

(1977) 01 BOM CK 0010
In the Bombay High Court
Case No : Sales Tax Reference No. 10 of 1975

Maniar and Sons	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 29-01-1977

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 12, 23, 3(3), 46, 5

Citation : (1978) 7 CTR 19 : (1977) 40 STC 562

Hon'ble Judges : M.H. Kania, J;D.P. Madon, J

Bench : Division Bench

Advocate : R.V. Patel, for the Appellant; M.S. Sanghavi and M.M. Dadhich, Jamsedji Rustomji and for Devidas and Jani and Merchant, for the Respondent

Judgement

Madon, J.—This is a reference u/s 61(1) of the Bombay Sales Tax Act, 1959, made at the instance of the assesseees, who are a partnership firm and were registered as a dealer under the said Act and also held a licence u/s 23 of the said Act, in respect of the assessment period 3rd November, 1965, to 31st March, 1966.

2. The facts material for the purposes of deciding this reference are that during the said assessment period the applicants purchased plastic bangles of the value of Rs. 2,89,990 from Aurobrite (India) Private Limited. In respect of the bangles so purchased by them Aurobrite (India) Private Limited issued to the applicants invoices in which at the end there appear the words :

"G.S. Tax - | included." Sales Tax -

3. The amount of such tax included in the invoices was not separately shown. During the assessment period the applicants resold the bangles so purchased by them for a total price of Rs. 3,92,208. Out of these sales, sales of the value of Rs. 50,000 were effected to the registered dealers who held recognition granted by the Commissioner of Sales Tax and against declarations in form 15 to the Bombay Sales Tax Rules, 1959, given by such purchasers. In respect of the

remaining sales of the aggregate value of Rs. 3,42,208, the applicants claimed a deduction as resales u/s 10(2)(i) of the said Act. This claim of the applicants was rejected. According to the applicants, they had paid a sum of Rs. 8,693.88 by way of sales tax and Rs. 7,568.52 by way of general sales tax to Aurobrite (India) Private Limited. In support of this claim, the applicants filed with the Sales Tax Officer, in the course of assessment proceedings, statements issued by the said Aurobrite (India) Private Limited showing the amount of sales tax and general sales tax recovered by the said company as also a letter from it stating that it had remitted the amounts so recovered by it to the Government authorities. The applicants also produced another letter from the said Aurobrite (India) Private Limited giving the date and the number of the receipted challan by which the said amounts were thus paid over by the said Aurobrite (India) Private Limited into the treasury. In the course of their assessment proceedings, the applicants claimed a set-off under rule 42 of the Bombay Sales Tax Rules, 1959, in respect of the said sum of Rs. 7,568.52, being the amount of general sales tax, which their vendors, the said Aurobrite (India) Private Limited, had recovered or collected from them. The Sales Tax Officer negatived both the claim for deduction and the claim for set-off. Against this order the applicants filed a first appeal to the Assistant Commissioner of Sales Tax. The said appeal was dismissed. Against the dismissal of their appeal the applicants filed a second appeal to the Tribunal, which too was dismissed. Thereafter, at the instance of the applicants the Tribunal has stated a case and referred the following two questions for our determination :

"(1) Whether, on the facts and in the circumstances of the case and on a true and correct reading of section 10(2)(i) of the Bombay Sales Tax Act, 1959, the Tribunal was justified in law in holding that the deductions provided in the said section were not allowable ?

(2) Whether, on the facts and in the circumstances of the case and on a true and correct interpretation of rule 42 of the Bombay Sales Tax Rules, 1959, the Tribunal was correct in law in holding that the claim of set-off of general sales tax made by the applicants (original assesseees) was not allowable ?"

4. At the hearing of this reference, Mr. Patel, the learned counsel for the applicants, stated that he did not desire us to determine question No. (1) and that he was confining this reference only to question No. (2). In view of this statement made on behalf of the applicants, we do not propose to deal with or answer question No. (1).

