

(2010) 01 BOM CK 0104

In the Bombay High Court

Case No : Writ Petition No. 2677 of 2005

State of Maharashtra

APPELLANT

Vs

Ketan Enterprises and Another

RESPONDENT

Date of Decision : 29-01-2010

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 32, 33, 33(2), 35, 35(1)

Citation : (2010) 30 VST 356

Hon'ble Judges : V.C. Daga, J;K.K. Tated, J

Bench : Division Bench

Advocate : V.A. Sonpal, for the Appellant; B.C. Joshi and N.R. Badheka, instructed by M.M. Vaidya, for the Respondent

Final Decision : Dismissed

Judgement

V.C. Daga, J.—This petition, filed by the State of Maharashtra, through the Commissioner of Sales Tax, is directed against the orders dated January 31, 2004 and May 7, 2005 passed by the Maharashtra Sales Tax Tribunal at Mumbai ("the Tribunal", for short).

2. The Tribunal, under order dated January 31, 2004 set aside the order of reassessment dated July 29, 2002 affirmed by the first appellate authority by order dated September 30, 2002 passed by the Commissioner of Sales Tax, Borivali, Mumbai, wherein the reassessment for the period of April 1, 2004 to March 31, 1995 was affirmed. The Tribunal, under order dated May 7, 2005 rejected the application for rectification moved by the Commissioner of Sales Tax u/s 62 of the Bombay Sales Tax Act, 1959 (for short, "the BST Act").

Factual background

3. The respondent-assessee herein, M/s. Ketan Enterprises, is a registered dealer under the BST Act. The respondent-assessee is a reseller in sulphur and iron and steel.

4. The respondent-assessee filed a return under the BST Act for the period 1994-95, i.e., for April 1, 1994 to March 31, 1995 showing turnover of sales at Rs. 1,83,63,441, resale claim at Rs. 1,83,63,441 and turnover of purchases at Rs. 1,69,60,887. However, while passing the order u/s 33(2) of the BST Act in form A, the Sales Tax Officer had shown turnover of sales as nil. The respondent-assessee was assessed for nil tax u/s 33(2) of the BST Act vide order dated June 4, 1996.

5. The Sales Tax Officer received a letter dated March 17, 1999 from the Sales Tax Officer, E-102, (Enforcement Branch), Mumbai stating, inter alia, that a visit was paid by him to the place of business of the respondent-assessee on January 19, 1999 and January 23, 1999 and on scrutiny of the books of accounts of the respondent-assessee, it was found that the respondent-assessee had effected purchases of sulphur during the year 1994-95 on high seas basis from MMTC and sold the same locally without payment of tax. The details given were as under:

6. The Sales Tax Officer, (Enforcement Branch), Mumbai also informed the Sales Tax Officer that the respondent-assessee has paid Rs. 24,00,000 against these two transactions along with interest and requested the Sales Tax Officer to consider the question of reassessment. On receipt of this letter from the Sales Tax Officer, Enforcement Branch, the assessing Sales Tax Officer issued notice in form 28 on May 29, 1999 to the assessee/respondent, wherein the Sales Tax Officer proposed as under:

Whereas I have reason to believe that your turnover in respect of the following sales and purchases, namely:

G.T.O. of sales at Rs. 1,83,63,441 and G.T.O. of purchases at Rs. 1,69,60,877 in respect of the period from April 1, 1994 to March 31, 1995 has escaped assessment.

7. In response to this notice, the respondent-assessee appeared. The Sales Tax Officer, after hearing the respondent-assessee, passed the assessment order u/s 35(1)(b) of the BST Act on July 29, 2002 which has resulted in the demand of Rs. 7,30,817.

8. The respondent-assessee, aggrieved by this order of the reassessment, preferred an appeal u/s 55 of the BST Act before the Assistant Commissioner of Sales Tax (Appeals) and urged that the reassessment order passed by the Sales Tax Officer is illegal, bad in law and without jurisdiction since it was not based on any reasonable belief as was required under the provisions of Section 35 of the BST Act. This submission did not find favour of the first appellate authority. With the result, the order of reassessment passed by the assessing officer was confirmed. However, the first appellate authority felt that the respondent-assessee had concealed the transactions liable to tax, and that the penalty levied u/s 36(2)(c) main Clause by the Sales Tax Officer was nominal. He, therefore, issued a show-cause notice for enhancement of the penalty. The first appellate authority, after hearing the respondent-assessee, increased the said penalty to

Rs. 1,25,000 u/s 36(2)(c), Explanation 1, vide order dated September 30, 2002.

