

(1974) 06 GUJ CK 0007
In the Gujarat High Court
Case No : Sales Tax Reference No. 2 of 1973

State of Gujarat

APPELLANT

Vs

Sakurbhai Abedbhai

RESPONDENT

Date of Decision : 20-06-1974

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 32(1), 32(3), 33, 35, 36

Citation : (1975) 35 STC 57

Hon'ble Judges : T.U. Mehta, J; J.B. Mehta, J

Bench : Division Bench

Advocate : G.N. Desai, Government Pleader and H.V. Chhatrapati, of Bhaishanker Kanga and Girdharlal, Additional Government Pleader, for the Appellant; S.L. Modi and N.I. Modi, for the Respondent

Judgement

T.U. Mehta, J.—The question involved in this reference is whether while considering the applicability of the test of the tax assessment exceeding more than 20 per cent of the tax already paid, as provided by sub-section (3A) of section 36 of the Bombay Sales Tax Act, 1959 (which is hereinafter referred to as the "Act"), the amount of tax paid by the assessee, after filing his return but before the final tax assessment was made, should be taken into consideration or not.

2. This question arises in the background of the following facts : The respondent-assessee is a partnership-firm doing the business of reselling timber, stone, etc., at Vadnagar. It is duly registered as a dealer under the Act. During the course of S.Y. 2025 the respondent-assessee filed quarterly returns under the Act showing the total taxable turnover of sales at Rs. 78,385 for the levy of sales tax and of Rs. 9,510 for the levy of general sales tax. It is an admitted position that along with the four returns filed by the respondent-assessee, it paid tax in accordance with these returns. The total amount of tax thus paid by it comes to Rs. 4,295.94. The last payment was made along with the last return on 12th December, 1969.

3. Thereafter on 15th December, 1970, the assessee was called for assessment. On that day he paid the further amount of Rs. 1,500 by producing a treasury challan which was accepted by the concerned Sales Tax Officer.

4. Thereafter on 31st December, 1970, the Sales Tax Officer carried out the assessment and found that the amount of Rs. 5,924.84 was payable by the respondent-assessee as total tax on the total turnover of sales during the year in question. Thus, according to the Sales Tax Officer the amount of Rs. 4,295.94 which was paid by the respondent-assessee along with his four returns was found short of the amount of tax payable as a result of the assessment by Rs. 1,628.88. The difference between the tax paid along with the return and the tax which was found payable being thus more than 20 per cent of the amount of Rs. 4,295.94, the Sales Tax Officer thought that the provisions of sub-section (3A) of section 36 of the Act were attracted. He, therefore, levied penalty of Rs. 415.47 as provided by the said sub-section (3A) of section 36. It should be noted here that while calculating the above-referred difference of 20 per cent, the Sales Tax Officer did not take into account the fact that the tax amount of Rs. 1,500 was paid by the respondent-assessee on 15th December, 1970. The view of the Sales Tax Officer was that since this amount of Rs. 1,500 was paid by the respondent-assessee not along with the returns, but subsequent to the returns, though before the date of the assessment, the same cannot be taken into account for the purpose of determining whether the 20 per cent rule embodied in sub-section (3A) of section 36 was attracted or not.

5. Being aggrieved by this decision, the respondent-assessee approached the Assistant Commissioner for Sales Tax in appeal, but failed. He, therefore, approached the Appellate Tribunal, where he succeeded. The Tribunal on a construction of sub-section (3A) of section 36 came to the conclusion that since the assessee had paid the tax amount of Rs. 1,500 prior to the assessment, the requirements of sub-section (3A) of section 36 of the Act were fully complied with. Being aggrieved by this decision of the Tribunal, the State the preferred this reference in which the Tribunal has referred the following question for our opinion :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in setting aside the order relating to the imposition of penalty of Rs. 415.47 on the opponent-firm u/s 36(3A) of the Bombay Sales Tax Act, 1959, by the sales tax authorities ?"

