

(1981) 02 BOM CK 0023

In the Bombay High Court

Case No : Sales Tax Reference No. 46 of 1977 in Reference Application No. 141 of 1975

Premier Automobiles Limited

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 17-02-1981

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 22, 32(1), 36, 36(2), 36(3)

Citation : (1981) 48 STC 552

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

Bench : Division Bench

Judgement

Madon, J.—The facts which have given rise to this reference u/s 61(1) of the Bombay Sales Tax Act, 1959, are somewhat unusual. The applicants are and were at all material times registered as a dealer under the said Act. During the quarter 1st April, 1964, to 30th June, 1964, the applicants sold chassis of motor vehicles to the Directorate-General, Supplies and Disposals, in the Ministry of Defence, Government of India. Under entry 37 of the notification issued by the State of Maharashtra u/s 41 of the said Act, these sales were subject to a lower rate of tax, namely, 2 per cent, instead of 10 per cent, if the sales were for construction of bodies thereon and the purchaser gave to the selling dealer a certificate in form S. The chassis sold by the applicants to the Directorate-General of Supplies and Disposals were for construction of bodies thereon. Though no condition as to who is to construct the bodies of chassis was prescribed in the said entry 37 as it stood at the relevant time, form S in which the certificate was to be given by the Directorate-General requires a declaration by the purchaser, namely, the Ministry of Defence, Government of India, that the chassis purchased were delivered to a firm of body builders for construction of bodies thereon. The applicants filed their return for the said quarter on 7th August, 1964, which was the last date for filing returns for the quarter April-June, 1964. Prior thereto they paid into the Government treasury the amount of tax payable according to such return. In view of the certificates in form S given

by the Ministry of Defence, the applicants showed the sales of chassis of motor vehicles made to the Directorate-General of Supplies and Disposals as being chargeable to tax at 2 per cent, and it was on that basis that the amount of tax payable was worked out in the said return and paid into the Government treasury. It is an admitted fact that the Ministry of Defence, instead of giving the chassis to a firm of body builders, constructed the bodies themselves. Thereupon feeling some doubt as to the rate of tax applicable to these transactions, the applicants filed an application u/s 52 of the said Act to the Commissioner of Sales Tax to determine the rate of tax payable on the said transactions. On 15th March, 1965, the Commissioner held that the rate of tax payable was 10 per cent and not the concessional rate of 2 per cent. This decision was communicated to the applicants on 30th March, 1965. The applicants then went in appeal to the Sales Tax Tribunal against the said determination by the Commissioner. During the pendency of the said appeal, between 27th November, 1965, and 11th December, 1965, the applicants paid into the Government treasury a sum of Rs. 14,57,382.10, being the amount of tax at 10 per cent on these transactions in excess of the amount of tax on them previously paid by them at 2 per cent. The applicants' appeal to the Tribunal was dismissed on 15th July, 1966.

2. Before we continue with the recital of the facts it may be convenient to mention that realising the confusion as also the hardship which was being created by reason of the apparent conflict between the wording of the said entry 37 and of the said form S, in December, 1964, the said entry was amended and two new forms, namely, forms S-1 and S-2, were inserted in the said notification u/s 41, under which there could not have been any doubt whatever that the transactions of sale by the applicants to the Ministry of Defence would be chargeable to tax at the concessional rate of 2 per cent.

3. By his order of assessment dated 31st December, 1967, the Sales Tax Officer imposed upon the applicants a penalty u/s 36(3) of the said Act in the sum of Rs. 3,14,834.67 on the ground that the applicants had made late payment of the said sum of Rs. 14,57,382.10 instead of paying it prior to filing their return for the April-June, 1964, quarter. The applicants thereupon went in appeal to the Assistant Commissioner of Sales Tax. The Assistant Commissioner upheld the applicants' contention with respect to this imposition of penalty and deleted it on the ground that they had paid the amount of tax according to their return for the said period and that the subsequent amount which was paid by them was paid by them by returning the said certificates in form S to the Ministry of Defence, Government of India, and on collecting from them the amount of the balance of the tax which they would have to pay on these transactions.

