

(1959) 07 BOM CK 0001

In the Bombay High Court

Case No : O.C.J. Miscellaneous Application No. 448 of 1958

Manordas Kalidas

APPELLANT

Vs

V.V. Tatke

RESPONDENT

Date of Decision : 24-07-1959

Acts Referred:

Bombay Sales Tax (Procedure) Rules, 1954 — Rule 41
Constitution of India, 1950 — Article 226

Citation : (1959) 61 BOMLR 1560 : (1960) 11 STC 87

Hon'ble Judges : Shah, J;S.T. Desai, J

Bench : Division Bench

Advocate : M.J. Mistree and B.A. Palkhivala, for the Appellant; H.D. Banaji, for the Respondent

Judgement

Shah, J.—Messrs Manordas Kalidas, who will hereafter be referred to as "the assesseees", carry on business in cloth in Bombay, and are registered dealers under the Bombay Sales Tax Act. For the assessment years 1948-49 and 1949-50, corresponding to the assessment period from 7th October, 1948, to 31st March, 1950, the Sales Tax Officer, C-I-J Ward, Bombay, assessed the assesseees on 4th May, 1951, u/s 11 of the Bombay Sales Tax Act, 1946. The Sales Tax Officer accepted the gross turnover returned by the assesseees at Rs. 1,15,50,858-10-3 and determined the sales tax payable thereon. On 13th June, 1958, the Assistant Collector of Sales Tax issued a notice to the assesseees informing them that they had suppressed sales of Rs. 20,00,000 from their regular books of account for the year 1948-49 and it was proposed to revise the order passed by the Sales Tax Officer for the said year by incorporating and adding sales of Rs. 20,00,000 to the turnover, and subject the same to sales tax at the rate of one anna in a rupee. A similar notice was also issued on the same day in respect of the year 1949-50. The assesseees then applied under Article 226 of the Constitution of India claiming a writ in the nature of certiorari or other writ, direction or order against the Assistant Collector of Sales Tax calling for the records relating to the assessment, re-assessment or revision of assessment of

the assessees for the assessment, years 1947-48, 1948-49 and 1949-50, and, after making enquiries and looking into the matter, setting aside the notices issued by the Assistant Collector of Sales Tax. The assessees also claimed a writ in the nature of prohibition or mandamus or other writ or direction prohibiting or restraining the Assistant Collector of Sales Tax and his successors in office from taking any action or proceeding for assessment, re-assessment or revision of assessment of the assessees in respect of the assessment years 1947-48, 1948-49 and 1949-50 and from enforcing the notices. The Assistant Collector of Sales Tax, who was appeared before us in pursuance of the notice, has challenged the right of the assessees to obtain the writs or writ claimed by them.

2. Mr. Mistree on behalf of the assessees has raised two contentions : (i) that whereas the assessment proceedings for the years in question against the assessees for assessment of sales tax were taken under the Bombay Sales Tax Act, 1946, the notices to revise the assessment were issued under the provisions of the Bombay Sales Tax Act, 1953, and as such the notices were illegal and could not form the basis of proceedings for revising the assessments made under the Act of 1946, and (ii) that the notices for revision of assessment were issued more than eight years after the expiry of the period of assessment and in view of the provisions contained in section 15 of the Bombay Sales Tax Act, 1953, and the corresponding provisions contained in section 14 of the Sales Tax Act, 1946, they are barred by limitation, and that, in any event, the notices are issued after an unreasonable lapse of time.

3. The two impugned notices were issued in Form No. XXIV prescribed under the Sales Tax Act of 1953; and in terms it is stated that it is a "notice to a person when it is proposed to pass an order which affects him adversely u/s 31 of the Bombay Sales Tax Act, 1953", and reference is made to rule 41 of the Bombay Sales Tax (Procedure) Rules, 1954. In the notice itself there is no reference to the provisions of the Act of 1953. The two notices which are substantially in identical terms state that whereas it was proposed to pass an order to the effect "mentioned below" the assessees were informed that if they wished to prefer any objection against such order they should attend either personally or by a legal practitioner or by an agent duly authorised for the purpose at the time place mentioned in the notice; and the gist of the order proposed to be passed was stated as follows :

"You have suppressed sales of Rs. from the regular books of accounts for the year and as such it is proposed to revise the orders passed by the Sales Tax Officer for the said year by incorporating and adding sales of Rs. subject to sales tax at the rate of one anna in the rupee."

4. The mere heading or the use of the form prescribed for issuing a notice for taking action u/s 31 of the Sales Tax Act, 1953, will not, in our judgment, alter the true character of the notices issued by the Assistant Collector of Sales Tax. The Assistant Collector of Sales Tax had authority under the Act of 1946 to issue notices of the nature of the impugned notices. Even assuming that the notices

had to be issued in exercise of the powers conferred under the Act of 1946, in the absence of any indication in the body of the notices that they were intended to be issued under the Act of 1953 and not under the Act of 1946, the notices were not unauthorised.

