

(1968) 11 GUJ CK 0007
In the Gujarat High Court
Case No : Sales Tax Reference No. 6 of 1966

State of Gujarat	Vs	APPELLANT
Mukhi Stores		RESPONDENT

Date of Decision : 11-11-1968

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 78

Citation : (1969) 23 STC 334

Hon'ble Judges : P.N. Bhagwati, C.J; R.B. Mehta, J; B.J. Divan, J

Bench : Full Bench

Advocate : J.M. Thakore, -General, instructed by H.V. Chhatrapati of Bhaishanker Kanga and Girdharlal, for the Appellant; S.L. Mody, for the Respondent

Judgement

Mehta, J. (Dissenting)

1. The Tribunal has referred the following question to us :

Whether on the facts and in the circumstances of the case penalty under Sub-section (4) of section 16 of the Bombay Sales Tax Act, 1953, could

be imposed on the opponent for the period for which the payment of dues was excused by the appellate and revisional authority by grant of stay order ?

2. The short facts which have given rise to this application are :-

The opponent, Messrs Mukhi Stores, Ahmedabad, is a firm registered under the Bombay Sales Tax Act, 1955, hereinafter referred to as "the Act

The Sales Tax Officer had assessed the opponent-firm for the period from 1st April, 1954, to 31st March, 1955, by the assessment order dated

30th March, 1957. In appeal the Assistant Commissioner of Sales Tax held that the amount of Rs. 17,618-14-0 along with penalty - u/s 16(4)

should be recovered from the opponent-firm after adjusting the payments made by the opponent-firm according to the provisions of law. When the assessee approached the Deputy Commissioner of Sales Tax in revision, by the order dated 22nd September, 1963, the revision was only partially allowed and the Sales Tax Officer was directed to recover the balance due calculating the penalty at 1 per cent for late payment. When the opponent-firm finally approached the Tribunal in revision, the Tribunal has set aside the order imposing penalty after the date of the assessment order till the communication of the judgment of the Tribunal and has confirmed the rest of the order passed by the Deputy Commissioner, on the ground that during the period the appellate and the revisional authorities granted the stay orders against the recovery of the balance of tax, the assessee committed no default for which it could be penalised. The State has, therefore, required the Tribunal to make the aforesaid reference to this Court.

3. The relevant section which falls for our interpretation is section 16. Sub-clause (4) runs as under :

If the tax is not paid by any dealer within the prescribed time, the dealer shall pay, by way of penalty in addition to the amount of tax, a sum equal to -

(i) one per cent of the amount of tax for each month for the first three months after the expiry of the prescribed time, and

(ii) two and one-half per cent for each month subsequent to the first three months as aforesaid during which he continues to make default in the payment of the tax :

Provided that where the tax has not been paid by any dealer within the prescribed time but the dealer has filed an appeal or an application for revision in respect of such tax, the authority hearing the appeal or the application for revision may direct that the penalty in respect of any period shall be paid at such rate as it may think fit, the rate being not less than one per cent and not more than two and one-half per cent of the amount of tax for each month :

Provided further that the Collector may, subject to such conditions as may be prescribed, remit the whole or part of the amount of the penalty payable by a dealer in respect of any period under this sub-section.

4. Sub-clause (5) provides as under :

(i) the amount of tax -

(a) due where the returns are finished without full payment thereof, or

(b) assessed for any period u/s 14 or u/s 15 less the sum, if already paid by the dealer in respect of such period, or

(ii) the amount of the penalty payable under sub-section (4), shall be paid by the dealer into a Government treasury by such date as may be

specified in a notice issued by the Collector for this purpose and the date to be so specified shall be not less than thirty days from the date of

service of such notice :

Provided that the Collector may, in respect of any particular dealer and for reasons to be recorded in writing, extend the date of such payment or

allow such dealer to pay the tax due and the penalty, if any, by instalments.

5. The material clause which has to be interpreted by us is section 16(4). The condition precedent for application of this section is that the tax is not

paid by any dealer within the prescribed time. In that event, the dealer who continues to make default in the payment of the tax is liable to pay the

penalty for all the time during which he so continues in default. For the first period of three months the penalty is at the monthly rate of 1 per cent

and for each month for the subsequent period after three months, there is enhanced rate of 2(1/2) per cent. Thus, the main ingredient which must

be satisfied before section 16(4) for imposing penalty is attracted is not mere non-payment of tax by the dealer, but his continuance to make a

default. The Legislature having provided a penalty which is at such a high rate for the entire period during which non-payment continues, it has

advisedly confined the same to those cases where the dealer continues to make a default. It would be revolting to our sense of justice to penalise a

person without hearing for default. Even though the hearing has not been specifically provided for in section 16(4), that lacuna would always be

filled up by Courts, as an implicit requirement of the principle of natural justice when a person is sought to be penalised. As for the other

requirement the Legislature itself was careful enough to make a specific provision that this penalty attaches to cases where default continues and

not otherwise. Therefore, the authority which assesses this penalty must find out during what period the assessee has continued to make default and

thereafter it an impose penalty within the limits laid down by the statute. The first proviso carves out a further relief in cases where the dealer files an appeal or application for revision and in that case, the appellate or the revising authority has a discretion to give relief in the penalty amount so that the rate is not less than 1 per cent and not more than 2(1/2) per cent of the amount of tax for each month. That relief would be available only where the dealer continues to make a default because unless there was default, the period of penalty itself does not start running. The second proviso gives discretion to the Collector even to remit the whole or part of the penalty. Even sub-clause (5) has been interpreted by this Court to be forming part of the one whole integrated scheme of this section. In *Viswa & Co. v. State Gujarat* [1966] 17 S.T.C. 581., the Division Bench, consisting of J. M. Shelat, C.J., and Bhagwati, J. (as they then were) held at page 594 that it must be remembered that sub-sections (2), (4) and (5) of section 16 form part of a connected whole and they must be construed as to make a consistent and harmonious enactment of the whole section. The Division Bench in terms held that if the construction contended for on behalf of the revenue were accepted, the assessee would be in default as soon as he files the return without payment of the full amount of the tax and he would render himself liable to penalty, which would be mounting from day to day u/s 16(4). But even so, u/s 16(5) he would be entitled to notice of not less than thirty days within which to pay up the amount of the tax remaining unpaid. That is why at page 597 the Division Bench held that the only rational and intelligible way of construing section 16, sub-section (5), is by taking the view that as in the case of the amount of tax assessed u/s 14 or 15, so also in the case of the amount of tax due according to the return when the return is furnished without full payment of such amount, the Legislature provided that a notice of at least 50 days should be given to the assessee for payment of the amount of tax before any consequences arising from default, either by way of penalty or proceedings for recovery, should be visited on him. The Division Bench had followed the decision of the Mysore High Court in *B. V. Aswathiah & Bros. v. Commercial Tax Officer* [1963] 14 S.T.C. 467 where it was held that the assessee can be said to have committed default in payment of tax within the prescribed period only if he failed to comply with the notice in the second proviso, which alone attracts the penal provision. Mr.

