
(1997) 08 BOM CK 0003

In the Bombay High Court

Case No : Sales Tax Reference No's. 15 and 16 of 1995

Metcon Engineering Works

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 14-08-1997

Acts Referred:

Central Sales Tax Act, 1956 — Section 9

Citation : (1997) 08 BOM CK 0003

Hon'ble Judges : D.G. Deshpande, J;B.P. Saraf, J

Bench : Division Bench

Judgement

Dr. B.P. Saraf, J.—By this references, at the instance of the assessee, the Maharashtra Sales Tax Tribunal has referred the following three questions of law to this Court for opinion u/s 61(1) of the Bombay Sales Tax Act, 1959 :

"(1) Whether, on the facts and circumstances of the case, the Tribunal was justified in holding that the provisions of section 36(2)(c), Explanation (1) were attracted and consequently, the applicant was liable for the penalty ?

(2) Whether, on the facts and circumstances of the case, the Tribunal was justified in holding that the mischief of Explanation (1) to section 36(2)(c) was attracted and the applicant was liable for penalty u/s 36(2)(c) read with explanation (1) of the Bombay Sales Tax Act, 1959 ?

(3) When admittedly all the returns were filed beyond the prescribed time, was the Tribunal justified in law in holding that the assessment of the applicant could be legally made under 33(3) of the Act by rejecting the plea that it can only legally made u/s 33(5) of the Bombay Sales Tax Act, 1959 and consequently holding that the provisions of section 36(2)(c), Explanation (1) are attracted ?"

2. The assessee, M/s. Metcon Engineering Works, is a manufacturer of fibre sheets, rubber hose pipes, etc. It is a dealer registered both under the Bombay Sales Tax Act, 1959 ("the Bombay Act") and the Central Sales Tax Act, 1956 ("the Central Act"). The assessee filed returns of its turnover for the financial

year 1978-79 with the Sales Tax Officer concerned. In its returns under Bombay Act, the amount of tax shown due was Rs. 21,067 and after adjusting the set-off, the net amount of tax payable by the assessee was shown as Rs. 12,520. The assessee however deposited only a part of the amount due and payable by it as per its return. The amount so deposited was only Rs. 6,520. The balance tax amounting to Rs. 6,000, though admitted, was not paid by the assessee till the assessment was made by the Sales Tax Officer. Similarly, in its return for the same period under the Central Act, though the tax due as per the return was Rs. 10,103, the assessee deposited Rs. 6,577 only.

3. The assessments for the above period under both the Acts were made by the Sales Tax Officer on 15th March, 1984. No discrepancy was found by the Sales Tax Officer either in the turnover or the amount of tax payable as disclosed in the returns which is evident from the following table :

It is clear from the above chart under the Bombay Act, the amount of tax payable as per return and the assessment order was the same, i.e., Rs. 21,067. There was a slight difference in the net tax payable as per return and as per the assessment because of deference in the amount of set-off. Similarly, in the assessment under the Central Act, there was no substantial difference between the amount of tax payable as disclosed in the return and the amount determined on assessment. However, the assessee having not paid full amount due as per return, it was required to pay the balance amount. The Sales Tax Officer regarded it as a case of concealment within the meaning of section 36(2)(c) of the Bombay Act and in that view of the matter, issued notice to the assessee to show cause as to why penalty should not be imposed on it under the provisions of section 36(2)(c) of the Bombay Act read with Explanation (1) thereto both under the Bombay Act and the Central Act, and after rejecting the cause shown by the assessee, imposed penalty of Rs. 9,850 under the Bombay Act and Rs. 5,600 under the Central Act. The assessee appealed to the Assistant Commissioner of Sales Tax. The contention of the assessee before the Assistant Commissioner was that there being no concealment of the particulars of turnover or furnishing of inaccurate particulars of any transaction, provisions of section 36(2)(c) of the Bombay Act were not attracted to justify imposition of penalty under that provision. The Assistant Commissioner did not accept the above contention of the assessee. He, however, reduced the amount of penalty by 50 per cent. Aggrieved by the order of the Assistant Commissioner, the assessee went in further appeal to the Maharashtra Sales tax Tribunal. Before the Tribunal, the assessee reiterated its contention that section 36(2)(c) or explanation (1) thereto were not attracted to the case of the assessee inasmuch as there was neither any concealment of turnover or the particulars thereof nor furnishing of inaccurate particulars of any transaction. The case of the assessee was that it had maintained regular books of account which were duly accepted by the Sales Tax Officer. According to the assessee, the only default on its part was its failure to pay the full amount of tax due as per the returns within time which did not fall within the purview of section 36(2)(c) of the Bombay Act. The alternate

