

(1982) 02 GUJ CK 0006
In the Gujarat High Court

Case No : Sales Tax Reference No. 18 of 1980

Subhash Iron and Steel Rolling Industries	APPELLANT
Vs	
The State of Gujarat	RESPONDENT

Date of Decision : 09-02-1982

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 2(17), 2(26), 36(3), 37(1), 46

Citation : (1982) 50 STC 305

Hon'ble Judges : D.H. Shukla, J;A.N. Surti, J

Bench : Division Bench

Advocate : R.D. Pathak, for S.L. Modi, for the Appellant; R.P. Bhatt, Assistant Government Pleader for Bhaishanker Kanga and Girdharlal, for the Respondent

Judgement

Shukla, J.—M/s. Subhash Iron & Steel Rolling Industries had filed the second appeal in the Gujarat Sales Tax Tribunal at Ahmedabad against the order of the learned Assistant Commissioner of Sales Tax, Ahmedabad, who had dismissed its first appeal against the order of forfeiture of the amount of Rs. 27,104 passed by the learned Sales Tax Officer of Ahmedabad dated 15th November, 1971, in respect of the period from 7th April, 1967, to 31st March, 1968, as the relevant year of account.

2. The facts of the case may shortly be stated as under :

M/s. Subhash Iron & Steel Rolling Industries was a dealer registered under the Bombay Sales Tax Act, 1959, and was dealing in the business of manufacture and sale of bars, billets and rods of iron and steel as manufactured out of iron scrap. The assessee, namely, M/s. Subhash Iron and Steel Rolling Industries, had purchased iron scrap locally from registered dealers and had manufactured and sold the said bars, billets and rods during the above year of account. The iron scrap purchased by the assessee as raw materials were goods specified in entry 3 of Schedule B, Part I, to the Bombay Act, but even when the assessee had converted iron scrap into bars, billets and rods by a process of "manufacture" as defined in section 2(17) of the Bombay Act, the assessee had not done anything

to the iron scrap which it had originally purchased, so as to take the manufactured bars, billets and rods out of the description of the goods contained in the aforesaid entry 3 of Schedule B, Part I, to the Bombay Act. Therefore, the sales of the above bars, billets and rods as manufactured goods in question continued to be resale of original goods, namely, raw materials consisting of scrap, within the meaning of the expression "resales" as defined in clause (iii) of section 2(26) of the Bombay Act. The assessee was entitled to deduction of such resales from its turnover of sales for the purpose of assessment. In short, the assessee was not liable to pay any tax on such resales. This is an undisputed position before us.

3. The case of the department was that the assessee had issued sale bills to its customers so as to charge and recover sale price as being specifically "inclusive of sales tax" while effecting the resales in question. The learned Sales Tax Officer found that since the assessee's sale bills were inclusive of tax, it had collected an amount of an amount of Rs. 27,104 in all by way of tax from the customers even though the assessee itself was not liable to pay any such tax on those resales. In the opinion of the learned Sales Tax Officer, the collection of Rs. 27,104 was an illegal collection by way of tax and thereby the assessee violated the mandatory provisions contained in sub-section (2) of section 46 of the Bombay Sales Tax Act, hereinafter referred to as "the Bombay Act". Invoking section 37(1) and section 46(2) of the Bombay Act, the learned Sales Tax Officer forfeited the aforesaid illegal recovery of the amount of Rs. 27,104. The Sales Tax Officer in his order dated 15th November, 1971 (annexure III), has stated to the effect that the assessee had been given deduction in respect of those resales and as the assessee had prepared the bills of the resale as "inclusive of tax", the said collection is deemed to be unauthorised, and after hearing the assessee, it is decided to forfeit the amount of Rs. 27,104. The learned Sales Tax Officer also imposed penalty of Rs. 585 upon the appellant in terms of sub-section (3) of section 36 of the Bombay Act on the ground that the assessee had not paid the tax due within the prescribed time, but we are not in the present reference concerned with the imposition of the penalty.

4. Having been aggrieved and dissatisfied with the decision of the Sales Tax Officer, the assessee filed an appeal before the learned Assistant Commissioner of Sales Tax, but its appeal was dismissed by the learned Assistant Commissioner of Sales Tax and being further aggrieved by this order of dismissal of the first appeal, the assessee took the matter in second appeal before the Gujarat Sales Tax Tribunal at Ahmedabad.