9. Aggrieved by the aforesaid order, the respondent-assessee carried second appeal before the Tribunal. The Tribunal, by a detailed reasoned order was pleased to quash and set aside the order of reassessment dated July 29, 2002 and the order of the first appellate authority dated September 30, 2002 including that of penalty levied on the respondent/assessee. The appeal was allowed with directions to the assessing officer to give credit of Rs. 1,84,000 with consequential relief as per the provisions of law.

10. The Commissioner of Sales Tax not satisfied with the above order of the Tribunal, holding belief that the Tribunal had decided the case against the Department without considering the ratio laid down by the High Court of Allahabad in the case of Allahabad Milling Co. Private Ltd. v. Sales Tax Officer II, Allahabad [1966] 17 STC 211, invoked the jurisdiction of the Tribunal u/s 62 of the BST Act and prayed for rectification of the order of the Tribunal dated January 31, 2004. The Tribunal, after detailed discussion followed by reasons was pleased to reject the application for rectification vide its order dated May 7, 2005.

11. Being aggrieved by the aforesaid order of the Tribunal dated January 31, 2004 and May 7, 2005, the writ jurisdiction of this Court under Article 226 is invoked by the State of Maharashtra through the Commissioner of Sales Tax, Mumbai.

Rival submissions

12. Mr. Sonpal, learned Counsel for the petitioner-State of Maharashtra urged that the Tribunal ought to have considered the order of reassessment by adopting liberal approach while construing Section 35 of the BST Act. According to him, the Tribunal has ignored the substantive law and erroneously interpreted the enabling machinery u/s 35 of the BST Act. He further submits that the view of the Tribunal is abundantly erroneous and contrary to the law laid down by the apex court as to the meaning of "reason to believe". According to him, assessing officer was having preliminary reliable information sufficient to form the belief that the deduction was wrongly allowed in the original assessment order by way of R.D. resale. According to him, the assessing officer had no occasion to verify the transaction in relation to the claims made by the assessee in the return furnished u/s 32 of the BST Act. He submits that there is a patent mistake committed by the Tribunal by setting aside the order affirmed by the first appellate authority whereby and whereunder order of reassessment was confirmed. In his submission the Tribunal further committed error by rejecting the application for rectification filed u/s 62 of the BST Act.

13. Mr. Sonpal while advancing his submissions, went on to submit that the Tribunal has erred in not considering the fact that the petitioner had "reason to believe" that the respondent-assessee had evaded the payment of sales tax reinforced by the conduct of the respondent-assessee who having admitted the tax evasion before the Sales Tax Officer, paid the tax to the tune of Rs. 24 lacs.

The Enforcement Officer had communicated these facts to the assessing authority and therefore the reassessment order dated July 29, 2002 passed was perfectly justified based on a "reasonable belief".

14. Mr. Sonpal also tried to demonstrate how the turnover of sales and purchases had escaped assessment so as to justify the reassessment on merits. He thus, prayed for setting aside the impugned order and for restoration of the order of the first appellate authority.

15. Per contra, Mrs. Badekha, learned Counsel appearing for the respondent, at the out set, raised a preliminary objection with regard to the maintainability of the petition contending that the petition is filed against a trade name, whereas the dealer is an individual living person, i.e., Mr. Bharat K. Mehta registered as "dealer" in his personal capacity, as such the petition under trade name is not maintainable.

16. Mrs. Badekha also contends that the alternate remedy by way of reference u/s 61 of the Act was very much available to the petitioner. No such reference application was filed u/s 61 of the Act, consequently, the impugned order has become final and conclusive. In her submission, the petition is not tenable. Reliance is placed on the Division Bench judgment of this Court in the case of *Shankar Dhawan v. Sales Tax Officer* [1964] 15 STC 292.

17. The another objection relates to the delay and laches in invoking writ jurisdiction of this Court contending that the time lost in prosecuting the rectification application cannot be taken into consideration, since it was not provided by way of alternate remedy. She further submits that the petition also involves investigation of disputed questions of facts as such this is not a fit case for invoking writ jurisdiction of this Court. She also urged that the impugned order of the Tribunal is based on material available on record as such they cannot be disturbed unless shown to be perverse or unreasonable. This Court, not being a court of appeal is not expected to substitute its views in place of the view of the Tribunal. She also submits that, at this stage, the merits of the case cannot be gone into by this Court.

