
(1956) 02 BOM CK 0024

In the Bombay High Court

Case No : Appeal No. 100 of 1955 and Miscellaneous No. 229 of 1955

S.D. Kulkarni and Others

APPELLANT

Vs

Tribhovandas Bhimji Zaveri

RESPONDENT

Date of Decision : 15-02-1956

Acts Referred:

Bombay Sales Tax Act, 1946 — Section 11A
Bombay Sales Tax Act, 1953 — Section 10, 10C, 15, 48(1), 48(2)
Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 34

Citation : AIR 1956 Bom 704 : (1956) 7 STC 385

Hon'ble Judges : Chagla, C.J.;Dixit, J

Bench : Division Bench

Advocate : Mistree, Madon and A.G, for the Appellant;

Judgement

Chagla, C.J.—By the petition which came up for hearing before Coyajee J. the petitioners challenged the validity of a notice issued by the Sales Tax Officer on the 28-2-1955 u/s 11A, Bombay Sales Tax Act of 1945 calling upon the petitioners to make a return in connection with escaped assessment for the period 1-4-1949 to 31-10-1952.

Act 3 of 1933 which is the present Act came into force on 25-3-1953 and during the relevant period with which we are concerned the Act in force was Act 5 of 1946, and the question which the learned Judge had to consider and decide was whether the notice of re-assessment with regard to escaped assessment should have been served under the old Act or under the new Act.

2. The Act of 1953 by Section 48(1) deals with the repeal of the old Act, and Sub-section (2) of that section provides:

"Notwithstanding the repeal of the said Act and the said entries, the said repeal shall not affect or be deemed to affect--

(i) any right, title, obligation or liability already acquired, accrued or incurred;

(ii)

(iii) the recovery of any tax or penalty which may have become payable under the said Act and the said entries before the said date, and all such taxes or penalties or arrears thereof shall be assessed, imposed & recovered, so far as may be, in accordance with the provisions of this Act." Therefore, on the plain words used by the Legislature in this section, it is clear that the recovery of the tax which had become payable under the old Act was not affected by the repeal of that Act. Therefore, whatever tax was payable by the petitioners for the period ending 31-10-1952, which tax was payable under the provisions of the old Act because that Act was in force, was not affected by the repeal of the old Act.

Clause (iii) of Section 48(2) then proceeds to deal with the procedure for recovering the tax & it provides that the machinery of assessment, the machinery of imposing the tax & the machinery of recovering the tax must be in accordance with the provisions of the new Act. This is not an absolute provision because the Legislature realised that there may be difficulties in recovering tax due under the old Act to apply the machinery of the new Act, and that is why the Legislature used the expression "so far as may be".

Therefore, to the extent that the machinery set up under the new Act can be availed of for the purpose of recovering a tax which became recoverable under the old Act, that machinery must be utilized, and therefore the burden would be upon the taxing authorities, if after the new Act came into force they used the machinery of assessment, imposition and recovery of tax not set up under the new Act but the old machinery under the old Act, to show that by reason of some practical difficulty or some anomaly which might result it was not possible to use the new machinery but the old machinery had to be resorted to.

3. The notice under the Act of 1946 is to be given u/s 11A and it deals with escaped assessment. The notice under the new Act is to be given u/s 15 and substantially it is in the same terms and it also is to be given with regard to escaped assessment. The Sales Tax Authorities have given the notice which is headed : "Notice u/s 11A, Bombay Sales Tax Act, 1946".

The contention of the petitioners was that by reason of Section 48(2)(iii) the notice should have been issued u/s 15 of the new Act, and inasmuch as that notice was not issued under the new Act the Sales Tax Authorities had no jurisdiction to assess the petitioners. It may be pointed out that pursuant to this notice the assessment order was made on 17-5-1955 and the petitioners have appealed against the assessment order and when this petition was filed the appeal was actually pending.

Prima facie, one should have thought that when a special machinery is set up under an Act and a special legal remedy is available to an aggrieved party, that party should avail itself of that remedy before he comes to this Court for a writ under Article 226. This is not a case where a party comes to Court and says that he has not availed himself of the legal remedy because it was not possible for

him to do so for any particular reason.

This is a case where the party has actually appealed, the appeal is pending, and before the decision could be given by the appellate authority the party comes to this Court claiming his rights under Article 226 of the Constitution.

4. We would have proceeded to decide this appeal on this preliminary point, but the Advocate-General appearing on behalf of the Sales Tax Authorities has requested us not to decide this preliminary point but to decide the petition on merits as the Sales Tax Authorities wish guidance from this Court with regard to the issuing of notices with regard to escaped assessment, and therefore without deciding the preliminary point we will proceed to decide the petition and the appeal on merits,

5. It will be noticed that the scheme of the Act of 1946 and the Act of 1953 with regard to the levying of sales tax is very different. Whereas Under the Act of 1946 the only taxes that were contemplated were the general tax and the special tax as provided by Section 6, under the Act of 1953 the ambit of taxation is much wider. The taxes contemplated by the new Act are the sales tax, general sales tax, purchase tax, and tax payable on goods purchased outside the State, and there are various sections-- Sections 8, 9, 10 and 10C -- which deal with these different taxes.