5. So far as the question of set-off is concerned, the Sales Tax Officer as also the Assistant Commissioner of Sales Tax have rejected the applicants' claim on the ground that the amount of tax recovered or collected from the applicants had not been shown separately in the invoices issued to them by the said Aurobrite (India) Private Limited and that the condition laid down in rule 45 of the said Rules in that behalf had not been satisfied. It appears that the Tribunal had in some cases given conflicting judgments with respect to the said rule 45. In

second Appeals Nos. 298 and 299 of 1966 Ramprasad Murlidhar v. State of Maharashtra, a Special Bench of three Members of the Tribunal held that rule 42 of the said Rules had to be read together with the said rule 45 and that clause (c) of sub-rule (1) of rule 45 was decisive of the matter, because under that clause, the amount of tax recovered from a dealer had to be shown separately in the bill or invoice given to him by his vendor. The Tribunal further held that in the 1966 Edition of the Bombay Sales Tax Rules, 1959, the said clause was shown as being under sub-clause (iii) of clause (B), but that appeared to be a misprint and that it was a separate clause by itself like clauses (A) and (B), which preceded. In dismissing the second appeals of the applicants, the Tribunal followed this decision of the Special Bench in Ramprasad Murlidhar v. State of Maharashtra (Second Appeals Nos. 298 and 299 of 1966).

6. In order to arrive at a correct interpretation of rules 42 and 45 of the said Rules, it is necessary to see the scheme with respect to the grant of drawback, set-off or refund as contained in the said Rules. The provisions with respect to the grant of such drawback, set-off or refund are contained in Chapter VII of the said Rules. These rule have been amended time and again and some new rules have been inserted. No one would categorise these rules as being simple or couched in easily intelligible language. For the same thing, different expressions are used in different rules, and the various amendments made thereto add to the confusion. We are none the less to deal with these rules and to give a consistent interpretation to them.

7. Before we turn to the general scheme it will be convenient first to set out the provisions of the said rule 42 and the material provisions of the said rule 45. They are as follows :

"42. Drawback, set-off, etc., of tax paid on goods purchased by a licensed dealer. - In assessing a registered dealer the Commissioner shall grant him a drawback, set-off or refund of general sales tax recovered from him on the sale to him of goods (other than those specified in Part II of Schedule B) made otherwise than against a certificate u/s 12 at a time when he held a licence on such registered dealer showing to the satisfaction of the Commissioner that the goods so purchased have been resold by him otherwise than in the course of inter-State trade or commerce or of export out of the territory of India.

45. Conditions for grant of drawback, set-off or refund. - (1) No drawback, set-off or refund under these Rules shall be granted to a dealer in respect of any amount of tax recovered from him or of tax not collected from him separate or payable by him on the purchase of any goods -

(A) unless such dealer was a registered dealer under the Act or a registered dealer under an earlier law at the time of such purchase;

Explanation. - The amount of tax recovered from a dealer in respect of purchase of goods on the resale of which no tax is payable by virtue of the proviso to sub-section (1), or the proviso to sub-section (2), or the proviso to sub-section (3) of

section 3, shall not be allowed as drawback, set-off or refund;

(B) unless such dealer has -

(i) maintained a true account in chronological order of all the purchases of goods made by him on or after the appointed day, showing the following details :-

(a) the date on which the goods were purchased;

(b) the name of the selling dealer and his registration certificate number if registered, from whom the goods are purchased, and the description of the goods;

(c) the number of the bill/invoice/cash memorandum under which they were purchased;

(d) the purchase price of the goods;

(e) the amount of purchase tax, if any, paid or payable by him in respect of the goods purchased;

(f) the amount of sales tax or general sales tax, if any, recovered from him by the selling dealer;

(ii) in the case of goods in respect of the purchase of which tax has been recovered from the claimant dealer or is payable by him as purchase tax under an earlier law, maintained a true account in chronological order of the goods so purchased and held by him on the appointed day, which shall show the particulars mentioned at (a) to (e) above, and the amount recovered under each of the earlier laws separately; and

(iii) in the case of goods held in stock on the commencement of the appointed day, furnished to the sales Tax Officer, on or after the appointed day but before the 26th March, 1960 -

(a) where the selling dealer has recovered from him any amount by way of tax under any earlier law, a statement in form 32, and

(b) where the selling dealer has not recovered from him any amount by way of tax under any earlier law, a statement in form 32-A duly signed and verified by him or by a person authorised by him;

(c) unless in the original bill/invoice/cash memorandum of the selling dealer relating to such purchase the amount of the sale price of the goods and the amount recovered by way of tax (if any), have been separately shown :

Provided that the Commissioner shall not reject the evidence of any such account only for the reason that the particulars of each transaction have not in all cases been maintained in chronological order, if the failure of the claimant dealer so to enter them was due in the opinion of the Commissioner to a reasonable cause.