18. Mrs. Badekha, with the aforesaid various technical objections, went on to submit that the very initiation of reassessment proceedings were bad and illegal contending that only entry in the proceeding sheet of the assessment and reassessment file on May 29, 1999, states as under:

Form 28 issued, called on June 21, 1999.

19. There are no reasons recorded supported by any documentary evidence or material. That bare noting "issue notice inform 28, called on June 21, 1999" does not spell out anything as to what was the material available for forming a reasonable belief. She further submits that there is no material on record to show as to how the total figures incorporated in the notice issued in form 28 were arrived at and from where they were picked up. She further submits that

the return filed clearly showed all purchases including the purchases from MMTC made in due course of import. These purchases were made from registered dealer and record stands to the testimony thereof.

20. Mrs. Badekha further submits that before exercising the power to reassess, the assessing officer has to establish that he had a reasonable belief that the turnover had escaped assessment, being a condition precedent. According to Mrs. Badekha, submits that no reasons were recorded to establish the material on which the belief of the assessing officer was based. In conclusion, she submits that the petition is liable to be dismissed.

21. Both the parties have circulated the compilation of the judgments in support of their respective submissions. In our view, the law laid down in those judgments is well-established. The settled legal position emerging therefrom hardly needs reproduction except to the extent they are necessary to decide the issues involved in the petition.

Statutory provisions

22. In the case in hand, we are concerned with the operation of Sub-section (1) of Section 35 of the BST Act, which reads as under:

35. Reassessment of turnover escaping assessment, under-assessed, etc.- (1) If, after a dealer has been assessed u/s 33 or u/s 4 or u/s 41, for any year or part thereof, the Commissioner has reason to believe that any turnover of sales or turnover of purchases of any goods has in respect of that year or part thereof escaped assessment, or has been under-assessed or assessed at a lower rate, or that any deduction has been wrongly made or any drawback, set-off or refund has been wrongly granted then the Commissioner may,

(b) where he has reason to believe that the dealer has concealed such sales or purchases or any material particular relating thereto, or has knowingly furnished incorrect returns, at any time within eight years, and

(c) in any case, at any time within five years,

of the end of that year, after giving the dealer a reasonable opportunity of being heard, proceed to assess or reassess, to the best of his judgment, the amount of tax due from such dealer.

Consideration

23. The aforesaid Sub-section lays down that when the Commissioner has reason to believe that during the assessment of turnover of any sales or purchases some turnover has either by mistake or by mischief escaped assessment, or has been under-assessed or some deductions have been wrongly made or any drawback, set-off or refund has been wrongly granted, he may in the case of a dealer who has concealed some sales or purchases or material particulars relating thereto, or has knowingly furnished incorrect returns, within eight years, and in any other case within five years, after giving the dealer an opportunity of being heard,

proceed to assess or reassess him to the best of his judgment.

24. The above Sub-section specifically makes out that there is a distinction of substance between the concept of assessment and reassessment, it is not a one and the same thing. Once the assessment is complete, that cannot be reopened merely for asking. The authority is manifestly circumscribed by certain conditions. The power to reassess can be exercised only if those conditions exist and not otherwise. On an analysis of the relevant provisions, the material conditions prescribed for the exercise of the power to commence proceedings for reassessment are to be found u/s 35(1) of the BST Act.

25. The existence of reasons is a must for holding the belief that any turnover of sales or turnover of purchases of any goods has in respect of that year or part thereof escaped assessment, or has been under-assessed or assessed at a lower rate, or that any deduction or other benefit referred to u/s 35(1) has been wrongly granted. The first condition thus immediately raises the question about the true import of the expression as "reason to believe" appearing in Section 35(1) of the BST Act.

