v. M.H. Vatnani*, Assistant Commissioner of Sales Tax reported in (2002) 126 STC 126, in which this Court has held that for reopening the assessment under the Central Sales Tax Act, a notice is mandatory. Paragraph 8 of the said judgment reads as under:

8. It is not in dispute that the assessment for the period September 1, 1978 to August 31, 1979 passed on March 29, 1982 allowing deduction of high sea sales amounting to Rs. 62,35,943 has not been reopened at all under the CST Act, 1956 and as such the said assessment has become final. Under the circumstances, reopening of the assessment under the BST Act on account of the alleged wrong deduction under the CST Act cannot be sustained. It is pertinent to note that the assessment under the CST Act and the BST Act is done by the same authority and the authority or the officer who has issued the impugned notice under the BST Act could very well have issued notice for reopening of the assessment under the CST Act, if wrong deduction was given under that Act. However, no such notice has been issued and the said assessment under the CST Act has become final.

19. In similar way the apex court in the matter of *Y. Narayana Chetty and Another Vs. The Income Tax Officer, Nellore and Others*, held that if no notice is

issued or if the notice issued is shown to be invalid then the proceedings taken in pursuance of the invalid notice would be illegal and void.

20. On the abovementioned submissions, Learned Counsel appearing on behalf of the applicant submits that the question referred by the Tribunal be decided in favour of the assessee and against the Revenue-State.

Submissions on behalf of the Revenue

21. Ms. Calcuttawala, learned Additional Government Pleader appearing on behalf of the Revenue-State, submits that the Deputy Commissioner within his powers and jurisdiction under the provisions of Sections 55 and 57 of the Bombay Sales Tax Act and u/s 9 of the Central Sales Tax Act can reopen the assessment for the previous year. She further submits that the appellate authority u/s 55 did not restrict itself to examine those aspects of the matter which are complained by the applicant but is competent to apply his mind to the order impugned in the appeal. He can revise any process which led to passing of the order appealed against. Under the Bombay Sales Tax Act, assessment, deductions, u/s 75 of the State Sales Tax Act which are components of the Central Sales Tax Act have to be filled in for completing the return to be filed under the Bombay Sales Tax Act. In the present case though the authority has called upon the applicant to produce the additional documents to show inter-State transaction, they failed to do so. The Deputy Commissioner of Sales Tax in his order dated November 29, 1999 held that:

Section 6A of the Central Sales Tax Act, 1956 clearly says that even though form F is not mandatory in support of claim of branch transfer and it can be produced on demand, the appellant is required to produce the other evidence of dispatch of such goods to prove his claim of branch transfers. The movement of goods from one State to another is occasioned as a result of transfer and not a sale can be proved by the evidence of dispatch only. In the present case, the appellant has not produced such evidence of dispatch and, therefore, the claim to that extent of branch transfer cannot be allowed in appeal and hence the claim of branch transfer worth Rs. 60,45,032 is required to be disallowed and taxed to sales tax at 10 per cent which comes to Rs. 6,06,504.

22. The learned Additional Government Pleader further submits that parallel action can be taken by the authority under the Central Sales Tax Act for the same cause of action because both the Acts are different, procedure is different and liability is also different.

Conclusions

We have heard the Learned Counsel for the parties and perused the written submissions made by them. The question of law to be answered in this case is as under:

Whether upon a true and correct interpretation of Section 55 of the Bombay Sales Tax Act, 1959, the Tribunal was justified in upholding the order of the first

appellate authority in disallowing the claim of branch transfers of Rs. 60,45,032 which was already allowed u/s 6A of the Central Sales Tax Act, 1956 when there was no appeal pending under the Central Sales Tax Act, 1956 ?

23. The above legal question involved in this reference is no longer *res integra*. It has been settled in a large number of cases decided by the apex court as well as by this Court. The decision of the apex court in the case of *Ashok Leyland Ltd.* (2004) 134 STC 473 is on all fours applicable to the facts of the present case. The apex court has held that once action is taken under one enactment then for the same cause of action the assessee cannot be punished under another enactment. The relevant part of this judgment reads as under (at pages 475 and 476 of STC):

Having regard to Article 286 of the Constitution of India, it is within the exclusive domain of Parliament to fix the situs of sale. Once the situs of sale, whether by way of fiction or otherwise, is determined, the State Legislature will be denuded of its power to fix another situs.