contention of the assessee was that though, there being no concealment of the particulars of any transaction or failure to furnish accurate particulars, section 36(2)(c) was not attracted, even assuming that it was attracted by virtue of explanation (1) thereto, the assessee should be deemed to have rebutted the presumption of concealment because admittedly there was no concealment. The Tribunal did not accept any of these contentions of the assessee and held that the provisions of section 36(2)(c) were applicable as the amount of tax paid by the assessee as per the returns was less than eighty per cent of the assessed tax. In that view of the matter, the Tribunal held that penalty was leviable u/s 36(2)(c) of the Act read with Explanation (1) as the assessee failed to show that the payment of lesser amount was not due to neglect on the part of the assessee and accordingly, dismissed the appeals of the assessee. Hence these references at the instance of the assessee.

4. We have heard Mr. P. V. Surte, learned counsel for the assessee, who submits that section 36(2)(c) of the Bombay Act has no application to the facts and circumstances of the instant case. The contention of the learned counsel is that section 36(2)(c) is applicable only to cases of concealment of the particulars of any transaction or knowingly furnishing of inaccurate particulars of any transaction and not to cases of failure to pay the tax within the time specified in the Act or the Rules. For that purpose, separate provision has been made in section 36(3) of the Act. According to him, in the instant case, admittedly there is no concealment of the particulars of any transaction or furnishing of inaccurate particulars of any transaction. The turnover disclosed in the returns and the particulars of transactions furnished were accepted in toto by the Sales Tax Officer. The only default on the part of the assessee was its failure to pay a part of the tax payable by it as per return within the stipulated time for which no penalty can be imposed u/s 36(2)(c) of the Bombay Act. It was contended by the learned counsel that section 36(2)(c) itself not being applicable in the instant case, there was no question of taking resort to Explanation (1) thereto. Reliance was placed in support of this contention on the decision of this Court in *Indoswe Engineers (P.) Ltd. v. State of Maharashtra* [1996] 101 STC 177.

5. As we were prima facie satisfied that there was force in the above submission of learned counsel for the assessee, we asked Mr. R. V. Desai, learned counsel for the Revenue whether it was possible for him to contend in the instant case that the assessee had concealed the particulars of any transaction or furnished inaccurate particulars of any transaction as contemplated by clause (c) of section 36(2) of the Bombay Act to justify imposition of penalty thereunder. Mr. Desai fairly conceded before us that it was not a case of concealment of the particulars of any transaction or furnishing inaccurate particulars thereof. He, however, submitted that despite that, penalty could be levied u/s 36(2)(c) of the Act by taking resort to Explanation (1) appended to the said clause which provides that if the total amount of tax paid by the dealer is found to be less than 80 per cent of the amount of tax assessed, then for the purpose of clause (c), the assessee shall be deemed to have concealed the turnover or knowingly furnished

inaccurate particulars of turnover.

6. We have carefully considered the rival submissions. The real controversy is whether section 36(2)(c) of the Act, which provides for imposition of penalty in cases of concealment of any transaction or furnishing of inaccurate particulars of any transaction, can be applied to a case of failure to pay the amount due as per return within the time required by the law by taking resort to Explanation (1) thereto. In other words, whether failure to pay tax as per return or any part thereof can be regarded as a case of concealment of turnover within the meaning of section 36(2)(c) of the Act in view of the well-settled legal position that an order imposing penalty being the result of quasi-criminal proceedings, the provisions dealing with the penalty should be construed strictly within the term and language of the particular statute and in case of doubt in a manner favourable to the assessee. Section 36 of the Act provides for imposition of penalty in certain cases. Clause (c) of sub-section (2) thereof, which deals with penalty for concealment of turnover, etc., so far as is relevant, at the material time, read as below :

"36. Imposition of penalty in certain cases and bar to prosecution. -

(1).....

(2) If, while assessing or reassessing the amount of tax due from a dealer under any provisions of this Act or while passing any order in any appeal or revision proceedings, it appears to the Commissioner that such dealer -

.....

(c) has concealed the particulars of any transaction or knowingly furnished inaccurate particulars of any transaction liable to tax, the Commissioner may, after giving the dealer an opportunity of being heard, by order in writing, impose upon the dealer by way of penalty, in addition to any tax assessed or reassessed or found due in the appeal or revision proceedings, as the case may be, a sum not exceeding one and one-half times the amount of the tax.

