

**(1979) 11 BOM CK 0020**  
**In the Bombay High Court**  
**Case No : Sales Tax Reference No. 4 of 1977**

Kisanlal Rajmal

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

**Date of Decision :** 20-11-1979

**Acts Referred:**

Bombay Sales Tax Act, 1959 — Section 32, 33(5), 61(1)

**Citation :** (1980) 45 STC 88

**Hon'ble Judges :** D.P. Madon, J; D.N. Mehta, J

**Bench :** Division Bench

**Advocate :** P.C. Joshi, B.C. Joshi and C. R. Dashputre, for the Appellant; S.M. Dixit, for the Respondent

## Judgement

Madon, J.—This is a reference u/s 61(1) of the Bombay Sales Tax Act, 1959 (hereinafter referred to as "the said Act"), made by the Sales Tax Tribunal, Bombay, at the instance of the applicants, who are the assesseees, in which the following question has been referred to us :

"Whether the Tribunal was justified in law in holding that the Sales Tax Officer was not wrong in ignoring the return filed by the assessee on 27th June, 1969, in the circumstances of the case ?"

2. At all material times, the applicants were registered as dealers under the said Act. u/s 33(5) of the said Act, if a registered dealer does not furnish returns in respect of any period by the prescribed date, the Sales Tax Officer has the power to make a best judgment assessment after giving such dealer a reasonable opportunity of being heard. For the period of Samwat Year 2022, the applicants failed to file any return and even though notice was served upon them u/s 33(5) of the said Act, they failed to produce their books of account as also to file their returns for the said period. Accordingly, the Sales Tax Officer passed or made an ex parte order of best judgment assessment. In respect of the period 13th November, 1966, to 2nd November, 1967, that is, for Samwat Year 2023 also, the applicants failed to file their returns. Thereupon, on 14th January, 1968, the

Sales Tax Officer issued a notice to them calling upon them to show cause why they should not be assessed under the said section 33(5). By this notice, the assesseees were also called upon to produce their books of account. It is not clear whether any subsequent notice was served upon the applicants but it appears that the matter was fixed for hearing on several dates at none of which the applicants produced their books of account. Ultimately by his order dated 4th August, 1969, the Sales Tax Officer passed an ex parte order of assessment estimating the applicants' taxable turnover for the period in question to the best of his judgment. It may be mentioned that on 27th June, 1969, more than a month before the said order of assessment was made, the applicants filed their returns for the said period and these returns were taken on the record. The reason for passing the said order of assessment is stated by the Sales Tax Officer in his said order as follows :

"The dealer, M/s. Kisanlal Rajmal Co., was served noticed in form No. 27 dated 12th January, 1968, calling him to attend office with books of account for verification on 23rd February, 1968, but he failed and hence subsequent adjournments were granted on 31st July, 1968, 22nd August, 1968, 27th January, 1969, 12th February, 1969, 17th March, 1969, 29th March, 1969, 22nd May, 1969, and 18th July, 1969. In spite of the fact the dealer failed to produce the books of account for verification not that (sic) but the dealer failed to submit the returns for the whole year and after show cause notice submitted only returns without the payment of taxes on 27th June, 1969, and under these circumstances ex parte assessment order is completed to be passed as follows."

3. It is an admitted position that though returns for the said period had been filed more than a month prior to the passing of the said ex parte order of assessment and though this fact is mentioned in the said order of assessment, the Sales Tax Officer did not take into consideration these returns or what was stated therein.

4. The applicants thereafter filed an appeal before the Assistant Commissioner of Sales Tax challenging both the fact of non-consideration by the Sales Tax Officer of the returns filed by them as also the estimate arrived at by the Sales Tax Officer. This appeal was dismissed. Against the order of dismissal of this appeal, the applicants went in second appeal to the Tribunal. So far as the question as to whether the Sales Tax Officer's order was vitiated by reason of the fact that he did not take into consideration the returns filed by the assesseees is concerned, the Tribunal rejected it in these words :

"We are of the opinion that it was not quite necessary on his part to take into consideration the figures as per the returns submitted by them for the simple reason that the appellants neither submitted any returns nor produced their books of account and they were also assessed ex parte for the earlier year, i.e., S.Y. 2022."