Mody in this connection also relied upon the decision in *A.S.U. Sahigara & Co. v. Commercial Tax Officer* [1968] 21 S.T.C. 77 where a Division

Bench of the Mysore High Court held that the period of time within which the petitioner could pay the tax without committing the default was

extended and, therefore, no penalty could be levied during such period.

6. Applying the aforesaid ratio to the facts of our case, if the ground which attracts penalty is the continuous making of the default by the dealer u/s

16(4), it is apparent that during the period when the appellate or the revisional authority granted stay, there would be no question of any default.

The penalty did not start running at all during this period because the operation of the order itself had been stayed by the appellate or the revisional

authority. The tax authorities ignored this basic fact and, therefore, the Tribunal was justified in correcting this perverse approach and in interfering

with the order of imposition of penalty even during this period when actually the stay had been granted. Under sections 30 and 31 the appellate

and the revisional authorities are empowered to entertain an appeal even without payment of the tax or penalty, if the conditions mentioned therein

are fulfilled. Thus, a discretion is vested in them to entertain an appeal or revision even without the tax or penalty being paid, if the assessee satisfies

that it is a fit case wherein the discretion conferred on the authority should be exercised. The appellate or the revisional authority in this particular

case had gone further and had passed even the stay orders. The learned Advocate-General argued that the appellate or the revisional authority

must be deemed to have exercised only their powers of entertaining an appeal or revision without the necessary payment of tax or penalty. It is

now too late for the learned Advocate-General to plead new facts before us. In fact, a contention was urged before the Tribunal that the authority

had acted in excess of its jurisdiction in granting such stay. This question has not been referred to us as to whether the relevant authorities had the

power to grant stay order and the question has been referred to us on the footing that in the present case the appellate and the revisional authorities

had granted stay. Once we proceed on that footing, it would be impossible to hold that during the period that the higher authority has granted stay,

the assessee continues to make a default. The learned Advocate-General even tried to argue that what was stayed was the recovery part and such

stay order would never prevent the assessee from voluntarily making the payment. This would be oversimplifying the matter. What is material u/s

16(4) is the there the assessee continued to make a default because only during such period that he can be penalised. Once he gets a proper stay

order, it can never be held that the assessee continues to make default. In fact, he has made out a prima facie case by satisfying proper authorities

to grant the stay order and thereafter the default could no longer continue for which he can be penalised u/s 16(4) of the Act. As I have already

mentioned the decided cases also take the same view, and, therefore, with great respect I beg to differ from my learned brother and record my

separate opinion.

7. In my opinion, the answer to the question referred must be in the negative. The reference is accordingly answered and the State shall pay the

costs of this reference to the assessee.

Divan, J. (Concurring)

8. In this reference u/s 34 of the Bombay Sales Tax Act, 1953 (hereinafter referred to as the Act), at the instance of the State of Gujarat, the

following question has been referred by the Sales Tax Tribunal to this Court :-

Whether on the facts and in the circumstances of the case penalty under sub-section (4) of section 16 of the Bombay Sales Tax Act, 1953, could

be imposed on the opponents for the period for which the payment of dues was excused by the appellate and revisional authority by grant of stay

order ?

9. The facts giving rise to this reference are as follows :-

The opponents herein are a firm registered under the Act and is a registered dealer. The Sales Tax Officer, Enforcement Branch, Ahmedabad,

assessed the opponent-firm for the period 1st April, 1954, to 31st March, 1955, by his assessment order. Against the said assessment order the

assessee-firm preferred an appeal u/s 30 of the Act and the appeal was filed before the Assistant Commissioner of Sales Tax (Appeals), Range II,

Ahmedabad. The Assistant Commissioner accepted partially the contentions of the assessee and in some respects reduced the tax and ultimately

held that the amount of Rs. 17,618-14-0 together with penalty u/s 16(4) of the Act should be recovered from the appellant after adjusting the

payments made by the assessee-firm according to the provisions of law. Thus the appeal was allowed in part. Against this decision of the Assistant

Commissioner, the assessee-firm went in revision before the Deputy Commissioner of Sales Tax (Appeals), Ahmedabad, u/s 31 of the Act. The

Depots Commissioner partially allowed the application in that though he confirmed the order of the Assistant Commissioner regarding the sales tax

does that were to be recovered from the assessee, he reduced the penalty to be recovered from the assessee to 1 per cent from 2(1/2) per cent.

Against the decision of the Deputy Commissioner, the assessee-firm went in revision before the Sales Tax Tribunal. The Tribunal allowed the

revision application so far as the imposition of penalty was concerned and set aside the imposition of penalty after the date of the assessment order

till the communication of the judgment of the Tribunal but confirmed the rest of the order passed by the Deputy Commissioner. Thereafter at the

instance of the State of Gujarat, the above question has been referred by the Tribunal to the High Court.