6. It is evident from the facts of the case stated above that the question which really falls for determination is about the true meaning of sub-section (3A) of section 36. This sub-section (3A) of section 36 was added to section 36 by Gujarat Act No. 9 of 1967. Section 36 is about the imposition of penalty in certain cases. So far as the facts of this case are concerned, reference to sub-sections (1) and (2) of section 36 is not relevant. But sub-section (3) of section 36 and sub-section (3A), which is introduced in the section by Act 9 of 1967, are in terms 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, he shall, subject to the provisions of sub-section (5) of section 55 pay by way of penalty, in addition to the amount of tax, a sum equal to - (a) one per cent of the amount of tax for each complete month for the first three months, after the last date by which he should have paid that tax, and

(b) one and one-half per cent of the amount of tax of each complete month thereafter, during the time he continues to make default in the payment of tax :

Provided that the Commissioner may, subject to such conditions as may be prescribed, and an appellate authority in an appeal u/s 55 may, remit the whole or any part of the penalty payable in respect of any period.

(3A) Where a dealer has failed to pay the whole of the amount of tax as required by sub-section (2) of section 38 or the whole of the extra amount of tax as required by sub-section (3) of that section or where in the case of a dealer the amount of tax assessed or reassessed for any period u/s 33 or section 35 exceeds the sum already paid by a dealer in respect of such period prior to such assessment or reassessment by more than twenty per cent of the sum so paid, the dealer shall be deemed to have failed to pay the tax to the extent of the difference between the amount payable as aforesaid and the amount paid the dealer shall pay by way of penalty on the amount of difference a sum calculated in accordance with the provisions of sub-section (3) and the provisions of sub-section (3) shall so far as may be apply thereto."

It is evident from both these sub-sections that sub-section (3) contemplates penalty in cases where the dealer does not, without reasonable excuse, pay the tax within the time he is required by or under the provisions of the Act to pay it. This sub-section then prescribes the quantum of penalty which can be imposed for the default in question. Sub-section (3A), which is introduced by Act No. 9 of 1967, contemplates three categories of cases for the purpose of imposition penalty referred to therein. These three categories are : (i) the case wherein a dealer has failed to pay the whole amount of tax as required by sub-section (2) of section 38, (ii) the case wherein a dealer has failed to pay the whole of the extra amount of tax as required by sub-section (3) of section 38, and (iii) the case where the amount of tax assessed or reassessed exceeds the sum already paid by a dealer prior to such assessment or reassessment by more than 20 per cent of the sum of paid. If any of these three defaults is committed by an assessee, then he would be liable to the penalty contemplated by sub-section (3A).

7. Sub-section (3A) refers to section 38 which is material for the purpose of deciding the cases falling in the first two of the three categories mentioned above. It is, therefore, necessary to see what is provided by section 38. This section is in the following terms :

"38. (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.

(3) A registered dealer furnished a revised return in accordance with sub-section (3) of section 32, which revised return shows that a larger amount of tax than already paid is payable, shall first pay into a Government treasury the extra amount of tax.

(4) (a) The amount of tax -

(i) due where returns have been furnished without full payment therefor, or

(ii) assessed or reassessed for any period u/s 33 or section 35 less any sum already paid by the dealer in respect of such period or assessed u/s 14C or 41A, and

(b) the amount of penalty (if any) levied u/s 36 or 37, and

(c) the sum (if any) forfeited to the State Government u/s 37, shall 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 for this purpose, being a date not earlier than thirty days from the date of service of the notice :

Provided that the Commissioner or an appellate authority in an appeal u/s 35 may, in respect of any particular dealer or person, and for reasons to be recorded in writing, extend the date of payment, or allow him to pay the tax or penalty (if any) or the sum forfeited, by instalments.

(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, and any instalment not duly paid, shall be recoverable as an arrear of land revenue."

A bare perusal of this section shows that sub-section (2) thereof requires a registered dealer to pay the whole amount of tax due from him according to the return filed by him and sub-section (3) thereof requires him to pay any extra amount of tax if he files a revised return. The State Government have framed rules prescribing the manner in which the payments stipulated by section 38 should be made by an assessee. These rules are found in Chapter V. Rule 29 says that every dealer required to furnish return on or before the date prescribed for the submission of the same, shall pay into the Government treasury the tax due and payable according to such return. Thus, if an assessee submits the return for a particular period, he is required by section 38(2) and rule 29 to pay up the tax due and payable according to the return filed by him but nothing more than that.

