(1993) 02 GUJ CK 0046

In the Gujarat High Court

Case No : Sales Tax Reference No. 17 of 1990

Marshal Distributors APPELLANT

Vs

State of Gujarat RESPONDENT

Date of Decision : 18-02-1993

Acts Referred:

Gujarat Sales Tax Act, 1969 — Section 12, 13, 13(A), 16, 16(1)

Citation : (1993) 02 GUJ CK 0046

Hon'ble Judges : M.B. Shah, J;C.V. Rane, J

Bench : Division Bench

Advocate : S.L. Modi, for the Appellant; Kamal M. Mehta, Assistant Government Pleader, instructed by H.V. Chhatrapati and Co., for the Respondent

Judgement

C.V. Jani, J.—The Gujarat Sales Tax Tribunal, Ahmedabad, has referred the following questions for decision of this Court u/s 69(2) of the Gujarat Sales Tax Act, 1969, hereinafter referred to as "the Act" :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal erred in law in holding that when the declarations in form 17A issued by the appellant were withdrawn after the breach thereof was committed by the appellant, purchase tax u/s 16(1) of the Act was attracted even though in the assessment of the vendor, deduction from the turnover of sales pertaining to the said declarations was not allowed ?

(2) If the answer to the above question is in the negative, whether the Tribunal erred in holding that the quantum of purchase tax to be worked out u/s 16(3) of the Act was not nil ?

(3) Whether, on the facts and in the circumstances of the case, the conclusion of the Tribunal that there was no reasonable cause within the meaning of section 45(6) of the Act was perverse and whether the Tribunal erred in holding that penalty was not required to be remitted either in whole or in part under the proviso to the said section ?"

2. These questions arise from the following unusual facts :

(i) The applicant, Messrs. Marshal Distributors of Baroda, is registered as a dealer under the Act, reselling the products manufactured by M/s. Suhrid Geigy Ltd. The applicant purchases dyes and chemicals from M/s. Suhrid Geigy Ltd. under regular sale bills issued by the vendor. During the period of assessment between July 1, 1978 and September 30, 1978, the applicant purchased such goods of the total value of Rs. 91,51,487 from the said vendor by issuing declarations in form 17A. The applicant had declared that the goods purchased by it will be resold by it in the course of inter-State trade and commerce. On account of issue of such declarations the vendor could not charge any tax from the applicant on the said sales of Rs. 91,51,487. For the assessment of this period the Sales Tax Officer issued a notice to the applicant on December 26, 1978, and on receiving such notice the applicant claims to have realised that out of the said goods purchased against the declarations in form 17A, the goods worth Rs. 60,44,927 had been transferred by the applicant to its branches outside the State of Gujarat and only the remaining goods were sold in the course of inter-State trade and commerce. Having realised this situation and the so-called mistake the applicant called back the declarations in form 17A from the vendor and replaced other forms in form 17A in respect of the goods which were actually sold by it in the course of inter-State trade and commerce. As the applicant did not sell all the goods of the value of Rs. 91,51,487 purchased by it by furnishing form 17A in the course of inter-State trade and commerce, the Sales Tax Officer regarded it as breach of the declarations which would result in payment of purchase tax u/s 16 of the Act in respect of the goods of the value of Rs. 60,44,927. At the time of replacement, the vendor while returning the original declaration forms, issued a debit note for the tax payable in respect of the sales of Rs. 60,44,927 and the applicant paid the said amount to the vendor which in turn paid to the Government, and on assessment of the vendor, no deduction of tax u/s 7(iv) of the Act was allowed to him in respect of the said value of Rs. 60,44,927, and interest u/s 47(4A) of the Act was charged in their assessment for making late payment of the tax. This withdrawal and replacement took place much before the assessment of either applicant as buyer or M/s. Suhrid Geigy as vendor. However, as stated earlier, the Sales Tax Officer held that the applicant was liable to pay purchase tax u/s 16 of the Act, and imposed such tax at Rs. 2,56,305 and held that the applicant was liable to pay purchase tax to the tune of Rs. 2,56,305 and also penalty u/s 45(6) of the Act to the tune of Rs. 55,015 in respect of such additional tax. A draft assessment order was issued by the Sales Tax Officer inviting objections u/s 46-A of the Act. Objections were filed by the applicant and so the proceedings were transferred to the Assistant Commissioner of Sales Tax (Appeals), before whom also, the applicant submitted written objections to the levy of purchase tax and penalty. The Assistant Commissioner passed an order of assessment levying purchase tax of Rs. 2,41,797.08 u/s 16 of the Act upon purchase of Rs. 60,44,927 in respect of which the applicant had committed the breach of the declarations. He added a sum of Rs. 14,507.82 as surcharge at 6 per cent and imposed penalty of Rs. 55,015.48 u/s 45(6) of the Act. Credit was given for the amount of Rs. 44,706 paid by the applicant and a demand of Rs. 2,66,614.38 was raised against the applicant. The Assistant Commissioner observed in his assessment order that when notice of assessment was issued in form No. 36 and when the applicant was called on January 16, 1979, and when the scrutiny of the account books was being made, the applicant realised that it had transferred some of its goods to its branches and it would be liable to pay purchase tax u/s 16 of the Act. As the Assistant Commissioner found that the difference between the purchase tax and the tax paid by the applicant along with the returns would exceed 20 per cent the penalty of Rs. 55,015.48 was leviable u/s 45(6) of the Act. He further observed that even though the vendor had recovered sales tax from the applicant and paid the same to the Government by challan he had not filed any revised return in that connection.