10. At the lime when the application to refer the matter to this Court u/s 34 was made, a dispute was raised before the Tribunal on the ground that

the application for reference was barred by limitation but the Tribunal held that the delay in making the application for reference could be condoned

and after condoning the delay this reference has been made by the Tribunal to the High Court. At the hearing of the reference before us at one

stage Mr. S. L. Mody, on behalf of the assessee-firm, wanted to contend that the reference was not competent inasmuch as the application for

reference was barred by limitation; and further that the Tribunal had no power to condone the delay once the application had become time-barred.

However, ultimately, Mr. Mody has not pressed this contention and we have heard the parties on the merits of the matter so far as the question

referred to us is concerned.

11. In order to appreciate the real controversy between the parties, it is necessary to bear in mind that after the assessment order was passed by

the Sales Tax Officer in the first instance, the assessee-firm was allowed to prefer an appeal against the assessment order without payment of tax

and penalty and the recovery thereof was stayed by the Assistant Commissioner. In the same manner, the Deputy Commissioner also admitted the

revision application against the order of the Assistant Commissioner on part-payment of the dues and on furnishing security for the balance and

thereafter the Sales Tax Tribunal also admitted the revision application against the order passed by the Deputy Commissioner on giving security

without further payment; and both the revisional authorities, viz., the Deputy Commissioner and the Sales Tax Tribunal, had granted stay orders

against the recovery of the balance of the tax. These facts are not in dispute before us; but the question is whether in the light of the provision of

section 16(4) of the Act, the penalty could be imposed for the period when the stay orders of this kind passed by the appellate and revisional

authorities were operative.

12. Section 16 of the Act, as in force at the relevant time, provided as follows :

16. (1) The tax shall be paid in the manner hereinafter provided at such intervals as may be prescribed.

(2) Before any registered dealer furnishes the returns required by sub-section (1) of section 13, he shall, in the prescribed manner, pay into

Government treasury the full amount of the tax due from him according to such returns.

(3) Before any registered dealer furnishes a revised return in accordance with sub-section (2) of section 13 which shows a greater amount of tax to

be due than was payable in accordance with the original return, he shall pay into a Government treasury the extra amount of the tax.

(4) If the tax is not paid by any dealer within the prescribed time, the dealer shall pay, by way of penalty in addition to the amount of tax, a sum

equal to -

(i) one per cent of the amount of tax for each month for the first three months after the expiry of the prescribed time, and

(ii) two and one-half per cent for each month subsequent to the first three months as aforesaid

during which he continues to make default in the payment of the tax :

Provided that where the tax has not been paid by any dealer within the prescribed time but the dealer has filed an appeal or an application for

revision in respect of such tax, the authority hearing the appeal or the application for revision may direct that the penalty in respect of any period

shall be paid at such rate as it may think fit, the rate being not less than one per

cent and not more than two and one-half per cent of the amount of tax for each month :

Provided further that the Collector may, subject to such conditions as may be prescribed, remit the whole or part of the amount of the penalty payable by a dealer in respect of any period under this sub-section.

(5)(i) The amount of tax -

(a) due where the returns are furnished without full payment thereof, or

(b) assessed for any period u/s 14 or u/s 15 less the sum, if any, already paid by the dealer in respect of such period, or

(ii) the amount of the penalty payable under sub-section (4), shall be paid by the dealer into a Government treasury by such date to may be

specified in a notice issued by the Collector for this purpose and the date to be so specified shall be not less than thirty days from the date of

service of such notice :

Provided that the Collector may, in respect of any particular dealer and for reasons to be recorded in writing, extend the date of such payment or

allow such dealer to pay the tax due and the penalty, if any, by instalments.

(6) Any amount of the tax together with the penalty, if any, which remains unpaid after the date specified in the notice issued under subsection (5)

shall be recoverable as an arrear of land revenue.

13. The other sections relevant for the purposes of this judgment are sections 30 and 31 of the Act. Section 30 provided as follows :

30. (1) Within sixty days from the making of an order of assessment either with or without penalty or the passing of any other order under this

Act, any person may, in the prescribed manner, appeal to the prescribed authority against such order.

(1A) No appeal against the order of assessment, with or without penalty, shall ordinarily be entertained by the prescribed authority unless it is

accompanied by satisfactory proof of the payment of the tax with penalty, if any, in respect of which the appeal has been preferred :

Provided that the authority may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against such order,

(a) without payment of the tax or penalty, if any, but on furnishing in the prescribed manner security for such amount of the tax and penalty as it

may direct; or

(b) on proof of payment of such smaller sum, with or without security, in the like manner, for such amount of the tax and penalty which remains

unpaid, as it may direct.

14. Sub-sections (2) and (3) of section 30 of the Act are not material for the purposes of this judgment.

15. Section 31 of the Act provided as follows :

31. (1) Subject to such rules as may be prescribed and for reasons to be recorded in writing, the Collector may, upon application or of his own

motion, revise any order passed under this Act or the rules thereunder by a person appointed u/s 3 to assist him, and, subject as aforesaid the

Tribunal may, upon application, revise any order passed by the Collector :

Provided that no application under this sub-section shall be entertained if it is not made within a period of four months from the date of the order :

Provided further that before rejecting any application for the revision of any such order the Collector or the Tribunal, as the case may be, shall

record reasons for such rejection.

16. Acting under the rule-making power conferred upon it by section 45 of the Act, the Government of Bombay had framed the Bombay Sales

Tax (Procedure) Rules, 1954, and it was provided by rule 37 of the said Rules that no application for revision shall be entertained by any authority

unless it is satisfied that the tax with penalty, if any, in respect of which the application is made has been paid; provided that the said authority may,

if it deems fit, for reasons to be recorded in writing, entertain an application for revision against such order without payment of the amount of tax

with penalty, if any, or on payment of such smaller amount as it may direct.