Explanation. - (1) Where a dealer furnishing returns has been assessed by the Commissioner under sub-section (3) or (4) of section 33, or assessed under sub-section (3) of section 41, or reassessed under clause (b) of sub-section (1) of section 35, or in whose case an order has been passed u/s 55 or clause (a) of sub-section (1) of section 57, and the total amount of tax paid by the dealer for any year is found to be less than eighty per cent of the amount of tax as so assessed or reassessed or found due in appeal or revision, then, for the purpose of clause (c), he shall be deemed to have concealed the turnover, or knowingly furnished inaccurate turnover liable to tax, unless he proves to the satisfaction of the Commissioner, that the payment of a lesser amount of tax was not due to gross or wilful neglect on his part.

Explanation. - (2) Where a dealer fails without sufficient cause to furnish returns in respect of any period by the prescribed date, then for the purpose of clause

(c), he shall be deemed (until the contrary is proved) to have concealed the whole turnover liable to tax as assessed or reassessed or determined in an order passed u/s 55 or clause (a) of sub-section (1) of section 57."

It is clear from the plain reading of the above provision that the gist of offence is that (i) the assessee has, concealed the particulars of any transaction or (ii) knowingly furnished inaccurate particulars of any transaction liable to tax. On commission of such an offence being established, the assessee would be liable to a penalty to the extent of one and one-half times the amount of the tax. The two explanations appended thereto in no way affect the above ingredients of the offence u/s 36(2)(c) of the Act. They merely create legal fiction if the conditions of their applicability are satisfied and enact a rule of evidence. Explanation (1) creates a legal fiction and brings an assessee straightway within the ambit of section 36(2)(c) on the existence of stipulated difference between the tax paid and the tax assessed. It is then not necessary for the Revenue to prove the positive element required for concealment. The onus will be shifted to the Revenue even where Explanation (1) applies, if the assessee can satisfy the authority concerned by producing necessary evidence that he was not guilty of gross or wilful neglect. In such case, if the revenue does not adduce any further evidence, penalty u/s 36(2)(c) cannot be sustained. Similarly, in a case under Explanation (2), the assessee may challenge its applicability by producing cogent, relevant and reliable material that there was sufficient cause for not furnishing the return by the prescribed date. If the authority concerned is satisfied that there was sufficient cause for the failure to submit return, Explanation (2) would not apply and there would be no presumption of deemed concealment. Then the onus will be on the revenue to prove the concealment by cogent material or evidence. If the assessee fails to show sufficient cause for failure to submit the return and Explanation (2) is attracted, he may still discharge the onus cast on him by establishing cogent and relevant material, that he had not concealed the turnover liable to tax. If he can do so, the onus will again shift to the Revenue to prove the concealment. Thus, the assessee can come out of the mischief of the explanation either by showing that the condition precedent for its applicability did not exist or by discharging the burden cast on him to rebut the presumption of deemed concealment. In that event, the burden will shift to the Revenue to prove the positive element required for concealment u/s 36(2)(c) of the Act.

7. From the reading of the above provision, it is clear that section 36(2)(c) will be applicable only to cases of concealment of particulars of turnover or furnishing of inaccurate particulars. It does not apply to cases of non-payment of tax due under the Act within the stipulated time. For imposition of penalty in cases of failure to pay tax within the stipulated time, separate provision has been made in sub-section (3) of section 36, which, at the material time, read as under :

"(3) If a dealer does not, without reasonable cause, pay tax within the time he is required by or under the provisions of this Act to pay it, the Commissioner may,

after giving the dealer an opportunity of being heard, by an order in writing, impose upon the dealer by way of penalty, in addition to the amount of tax a sum equal to -

(a) one and one half per cent of the amount of tax for each month for first three months, after the last date by which the dealer should have paid that tax, and

(b) two per cent of the amount of tax for each month thereafter, during the time the dealer continues to make default in the payment of tax :

Provided that, the Commissioner, or any appellate or revisional authority, may remit the whole or any part of the penalty payable in respect of any period."

On a conjoint reading of the two provisions contained in section 36 itself, viz., clause (c) of sub-section (2) and sub-section (3), it is clear that the Legislature has made two different provisions for imposition of penalty in case of two different defaults - one in clause (c) of sub-section (2) of section 36 for imposition of penalty for concealment of turnover or furnishing of inaccurate particulars of turnover and other for failure to pay the tax within the time stipulated under the law.

8. Obviously, the instant case is not a case of concealment of turnover, etc., but a case of failure to pay the tax within the time required under the provisions of the Act. Admittedly, the assessee submitted the returns, showed the tax due from him on the basis thereof but failed to pay the full amount due from him within the time he was required by the law to pay the same.

9. The law regarding payment of tax is contained in section 38 of the Act which provides that :

"(1) Tax shall be paid in the manner herein provided and at such intervals as may be prescribed.

(2) A registered dealer furnishing returns as required by sub-section (1) of section 32, shall first pay into a Government treasury, in the manner prescribed the whole of the amount of tax due from him according to such return along with the amount of any penalty payable by him u/s 36."