4. On 15th February, 1974, the Deputy Commissioner of Sales Tax issued to the applicants a notice u/s 57 of the said Act calling upon them to show cause why the said order of the Assistant Commissioner of Sales Tax in so far as it related to the deletion of the penalty imposed by the Sales Tax Officer should not be suo motu revised by him. On 21st May, 1974, the Deputy Commissioner revised the

said order and levied upon the applicants penalty u/s 36(3) in the sum of Rs. 1,60,545. According to the Deputy Commissioner, the balance amount of the tax on the said transactions of sale to the Ministry of Defence should have been paid by the applicants on receipt by them of the order of the Commissioner of Sales Tax in the said determination proceedings. In appeal the Tribunal upheld the order of the Deputy Commissioner.

5. At the instance of the applicants the following question has been referred to this High Court by the Tribunal :

"Whether, on the facts and in the circumstances of the case, the provisions of section 36(3) of the Bombay Sales Tax Act, 1959, were attracted ?"

6. Sub-section (3) of section 36 of the said Act has been amended from time to time, the material part with which we are concerned, however, remaining unaltered. Under that sub-section "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", he becomes liable to a penalty. The procedure for imposing this penalty and the rate at which it is to be imposed have by these different amendments been changed, but, as mentioned earlier, we are not concerned with those parts of the said sub-section. The question, therefore, which falls for determination is whether the applicants had not paid tax within the time they were required by or under the provisions of the said Act to pay it. It was urged by Mr. Phadkar, the learned counsel for the applicants, that the applicants had paid before filing their return in question the full amount of tax payable according to it. The amount of Rs. 14,57,382.10 which they paid subsequently was not tax which they were required to pay and that they paid it not because it was an amount of tax payable according to the return but as a result of the determination by the Commissioner of Sales Tax in the application u/s 52 of the said Act. Mr. Phadkar further in the alternative submitted that even assuming section 36(3) was attracted to the present case, the Deputy Commissioner of Sales Tax should not have imposed any penalty, or in any event, the Tribunal in appeal should have remitted the whole of it in exercise of the discretion under the proviso to sub-section (3) of section 36, because the applicants had throughout acted bona fide and had paid the said amount without even waiting for the decision of the Tribunal. Mr. Jetly, the learned counsel for the respondents, on the other hand, submitted that the payment of Rs. 14,57,382.10 was a payment made towards the return in question and, therefore, this payment showed that the said return had been filed without first paying the full amount of tax payable according to it and, therefore, the penalty had been properly imposed. Mr. Jetly further submitted that in imposing penalty only from the date of the communication to the applicants of the said order of the Commissioner of Sales Tax in determination proceedings the Deputy Commissioner of Sales Tax had been generous to the applicants.

7. We will now examine these rival contentions. There is no dispute that the return in question was filed by the applicants in time. Section 38 of the said Act

deals with payment of tax. Under sub-section (1) of section 38 tax is to be paid in the manner provided in the said section and at such intervals as may be prescribed. Under sub-section (2) a registered dealer (that is, a dealer registered u/s 22 of the said Act) furnishing returns as required by sub-section (1) of section 32 is to first pay into a Government treasury in the prescribed manner "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. Under sub-section (4) the amount of tax "due where returns have been furnished without full payment therefore, or assessed or reassessed less any sum already paid by the dealer, and the amount of penalty is to be paid by the dealer or the person liable therefore into a Government treasury by such date as may be specified in a notice issued by the Commissioner of Sales Tax for this purpose, being a date not later than thirty days from the date of service of the notice. Under sub-section (5) any tax, penalty or sum forfeited, which remains unpaid after the date specified in the notice for payment, or after the extended date of payment where the Commissioner of Sales Tax has granted an extension of time for payment of the amount, or where installments have been granted, an installment has not been duly paid, are to be recoverable as an arrear of land revenue. Seeing that the amount of the balance of tax paid by the applicants was a large amount in the sum of Rs. 14,57,382.10, we inquired of Mr. Jetly in the course of arguments as to why a notice under sub-section (4) of section 38 was not issued to the applicants calling upon them to pay the said amount, and if they failed to pay, to recover the same as an arrear of land revenue. Mr. Jetly in his usual fairness stated that such a notice could not have been issued, because the entire amount of tax which had been payable according to the return had been paid. He, however, submitted that though this was the position under the return, the subsequent payment by the applicants changed the situation and made this a payment which ought to have been made prior to filing the return. Now, it is an admitted position that had the applicants not filed their application u/s 52 of the said Act to have it determined whether these transactions were taxable at a concessional rate of 2 per cent, they would not have been liable to pay any penalty under sub-section (3) of section 36 on the ground that this amount was not paid by them within the time by which it was required to be paid. What is, however, in substance contended is that instead of merely sitting back and waiting for this point to be decided in assessment proceedings, the applicants, by approaching the Commissioner of Sales Tax u/s 52 of the said Act and by paying up the amount according to the determination of the Commissioner without waiting for the result of the appeal to the Tribunal, have put themselves in a worse position than what they would have otherwise done. We are unable to accept this contention. The return showed the amount of tax which was payable according to it. The applicants had claimed that the transactions of sale in question were exigible to tax at a lower rate. Merely because the contention was found not to be correct, it did not make the full amount of tax, as would have been assessed, payable before filing the return. The Tribunal has sought to draw a subtle distinction between the words "by" and "under" in the phrase "by or