17. Thus it can be seen that so far as appeals are concerned, by virtue of the proviso to section 30(1), and so far as revision applications are

concerned, by virtue of rule 37 of the Rules, ordinarily neither an appeal against an assessment order nor a revision application can be entertained

unless the appellate or the revisional authority was satisfied that the tax with penalty, if any, in respect of which the appeal or the revision

application was made, had been paid and by virtue of the proviso, the power was conferred on the appellate authority in case of appeals and on

the revisional authority in case of revision applications to entertain the appeal or the revision application without payment of the tax with penalty, if any, or on payment of such smaller amount, as may be directed and it is in the light of these powers conferred upon the appellate authority or the revisional authority to entertain the appeal or the revision application without the payment of the tax with or without penalty, if any, that we have to read the proviso to section 16(4), which as quoted above, lays down that where the tax has not been paid by any dealer within the prescribed time but the dealer has filed an appeal or an application for revision in respect of such tax, the authority hearing the appeal or the application for revision may direct that the penalty in respect of any period shall be paid at such rate as it may think it, the rate being not less than one per cent and not more than two and one-half per cent of the amount of tax for each month. It is, therefore, clear that the first proviso to section 16(4) confers a power upon the appellate authority and upon the revisional authority to impose penalty in respect of any particular period during which a tax remains unpaid, the rate of penalty being not less than 1 per cent and not more than 2 1/2 per cent of the amount of tax for each month. It is by virtue of this power in the proviso to section 16(4) that the Assistant Commissioner imposed the penalty when he passed the order in appeal and directed that the amount of Rs. 17,618-14-0 together with the penalty u/s 16(4) should be recovered from the assessee-firm after making adjustments according to the provision of law. Again it was by virtue of the powers conferred upon him by the first proviso to section 16(4) that the Deputy, Commissioner when he disposed of the revision application, restricted the penalty to 1 per cent.; and the question that we have to consider is whether the operative part of section 16(4) can be invoked when the stay orders of the type that we have referred to above were issued by the appellate and revisional authorities during the period when the appeal before the Assistant Commissioner and the revision application before the Deputy Commissioner and the Sales Tax Tribunal were pending.

18. I have had the benefit of being present when my learned brother Mehta was dictating the judgment in this reference in open Court, but I regret that I am unable to agree with his conclusions regarding the interpretation to be placed on section 16(4) of the Act.

19. So far as the decided cases are concerned, no assistance can be derived from any of the decided cases that have been cited before us. In

A.S.U. Sahigara & Co. v. Commercial Tax Officer [1968] 21 S.T.C. 77., decided by a Division Bench of the Mysore High Court, the problem

was slightly different from the problem before us. In that particular case, the Commercial Tax Officer directed the petitioner before the High Court

to pay the tax assessed within 21 days from the date of his notice, but before the expiry of that period the petitioner made an application for

payment of the tax in instalments and the Government passed an order after the expiry of that period permitting the petitioner to pay the tax in

instalments and on these facts the Division Bench of the Mysore High Court held that the period of the within which the petitioner could pay the tax

without committing default was that fixed by the Government and in consequence the notice of the Commercial Tax Officer stood superseded by

the order made by the Government and instead of the tax becoming due on the expiry of 21 days specified in the notice, it became due when the

instalments allowed by the Government became due. It is clear from the facts which I have set out just now that it was because of the supersession

of the notice of the Commercial Tax Officer by the order of the Government allowing instalments, that the Division Bench came to the conclusion

that no default was committed by the assessee concerned and that the default could be said to be committed in respect of each instalment when the

instalments allowed by the Government became due. Somnath Iyer, J., delivering the judgment of the Division Bench pointed out at page 79 of the

report as follows :

Under action 13 of the Sales Tax Act, a dealer becomes a defaulter then he neglects to make payment of the tax when it becomes due. Since the

date on which the tax had to be paid by the petitioner was shifted from the date fixed by the Commercial Tax Officer to the dates of the instalments

allowed by Government, the petitioner would have become a defaulter only if there was non-payment of any one of those instalments when they

became due, and on such default, the penalty became payable by him u/s is with respect to the amount in respect of which payment was not made

..... the grant of instalments by Government effaced the default emanating from non-compliance with the Commercial Tax Officer's demand

and extended the time for payment.

20. On the special facts which were present before the Mysore High Court, the conclusions reached by that Division Bench were correct and I

respectfully agree with those conclusions so far as the facts of that particular case were concerned. In the instant case before us, there is no such

superseding of the original order which was present in the case before the Mysore High Court and, therefore, that case is distinguishable from the present one.

21. In *Viswa & Co. v. The State of Gujarat* [1966] 17 S.T.C. 581 a Division Bench of this High Court consisting of J. M. Shelat, C.J. (as he then

was), and Bhagwati, J. (as he then was), considered the provision of section 16 of the Act and the question as to the liability to pay the penalty on

sales tax. At page 591 of the report, Bhagwati, J., delivering the judgment of the Division Bench, observed as follows while dealing with the

question as to whether the revenue could claim penalty from an assessee u/s 16(4) of the Act :

It is clear that the revenue can claim penalty from the assessee only if the case of the assessee falls within section 16(4). Now the condition which

attracts levy of penalty u/s 16(4) is that the dealer should have failed to pay the amount of the tax within the prescribed time. This much was agreed

on both sides but the controversy centered round the question as to what is the prescribed time in the case of payment of tax due according to the

return. The contention of the revenue was - and that was the contention which found favour with the Tribunal - that the prescribed time for the

purpose of payment of tax due according to the return was the time for furnishing the return, since section 16(2) as also rules 4 and 10 required

that the assessee must pay the full amount of tax due according to the return into the Government treasury before filing the return.

22. Now the controversy in that case was as to when the default can be said to commence. That is not the question before us and though I agree

with the observations of the Division Bench that the revenue can claim penalty from the assessee only if the case of the assessee falls within section

16(4) of the Act, the question that arises before us in the instant case is as to whether any default can be said to have been committed by the

assessee when he did not pay the tax during the pendency of the appeal and the

pendency of the revision applications first before the Deputy Commissioner and then before the Tribunal.

23. The decision of another Division Bench of the Mysore High Court in *B. V. Aswathiah & Bros. v. Commercial Tax Officer* [1963] 14 S.T.C.

467. is again of not much assistance to us in solving the problem before us because that decision lays down that under the provisions of the Mysore

Act and the Rules framed thereunder, an assessee is required to pay the admitted tax and if he underestimates his turnover, no penalty could be

levied till the final assessment was made.

