

(1982) 11 BOM CK 0011

In the Bombay High Court

Case No : Sales Tax Reference No. 10 of 1978 along with Notice of Motion No. 70 of 1978 and Sales Tax Reference No. 42 of 1979

Mather and Platt Ltd.

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 24-11-1982

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 37(1), 46, 46(2), 5, 61(1)

Citation : (1983) 53 STC 104

Hon'ble Judges : D P Madon, C.J; Sujata V. Manohar, J

Bench : Division Bench

Judgement

Madon, C.J.—As the parties to those two references u/s 61(1) of the Bombay Sales Tax Act, 1959, made by the Maharashtra Sales Tax Tribunal at the instances of the applicants and the points which arise for determination therein are the same, we have thought it convenient to dispose them of by a common judgment.

2. The applicants are registered as dealers under the Bombay Sales Tax Act, 1959. They also hold a licence under the said Act. They deal in machinery and its parts. In some cases, they purchase these goods and resell them within the State, while in other cases, they purchase these goods from outside the State and resell them within the State. In respect of some of the sales made by the applicants they became liable to pay both sales tax and general sales tax under the Act while in respect of some other goods, they became liable only to pay general sales tax inasmuch as these goods were purchased by them within the State from a registered dealer by issuing to their vendors a certificate in form 16 to the effect that the goods were being purchased by them for the purpose of resale. In those cases where the applicants were liable to pay both sales tax and general sales tax to the Government, the amount payable by them by way of such taxes was charged separately in the bills. One of such bills on record as a specimen shows the amount so charged as :

"3 per cent sales tax.

3 per cent general sales tax."

3. In those cases where, however, the applicants were liable to pay only general sales tax, they recovered from their customers not only the amount of general sales tax which was payable by them to the Government but also a certain amount on account of sales tax. The bills issued by the applicants in respect of these sales do not appear to be uniform in pattern. One of the bills which is a part of the statement of the case in Sales Tax Reference No. 10 of 1978 shows the relevant items as follows :

"3 per cent surcharge on account of sales tax.

3 per cent general sales tax."

Another bill which is on record and which is part of the statement of the case in Sales Tax Reference No. 42 of 1979, however, shows the relevant items as follows :

"General sales tax at 3 per cent.

Surcharge on account of sales tax paid by us."

4. For the assessment year 1st January, 1968, to 31st December, 1968, the Sales Tax Officer found that the applicants had collected an amount of Rs. 5,724.77 by way of surcharge on account of sales tax. The Sales Tax Officer issued a notice to the applicants to show cause why the said amount should not be forfeited to the Government. The applicants contended that the amount collect by them by way of surcharge was only the amount which had been collected from them by their vendors on the sales of goods to them which were resold by them. However, on calculating the amounts charged by way of surcharge in the bills, the Sales Tax Officer found that the amount of such surcharge collected by the applicants from their customers was in excess of the amount paid by them to their vendors by way of sales tax. He, therefore, proceeded to forfeit the entire amount of Rs. 5,724.77. An appeal against the said order of forfeiture filed by the applicants was dismissed by the Assistant Commissioner of Sales Tax. A second appeal to the Tribunal equally failed. The reference which has been made at the instance of the applicants in respect of this judgment and order of the Tribunal is Sales Tax Reference No. 42 of 1979. In this reference, the following two questions have been submitted to us by the Tribunal for our determination.

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that an amount of Rs. 5,724.77 collected by way of surcharge on account of sales tax was tax within the meaning of that word u/s 46(2) of the Bombay Sales Tax Act, 1959 ?

(2) Whether, on the facts in the circumstances of the case, there was any evidence for the Tribunal to hold that the amount of Rs. 5,724.77 collected as

surcharge was tax ?"

5. For the period from 1st July, 1970, to 31st December, 1970, the applicants collected from their purchasers a sum of Rs. 17,720.91 by way of such surcharge. In this case, however, the Sales Tax Officer forfeited only a sum of Rs. 3,626.81 on the ground that this sum was in excess of the amount of sales tax which was collected from the applicants by their vendors. The applicants went in appeal against the said order of forfeiture. In appeal, however, the Assistant Commissioner of Sales Tax held that the entire sum of Rs. 17,720.91 was collected in contravention of section 46 of the Act and forfeited the entire amount of Rs. 17,720.91. A second appeal to the Tribunal against the said order of the Assistant Commissioner failed. The reference made at the instance of the applicants in respect of this judgment and order of the Tribunal is Sales Tax Reference No. 10 of 1978. In this reference, the Tribunal has referred only the following question to this Court for its determination :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that an amount of Rs. 17,720.91 collected by way of surcharge on account of sales tax was tax within the meaning of that word u/s 46(2) of the Bombay Sales Tax Act, 1959 ?"