5. The statement by the Tribunal that the returns filed by the applicants need not

be taken into account because they were assessed ex parte for the previous year makes surprising reading. It amounts to saying, "Give a dog a bad name and hang him".

6. The reasons given by the Tribunal for holding that it was not necessary for the Sales Tax Officer to have taken into consideration the returns filed by the applicants more than a month before the ex-parte order of assessment was made, namely, that the applicants had not submitted any returns or produced their books of account for the earlier period, namely, for the Samwat Year 2022, and in respect thereof an ex-parte order had also been made, are unsupportable in law. As mentioned earlier, it is not clear from the record whether the applicants had at any time appeared before the Sales Tax Officer, but it is difficult to understand how the matter was adjourned to different dates as mentioned in the order of assessment unless the applicants had appeared. The admitted position, however, is that the applicants did appear before the Sales Tax Officer on 18th July, 1969. This is one of the dates which is mentioned in the said order of assessment as being a date to which an adjournment was given. The Tribunal in its judgment stated that on that day the applicants had not been called for the purpose of assessment but were called in connection with an application for cancellation of their registration certificate made by them. There does not seem to be any material on record to justify this conclusion arrived at by the Tribunal. Mr. Dixit, the learned Advocate for the respondents, submitted that the assessment had been closed prior to the returns being filed. Neither the order of assessment nor the appellate order of the Assistant Commissioner nor the judgment of the Tribunal in second appeal bear out this fact, though it must be mentioned that the statement of the case mentions that the hearing was closed by the Sales Tax Officer on 22nd May, 1969. It is very difficult to understand from what material the Tribunal has come to make this statement in the statement of the case. The assessment order itself makes no such mention. Though the Rules made under the said Act prescribe the time within which returns are to be filed, there is no prohibition in the said Act against filing returns after the prescribed date has expired. On the contrary, section 63(1)(c), which makes it an offence for a dealer failing "without sufficient cause to furnish any return as required by section 32, by the date and in the manner prescribed" would show that returns can be filed after the expiry of the prescribed date. In fact, Mr. Dixit has candidly stated to the court that returns are allowed to be filed late and taken on the file and that the returns in this particular case were also allowed to be filed and were taken on the record. In our opinion, if, before the Sales Tax Officer came to pass the ex-parte order of assessment, the applicants had submitted the returns and these returns were accepted and taken on the record, it was not right for the Sales Tax Officer to ignore these returns and to seek to assess the applicants as if no returns had been filed. The position in law is clear and obvious and no authority is required in support of it. We, however, find ourselves fortified in the conclusion we have reached by the judgment of the Madras High Court in *Bata Shoe Company Private Limited v. Joint Commercial*

Tax Officer, Harbour Division II, Madras [1968] 21 S.T.C. 135. Section 12 of the Madras General Sales Tax Act, 1959, makes provision similar to section 33(5) of the said Act. With reference to the said section 12, the Madras High Court held in that case that there is no provision in the Madras General Sales Tax Act, 1959, which forbids the filing of a return after the prescribed time, or which forbids returns filed belatedly being considered by the assessing officer in the assessment proceedings. The court held that the whole object of section 12(2) was to provide for two contingencies, (1) where a return had not been filed within the prescribed time, and (2) where one was filed and it was in the opinion of the assessing officer incorrect or incomplete, and that in neither of these cases the jurisdiction of the officer to assess by best judgment arose, but that did not mean that where before an assessment order was made a return was filed, though belatedly, the assessing officer was at liberty to ignore it and make a best judgment assessment. In our opinion, the failure of the Sales Tax Officer in ignoring the returns filed by the applicants is an error which vitiated the said order of assessment passed by him.

7. In the result, we answer the question referred to us in the negative, that is, in favour of the assesseees and against the department.

8. The respondents will pay to the applicants the costs of this reference fixed at Rs. 300. The assesseees will be entitled to a refund of the fee of Rs. 100 paid by them.

9. Reference answered in the negative.