24. In my opinion, it is important to bear in mind that under the so-called stay orders first the stay was granted by the Assistant Commissioner and

thereafter in the case of the stay orders granted by the Deputy Commissioner and by the Sales Tax Tribunal, there was stay of the recovery of the

amount of sales tax due from the assessee-firm for the period 1954-55. It is clear that u/s 16(6), any amount of tax together with penalty, if any,

which remains unpaid after the dates specified in the notice is recoverable as an arrear of land revenue; and by virtue of the stay orders granted at

the relevant stages, first by the Assistant Commissioner and then by the Deputy Commissioner and the Sales Tax Tribunal, the recovery

proceedings u/s 16(6) were stayed and so long as those stay orders regarding recovery were in force, the sales tax does with penalty, if any, could

not be recovered as arrears of land revenue from the assessee-firm. That, in my opinion, is the only effect of the stay orders granted by the

Assistant Commissioner at the stage of appeal and by the Deputy Commissioner and the Tribunal at the stage of the respective revision

applications before each of those two revisional authorities. Ordinarily, the assessee-firm was bound to pay the amount of the sales tax dues as

assessed by the Sales Tax Officer and had to satisfy u/s 30, the Assistant Commissioner with satisfactory proof of the fact of payment of the tax

with penalty, if any, in respect of which the appeal was filed. It was only by way of indulgence that under the second proviso to section 30(1) of

the Act, as it then stood, the appellate authority entertained the appeal against the assessment order without payment of the amount of the tax

including penalty and it is by virtue of the provisions of rule 37 of the Bombay Sales Tax (Procedure) Rules, 1954, that the Deputy Commissioner

of Sales Tax and the Tribunal entertained the relevant revision applications before them without payment of the amount of tax with penalty and on

payment of such smaller sum as they directed.

25. Thus the coercive process contemplated by section 16(6) could not be put in motion against the assessee-firm in respect of the assessment

dues for the period 1st April, 1954 to 31st March, 1955, because of the stay orders granted by the Assistant Commissioner and thereafter by the

Deputy Commissioner and the Sales Tax Tribunal. The question, however, remains whether the penalty u/s 16(4) could be levied on the assessee

in respect of the period taken up in the appeal and the revision applications. To my mind, the governing words are to be found in the first proviso

to section 16(4), which empowers the appellate authority and the revisional authority to direct that the penalty in respect of any period shall be paid

at such rate as it might think fit, the rate of penalty being not less than 1 per cent. and not more than 2 1/2 per cent of the amount of tax each

month. This power of the appellate authority and the revisional authority is set out in the proviso to section 16(4) has to be read in the light of the

power given to the appellate authority by the first proviso to section 30(1) and to the revisional authority by rule 37 of the Rules to allow the appeal

or application to be filed without the payment of the tax. In my opinion, it is only by the concession that might be granted by the appellate authority

u/s 30(1) proviso or by the revisional authority under rule 37 of the Rules that the appeal or the revision application can be filed without the prior

payment of tax; and the first proviso contemplates that when such tax is not paid by the assessee before filing the appeal or before filing the revision

application, the authorities hearing the appeal or the revision application have been empowered to direct levy of the penalty in respect of any

period at the rate of not less than 1 per cent per month and not more than 2 1/2 per cent per month. u/s 16(4)(i), the penalty has to be paid at the

rate of 1 per cent for each month for the first three months after the expiry of the prescribed time and 2 1/2 per cent for each month subsequent to

the first three months, during which the assessee continues to make default. I agree with my learned brother that ordinarily the word "default" brings

in the concept of a deliberate action on the part of the assessee in withholding the payment; but I am unable to agree with my learned brother that

when the process of recovery u/s 16(6) was stayed by the Assistant Commissioner and thereafter by the Deputy Commissioner and the Sales Tax Tribunal, the payment of the amount assessed by the Sales Tax Officer was stayed. What was stayed was the coercive process of recovery but not the running of the penalty u/s 16(4). In the context in which the word "default" occurs in the sentence, "during which he continues to make default in the payment of the tax" as occurring in section 16(4)(ii), it can only be read as meaning "non-payment". Under the scheme of the Act and the Rules, it has been contemplated by the Legislature that in some cases at least u/s 30(1) during the pendency of the appeal the appellate authority would entertain an appeal against an order of assessment without insisting on prior payment of the amount of tax or on proof of payment of such smaller sum as the appellate authority may direct. In the same manner, it was also contemplated by the law in the form of statutory rule 37 that the revisional authority would entertain an application for revision against an order complained of without prior payment of the amount of the tax with penalty, if any, or on payment of such smaller amount as the revisional authority may direct. Thus in view of these powers conferred upon the appellate authority and the revisional authority to allow a particular assessee to die an appeal or a revision application without prior payment of the tax assessed against him, that the proviso confers upon the authority hearing the appeal or the application for revision the power to direct that the penalty in respect of any period shall be paid at such rate as it may think fit, the rate being not less than 1 per cent and not more than 2 1/2 per cent of the amount of tax for each month. It is true that the words used in the proviso are "may direct" so far as the imposition of the penalty by the appellate or the revisional authority is concerned, but the question in the instant case is whether the word "default" as used in the phrase "during which he continues to make default in the payment of the tax" means any deliberate withholding of the tax or means mere non-payment of the tax. In the light of the proviso to section 16(4) and in the light of the discretion conferred upon the appellate authority and upon the revisional authority to hear the appeal or revision application without insisting on the prior payment of the tax in respect of which the appeal or the application has been filed, it is clear that in the context in which the word "default" occurs and in view of the scheme of the different sections and rule 37 of the Rules,

which I have referred to above, the only meaning that can be attached to the word "default" is non-payment and nothing more. The only effect of the so-called stay orders granted by the Assistant Commissioner, the Deputy Commissioner and the Tribunal was to stay the coercive machinery for the recovery of the tax u/s 16(6). That does not mean that the assessee who was given the special concession at the time of filing the appeal or filing the revision without prior payment of the full tax then due from him, was also exonerated from the payment of penalty during such period as the tax remained unpaid. With great respect to my learned brother, I am unable to agree with his conclusion that there is anything shocking in this interpretation of the scheme of the sections and the rules; and there is nothing contrary to the spirit in which the taxation laws have to be in interpreted and administered in interpreting section 16(4) and its proviso in the manner in which I have done.