(ii) This levy of tax and penalty was confirmed by the Deputy Commissioner of Sales Tax in appeal.

(iii) The appellate order came to be challenged in Revision Application No. 61 of 1983. It was submitted on behalf of the applicant that as soon as the applicant realised that it had committed breach of declarations in form No. 17A he withdrew such forms even before the breach came to the notice of the department, and in view of this bona fide action on the part of the applicant, purchase tax and penalty ought not to have been levied. It was further submitted that after withdrawing the said forms from the vendor the applicant paid sales tax to the vendor and the vendors paid the same amount to the Government in July 1979, along with interest for making late payment. The Government actually had not lost any tax whatsoever on the entire amount of turnover. It was submitted on behalf of the Government that if the dealer commits the breach of the declarations, and the goods are not resold or despatched in the manner specified in the declarations he becomes liable to include purchase price in the turnover of purchases in the return to be furnished within the specified period and he also becomes liable to pay tax on the purchase of goods. It was further submitted on behalf of the Government that whether deduction is allowed to the vendor on account of declarations furnished by the purchaser is not at all material.

After referring to the provisions of section 16 of the Act, the Tribunal expressed the view that no such course of withdrawal or replacement of certificates in form 17A would be permissible after the breach of such declaration was committed. It also expressed the view that even the vendor was not right in returning the certificate to the applicant and the vendor could have very well relied on the certificate in order to claim deduction in the turnover of sales, and that if the vendor might have filed an appeal against the assessment order passed against him, the vendor''s plea for claiming deduction at the stage of appeal might be entertained and might merit consideration. In respect of the submission on behalf of the applicant that recovery of purchase tax from the applicant and also of the sales tax from the vendors, M/s. Suhrid Geigy, in respect of the same turnover would result in double taxation, the Tribunal observed that strict interpretation of section 16 of the Act would not result in double taxation. The Tribunal, therefore, rejected the revision application.

(iv) Now at the instance of the applicant-dealer the aforesaid questions have been referred to this Court by the Tribunal.

3. The following facts have to be kept in mind while considering and answering the questions :

(i) The declarations in form No. 17A were withdrawn and replaced by other forms in respect of goods worth Rs. 60,44,927 before the assessment orders were passed against the applicant-dealer, and the vendor.

(ii) The Vendor paid sales tax in respect of the turnover in question by recovering it from the applicant, along with interest charged u/s 47(4A) of the Act at the rate of 24 per cent per annum for late payment of the tax.

(iii) As stated by Mr. Modi for the applicant, at the Bar, the vendor M/s. Suhrid Geigy and Co. challenged his assessment by filing an appeal which is still pending.

(iv) By the order of Assistant Commissioner of Sales Tax the applicant is required to pay purchase tax and penalty at the rate of 24 per cent per annum on the same turnover in respect of which the vendor has paid sales tax and interest as aforesaid by recovering it from the applicant-purchaser.