The form of the notice to be issued u/s 11A of the old Act and Section 15 of the new Act has been respectively prescribed by the rules made under these two respective Acts. The form of the notice under the old Act corresponds to the liability to pay tax under the old Act. It will be noticed that the form of the notice refers to turnover in respect of sales because under the old Act only sales were taxable.

The notice under the new Act refers to the turnover in respect of both sales and purchases because, as already pointed out, under the new Act a tax was levied not only on sales but also on purchases. Therefore, whereas the notice under the old Act called upon the assessee to show cause why he should not be re-assessed in respect of certain sales which had escaped tax, the notice under the new Act called upon the assessee to show cause why he should not be re-assessed not only in respect of his sales but also in respect of his purchases which had escaped tax.

Therefore, it is clear that the statutory form of the notice u/s 15 of the new Act cannot apply to a liability to pay tax under the old Act, and therefore, with respect, we do not agree with the learned Judge when he took the view that the form of the notice should have been the form under the new Act and not under the old Act. The statutory form of the notice under the new Act could not possibly conform to the liability for tax imposed under the old Act.

As the liability under the two Acts was entirely different the two statutory forms were also different, and the machinery of assessment to the extent of the form

of the notice set up under the new Act could not be availed of when assessing escaped assessment under the old Act.

The same is the position with regard to the assessment order itself. A form of the assessment order has been prescribed both under the old Act and the new Act and that form again is in line with the liability to tax under the old Act and under the new Act, and it is difficult to understand how the form prescribed under the new Act of the order of assessment could have been adopted when the liability upon the petitioners was to pay tax in accordance with the provisions of the old Act.

It is unnecessary to consider the other provisions of the Act to which the Advocate-General drew our attention pointing out that a penalty for not making the assessment in time or for making a false assessment has been altered under the old Act and the new Act.

As we are not concerned now with a penalty imposed upon a defaulting assessee, we need not go into that question. But it is sufficient to say that as the liability to tax and the incidence of tax and the scheme of the tax are entirely different under the two Acts, it is not possible to adopt the form of the notice under the new Act or the form of the assessment order under the new Act when the Sales Tax Authorities are dealing with liability to pay tax arising under the old Act.

If the position had stood thus there would have been no difficulty in the way of the Taxing Authorities. But there is an important alteration in the length of the service of the notice as provided by the rules under the old Act and under the new Act. Under the old Act the duration of the notice required was 15 days from the date of issue. Under the new Act the duration of the notice is 15 days from the date of service. Therefore it is clear that under the new Act the assessee who is served with a notice u/s 15 which corresponds to Section 11A of the old Act, is entitled to a longer notice.

In this case the notice which has been given. Would be a proper notice if judged by the duration of the notice laid down under the rules framed under the old Act. The notice is dated 28-2-1955 and the assessee is asked to show cause on 17-3-1955. This would be more than 15 days from the date of issue. But if you were to test it from the date of service, as in this case the notice was served on 3-3-1955, then the notice is obviously short-dated.

The Advocate-General says that if the notice has to be given according to the old form and if the notice is to be issued u/s 11A, then logically it must follow that the duration of the notice must be as provided by the rules framed under the old Act. In our opinion, that contention is not tenable. If we were to accept that contention, then we would, be refusing to give effect to the intention of the Legislature as clearly indicated in Section 48(2) (iii).

The period of the notice issued to an assessee who has not paid the full tax and

where there has been an escape of assessment is part of the machinery of assessment, and if it is possible to adopt that machinery which has been set up under the new Act, then it is incumbent upon the Taxing Authorities to adopt that machinery rather than the old absolute machinery set up under the old Act. The Advocate-General has failed to satisfy us that there was any difficulty in the way of the Taxing Authorities giving a notice of the duration required under the rules framed under the new Act rather than a notice of the duration required under the rules framed under the old Act. If therefore there was no difficulty in giving the longer notice now required, the Taxing Authorities have failed to carry out the mandate given to them by the Legislature u/s 48 (2) (iii).

7. The next question therefore is that if the notice is not of the proper duration and to that extent the notice is defective, what is the consequence? We had occasion to consider the parallel law contained in Section 34, Income-tax Act in Commissioner of Income Tax, Bombay City Vs. Ramsukh Motilal, , where we took the view that a notice "under Section 34, constituted the very foundation of the jurisdiction of the Income Tax Officer to assess u/s 34 and that any defect in the notice could not be waived by the assessee as the notice was a condition precedent to the exercise of the jurisdiction of the Income Tax Officer and any defect in the notice would be fatal to the assessment made by the Income Tax Officer u/s 34.

By parity of reasoning, if Section 11A of the old Act and Section 15 of the new Act are in "pari materia", we must hold that the notice required either u/s 11A or u/s 15 is a condition precedent to the exercise of the jurisdiction by the Sales Tax Officer and that if the notice is defective the condition precedent is not complied with and the Sales Tax Officer has no jurisdiction to assess.

In this case the defect in the notice is constituted by failure on the part of the officer to give a notice of sufficient duration. Admittedly, the notice is short, it is not of the length or duration required by the rules, and as in our opinion that defect is fatal not only to the validity of the notice but to the validity of the assessment itself, the order of assessment passed by the Sales Tax Officer cannot stand.

8. We therefore agree that this order of assessment should be quashed, but not, with respect, for the same reasons and on the same grounds as given by the learned Judge below. The result is that the appeal must fail and is dismissed. No order as to costs. Appeal dismissed.