26. In my opinion, the question should be reframed in order to bring out the real controversy between the parties, as follows :-

Whether on the facts and in the circumstances of the case, penalty u/s 16(4) of the Bombay Sales Tax Act, 1953, should be imposed on the opponent for the period covered by the stay orders issued by the appellate and the revisional authorities ?

27. The question as originally framed by the Tribunal implies that the period during which the appeal and application were pending, the payment was excused by the appellate and the revisional authorities by grant of stay orders. As I have stated above, the said orders did not operate to excuse the assessee from payment of the tax assessed; all that each stay order stayed was the process of coercive recovery u/s 16(6) and nothing more. Even under regulation 11 of the Sales Tax Regulations, the execution of the coercive process of recovery was stayed and nothing more; and, therefore, in my opinion the question as reframed by me should be answered in the affirmative. In my opinion, the assessee should be made to pay the costs of this reference to the State of Gujarat.

28. P.C. In view of the difference of opinion on the points which clearly emerges from our respective judgments, the case should now be placed under clause 36 of the Letters Patent of this High Court before one or more of the other Judges and the points should be got decided as laid down

in that clause.

29. In pursuance of the abovesaid order, the reference came up for hearing before Bhagwati, C.J., and the learned Chief Justice delivered the following judgment on November 11, 1968.

Bhagwati, C.J. (Concurring)

30. This reference comes before me on a difference of opinion between Divan, J., and Mehta, J. The reference arises out of assessment to sales

tax made on the assessee for the period 1st April, 1953, to 31st March, 1955, under the Bombay Sales Tax Act, 1955. The original assessment

was made by the Sales Tax Officer and a certain amount was determined as payable by the assessee by way of sales tax but the assessee was

aggrieved by the order of assessment and he therefore preferred an appeal to the Assistant Commissioner of Sales Tax u/s 30 of the Act. The first

proviso to section 30, sub-section (1), provided that no appeal against an order of assessment, with or without penalty, shall ordinarily be

entertained by the prescribed authority unless It is accompanied by satisfactory proof of the payment of the tax, with penalty, if any, in respect of

which the appeal has been preferred. But the rigour of this provision was mitigated by the second proviso which declared that the prescribed

authority may, if it deems fit, for reasons to be recorded in writing, entertain an appeal against such order without payment of the amount of the tax

including penalty, if any, or on proof of payment of such smaller amount as it may direct. The assessee did not make payment of the full amount of

tax determined to be due under the assessment order and made an application to the Assistant Commissioner of Sales Tax that the appeal be

entertained without insisting on full payment of the amount of the tax. The Assistant Commissioner of Sales Tax in exercise of his discretion under

the second proviso to section 30, sub-section (1), admitted the appeal without insisting on payment of the full amount of tax by the assessee. The

Assistant Commissioner of Sales Tax also on the application of the assessee passed an order staying the recovery proceedings which had been

started by the department against the assessee for recovery of the balance of the amount of the tax and as the copy of the order tendered on behalf

of the revenue and marked exhibit A clearly shows, the order was passed by the Assistant Commissioner of Sales Tax ""without prejudice to the

penalty u/s 12(3A) of the Bombay Sales Tax Act, 1946/under section 16(4) of the Bombay Sales Tax Ordinance (No. 2), 1952/under section

16(4) of the Bombay Sales Tax Act, 1953, that may be leviable from the date of assessment to the date of payment." The appeal of the assessee

was thereafter heard by the Assistant Commissioner of Sales Tax and partly allowing the appeal, the Assistant Commissioner of Sales Tax held

that a sum of Rs. 17,618-14-0 together with penalty u/s 16(4) should be recovered from the assessee after adjusting payments made by the

assessee from time to time according to the provisions of the law.

31. The assessee thereupon preferred a revision application to the Deputy Commissioner of Sales Tax. Now by reason of rule 37 of the Bombay

Sales Tax (Procedure) Rules, 1954, the revision application of the assessee was also not liable to be entertained by the Deputy Commissioner of

Sales Tax unless he was satisfied that tax with penalty, if any, in respect of which the revision application was made had been paid but the proviso

to that rule conferred a discretion on the Deputy Commissioner of Sales Tax, if he thought fit for reasons to be recorded in writing, to entertain the

revision application without payment of the amount of tax with penalty, if any, or on payment of such smaller amount as he might direct. The

Deputy Commissioner of Sales Tax exercising his discretion under the proviso to rule 37 in favour of the assessee admitted the revision application

on the assessee making part-payment of the amount of the tax and furnishing security for the balance. The Deputy Commissioner of Sales Tax also

by an order, a copy of which has been tendered as part of exhibit A collectively, granted stay against the recovery proceedings instituted by the

department. The revision application was thereafter heard by the Deputy Commissioner of Sales Tax and on the merits, the assessee did not

succeed but so far as penalty was concerned, the Deputy Commissioner of Sales Tax directed that penalty u/s 16(4) should be restricted only to

one per cent of the amount of the tax. The assessee then carried the matter in revision to the Tribunal. The Tribunal also, like the revenue

authorities, granted an order staying the recovery proceedings against the assessee and admitted the revision application without requiring any

further payment of the amount of tax from the assessee. The Tribunal ultimately, when it came to hear the revision application, confirmed the

assessment on merits but so far as penalty was concerned, the Tribunal took the view that since stay orders had been granted by the different

appellate and revisional authorities, no penalty was leviable on the assessee u/s 16(4). The Tribunal accordingly set aside that part of the order

which related to the imposition of penalty on the assessee. Hence the present reference at the instance of the State.