5. It was urged before the learned Tribunal that merely because the assessee had collected sale price in its bill as being inclusive of sales tax, it did not necessarily mean that it had collected any amount by way of tax from its purchasers so as to justify the order of forfeiture passed in this case. It was urged that the assessee had merely collected a lump-sum price in its bill and reference therein to the inclusion of sales tax was merely done in order in inform

the customers that they were not liable to pay tax on the relevant sales and that the liability to pay tax thereon, if at all or any, was wholly upon the assessee. It was, therefore, wrong to interpret the sale bills of the assessee as indicating that the assessee had collected the disputed sum of Rs. 27,104 or any amount by way of tax u/s 46(2) of the Bombay Act. It was urged before the Tribunal that even though the assessee had charged and recovered price as being inclusive of sales tax, it has really not collected any amount of sales tax from the customers and what the purchasers were charged was only a lump-sum price being the consideration for the resales to the purchasers in question. It was urged that by the term "inclusive of tax" printed on the bills, what was conveyed to the customers was that tax, if any, payable on the transactions shall be paid by the assessee and that the customer would have nothing to do in regard to the concerned resales so far as the tax liability was concerned.

6. The aforesaid submissions made before the Tribunal were not accepted by it. The view which the Tribunal took was that when the assessee included the sales tax in the sale price, it was done with no other purpose but to collect such amount by way of tax from the customers. The price quoted by the assessee in the said bills was the price inclusive of tax and that the assessee had collected such tax even though it was itself not liable to pay any tax on the R. D. resales. In this connection, the learned Tribunal made an observation in the course of its judgment that the case would have been different if the assessee had not stated anything in its bills or it had remained silent with regard to the inclusion or otherwise of the sales tax in the sale price charged to the purchasers. The Tribunal further observed, in effect, that if the assessee had not stated anything in the bills or had remained silent about the tax liability in the bills, the sales tax authorities could not have said with any amount of certainty that the assessee had collected tax from the customers or that the price charged was inclusive of tax, but since the words "inclusive of tax" had been incorporated in the bills, in the opinion of the Tribunal, no other inference can be drawn except that the assessee collected tax from its purchasers although none on the transaction was to be payable by it. The Tribunal also referred to the fact that in its quarterly returns filed by the assessee for the relevant period, the assessee had deducted under rule 46A of the Bombay Act the amount of tax which it had included in the total amount of sale price shown in the bills. The Tribunal inferred from this fact that the assessee would never have resorted to rule 46A to get the benefit of this provision if the sale price which the assessee had charged was not inclusive of tax or if the assessee had not really collected such amount by way of tax. Under these facts and circumstances, the Tribunal came to the conclusion that the assessee had illegally collected the disputed amount of tax and thereby it had made breach of the mandatory provision enacted in section 46(2) of the Bombay Act and therefore the tax so collected by them was liable to forfeiture u/s 37(1) of the Bombay Act. Thus the Tribunal accepted the conclusion reached by the Assistant Commissioner and it further agreed with him as regards the quantification of the penalty. The Tribunal observed during the course of its

judgment that if the assessee's plea was rejected on merits, the disputed amounts so collected by way of tax would actually come to Rs. 27,104. Having reached this conclusion, the Tribunal dismissed the second appeal and confirmed the order passed by the learned Assistant Commissioner.

7. Having been dissatisfied and aggrieved by the aforesaid order of dismissal passed by the Tribunal on 1st May, 1972, the assessee sought a reference on a question of law. The question of law which is referred to us is in the following terms :

"Whether, on the facts and in the circumstances of this case, the Tribunal was right in law in upholding the order of forfeiture of Rs. 27,104 u/s 37(1) read with section 46(2) of the Bombay Sales Tax Act, 1959 ?"

8. Before we proceed to consider the submissions made before us by Mr. R. D. Pathak, the learned Advocate for the assessee, we would like to make a reference to certain observations passed by the Division Bench of this Court in *Hemchandbhai & Co. v. State of Gujarat* (Sales Tax Reference No. 13 of 1979, decided on 8th December, 1981 - Gujarat High Court) [1982] 50 STC 274 with regard to the penal proceedings taken by the sales tax authorities. P. D. Desai, J., speaking for the Division Bench, stated : "Now, we must, at the outset, observe that the Tribunal has failed to decide the question under consideration by taking into account all the relevant factors and by applying the correct legal tests. The Tribunal ought to have appreciated that the liability to pay penalty does not arise merely upon the proof of default in payment of tax within the prescribed time-limit and that penalty will not ordinarily be imposed unless the assessee was shown to have acted deliberately in defiance of law or was found to be guilty of conduct contumacious or dishonest or was proved to have acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so."