8. In view of the above provisions of section 38 read together with the provisions

contained in sub-section (3A) of section 36 of the Act, it is evident that the first two categories of cases contemplated by this sub-section (3A) have no relevance to the facts of this case. As a matter of fact, the taxing authorities have levied penalty not for any breach u/s 38, sub-section (2) or sub-section (3), but for the reason that the amount of tax which was ultimately assessed on 31st December, 1970, exceed the sum paid by the dealer prior to such assessment by more than 20 per cent of the amount so paid. Under the circumstances, the only question is whether the test of 20 per cent which is provided by the third category of sub-section (3A) of section 36 is complied with by the respondent-assessee or not.

9. On a bare perusal of the words employed by the legislature in sub-section (3A) with regard to the third category of cases, it is clear that the penalty contemplated therein is attracted only if the concerned assessee fails in making the required payment prior to the actual assessment of his total turnover. It should be recalled here that the penalty contemplated by this third category shall be attracted only if the amount of tax assessed exceeds the sum already paid prior to the said assessment by 20 per cent of the amount so paid. Therefore, in order to find out whether the test of 20 per cent contemplated by this clause is attracted or not, what the assessing authority is required to see is whether all the payments made by the assessee prior to the actual assessment are such that the tax, which is finally assessed, is found to be more than 20 per cent thereof. The revenue in this case wants to disregard the payment of Rs. 1,500 made by the assessee on 15th December, 1970, on the ground that what is to be seen for the purpose of applying the 20 per cent test is the payment of tax made by the assessee along with the return, and not any other payment which is made subsequent thereto. We do not find any justification for such a view from the language which the legislature has preferred to use in sub-section (3A). This language is quite simple and plain and does not admit of any ambiguity or any interpretation. The sub-section refers to the "sum already paid". It does not say that it should be the sum "already paid along with the returns". In other words, it does not qualify or limit the meaning of the wide range of the expression "sum already paid". It cannot be disputed that the sum of Rs. 1,500 paid by the assessee on 15th December, 1970, was the sum "already paid prior to" the assessment in question. Therefore, in order to determine what was the sum paid prior to the assessment, all those amounts of taxes paid on different dates whether at the time of filing the return or otherwise before the assessment was actually made, have to be taken into account. There is nothing in the language of this sub-section to suggest that only the payments made along with the returns should be taken into account. If the intention of the legislature was to make the payments made along with the returns the real basis for applying the rule of 20 per cent test, it could have easily stated that the tax assessed should exceed the sum already paid only "along with the return". Instead of using the words "along with the return" the legislature has used the words "the sum already paid". The legislature was at liberty to select any measure for the purpose of applying the 20 per cent test contemplated by sub-section (3A). The measure selected by it is

not the sum paid along with the return but all the sums paid prior to the assessment. Thus the legislature seems to have advisedly permitted the assessee to make proper payments even after filing returns with a view to avoid the penalty contemplated by the third category of cases. The words used by the legislature thus do not admit of any other interpretation and if the interpretation canvassed by the revenue is accepted, it would not only be the misinterpretation of the section, but would also amount to a legislation by court, as it asks us to read something which is not there even by implication.

10. In this connection it would not be out of place to note that even the Indian Income Tax Act, 1961, has got a similar provision in section 271. Explanation which is attached to this section reads as under :

"Where the total income returned by any person is less than eighty per cent. of the total income (hereinafter in this explanation referred to as the correct income) as assessed u/s 143 or section 144 or section 147 (reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income but which has been disallowed as a deduction), such person shall, unless he proves that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of clause (c) of this sub-section."

It is evident from the language employed by the legislature in this explanation that it has made the total income returned by an assessee as its basis for the purpose of deciding whether it is less than 80 per cent of the total income assessed. The language of this explanation is, therefore, quite unequivocal in emphasising that it is the return which is to be taken into account in order to determine whether the penalty contemplated by it is attracted or not. This provision of the Income Tax law was before the legislature and yet the legislature has preferred to use the language which in no way bring about an idea that only the tax paid by an assessee at the time of his return should be taken into account in order to see whether the penalty contemplated by the third category of cases referred to in sub-section (3A) of section 36 is attracted.

11. Under these circumstances, we find that the view taken by the Tribunal is correct and, therefore, our answer to the question which is referred to us is in the affirmative. The reference is accordingly disposed of. The petitioner-State shall bear the costs of the respondent-assessee in this reference.

12. Reference answered in the affirmative.