4. In the background of the aforesaid undisputed facts Mr. S. L. Modi for the applicant-dealer repeated the submissions already made before the Tribunal. Mr. Modi, submits that actually no tax was assessed or recovered pursuant to the declaration in form 17A and it cannot be said that the applicant had purchased goods against such declarations. Hence, according to Mr. Modi, for all practical purposes such declarations cannot be taken to have existed at all, and if there are no such declarations the question of levying purchase tax as per section 16 of the Act would not arise. In any case, according to him, section 16 would come into play only if deductions are granted to the vendor on account of such declarations. He further submitted that the action of the department in levying purchase tax would amount to imposing double taxation inasmuch as sales tax has already been recovered from the vendor, M/s. Suhrid Geigy & Co., and by the impugned order the department wants to recover the same amount by way of purchase tax from the applicant-purchaser. Such a course would never be permissible. He has also submitted the figures regarding payment of tax by the vendor, M/s. Suhrid Geigy & Co., and the tax paid by the applicant u/s 16 along with penalty levied u/s 45(6). We will revert to these figures later on. However, the statement containing these figures also bears the signatures of the Chief Accountant of M/s. Suhrid Geigy Ltd. showing their consent to the suggested

adjustment of the amount paid by the vendor Suhrid Geigy Ltd. against the amount found to be due u/s 16 of the Act by way of purchase tax, if at all such tax is leviable. Mr. Modi submitted in the alternative that the amount of sales tax paid by Suhrid Geigy Ltd. was in reality the amount paid by the applicant and so it should be given an adjustment if at all the applicant is held liable to pay purchase tax.

5. As the course suggested by Mr. Modi regarding adjustment of the amount paid by the vendor Suhrid Geigy Ltd. by way of sales tax against the amount that may be found due by way of purchase tax u/s 16 of the Act, from the applicant-dealer would necessarily involve consent of the vendor Suhrid Geigy Ltd., we called upon Mr. Modi to produce the authentic consent recorded by Suhrid Geigy Ltd. Suhrid Geigy Ltd. has now appeared through Mr. J. S. Joshi, Advocate, who states that M/s. Suhrid Geigy Ltd. would have no objection if adjustment is granted as suggested by Mr. Modi on behalf of the applicant-dealer.

6. In order to appreciate the submissions of Mr. Modi regarding the applicability of section 16 of the Act, we will have to refer to the aforesaid provision along with section 13 of the Act. The relevant provision which is applicable in the present case is section 16(1) of the Act which reads as under :

"16. Liability to purchase tax for contravention of terms of certificates, etc. - (1) Where any dealer or commission agent has purchased any taxable goods under a certificate given by him u/s 12 or 13, and

(a) contrary to such certificate, the goods are used for another purpose, or are not resold or despatched in the manner and within the period certified, or

(b) on the resales in the course of inter-state trade or commerce, of the goods so purchased, no tax under the Central Sales Tax Act, 1956 (LXXIV of 1956) is actually payable by him on account of any deduction admissible under any of the provisions of the said Act.

then such dealer or commission agent shall be liable to pay tax on the purchase price of the goods purchased under such certificate; and accordingly, he shall include the purchase price thereof in his turnover of purchases in his declaration or return u/s 40 which he is to furnish next thereafter."

7. Admittedly, the applicant-dealer who is a licensed dealer, has purchased taxable goods under certificates given by it u/s 13(1)(A).

8. Section 13(1)(A) provides that if a licensed dealer to whom taxable goods are sold certifies in the prescribed form that the goods are purchased for resale in the course of inter-State trade or commerce and that such goods will be sold or resold within 12 months from the date of such purchase then the sales of such goods to the licensed dealer will be deducted from the turnover of sales of the vendor concerned. Hence the vendor would be entitled to deduction u/s 13 of the Act if the purchasing licensed dealer furnishes a certificate u/s 13(1)(A).

9. The consequences of committing breach of such assurance given in such a certificate are indicated u/s 16(1) of the Act. If the purchasing dealer after giving a certificate contemplated u/s 13 of the Act, uses the goods for another purpose or does not resell the goods in the manner indicated in the certificate within the period certified, then such dealer would be liable to pay tax on the purchase price of the goods purchased under such certificate and for that purpose, he shall include the purchase price thereof in its turnover of purchase in its declaration or return u/s 40.