9. The learned Division Bench referred to the case of *Hindustan Steel Ltd. Vs. State of Orissa*, and stated as under :

"It was held that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and that penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or is guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. The liability to pay penalty does not arise merely upon proof of default. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the

statute."

10. This is the nature of the penalty proceedings as outlined by the pertinent observations of the Division Bench of this High Court.

11. It is in the aforesaid background of the nature of the penal proceedings that we now proceed to examine the legal position which emerges from the judgment of the learned Tribunal.

12. Mr. R. D. Pathak, submitted before us that certain position in this case is undisputed. He submitted that it was not disputed that the sale of bars, billets and rods of iron and steel as manufactured by the assessee out of the iron scrap only amounted to resale so as not to take the transactions out of entry 3 of Schedule B of part I to the Bombay Act. It is also an undisputed position that the assessee was not liable to pay any tax on those resales. It is also undisputed that the credit of tax on such resale was sought and was given by the department. It is also undisputed that the assessee had resold the goods in question to its customers under the sale bills which incorporated a phrase or a term "inclusive of sales tax". Mr. Pathak submitted that merely because the bills contained the phrase or term "inclusive of sales tax", it did not mean that every time what the assessee recovered from its customers was the price plus tax. Mr. Pathak submitted that when the goods were taxable, the phrase or term "inclusive of tax" would mean that the purchaser would not have to pay the same tax. Further, the customers were supplied the same set of bills even with respect to goods which did not attract any liability in the hands of the assessee to pay any tax and in such an eventuality what the phrase or term "inclusive of tax" means is "inclusive of the tax, if any". Mr. Phatak stated that no tax was collected by the assessee with respect to the resales, that is to say, in the of case those transactions in which the assessee was not obliged to pay any tax. He submitted that the penalty was not levied in fact specifically in regard to those resales by the department. The department had found while assessing the liability to pay the tax in regard to the relevant period that the assessee was under a net liability to pay Rs. 19,476 by way of tax. The department also found that the assessee had collected Rs. 46,645 as tax and taking the difference between these two sums, namely, Rs. 19,476 and Rs. 46,645, the department considered Rs. 27,104 as an illegal recovery by way of tax. Mr. Pathak submitted that the department had not specifically come to the conclusion on the record of the case that the assessee had collected the tax from its customers on the transactions of the resale on which transactions the assessee did not have to pay any tax. What the department had considered was that the collection of the excess amount of Rs. 27,104 during the relevant periods, was an illegal recovery of tax. This approach of the department, in Mr. Pathak's submission, is utterly unwarranted and incorrect. He submitted that this amount of Rs. 27,104 has not been collected by the assessee as a tax, but the same has been collected as the recovery of the sale price from its customers. So the question which arises is as to whether there is anything to clearly show that the recovery of Rs. 27,104 by