(2) The claimant dealer shall, if so required, produce before the Commissioner

the original bill/invoice/cash memorandum relating to each purchase in respect of which the claim for drawback, set-off or refund has been made."

8. It appears that in some earlier editions of the Bombay Sales Tax Rules, 1959, in sub-clause (c) of clause (iii) of condition (B) in sub-rule (1), the letter "c" in brackets was printed as a capital letter, but after some time it has been consistently printed as a small "c". According to the Tribunal, this is a mistake in the later editions, and sub-clause (c) formed a separate clause like the earlier two clauses (A) and (B). If clause (c) were an independent clause, it would form a separate condition by itself. If not, then it would be merely a part of clause (iii) of condition (B). The controversy before us has ranged round whether sub-clause (c) is a separate condition or is a part of condition (B). The other controversy is with respect to the meaning to be given to the word "recovered" in rule 42. According to the applicants, the word "recovered" in rule 42 means recovered either separately or otherwise, while according to the respondents "recovered" means recovered separately. As mentioned earlier, the Tribunal construed sub-clause (c) as an independent condition, and held that in rule 42 read with this clause "recovered" must be construed as recovered separately.

9. The scheme of drawback, set-off or refund appears to be that in respect of various rules refund is granted to a purchaser in respect of the amounts recovered or collected from him by his vendor by way of sales tax or general sales tax or both. Rule 40 deals with drawback, set-off or refund of tax for goods in stock on 1st January, 1960. Sub-rule (2) of rule 40 deals with a case where the goods were purchased by an assessee from a dealer registered under any earlier law and, on such purchase, the dealer had "recovered from the assessee any tax under such earlier law". Clause (a) of sub-rule (3) of rule 40 deals with a case where "the selling dealer has not separately recovered" from the assessee any tax u/s 8 of the Bombay Sales Tax Act, 1953. Similarly, rule 40-A, which deals with drawback, set-off or refund of tax for certain goods held in stock on 14th March, 1960, uses the word "recovered", and so does rule 40-B which deals with drawback, set-off or refund of tax for country liquor and foreign liquor held in stock on 17th December, 1964, or 1st July, 1965. Rule 40-B also deals with a case where the registered dealer from whom the liquors were purchased "did not recover" from the assessee any amount by way of sales tax or general sales tax. Rule 41 deals with drawback, set-off or refund of tax paid by a manufacturer in respect of his purchases up to 15th July, 1962. Clause (a) of the said rule 41 uses the expression "recovered", while clause (aa)(iii) uses the expression "has not separately recovered". Similarly, clause (c)(ii) uses the expression "has not separately recovered" and so does clause (cc)(iii), while clause (e) uses the expression "recovered". Clause (c) of rule 41-A, which deals with drawback, set-off or refund of tax paid by a manufacturer in respect of purchases made on or after 15th July, 1962, uses the expression "had not charged tax, other than retail sales tax, separately". In rule 42-A, which deals with drawback, set-off or refund of tax paid on purchases of goods sold to certain classes of dealers, the word "recovered" alone is used. In rule 43(1), while clause (a)(i) uses the word

"recovered", clause (a)(ii) uses the expression "has not charged tax, other than retail sales tax, separately".