10. In the present case, the applicant-dealer realised his mistake regarding the breach committed by him, only when the notice of assessment was issued to the applicant and the scrutiny of his account books was being made. Hence the assessment proceedings had already started before the declarations were withdrawn and so far as the applicant was concerned, it could not be said that the certificate containing the declarations were not in existence when the assessment proceedings were started. It was therefore, a clear case attracting the provision of section 16(1) of the Act, and the Tribunal cannot be said to have erred in holding that the purchase tax was attracted u/s 16(1) of the Act. This finding will have the repercussions on the issues involved in all the three questions and in view of the suggestions made by Mr. Modi on behalf of the applicant which is approved and accepted by the vendor, Suhrid Geigy Ltd., the questions will have to be re-framed as under :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal erred in law in holding that the applicant was liable to pay purchase tax u/s 16(1) of the Act, even though it had withdrawn the declarations in form 17A after the assessment proceedings started and before they were concluded ?

(2) If answer to the above question is in negative, whether adjustment should be given to the amount of sales tax paid by the vendor, Suhrid Geigy Ltd., in respect of the same turnover in order to avoid the vice of double taxation ?

(3) If answer to the above question No. (2) is in the affirmative, whether the applicant was liable to pay penalty u/s 45(6) of the Act ? If the answer to the question No. (2) is in the negative, whether the Tribunal erred in holding that penalty was not required to be remitted either in whole or in part, under the proviso to section 45(6) of the Act ?"

11. The second question as now framed will have to be answered in the affirmative in order to meet the ends of justice because of the peculiar facts of the case. The statement regarding payment made by the vendor as well as the applicant shows that the vendor, Suhrid Geigy Ltd., has paid sales tax of Rs. 2,57,334 before the assessment dated August 30, 1983 in respect of sales to the applicant-firm, and also paid interest of Rs. 50,738 for late payment of the tax from due date Mr. K. M. Mehta, learned Assistant Government Pleader for the Revenue, verified from the record that the tax was actually paid on January 16, 1979 and August 1, 1979, i.e., about 4 years before the assessment of the

vendor. The applicant himself was assessed on January 30, 1980. Before his assessment order was passed, he had paid the sales tax amount to the vendor, Suhrid Geigy Ltd., for being passed on to the Revenue. Still he was required to pay purchase tax u/s 16 of the Act to the tune of Rs. 2,56,305 and penalty u/s 45(6) of the Act to the tune of Rs. 55,015. They have already paid Rs. 44,706 by way of adjustment as per the assessment order and the remaining amount of assessment on December 10, 1985. The amount of Rs. 3,23,846 was recovered from the applicant-dealer by way of interest in view of the late payment after the date of the assessment order. Thus, according to the applicant, he had to pay a total amount of Rs. 6,35,168 including interest. The amount paid by the vendor on account of tax in the same turnover has to be regarded as the amount paid on behalf of the applicant-dealer since it was the applicant which had paid the amount of tax to the vendor who in turn deposited it with the Government. Hence, according to the applicant, the amount paid by the vendor, Suhrid Geigy Ltd., has to be given adjustment against the liability of the applicant u/s 16. As per this statement signed and approved by Suhrid Geigy Ltd. also, the applicant claims to be entitled to receive refund of Rs. 6,31,920.

12. Mr. J. S. Joshi for M/s. Suhrid Geigy Ltd. states that even though the appeal filed by Suhrid Geigy Ltd. against the assessment order by the Assistant Commissioner of Sales Tax is pending, the appellant will not press the claim so far as the amount paid by way of sales tax on the same turnover is concerned and will not claim any refund. Hence the apprehension that deduction may be claimed by the vendor, Suhrid Geigy Ltd., and may be allowed legally or technically by the appellate authority is dispelled.

13. It is, therefore, clarified that the amount paid by the vendor, Suhrid Geigy Ltd., by way of sales tax to the Government in respect of the same turnover which has made the applicant liable for purchase tax u/s 16 of the Act, will be given adjustment against the applicant''s liabilities, and refund, if any, will be given as early as possible.

14. The question No. (1) as reframed will have to be answered in the negative and in favour of the Revenue; while question No. (2) as reframed will be answered in the affirmative i.e., in favour of the assessee. So far as the third question is concerned, when adjustment will be given to the amount paid by way of sales tax to the Government in respect of the same turnover, the Tribunal will have to determine the amount of penalty, if any, which will have to be borne by the applicant after the necessary calculation. In that view of the matter the second part of question No. (3) does not survive.

15. There will be no order as to costs in the circumstances of the case.

16. The statement containing the signatures of Chief Accountant of Suhrid Geigy Ltd. as well as the learned advocate for the applicant and the State of Gujarat, will be taken as part of the record.

17. Questions reframed and answered accordingly.