under the provisions of this Act" occurring in section 36(3) of the said Act, which we are neither able to appreciate nor understand. The Tribunal seems to have been much impressed by the fact that if penalty in such cases was not leviable it would throw open the door to mass-scale evasion of tax. The Tribunal has observed (at pages 31-32) : "And, if section 36(3) ... is interpreted to cover only the case of a registered dealer, who does not pay the tax due according to the returns within the prescribed time, a dealer who conveniently or advisedly pays less tax, by showing less than the tax legally payable by him, in the returns, will be given a carte blanche to perpetuate such a state of affairs, to the detriment of the Government revenue, with impunity, which is not the scheme of the Act." We are as much unable to understand this great concern for the revenue shown by the Tribunal as we were unable to understand the distinction drawn by it between the words "by" and "under". It is common experience that in enacting fiscal legislation the legislature seeks to take proper care to ensure that the revenue is not cheated or defrauded, and as and when ingenuity of taxpayers devise methods of finding out ways to avoid tax, such legislations are amended time and again to plug legal loop-holes. There are provisions in the Bombay Sales Tax Act, 1959, which amply safeguard the interests of the revenue in such cases. Unfortunately, the attention of the Tribunal does not appear to have been drawn to those provisions. Section 36 of the said Act deals with imposition of penalty not only just where the tax is not paid within the time it is required to be paid by or under the provisions of the said Act but also for imposition of penalty in other cases. The penalty which is to be levied u/s 36(3) is at a certain percentage rate which after the initial periods amounts to 24 per cent per annum. There are other provisions in the said Act, however, which provides for imposition of far heavier penalty. Thus, u/s 36(2)(c) a dealer who has concealed the particulars of any transaction, or has knowingly furnished inadequate particulars of any transaction liable to tax, exposes himself to a penalty in a sum which may be as high as one and a half times the amount of the tax which he was liable to pay. There is also an explanation to section 36(2)(c) under which where the total of tax paid by the dealer for any year is found to be less than eighty per cent of the amount of tax assessed or reassessed, he is to be deemed to have concealed the turnover, or knowingly furnished inaccurate turnover liable to tax, unless he proves to the satisfaction of the Commissioner of Sales Tax that the payment of a lesser amount of tax was not due to gross or wilful neglect on his part. These are sufficiently deterrent provisions to act as a check on dealers who may be inclined deliberately to file inaccurate returns. The present case does not and cannot fall within the four corners of section 36(3), which is the only statutory provision which has been involved. The tax which was shown according to the return was paid in full. The amount which was paid by the applicants in November-December, 1965, could not be said to be an amount paid by them under or towards the amount of tax due from them according to the return in question. This was an amount which was paid by them in anticipation of the amount of tax to which they were going to be assessed, in view of the said determination by the Commissioner of Sales Tax, in case they had failed in their appeal to the

Tribunal. Thus, this was an amount paid in advance towards the tax which might be assessed and not the amount paid under or according to the return.

8. In the result, we answer the question referred to us in the negative, that is, in favour of the assessment and against the department.

9. The respondents will pay to the applicants the costs of this reference fixed at Rs. 300.

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

11. Reference answered in the negative.