6. The applicants have taken out a notice of motion being notice of motion No. 70 of 1978 in the said Sales Tax Reference No. 10 of 1978 for raising an additional question which they had asked the Tribunal to refer and which the Tribunal refused to do. That question is as follows :

"Whether, on the facts and in the circumstances of the case, there was any evidence for the Tribunal to hold that the amount of Rs. 17,720.91 collected as surcharge was tax ?"

7. Now, with respect to the period 1st January, 1968, to 31st December, 1968, an identical question has been referred by the Tribunal to this High Court being question No. (2) in Sales Tax Reference No. 42 of 1979. In view of this, it would be but logical to allow the question which is sought to be raised by the said notice of motion to be raised before us and this position has not been disputed on behalf of the department. Both the learned counsel have agreed that even though this question may be raised as question No. (2) in Reference No. 10 of 1978, no additional statement of the case is necessary or required as all the facts necessary for deciding that question are on the record. We accordingly make this notice of motion absolute by adding to the reference already made to us, namely, in the said Reference No. 10 of 1978, the aforesaid question with respect to which the notice of motion was taken out.

Sub-section (2) of section 46 of the said Act provides as follows :

"46. (2) Prohibition against collection of tax in certain cases. - No person, who is not a registered dealer and liable to pay tax in respect of any sale or purchase, shall collect on the sale of any goods any sum by way of tax from any other

person and no registered dealer shall collect any amount by way of tax in excess of the amount of tax payable by him under the provisions of this Act :

Provided that, this sub-section shall not apply where a person is required to collect such amount of the tax separately in order to comply with the conditions and restrictions imposed on him under the provisions of any law for the time being in force."

8. This sub-section fell for consideration before a Division Bench of this High Court in *Ramkrishan Kulwantrai v. Commissioner of Sales Tax* [1979] 44 STC 117. Referring to sub-section (1) of that section which prohibits any person from collecting a sum by way of tax in respect of sales of any goods on which by virtue of section 5 no tax is payable and the said sub-section (2) the court observed as follows (page 128) :

"..... Section 46(1) and (2) properly analysed contain three prohibitions : (1) A prohibition against any person, whether a registered dealer or not, from collecting any sum by way of tax in respect of sales of tax-free goods. (2) a prohibition against any person who is not a registered dealer liable to pay tax from collecting any sum by way of tax on the sale of any goods, and (3) a prohibition against a registered dealer from collecting any amount by way of tax in excess of the amount of tax payable by him in respect of a transaction of sale or purchase. The third prohibition set out above would be violated when a registered dealer collects tax in respect of a transaction of sale of goods at a rate higher than the rate of tax attracted to the sales of this particular class of goods, for the dealer has then collected an amount by way of tax in excess of the amount of tax payable by him. Such prohibition would also be violated if in the case of a particular transaction of sale only sales tax is payable but the registered dealer collects amounts by way of sales tax as also general sales tax on such transaction of sale. It would also be violated where, by reason of certain exemptions, no tax is payable on a particular type of sale and the registered dealer collects amounts by way of tax on it"

9. The short question which falls for determination is whether in the facts and circumstances of this case, the amount collected by the applicants by way of surcharge on account of sales tax falls within the prohibition contained in sub-section (2) of section 46, because if it does, then u/s 37(1) it is liable to be forfeited to the Government. The bill which is on record in Sales Tax Reference No. 10 of 1978 describes the amount collected as "3 per cent surcharge on account of sales tax". There is nothing to show in this bill that this is the amount which the applicants had themselves paid to their vendors in respect of the amount of sales tax which the vendors were liable to pay to the Government on their sales to the applicants. Mr. Patel on behalf of the applicants contended that in the books of account, the applicants had taken the amount of surcharge to sale account and the amount of tax collected to the tax account. The relevant entries are not before us nor do they appear to have been before the Tribunal, but it is clear on the record that the amount collected by the applicants as