10. The pertinent thing to note in all these rules is that wherever any rule provides for a case where a dealer has recovered from the purchasing dealer any amount by way of tax, in cases where such tax has not been recovered separately, a lesser amount by way of drawback, set-off or refund has been granted than in those cases where the amount of tax has been recovered separately. In these cases, while the word "recovered" is used first, generally an exception is carved out in respect of cases where the tax has not been recovered separately in order to reduce by a certain proportion the amount of drawback, set-off or refund. The scheme, therefore, of these rules seems to be to grant a drawback, set-off or refund of tax recovered from a purchasing dealer by his vendor in all cases save that in those cases where it has not been collected separately, that is, collected, charged or recovered separately, a lesser amount is given by way of drawback, set-off or refund. The object underlying this seems clear. The rule-making authority proceeded upon the basis that even where a seller does not show in the bill separately the amount of tax, he was not likely to pay such amount himself out of his own pocket or from his own profits and that in order to recoup or reimburse himself for the amount of tax which would become payable by him he would put up the price of goods; and since the tax under the Bombay Sales Tax Act is a tax levied on percentage basis and there would be no difficulty in calculating on any transaction the amount of tax payable in respect thereof, the rule-making authority proceeded to grant drawback, set-off or refund even in those cases where the amount of tax was not separately shown in the bill.

11. Rule 42 of the said Rules uses clearly the word "recovered". It provides for drawback, set-off or refund of general sales tax on goods purchased by a licensed dealer in respect of the amount of such general sales tax recovered from him on the sale to him of goods other than declared goods specified in Part II of Schedule B to the said Act in cases where the purchasing licensed dealer has not furnished to his vendor a certificate u/s 12. This rule does not contain any specific provision like in rules 41(aa), 41(c), 41-A and 43(1)(a)(ii) providing for a lesser amount of drawback, set-off or refund in cases where general sales tax has not been recovered separately. Relying upon this fact, Mr. Sanghavi, the learned counsel for the respondents, submitted that since the other rules mentioned above specifically provided for grant of drawback, set-off or refund where sales tax had not been recovered separately as also where sales tax had been recovered and shown separately in the bill or invoice, the operation of the word "recovered" in rule 42 must also be confined to cases where general sales tax had been "recovered separately", and since there was no provision in the said rule 42 for granting any drawback, set-off or refund in cases where general sales tax had not been recovered separately, the appellants were not entitled to any such relief. We are unable to accept this interpretation urged before us by Mr. Sanghavi. As we have pointed out earlier, the general intention is to grant

drawback, set-off or refund in respect of taxes collected by a vendor from a purchasing dealer. This is not for the purpose of benefiting any particular dealer but to prevent in a chain of transactions where the goods have passed through several hands, the price of goods being inflated and put up exorbitantly by reason of each vendor adding to the price the amount of tax collected from him by his own vendor. In certain cases mentioned earlier, where sales tax had not been recovered separately, the drawback, set-off or refund that is given is less than the full amount, but even this lesser amount is only fractionally so. u/s 23 of the said Act a licence is granted by the Commissioner of Sales Tax to a registered dealer whose turnover of sales to other registered dealers exceeds Rs. 50,000 a year. A licence is thus to be granted to a wholesaler and not to a retailer. A licensed dealer would, in his turn, therefore, sell goods to other registered dealers. u/s 10(2)(ii) read with clause (c) of section 12 of the said Act where a licensed dealer purchased goods against certificate given by him that the goods were intended for resale by him otherwise than in the course of inter-State trade or commerce or export out of the territory of India or were intended for resale by him in the course of inter-State trade or commerce or export out of the territory of India within nine months from the date of such purchase, the turnover of such sales was to be deduced from the gross turnover of the vendor provided the vendor was a licensed dealer. In quite a few cases, however, a licensed dealer purchasing goods may not find it possible to give the required certificate, because when he purchases goods he may not know whether he would resell them in the course of inter-State trade or commerce or export them out of the territory of India or whether he would sell them within the State, and seeing that there is a condition that the resales in the course of inter-State trade or commerce or export out of the territory of India are to be made by him within nine months from the date of the purchase, if the licensed dealer so resells the goods after the expiry of that period he might find himself in the position of having charged with having given a false certificate with the consequences attaching thereto. In such cases, a licensed dealer would prefer not to purchase goods against certificate so that the dealer, who is the vendor, would recover from the licensed dealer who is purchasing the goods the amount of tax, because the turnover of such sales is not to be deducted from the vendor's turnover of sales. In the normal course, when the purchasing licensed dealer resells these goods he could add to the price the amount of tax which has been recovered from him by his own vendor. This would put up the price of goods. In order that the prices of goods may not be so increased, rule 40 provides for drawback, set-off or refund of the amount of general sales tax recovered from a licensed dealer by his own vendor. The sole question is whether the meaning to be given to the word "recovered" is to be cut down by a reference to the other rules in which a marginally lesser amount of drawback, set-off or refund is provided in cases where the amount of tax has not been separately recovered. We see no reason why this should be done. The word "recovered", wherever it is used in the Rules, is used in a general sense, but when in certain cases a lesser amount by way of drawback, set-off or refund is to be granted, the rule-making authority has