the assessee was a recovery of tax and not the recovery of price for the goods sold. In order to pin down the assessee as having collected the same amount as tax, the department relied upon the words "inclusive of tax" in the bills of the assessee itself. Since the phrase or term "inclusive of tax" is inserted in the bills, it must be concluded that the assessee had recovered the tax and that amount must stand forfeited. It is by the very conduct of the assessee, so the department proceeded, that it is clearly borne out that the assessee intended to recover the amount as tax and if such was not the intention of the assessee, the term "inclusive of tax" carries no meaning. In other words, to come to the conclusion that the amount of Rs. 27,104 was recovered as tax, the only prop which was availed of by the department is the phrase or term "inclusive of tax". The conclusion to levy penalty is reached thus primarily upon an inference drawn from the phrase or term used in the assessee's bills, namely, "inclusive of tax". We do not find any other reason in the order of the Tribunal for reaching that conclusion. We repeatedly asked Mr. R. P. Bhatt, the learned Assistant Government Pleader appearing for the department, whether there was any evidence to show that the sum of Rs. 27,104 was recovered as tax, barring the department's inference based upon the same phraseology "inclusive of tax". Mr. Bhatt candidly admitted that the entire result rests upon the explanation of the "inclusive of tax" and that is how so far as the present reference is concerned, we are called upon to answer the question as to whether when the assessee has used a phrase "inclusive of tax" it would necessarily imply under the facts and circumstances of the case that the forfeited amount was recovered by it as tax and not as a sale price. As rightly observed by the Tribunal, it seems beyond any dispute that the assessee was at liberty to include any tax which was paid or payable by him as included in the sale price. The difficulty arises only if the assessee labels the same amount as tax, but there would be no difficulty if without any tax the amount is included in the total sale price. We are of the view that the Tribunal was not right in construing the phrase or term "inclusive of tax" in the sale bills of the assessee leading only to one conclusion that what was recovered under that bill included the recovery of tax along with the price. Be it noted that so far as the bills of the assessee in question under the reference are concerned, the assessee has not divided the amount into the price and the tax. The entire amount is stated in the bill as the price of the goods, but the whole bill is under the caption "subject to tax". Now it is also not in dispute that the assessee was required to pay tax in regard to certain transactions which it entered into with its customers, for otherwise the liability to pay Rs. 19,476 as tax would not arise. It appears that the assessee was supplying the bills with the phrase or term "inclusive of tax" to its customers for the transactions for which it has to pay the tax as well as for the transactions for which it did not have to pay the tax. It would not be correct, therefore, to imply only on meaning to the phrase or term "inclusive of tax," but in our opinion, it admits of a meaning, under the relevant facts and circumstances, that by introducing the phrase or term "inclusive of tax", it conveyed to its customers a sense that under no circumstances will the customers be required to pay the tax on the goods

purchased by them. We may at this stage note a ruling of the Supreme Court in the case of Delhi Cloth and General Mills Co. Ltd., etc. Vs. The Commissioner of Sales Tax, Indore, for the following observations :

"Under section 4 of the M.P. General Sales Tax Act, 1958 (prior to the introduction of section 7-A therein 1963), liability to pay sales tax is that of the dealer : the purchaser has no liability to pay the tax imposed on the dealer. There is no provision in the Act which given any statutory power to collect sales tax as such from any class of buyers. If the dealer passes on his tax burden to his purchasers he can only do it by adding the tax in question to the price of the goods sold. In that event the price fixed for the goods including the tax payable becomes the valuable consideration given by the purchaser for the goods purchased by him and the tax collected by the dealer from his purchaser becomes a part of the "sale price", as defined in section 2(o) of the Act.

Unless the price of an article is controlled, it is always open to the buyer and the seller to agree upon the price payable. While doing so it is open to the dealer to include in the price the tax payable by him to the Government. If he does so, he cannot be said to be collecting the tax payable by him from his buyers. The levy and collection of tax is regulated by law and not by contract. So long as there is no law empowering the dealer to collect tax from his buyer or seller, there is no legal basis for saying that the dealer is entitled to collect the tax payable by him from his buyer or seller. Whatever collection may be made by the dealer from his customers can only be considered as valuable consideration for the goods sold."

13. It is undisputed that in the present case, the assessee was at liberty to cover the tax paid by his vendors against his own purchasers and that is what he has done. Merely because the goods are sold under the bills containing the phrase or term "inclusive of tax" it does not mean that what the assessee collected was the tax and not the sale price of the goods sold to its customers. As noted above, Mr. R. P. Bhatt could not point out any other material on the record of the case to show that the assessee had collected the tax in regard to the transactions on which he was not obliged to pay any tax.

14. Under the facts and circumstances of the case as brought to light by the judgment of the Tribunal, we are of the view that the department was not correct in levying upon the assessee the order of forfeiture of Rs. 27,104 u/s 37(1) read with section 46(2) of the Bombay Sales Tax Act, 1959, and therefore we do not consider it necessary to decide a further question which was agitated before us with persistence by both the sides as to whether the imposition of penalty was attracted at all u/s 37(1) read with section 46(2) of the Bombay Sales Tax Act, 1959. Accordingly, our answer to the question referred to us is in the negative, that is to say, under the facts and the circumstances of this case, the Tribunal was not right in law in upholding the order of forfeiture of Rs. 27,104 u/s 37(1) read with section 46(2) of the Bombay Sales Tax Act, 1959; the result is that our answer is in favour of the assessee and against the department. No order as to costs.

15. Reference answered accordingly.