Rule 29 of the Rules requires the dealer to pay the tax due and payable according to the returns on or before the prescribed date for submission of the return. This Rule as it stood at the material time, so far as is relevant, read as under :

"Time for payment. - (1) Every dealer required to furnish a monthly, quarterly or annual return, other than the dealer to whom sub-rule (2) applies, shall, on or before the date prescribed for the submission of such return, pay into the Government treasury the tax due and payable according to such return and the penalty, if any, payable by him u/s 36."

It is clear from the above provisions that a dealer is obliged to pay the tax due

from him as per return before the prescribed date for submission of the return and on failure to do so, he may be saddled with penalty under sub-section (3) of section 36. Such default clearly falls within the purview of sub-section (3) of section 36 of the Act and not u/s 36(2)(c). The ingredients of offence under the two provisions are quite different, so also the exonerating circumstances. In case of default in payment of tax in time, the dealer can get out of provision if he can show reasonable cause for the default. The rate of penalty for default under sub-section (3) as prescribed under clauses (a) and (b) thereof is quite different from the penalty prescribed for concealment of turnover under clause (c) of sub-section (2). At the material time, the penalty for concealment of turnover was an amount not exceeding one and one half times of the amount of tax whereas penalty for failure to pay the tax within the statutory period was one and half per cent of the amount of tax for each month for the first three months after the last date by which the dealer should have paid tax and two per cent of the amount of tax for each month thereafter during the time the dealer continued to make default in the payment of tax. Power has also been conferred under the proviso to sub-section (3) on certain authorities to remit the whole or any part of the penalty payable in respect of any period under sub-section (3) of section 36 of the Act.

10. The uncontroverted factual position in this case is that the assessee failed to pay the full amount of tax before the submission of return which he was required to pay under provisions of section 38 of the Act read with rule 29 of the Rules. Only a part of the tax payable was paid within the stipulated time. There was delay in paying the balance. For such delay, in the event of his failure to show reasonable cause for the delay, he might have been liable to penalty under sub-section (3) of section 36 at the rates set out in clauses (a) and (b) thereof. Admittedly, that was not done in this case. On the other hand, penalty has been imposed u/s 36(2)(c) of the Act at the rates specified therein on an erroneous assumption that it was applicable even to cases of non-payment of tax due as per return. That being so, the order of penalty imposed u/s 36(2)(c) of the Bombay Act is not tenable in law. Similarly, penalty imposed under the Central Act under the said section read with section 9(2A) of the Central Act is equally untenable. In the facts and circumstances of the case, the Tribunal was therefore not justified in confirming the penalty levied u/s 36(2)(c) of the Bombay Act. In the view of the matter, we answer questions Nos. 1 and 2 in the negative, i.e., in favour of the assessee and against the revenue. In view of the above, question No. 3 need not be answered and the same is therefore returned unanswered.

11. This reference is disposed of accordingly. No order as to costs.

Sales Tax Reference No. 16 of 1995 :

1. By this reference, at the instance of the assessee, the Maharashtra Sales Tax Tribunal has referred the following three questions of law to this Court for opinion u/s 61(1) of the Bombay Sales Tax Act, 1959 :

(1) Whether on the facts and circumstances of the case, the Tribunal was justified in holding that the provisions of section 36(2), Explanation (1) of the Bombay Sales Tax Act, 1959 read with section 9(2A) of the Central Sales Tax Act, 1956 were attracted and consequently, the applicant was liable for that penalty ?

(2) Whether on the facts and circumstances of the case, the Tribunal was justified in holding that the mischief of explanation (1) to section 36(2)(c) read with section 9(2A) was attracted and the applicant was liable for penalty u/s 36(2)(c), Explanation (1) read with section 9(2A) of the Central Sales Tax Act, 1956 ?

(3) When admittedly all the returns were filed beyond the prescribed time, was the Tribunal justified in law in holding that the assessment of the applicant could be legally made u/s 33(3) of the Act by rejecting the plea that it can only legally made u/s 33(5) of the Bombay Sales Tax Act, 1959 read with section 9(2A) of the Central Sales Tax Act, 1956 and consequently holding that the provisions of section 36(2)(c), Explanation (1) read with section 9(2A) of the Central Act are attracted ?

2. For the reasons stated in the aforesaid judgment in Sales Tax Reference No. 15 of 1995, we answer questions Nos. 1 and 2 in the negative, i.e., in favour of the assessee and against the revenue. In view of the above, question No. (3) need not be answered and the same is therefore returned unanswered.

3. This reference is disposed of accordingly. No order as to costs.

12. Reference disposed of accordingly.