5. By sub-section (1) of section 48 of the Bombay Sales Tax Act, 1953, the Bombay Sales Tax Act, 1946, was repealed. By sub-section (2) it is provided that the repeal does not affect or will not be deemed to affect any right, title, obligation or liability already acquired, accrued or incurred, and also the recovery of any tax or penalty which may have become payable under the Act of 1946; and that such taxes or penalties or arrears thereof shall be assessed, imposed and recovered so far as they may be, in accordance with the provisions of the Act of 1913. Evidently by virtue of the provisions contained in the Sales Tax Act, 1946, the assessee, for any evasion of tax, incurred an obligation to pay that tax, liability to pay which had arisen by reason of the sales effected but of which the particulars were concealed. The repeal of that Act does not, by virtue of the provision contained in section 48(2), affect that obligation; and the recovery of that tax which was payable under the Act of 1946 is, by the express provision made in section 48(2), not affected by the repeal of the Act of 1946, and all such taxes are to be assessed, imposed and recovered in accordance with the provisions of the Act of 1953. The Assistant Collector of Sales Tax had, therefore, authority to issue the notices and conduct the proceedings for re-assessment of the liability, if any, of the assessee under the Act of 1953.

6. To appreciate the second contention, it is necessary to set out certain provisions of the Sales Tax Acts of 1946 and 1953. By section 10 of the Act of 1946 it was provided that every dealer who may be required so to do by the Commissioner by notice served in the prescribed manner and every registered dealer shall furnish such returns by such dates and to such authority as may be prescribed. By section 11 the procedure for assessment of taxes was prescribed. Authority was given under that section to the Commissioner to make "best judgment assessment" in certain specified cases. There was no provision enacted by the Sales Tax Act, 1946, about the period within which the notice requiring a dealer or a registered dealer to make a return was to be issued. By section 11A, which was added by Act I of 1949, authority was given to the Collector to issue a notice within the period prescribed, where that officer was satisfied that any turnover in respect of sales or supplies of any goods chargeable to tax under the Act had escaped assessment in any year or had been under-assessed or assessed at a lower rate or any deductions had been made wrongly therefrom and in any case where the Collector had reason to believe that the dealer had concealed the particulars of such sales or supplies or deliberately furnished incorrect returns. By that section authority was also conferred upon the Collector to proceed to assess or re-assess the tax due by such dealer and the provisions of the Act were to apply as if the notice were one served u/s 11. Even though no period was prescribed for issue of a notice u/s 11, re-assessment u/s 11A could be made within the period of five years or three years as prescribed. By section

22 power was conferred upon the Collector, subject to the rules which may be prescribed and for reasons to be recorded in writing, either upon application or of his own motion, to revise any order passed under the Act or the rules made thereunder by a person appointed u/s 3 to assist him. By this provision authority was evidently conferred upon the Collector to revise the orders of his subordinates who were authorised to act as Sales Tax Officers, but the Legislature did not prescribe any period for revising the orders of the subordinate authorities when the Collector proceeded suo motu. Under the Bombay Sales Tax Act, 1953, the corresponding provision relating to the making of returns was section 13; the provision relating to the assessment of taxes was section 14 and the provision relating to the issue of notice and re-assessment of dealers in respect of turnover escaping assessment was section 15. By section 31 authority was conferred upon the Collector, subject to the rules prescribed and for reasons to be recorded in writing, to revise the orders passed under the Act or the rules made thereunder by a person appointed u/s 3 to assist him.

7. This Court has taken the view in *Commissioner of Income Tax, Bombay City-I, Bombay Vs. Narsee Nagsee and Co.*, , in dealing with provisions which are analogous to those of the Sales Tax Act, that a notice calling for a return from a taxpayer under the Business Profits Tax Act may not issue after the expiry of the period prescribed by the Legislature for re-assessment. It was held in that case that even though the Legislature had not prescribed any period for issuing a notice calling for a return, inasmuch as the Legislature had prescribed a period of four years from the close of the accounting period for re-assessment, the notice issued more than four years after the close of the accounting period was beyond the time mentioned in section 14 of the Business Profit Tax Act and hence the notice was not a valid notice u/s 11 of that Act. Chagla, C.J., observed :

"Although the Legislature has not imposed any limitation of time with regard to the issue of a notice u/s 11 and although as a canon of construction it may be said that if the Legislature has not imposed any limitation it is not for the Court to restrict the power conferred by the Legislature upon the Income Tax Officer, it is well settled that if statutory powers are conferred upon an authority, the Court must hold that those statutory powers must be exercised reasonably, and, in our opinion, if statutory power is conferred upon the Income Tax Officer to issue a notice for the purpose of assessment u/s 11, that power must be exercised reasonably, and looking to the provisions of section 14 it could not be said that when the Income Tax Office issued this notice four years after the close of the chargeable accounting period he was exercising his statutory authority in a reasonable manner."