32. The question which arises for consideration is whether penalty could be validly imposed on the assessee u/s 16(4) even though the assessee

had obtained stay of recovery proceedings from the appellate and revisional authorities. The determination of the question obviously depends on a

true interpretation of section 16, sub-section (4), but in order to arrive at its proper meaning, it is necessary to refer to the other sub-sections of

that section as well. Section 16 as it stood at the material time was in the following terms :

16. (1) The tax shall be paid in the manner hereinafter provided at such intervals as may be prescribed.

(2) Before any registered dealer furnishes the returns required by sub-section (1) of section 13, he shall, in the prescribed manner, pay into a

Government treasury the full amount of the tax due from him according to such returns.

(3) Before any registered dealer furnishes a revised return in accordance with sub-section (2) of section 13 which shows a greater amount of tax to

be due than was payable in accordance with the original return, he shall pay into a Government treasury the extra amount of the tax.

(4) If the tax is not paid by any dealer within the prescribed time, the dealer shall pay, by way of penalty in addition to the amount of tax, sum equal

to -

(i) one per cent of the amount of tax for each month for the first three months after the expiry of the prescribed time, and

(ii) two and one-half per cent for each month subsequent to the first three months as aforesaid

during which he continues to make default in the payment of the tax :

Provided that where the tax has not been paid by any dealer within the prescribed time but the dealer has filed an appeal or an application for

revision in respect of such tax, the authority hearing the appeal or the

application for revision may direct that the penalty in respect of any period shall be paid at such rate as it may think fit, the rate being not less than one per cent and not more than two and one-half per cent, of the amount of tax for each month :

Provided further that the Collector may, subject to such conditions as may be prescribed, remit the whole or part of the amount of the penalty payable by a dealer in respect of any period under this sub-section.

(5) (i) The amount of tax -

(a) due where the returns are furnished without full payment thereof, or

(b) assessed for any period u/s 14 or u/s 15 less the sum, if any already paid by the dealer in respect of such period, or

(ii) the amount of the penalty payable under sub-section (4), shall be paid by the dealer into a Government treasury by such date as may be

specified in a notice issued by the Collector for the purpose and the date to be so specified shall be not less than thirty days from the date of

service of such notice :

Provided that the Collector may, in respect of any particular dealer and for reasons to be recorded in writing, extend the date of such payment or

allow such dealer to pay the tax due and the penalty, if any, by instalments.

(6) Any amount of the tax together with the penalty, if any, which remains unpaid after the date specified in the notice issued under sub-section (5)

shall be recoverable as an arrear of land revenue.

33. This section, as the marginal note shows, dealt with the subject-matter of payment and recovery of tax. Sub-section (1) which marks the

starting point in the scheme of payment and recovery of tax embodied in this section provided that ""the tax shall be paid in the manner hereinafter at

such intervals as may be prescribed"". Sub-sections (2), (3) and (5) then proceed to provide for the manner in which the tax shall be paid. Sub-

section (2) declared that the full amount of tax due from the assessee according to his return must be paid by him into a Government treasury

before he dies his return. This sub-section fixed the liability of the assessee to make payment of the full amount of tax due from him according to

the return before he furnished the return even though assessment was not yet made on him. Sub-section (3) then provided for a case where the

assessee who had already filed the return might want to revise it by showing additional turnover and in such a case, he must pay into a Government treasury the extra amount of the tax payable by him according to the revised return before he furnished such revised return. Sub-section (5) prescribed the time within which the amount of tax must be paid. It provided, that the amount of tax (a) due where the returns are furnished without full payment thereof or (b) assessed for any period u/s 14 or section 15 less the sum, if any, already paid by the dealer in respect of such period, shall be paid by the dealer into a Government treasury by such date as may be specified in a notice issued by the Collector for that purpose and the date to be so specified shall be not less than thirty days from the date of service of such notice. The proviso to sub-section (5) conferred power on the Collector to extend the date of payment and it said that the Collector may, in respect of any particular dealer and for reasons to be recorded in writing, extend the date of payment or allow the dealer to pay the tax due by instalments. If the assessee paid the amount of tax within the prescribed time, there was no difficulty but what should happen if the assessee failed to make payment within the prescribed time. That was provided in sub-sections (4) and (6). Sub-section (4) provided penalty if the tax was not paid by the dealer within the prescribed time and sub-section (6) provided for recoverability of the amount of tax as an arrear of land revenue. Two consequences were thus provided for as arising on non-payment of the amount of tax by the dealer within the prescribed time. One was penalty and the other was proceedings for recovery. If the assessee wanted to avoid these two consequences, he could either make payment of tax within the prescribed time or apply to the Collector for extending the date of payment or allowing the payment to be made by instalments and then comply with the extended date or the dates of instalments. If he did not do so, he would be liable to pay by way of penalty, in addition to the amount of tax, a sum equal to a certain percentage of the amount of tax depending upon how long the default continues. The State would also be entitled to proceed to recover the amount of tax from the assessee as an arrear of land revenue. The assessee in the present case admittedly failed to pay the amount of tax within the prescribed time and proceedings for recovery of the amount of tax were therefore instituted against him by the department. These proceedings were however

stayed by the appellate and revisional authorities and there is no question before me in relation to these proceedings. The question arises only in

regard to penalty and it is whether, for the period during which the stay orders were operative, penalty could be imposed on the assessee under

sub-section (4).