By reason of Section 6A(2) of the Central Sales Tax Act, 1956, a legal fiction has been created for the purpose of Central sales tax to the effect that where the movement of goods takes place otherwise than as a result of a sale, the transaction would not be an inter-State sale. The initial burden of proof is on the dealer to show that the movement of the goods was occasioned by reason of transfer of such goods otherwise than by reason of sale. On a declaration being filed by the dealer, an inquiry is to be made by the assessing authority for the purpose of passing an order on arriving at a satisfaction that movement of goods was occasioned otherwise than as a result of sale. Whenever such an order is passed a legal fiction is created.

If, through the means of a legal fiction, it is determined that the transaction in question is not an inter-State sale, then it amounts to a transfer of stock. This finding is made by the statutory authority who has the jurisdiction to do so and there is no provision for appeal. Therefore, the order made by such authority is conclusive, in that it cannot be reopened on the basis that there has been a mere error of judgment. It cannot also be reopened under the sales tax law of the State concerned when the order has been made under the Central Sales Tax Act. Section 9(2) of the Central Sales Tax Act is subject to the other provisions of the Act, which would include Section 6A(2). "Subject to" is an expression whereby limitation is expressed. The order in which a finding is given that the movement of the goods was occasioned by reason of transfer otherwise than by reason of sale, is conclusive for all purposes: it can only be reopened on a small set of grounds such as fraud, misrepresentation, collusion, etc.

Although it provides for a burden of proof, Section 6A of the Central Sales Tax Act, 1956, has to be read in the context of Section 6. Section 6 provides for the liability to pay tax on inter-State sales. Any transaction which does not fall within the definition of "sale" in Section 2(g)--the burden whereof would evidently be

on the assessee/dealer--would not be exigible to tax. Prior to the amendment of Sub-section (1) of Section 6A, the dealer had an option of filing the declaration in form F. After the amendment, the dealer does not have such an option. If the dealer fails and/or neglects to file such a declaration, the transaction would be deemed to be an inter-State sale. For this purpose also Parliament advisedly used the expression deemed. The amendment was necessitated not only to make the dealer file such a declaration imperatively but also to see that such movement of goods becomes inter-State sale by raising a legal fiction as "having been occasioned in the course of inter-State sale". In other words, if, a declaration is filed and, on an inquiry made pursuant thereto or in furtherance thereof, the particulars furnished are found to be correct by the assessing authority, the result thereof which is evidenced by the expression "thereupon" shall, in view of the legal fiction created, would be a transaction otherwise than as a result of an inter-State sale. Once such a legal fiction is drawn, the same would continue to have its effect not only while making an order of assessment in terms of the State law but also for the purpose of invoking the powers of assessment contained in Section 9(2) of the Central Sales Tax Act. The legal fiction continues to have effect even in relation to the powers of reassessment contained in the State tax law, e.g., Section 16 of the Tamil Nadu General Sales Tax Act, 1959.

....

Section 6A of the Central Sales Tax Act, 1956, as amended provides for a conclusive proof, except on a limited ground. The order of an authority u/s 6A is conclusive for all practical purposes, and the reopening of an assessment is permissible only on limited grounds, such as fraud, collusion, misrepresentation or suppression of material facts or giving or furnishing of false particulars, since in such cases the order would be vitiated in law. When an order passed in terms of Sub-section (2) of Section 6A is found to be illegal or void ab initio or otherwise voidable, the assessing authority derives jurisdiction to direct reopening of the proceedings and not otherwise. Mere change in the opinion of the assessing authority or to have a relook at the matter would not confer any jurisdiction upon him to get the proceedings reopened. Discovery of new material, although it may form a ground, by itself may not be a ground for reopening the proceedings unless by reason of such discovery it turns out that a jurisdictional error had been committed.

24. In a similar way, this Court in the matter of K. Mohan and Co. (Exports) v. M.H. Vatnani, Assistant Commissioner of Sales Tax reported in (2002) 126 STC 126 held that if a notice is not issued for reopening of the assessment, the order passed by the authority cannot be sustained in law.

25. In view of the above law laid down by the apex court and this Court, the legal question referred to this Court is answered in the negative and against the Revenue. The reference is disposed of accordingly with no order as to costs.