8. In the view of the learned Chief Justice even though the Legislature had not prescribed any period for issuing a notice calling for return, a notice issued after the expiry of the period prescribed for re-assessment was a notice issued beyond a reasonable period and, therefore, unauthorised. This view, which was expressed in considering the scheme of the Business Profits Tax Act, was adopted

by the learned Chief Justice in dealing with a case under the Sales Tax Act. In *Bisesar House v. State of Bombay* [1958] 9 S.T.C. 654; 60 Bom. L.R. 1395, a Full Bench of this Court held that even though no period of limitation was prescribed for issue of a notice u/s 11(2) of the Central Provinces and Berar Sales Tax Act, 1947, calling for a return from a dealer, because an order for re-assessment u/s 11A may not be made after the expiry of three years, the notice u/s 11(2) issued more than three years after the expiry of the period for which it was proposed to make the assessment was incompetent. Chagla, C.J., who delivered the judgment of the Court in that case, applied the principle of the case in *Commissioner of Income Tax, Bombay City-I, Bombay Vs. Narsee Nagsee and Co.*, to the interpretation of section 11 of the Central Provinces and Berar Sales Tax Act. In both the aforesaid cases the Court took the view that even though not expressly prescribed, a period of limitation for the issue of a notice calling for a return must be regarded as implied when the Legislature has prescribed a period of limitation for re-assessment of escaped income. In neither of those two cases revisional powers were sought to be exercised, but the principle of those cases must, in our judgment, apply for the same reasons to the exercise of revisional jurisdiction, and that jurisdiction must be exercised within a reasonable period, and the yard-stick of reasonableness will be the period prescribed for re-assessment.

9. If the Legislature had not intervened, we might have held that the notices issued beyond the period prescribed by section 11A of the Bombay Sales Tax Act, 1946, or by section 15 of the Act of 1953, were invalid and no proceeding for review or revision could lie at the instance of the Assistant Collector of Sales Tax. But the Legislature has by Act XXII of 1959 amended the Bombay Sales Tax Act, 1953. By section 3 of Act XXII of 1959 it is provided that -

"Section 15 of the Bombay Sales Tax Act shall be renumbered as sub-section (1) of that section, and in that section after sub-section (1), the following sub-section shall be inserted, namely :-

"(2)(a) Nothing in sub-section (1), -

(i) shall apply to any proceeding (including any notice issued) u/s 14 or 31, and

(ii) notwithstanding any judgment, decree or order of a Court or Tribunal, shall be deemed ever to have been applicable to such proceeding or notice.

(b) The validity of any such proceeding or notice shall not be called in question merely on the ground that such proceeding or notice was inconsistent with the provisions of sub-section (1)."

10. On the principle of the two cases, to which we have referred, the taxing authority was obliged to issue a notice requiring a dealer to make a return within the period prescribed by section 15 of the Bombay Sales Tax Act before it was amended, but the Legislature has now expressly provided by sub-section (2) of section 15 that nothing in section 15 as it originally stood shall apply to any

proceeding u/s 14. Evidently since the enactment of Act XXII of 1959, the principle applied by this Court in the interpretation of provisions relating to calling for a return, even though no period of limitation has been prescribed in that behalf by a taxing statute, must be regarded as superseded. The Legislature has also referred to section 31 in sub-section (2)(a)(i) of section 15 as amended, and by that reference evidently the view which we have taken, viz., that the power of revision has to be exercised within a reasonable period and such period is not to exceed the period prescribed by section 15 as it originally stood, must also be regarded as superseded. Clause (a)(i) of sub-section (2) of section 15 is undoubtedly prospective in terms, but by clause (b) of sub-section (2) the validity of any such proceeding or notice is not liable to be called in question merely on the ground that such proceeding or notice was inconsistent with sub-section (1). It is again provided by clause (a)(ii) of sub-section (2) that notwithstanding any judgment, decree or order of a Court or Tribunal, nothing in sub-section (1) shall be deemed ever to have been applicable to such proceeding or notice. The widest retrospective operation is, therefore, given to clause (a)(i) of sub-section (2) of section 15. The retrospective operation is given to all proceedings and notices and even to proceedings which have been concluded by judgments, decrees or orders of Courts or Tribunals. It is evident that the Legislature intended by the amendment that in construing the provisions of section 31 of the Bombay Sales Tax Act, 1953, the obligation to initiate proceedings within the period not longer than the period prescribed by section 15 will not be implied.

11. Mr. Mistree for the assessee contends that even on that view, the rule that revisional jurisdiction will be exercised within a reasonable period is not abrogated by legislation. But by section 31 no period has been prescribed for the exercise suo motu of the jurisdiction of the Collector to revise the order of authorities appointed u/s 3; and by Act XXII of 1959 the rule of interpretation adopted by the Court in Commissioner of Income Tax, Bombay City-I, Bombay Vs. Narsee Nagsee and Co., and applied in cases under the Sales Tax Act has been expressly superseded.

12. We are, therefore, of the view that the petitioners have made out no case for the issue of a writ. The petition fails and is dismissed. Having regard to the circumstances, there will be no order as to costs of this application.

13. Petition dismissed.