specifically made provision for it and has carved an exception out of the general rule. It would be somewhat surprising if the rule-making authority thought it expedient to grant a marginally lesser amount of drawback, set-off or refund where tax was recovered but not separately shown in the case of sales of foreign and country liquor under rule 40-B or of precious stones, opium, ganja and bhang under rule 40, but not in a case of a large number of goods, many of which are goods of household necessity. According to us, the said set-off rules provide for this relief in all cases where tax has been recovered save that in respect of certain classes of goods and certain types of sales the amount of such relief is made marginally less. It may also be mentioned that the Bombay Sales Tax Act, 1959, nowhere uses the expression "recover" tax. The expression used there is "collect any sum by way of tax". Section 46 of the said Act prescribes certain prohibitions against collection of tax in certain cases. Thus, it prohibits a person from collecting any sum by way of tax in respect of sales of any goods, which are tax-free u/s 5, or an unregistered dealer not liable to pay tax from collecting any sum by way of tax in respect of any sale or purchase made by him or a registered dealer from collecting any amount by way of tax in excess of the amount of tax payable by him. One would have expected that when the rule-making authority made rules providing for drawback, set-off or refund of any amount paid by way of tax, it would have adopted the same phraseology which the legislature had used. However, the rule-making authority for reasons best known to it thought it fit in many places to use the expression "recovered" tax or general sales tax or sales tax, as the case may be. In this connection, it might be useful to recollect that rule 45, which prescribed conditions for drawback, set-off or refund, speaks both of tax recovered from a dealer as also "of tax not collected from him separately". In spite of repeated questions put by us to both the learned counsel, they were not able to point out any distinction or difference between the meaning of the two words "collected" and "recovered" as used in the Bombay Sales Tax Rules, 1959, and we may mention that the learned counsel for the respondents informed us that even the officers instructing him had not been able to point out any difference.

12. We will now turn to rule 45 by reason of which the taxing authorities and the Tribunal have held that the applicants are not entitled to any relief. Rule 45 is a rule which lays down conditions for grant of drawback, set-off or refund. It expressly refers to drawback, set-off or refund "under these Rules". Therefore, rule 45 prescribes general conditions, which are to be read into each and every rule. Both the taxing authorities and the Tribunal have proceeded upon the basis that sub-clause (c) before the proviso to rule 45(1) is a separate condition. Rule 45 provides that no drawback, set-off or refund under the Rules is to be granted to a dealer in respect of any amount of tax recovered from him or of tax not collected from him separately or payable by him on the purchase of any goods unless the conditions set out in that rule are complied with. The first condition is numbered (A). It is that the registered dealer claiming such drawback, set-off or refund was a registered dealer under the Act or under any earlier law at the time