surcharge on account of sales tax exceeds the amount which was paid by them by way of tax to their own vendors, because this amount of surcharge at the rate of 3 per cent has been calculated on the sale price of the applicants and not on their purchase price. There is nothing on the face of the bill to show that this amount was to reimburse the applicants in respect of the amount of sales tax recovered from them by their vendors. On the contrary, it would lead a person to believe that this surcharge represents the amount which the applicants would be liable to pay to the Government by way of sales tax. The amounts kept by the applicants in their books of account are not relevant for this purpose. Assuming what is stated on their behalf is correct, the accounts do not reflect the correct position for what the applicants have taken to "the tax account" is not the amount of sales tax collected from them by their vendors on the applicants' purchase price but the amounts collected by the applicants from their customers on the applicants' selling price. The real question is what representation the applicants made to their customers. Such representation is contained in the bills issued by the applicants, and the representation contained therein is that this amount was the amount of sales tax which the applicants were liable to pay to the Government while in fact they were not liable to pay any sales tax to the Government. This was thus a clear violation of section 46(2) and the amount so collected was, therefore, liable to be forfeited u/s 37(1) and was thus rightly forfeited.

10. This is, however, not the end of the matter. Because, admittedly in respect of sales during the periods in question the applicants have not issued stereotyped bills. For instance, in Sales Tax Reference No. 42 of 1979 the bill which is on the record as a specimen describes the surcharge as "surcharge on account of sales tax paid by us". Now, sales tax is not paid to the Government before a transaction of sale takes place. When the applicants have referred to this amount as being on account of sales tax paid by them it could only refer to the amount which was paid by them to their vendors in respect of the amount of sales tax which their vendors became liable to pay to the Government. There is nothing on the record to show that in respect of the entire period covered by Sales Tax Reference No. 10 of 1978 or Sales Tax Reference No. 42 of 1979 the applicants have issued in respect of the concerned sales bills only of the types of the specimen bill that we find on the record of each of these cases. The matter will, therefore, have to be determined with respect to each transaction of such sales effected by the applicants as to the type of bill issued by them. Further, even in respect of the type of bill in which the amount is collected by the applicants on accounts of sales tax paid by them, such amount is calculated not on the actual price paid by the applicants to their vendors, but on the price charged by them to their own customers. Here too the amount collected by the applicants is thus in excess of the amount paid by them to the vendors. The question, therefore, which falls to be decided is, whether in such cases what is required to be forfeited is only the excess amount or the entire amount collected by the applicants for there is no dispute that had the applicants in these cases collected

from their customers the exact amount recovered from them by their own vendors such amount would not be liable to forfeiture. Mr. Jetly, learned counsel for the department, relied upon a decision of the Gujarat High Court in *State of Gujarat v. Ilac Ltd.* [1982] 50 STC 24 and contended that the entire amount was required to be forfeited. In the case before the Gujarat High Court, the bills in question showed the item under the heading "sales tax paid to the manufacturers". The assesseees in that case were not liable to pay the sales tax on the sales made by them. The Gujarat High Court held that this was the amount collected by the assesseees by way of tax and the entire amount was liable to be forfeited. With reference to the assesseees' contention, the Gujarat High Court observed (page 30) :

"..... This is too ingenious a contention which cannot be upheld for the simple reason that what the legislature has prescribed in the prohibition is that the person must not collect any amount by way of tax - may be - that may be an amount of tax which the dealer might have paid to his vendor"

11. With great respect to the learned Judges who decided that case, we are unable to agree with these observations. What section 46(2) prohibits is the collection of any amount by way of tax by a dealer who is not liable to pay tax on the transaction or any amount by way of tax in excess of the amount of tax payable by him under the provisions of the Act. Tax under the Act, whether it is sales tax or general sales tax, is payable by a dealer to the Government and not to a private party. The fact that the Act and the Rules made thereunder permit a seller to recover from his purchaser the amount which he would have to pay to the Government by way of tax does not convert the amount collected by the seller into a tax. If a purchaser from whom his seller has so recovered the amount of tax recoups such amount paid by him from his own purchaser when he comes to resell the goods, he is not prohibited by the Act from doing so, so long as he does not represent to his own purchaser that this is the amount of tax which he was liable to pay by way of tax. In thus recouping himself he is really increasing his sale price with a view to reimburse himself for an extra item of cost. There is no prohibition under the Act against a reseller thus reimbursing himself by increasing his selling price and in our opinion whether he does so by increasing the selling price or by showing the amount by way of tax collected from him by his own vendor as a separate item in the bill makes no difference. So long as the purchaser is not led to believe that the amount charged to him is the amount which the seller would be liable to pay as tax to the Government when he is not liable to pay it, there would be no contravention of section 46(2). In the type of bills we are considering the representation made by the applicants was that their vendors had collected from them certain amount by way of sales tax which their vendors were liable to pay to the Government and they, that is, the applicants were reimbursing themselves in respect of such amount. However, here the applicants have recovered from their customers a larger amount than the amount paid by them to their vendors on account of sales tax. This excess amount was not payable by way of tax and in the particular facts and