34. The condition which attracts the applicability of sub-section (4) is that the tax is not paid by the dealer within the prescribed time. If the dealer

fails to pay the tax within the prescribed time, sub-section (4) says that the dealer shall pay by way of penalty, in addition to the amount of tax, a

sum equal to one per cent of the amount of tax for each month for the first three months after the expiry of the prescribed time and two and one-

half per cent for each month subsequent to the first three months during which he continues to make default in the payment of the tax. The drafting

of this sub-section is unhappy in that the words ""during which he continues to make default in the payment of the tax"" are so placed that they seem

to govern only clause (ii) of the sub-section but there is no doubt - and indeed this was not disputed on behalf of the revenue - that these words

govern not only clause (ii) but also clause (i) and penalty would be payable by the dealer only for the period during which he continues to make

default in the payment of the tax. There was some argument before me as to what is the true connotation of the word ""default"" in this sub-section :

does it mean just non-payment or does it involve an idea of deliberate or intentional non-payment. The contention of the assessee was that, in the

context of a provision imposing penalty, the word ""default"" should not be construed to mean non-payment simpliciter but there should be a certain

amount of culpability attached to non-payment in the sense that it must be deliberate or intentional before it could be regarded as ""default"". This

contention, I am afraid, is not well-founded. It is no doubt true that the word ""default"" occurs in what is indisputably a penal provision but in the

context in which that word occurs, it means nothing more than non-payment. The sub-section says that if the tax is not paid by any dealer within

the prescribed time, the dealer shall pay penalty for each month during which he continues to make default. The use of the word ""continues

indicates that default occurs as soon as the dealer fails to pay the tax within the prescribed time, whether from inability to make payment or

otherwise, and for each month during which this default, that is non-payment, continues the dealer is liable to pay penalty. So long as the default, that is non-payment, continues, the liability to penalty is imposed by the sub-section proprio vigore and it is only the discontinuance of the default, that is payment of the amount of the tax, which can put an end to the operation of the sub-section. Now this provision would obviously cause great hardship to an assessee who might not be able to pay up the amount of tax by reason of financial stringency or other justifying circumstance. To mitigate this hardship in some measure, in cases where an appeal or a revision application might have been preferred by the assessee, the first proviso to the sub-section provided that the authority hearing appeal or the revision application may direct that the penalty in respect of any period shall be paid at such rate as it may think fit, the rate being not less than one per cent and not more than two and one-half per cent of the amount of tax far each month. The authority hearing the appeal or the revision application was thus given the discretion to fix the rate of penalty at a figure less than two and one-half per cent even in those cases where that rate was otherwise applicable. But the rate could not in any event be less than one par cent. The assessee could, however, in case of genuine difficulty, approach the Collector and the Collector was given power under the second proviso to remit the whole or part of the amount of penalty payable under the main part of the sub-section. The rigour of the sub-section as regards the imposition of penalty could thus be mitigated partly to a limited extent by the authority hearing the appeal or the revision application and wholly or in part by the Collector if there was a justifying reason. But apart from this dispensing power in the appellate or revisional authority or in the Collector, nothing short of discontinuance of the default, that is, payment of the amount of tax, could arrest the running of the penalty. This provision might at first blush appear to harsh but there was a reason behind this provision and it was that if, by virtue of the enabling provision in the Act, the dealer recovered the amount of the sales tax from the purchaser, there was no reason why he should not pay it over to the State within the prescribed time on pain of running penalty. The only question in the present case could therefore be whether the assessee could validly say that it did not continue to make default during the period that the stay orders were operative.

35. The argument of the assessee was that the stay orders operated to extend the time of payment and the prescribed time therefore stood extended up to the date of expiration of the last stay order, namely, the decision of the Tribunal. This argument was an entirely new argument which was not advanced before the Tribunal nor even before the learned differing Judges. But that by itself is no ground for not entertaining it. The difficulty however arises from the fact that it involves investigation of certain facts which has not been done before the Tribunal. The proviso to sub-section (5) confers power to extend the time of payment on the Collector and unless it is shown that this power was delegated by the State to the Assistant Collector of Sales Tax u/s 44(1) and the Assistant Commissioner of Sales Tax was the officer corresponding to the Assistant Collector of Sales Tax within the meaning of section 78 of the Bombay Sales Tax Act, 1959, and the Deputy Commissioner of Sales Tax was an officer corresponding to the Additional Collector of Sales Tax so as to be entitled to exercise the powers of the Collector, no contention can be advanced that though the orders passed by the Assistant Commissioner of Sales Tax and the Deputy Commissioner of Sales Tax were ostensibly orders of stay, they had the effect of extending the date of payment. But apart altogether from this difficulty I fail to see how the orders staying the recovery proceedings can be regarded as orders extending the date of payment. As a matter of fact the order of stay passed by the Assistant Commissioner of Sales Tax in so many terms says that the order shall not prejudice the penalty leviable under sub-section (4). Moreover this argument cannot possibly apply to the order of stay passed by the Tribunal.

36. It was then urged on behalf of the assessee - and that was the argument which found favour with the Tribunal and also with Mehta, J. - that during the period that the stay orders were operative the assessee could not be said to be continuing to make default. This argument also does not appeal to me. The stay orders granted by the Assistant Commissioner of Sales Tax, the Deputy Commissioner of Sales Tax and the Tribunal did not have the effect of suspending the liability of the assessee to pay the amount of tax. The only effect of the stay orders was that recovery proceedings instituted by the State were stayed. Once the prescribed time was over and the amount of tax was not paid by the assessee within the

prescribed time, the State was entitled to proceed to recover the amount of tax as an arrear of land revenue under sub-section (6) and it was this

proceeding by the State which was stayed by the orders of stay passed by the Assistant Commissioner of Sales Tax, the Deputy Commissioner of

Sales Tax and the Tribunal. The liability to pay the amount of tax was not suspended and so long as payment was not made by the assessee in

discharge of that liability, default continued and during the period of default the assessee continued to be liable to pay penalty at the stated

percentage for each month of default. If the assessee wanted to avoid this consequence, the assessee could have paid up the amount of tax and if he

succeeded in the appeal or the revision, he would have obtained a refund of it. But if the assessee chose to take the risk and did not pay up the

amount of tax and ultimately the appeal or revision failed and the amount of tax originally assessed was held payable by him, it could not be a valid

answer to the claim for penalty that the assessee had obtained orders for staying the recovery proceedings. The assessee was of course given relief

to the limited extent possible under the first proviso to sub-section (4) and if he had any justifying reason for not making payment of the amount of

tax, he could always apply to the Collector for remitting the whole or part of the amount of penalty. But that is very much different from saying that

the assessee was not liable to pay penalty under the main part of the sub-section.

37. I would therefore prefer the view expressed by Divan, J., and answer the question as reframed by Divan, J., in the affirmative. The assessee

will pay the costs of the reference to the State.

38. Reference answered accordingly.