of such purchase. The second condition is numbered (B). It is that a registered dealer cannot claim drawback, set-off or refund unless he has maintained a true account in the manner prescribed. This provision with respect to the maintenance of accounts is to be found in clause (i) of condition (B). Clause (ii) of condition (B) also provides for maintenance of accounts in a particular form in cases where tax has been recovered from the claimant dealer or is payable by him as purchase tax under an earlier law. Clause (iii) of condition (B) deals with the case of goods held in stock on 1st January, 1960, on which date the Act came into force. In such a case, the dealer claiming drawback, set-off or refund was required to furnish to the Sales Tax Officer before 26th March, 1960, a statement in form 32 in cases where the selling dealer has recovered from him any amount by way of tax under any earlier law and a statement in form 32-A in cases where the selling dealer has not recovered from him any amount by way of tax under any earlier law. Form 32 contains several columns. One of them is headed "Purchase price excluding tax". Another is headed "Amount of tax recovered or paid as purchase tax or by way of addition of purchase price to the taxable turnover (showing each tax separately)". Form 32-A requires the dealer to state the amount of purchase price and nine-tenth of the value of stock remaining to be sold as also the amount to be claimed as drawback, set-off or refund under rule 40. Thereafter comes in rule 45 the paragraph numbered (c). It provides "unless in the original bill/invoice/cash memorandum of the selling dealer relating to such purchase the amount of the sale price of the goods and the amount recovered by way of tax (if any), have been separately shown". According to the taxing authorities and the Tribunal, it is a separate condition altogether. According to the applicants, it is a part of clause (iii) of condition (B). As mentioned earlier, the Tribunal has further referred to the fact that in some of the earlier editions of the Bombay Sales Tax Rules the letter "c" before this paragraph was capital letter "C". In arriving at this conclusion, the Tribunal has overlooked the setting in which this paragraph occurs. It is followed by a proviso which states : "Provided that the Commissioner shall not reject the evidence of any such account only for the reasons that the particulars of each transaction have not in all cases been maintained in chronological order, if the failure of the claimant dealer so to enter them was due in the opinion of the Commissioner to a reasonable cause." The phrase "any such account" in the said proviso refers to the account required to be maintained by condition (B). If paragraph (c) was a separate condition, the proper place for the proviso would have been at the end of condition (B), that is, after clause (iii)(B). It could have never come after the clause which deals not with the maintenance of accounts but with the production of original bill, invoice or cash memorandum. The position in which paragraph (c) occurs clearly makes it a part of clause (iii) of condition (B), and, on reading the whole of condition (B), it is clear that what is sought to be done by this sub-clause (c) is that a statement in form 32 and form 32-A are not required to be filed if in the original bill, invoice or cash memorandum of the selling dealer the amount of the sale price of the goods and the amount recovered by way of tax have been separately shown.

13. There is yet another reason why sub-clause (c) cannot be a separate condition by itself. The opening words of rule 45 speak of drawback, set-off or refund under these rules in cases where tax has not been collected from the dealer separately. As we have seen, some of the rules in the said Chapter VII provide for drawback, set-off or refund in cases where tax has not been recovered separately, that is, it has been recovered but not shown separately in the original bill, invoice or cash memorandum. If sub-clause (c) were to be taken as a condition to apply it to every case, then the result would be that in cases where tax has been recovered but not shown separately in the bill in spite of the provisions of the earlier rules, the claimant dealer would not be entitled to any drawback, set-off or refund. It is also significant that in all the subsequent editions of the Bombay Sales Tax Rules, 1959, the letter "c" in brackets against the sub-clause in question is printed in small letter and not in capital letter. But what is more important is that in each and every subsequent editions of the said Rules, the said sub-clause is printed immediately below the indented sub-clauses (a) and (b) of clause (iii), that is, it is itself printed indented. In our opinion, if there was a misprint, the misprint was in the earlier editions of the said Rules.

14. So far as the applicants are concerned, there is no dispute that their vendors, Aurobrite (India) Private Limited, have recovered tax from them, including general sales tax. There is equally no dispute that the other conditions in rule 45 applicable to them have been satisfied. The only ground on which their claim for drawback, set-off or refund was disallowed was that their vendors' invoice did not show the amount of tax recovered from them separately.

15. For the reasons set out above, we answer the questions referred to us as follows :

Question No. (1) : Unnecessary to answer in view of the statement made on behalf of the applicants that they did not desire to have it answered.

Question No. (2) : In the negative.

16. The respondents will pay to the applicants the cost of this reference fixed Rs. 300.

17. The fee of Rs. 100 paid by the applicants will be refunded to them.

18. Reference answered accordingly.