circumstances of this case and the type of bills we have before us, such excess amount must be taken to be an amount collected by way of tax when in fact it was not payable by way of tax. It is, therefore, only the excess amount so collected by the applicants which can be said to be in contravention of section 46(2) and not the entire amount so collected by them.

12. Mr. Jetly on behalf of the department also relied upon a decision of the Andhra Pradesh High Court in Putineedi Krishna Rao v. State of Andhra Pradesh [1973] 31 STC 611. We are unable to see what relevance that decision has to the case before us. In that case a dealer who was not liable to pay tax purported to collect certain amount by way of tax calling it "rusum" and "kolagaram". In the ledger books of the assessee, it was found that this "rusum" was accounted as tax. This coupled with other facts and circumstances led the authorities to the conclusion that this amount was wrongfully collected by way of tax and this view was accepted by the High Court.

13. Two other decisions were also relied upon by Mr. Jetly. The first was Spencer & Co. Ltd. v. State of Mysore [1970] 26 STC 283. In that case the court held that in order to entitle a dealer to claim deduction under the Mysore Sales Tax Rules, 1957, of any amount collected by way of tax, it was not necessary that the amount should be separately shown in the bill or the cash memorandum issued by the dealer to his customer and the dealer can be said to have collected the amounts by way of tax under the Mysore Act where, from the facts and circumstances, it can be inferred that the seller intended to pass on the tax and the buyer had agreed to pay the sales tax in addition to the price and that in the accounts of the dealer he had shown such amounts separately. The case turned upon the interpretation of the relevant provisions of the Mysore Sales Tax Act, 1957, and the Rules framed thereunder and has no relevance to the point which we have to decide.

14. The second case was the decision of the Madras High Court in M. A. R. Arunachalam Chettiar & Co. v. State of Tamil Nadu [1979] 44 STC 8. Under the Tamil Nadu General Sales Tax Act, 1959, a transaction in jaggery was taxable only at the point of purchase and not at the point of sale. The assessee who had purchased jaggery sold it to his customers from whom he charged tax as an independent amount. The court held that this amount was liable to be forfeited. It does not appear from this judgment how the amount was described in the bill and whether the purchaser on resale was entitled under the Tamil Nadu Act to recover the amount of tax which his vendor was liable to pay and which such vendor had collected from him. This decision, therefore, does not also serve any useful purpose, so far as we are concerned.

15. In view of the conclusion we have reached, it is not possible for us to answer either in the affirmative or negative the question referred to us as also the additional question which we have allowed to be raised on the notice of motion taken out by the applicants. We accordingly answer question No. (1) in both these references as follows :

16. The amounts collected by the applicants from their purchasers and shown as surcharge on account of sales tax in the bills in respect of the relevant transactions of sale was in contravention of section 46(2) of the Bombay Sales Tax Act, 1959, while the amounts collected by the applicants from their purchasers and shown in the bills issued by them as surcharge on account of sales tax paid by them was not in contravention of the said section 46(2) except with respect to the amount in excess of the amount recovered from the applicants by the applicant's vendors. The Tribunal while disposing of this reference will calculate the aggregate of the amount which according to our judgment was collected by the applicants in contravention of the said section 46(2) of the Act and would only direct forfeiture of such amount.

17. Question No. (2) in Reference No. 10 of 1978 which we have allowed to be raised on the applicants' notice of motion and question No. (2) in Sales Tax Reference No. 42 of 1979 do not required to be answered in view of our answer to question No. (1) in both these references.

18. The applicants will pay to the respondents the costs of these two references consolidated at Rs. 300 in the aggregate.