26. The expression "reason to believe" postulates belief and the existence of reasons for that belief. The expression does not mean a purely subjective satisfaction of the Sales Tax Officer: the forum of decision as to the existence of reasons and the belief is not in the mind of the Sales Tax Officer. The words "reason to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Sales Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. It cannot be merely a pretence. "Reason to believe" is a common feature in taxing statutes. It has been considered to be the most salutary safeguard on the exercise of power by the officer concerned. It is made of two words "reason" and "to believe". The word "reason" means cause or justification and the word "believe" means to accept as true or to have faith in it. Before the officer has faith or accepts a fact to exist there must be a justification for it. The belief may not be open to scrutiny as it is the final conclusion arrived at by the officer concerned, as a result of mental exercise made by him on the information received. But the reason due to which the decision is reached can always be examined. The existence of reason(s) to believe is supposed to be the check, a limitation upon the power to reopen the assessment see the leading decision on this subject in *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, . The power conferred upon the Sales Tax Officer by Section 35(1) is thus not unbridled one. It is hedged with several safeguards conceived in the interest of eliminating room for abuse of this power by the assessing officers. The idea is to save the assessee from harassment resulting from mechanical reopening of assessment. When it is said the reason to believe is not open to scrutiny what is meant is that the satisfaction arrived at by the officer concerned is immune from challenge but where the satisfaction is not based on any material or it cannot withstand the test of reason, which is an integral part of

it, then it falls through and the court is empowered to strike it down. Belief may be subjective but reason has to be objective. In other words, the expression "reason to believe" postulates belief and the existence of reasons for that belief. The existence of reasons for the belief is certainly justiciable but not the sufficiency of the reasons. It is, therefore, necessary for the assessing officer to record reasons so that the same can be supplied to the assessee in the event of demand by him. In the event of challenge, the higher forum is entitled to examine, it being justiciable. In a nutshell, the expression "reason to believe" mandates that before jurisdiction u/s 35(1) is invoked by the assessing officer, he has to record his reasons for doing so or before issuing notice u/s 35(1) of the BST Act. The formation of belief and recording of reasons are imperative before the assessing officer can reopen a completed assessment. A mere change of opinion would not confer jurisdiction upon the assessing officer to initiate proceeding u/s 35(1) of the BST Act.

27. Having said so, let us turn to the factual matrix available on record so as to find out legality of the reopening and validity of the order of reassessment. So far as the case in hand is concerned, as extracted in paragraph 6 (supra), what was recorded by the assessing officer in the Note Sheet dated May 29, 1999 reads as under:

Form No. 28 issued and called on June 21, 1999

Sd/- Sales Tax Officer

28. Can the above notings made by the assessing officer by any stretch of imagination be said to be reasons recorded by him. What is written by the Sales Tax Officer, does not indicate any reason in support of the decision to issue notice under form No. 28 returnable on June 21, 1999. One does not get answer as to why the Sales Tax Officer came to the conclusion warranting notice returnable on June 21, 1999. No reasons are to be found. Notings do not show that he had independently gone through the material brought to his notice by the Sales Tax Officer (Enforcement Branch) and applied his mind to form the belief that the assessee needs to be reassessed u/s 35 of the BST Act. There is nothing to show that the Sales Tax Officer took any step to ascertain the factual matrix before issuing notice in form No. 28.

29. In our considered opinion, the proceedings for reassessment in the case in hand were initiated without application of mind and without ascertaining facts and without recording reasons in support of the belief formed by the Sales Tax Officer u/s 35 of the BST Act. The assessing officer has assumed jurisdiction by initiating reassessment proceedings not as per law. The assessment order was thus rightly set aside by the Tribunal for the reasons recorded therein.

30. Having examined and recorded the above positive findings in respect of erroneous assumption of jurisdiction, we do not think it is necessary for us to deal with the preliminary objections raised in detail. However, since the matter was argued by the parties at length, we may observe that alternate remedy, by

way of reference was very much available to the petitioner. By not resorting to the remedy provided under the Act itself, the order of the Tribunal became final and conclusive. So far as other preliminary objections are concerned, we do not think they will have any direct bearing on the view taken by us as such we do not propose to dwell on the same.

31. Before parting what needs to be emphasized is that, the obligation on the assessee to disclose the material facts or what are called primary facts is not a mere disclosure but it must be full and true. A false assertion or statement of material fact thereof may attract jurisdiction of the assessing officer under the provisions of Section 35(1). Since the petition is being allowed on the basic issue holding erroneous assumption of jurisdiction by the assessing officer, it is not necessary for us to examine the merits or demerits of the reassessment order.

32. In the above view of the matter, the petition is without any substance, the same stands dismissed. Rule stands discharged with no order as to costs.