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**(1995) 02 BOM CK 0083**  
**In the Bombay High Court**  
**Case No : Sales Tax Reference No. 61 of 1987**

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| Tata Exports Limited | Vs | APPELLANT  |
| State of Maharashtra |    | RESPONDENT |

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**Date of Decision :** 01-02-1995

**Acts Referred:**

Bombay Sales Tax Act, 1959 — Section 22, 33, 33(3), 35, 36

**Citation :** (1995) 02 BOM CK 0083

**Hon'ble Judges :** D.K. Trivedi, J;B.P. Saraf, J

**Bench :** Division Bench

**Advocate :** S.S. Gaitonde and K. B. Bhujle, for the Appellant; R.V. Desai, for the Respondent

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## Judgement

DR. B.P. Saraf, J.—By this reference u/s 61(1) of the Bombay Sales Tax Act, 1959, made at the instance of the assessee, the Maharashtra Sales Tax Tribunal has referred the following question to this Court for opinion :

"Whether, on the facts and in the circumstances of the case, the Assistant Commissioner had jurisdiction to take any action u/s 57 of the Act and thereby levying penalty for the first time u/s 36(2)(c) of the Act and consequently the Tribunal confirming orders of the lower authorities ?"

Obviously the above question is a pure question of law and the answer thereto would depend on a proper construction of section 57 and section 36(2) of the Bombay Sales Tax Act, 1959 ("the Act").

2. The assessee, who is a dealer under the Bombay Sales Tax Act, 1959, was assessed by the Sales Tax Officer by his order of assessment dated June 30, 1975, u/s 33(3) of the Act for the period April 1, 1972 to March 31, 1973. No appeal or revision was filed by the assessee against the above order of assessment.

3. After more than one and half years of the completion of the assessment, the Assistant Commissioner of Sales Tax (Administration) issued a notice dated

January 24, 1977 to the assessee purporting to be a notice u/s 55 or 57 of the Act. By the said notice, the assessee was informed that it was proposed to impose a penalty of Rs. 7,500 u/s 36(2)(c) of the Act for knowingly furnishing inaccurate particulars of transactions liable to general sales tax ("the GST") by revising assessment order u/s 57 of the Act. On the very same day, another notice was also issued by him to the assessee-company asking it to show cause why penalty should not be levied on him u/s 36(2)(c) of the Act for the period April 1, 1972 to March 31, 1973, for knowingly furnishing inaccurate particulars of transactions specified therein liable to the GST.

4. In pursuance of the above notices, the assessee appeared before the Assistant Commissioner of Sales Tax (Administration) and objected to the issue of both the notices on the ground, inter alia, that no penalty having been levied by the assessing authority u/s 36(2)(c) of the Act, there was no order which could be revised in exercise of revisional jurisdiction. It was also pointed out that the revisional authority had no jurisdiction to initiate proceedings for levy of penalty and to levy penalty u/s 36(2)(c) of the Act except while passing an order in revision proceedings. The revisional authority did not find any error in the order of assessment made by the Sales Tax Officer u/s 33 of the Act. He, however, acted on the notice issued by it asking the assessee to show cause against levy of penalty u/s 36(2)(c) of the Act and imposed penalty of Rs. 7,500 under the said section in the purported exercise of the power of suo motu revision u/s 57 of the Act. The assessee appealed against the above order of the revisional authority, the Assistant Commissioner, to the Deputy Commissioner of Sales Tax, who rejected the appeal and confirmed the order of the revisional authority. Against the order of the Deputy Commissioner, the assessee went in revision to the Maharashtra Sales Tax Tribunal ("the Tribunal") challenging the levy of penalty for the first time u/s 36(2)(c) of the Act in the purported exercise of the powers u/s 36(2) of the Act. The Tribunal did not accept the challenge of the assessee to the revisional order on the ground of lack of jurisdiction of the revisional authority. It however reduced the quantum of penalty from Rs. 7,500 to Rs. 1,000. Hence this reference at the instance of the assessee.

5. The learned counsel for the assessee submits that the revisional authority, the Commissioner, has no power to levy penalty u/s 36(2) of the Act except while passing an order in revision. His power u/s 57(1)(a) of the Act is also confined to revision of an order of any subordinate authority including an order of penalty passed u/s 36(2) of the Act. Power to levy penalty itself u/s 36(2) can be exercised by the revisional authority only while passing an order in revision of any order of assessment. Unlike assessing authority, he cannot initiate revisional proceedings for the purpose of imposing penalty u/s 36(2) of the Act for the first time. Mr. R. V. Desai, learned counsel for the Revenue, on the other hand, submits that the power of revisional authority u/s 57 is wide enough to enable him to impose penalty in a case where the authorities subordinate to him had failed to do so. The said power, according to the learned counsel, can be exercised in a case where penalty had not been imposed by the subordinate

authority u/s 36(2) of the Act on the presumption that such authority had decided not to impose penalty. We have given our careful consideration to the above submissions of Shri Desai, for the Revenue. However, on a reading of section 57 and section 36(2) of the Act, we find it extremely difficult to accept the same. Section 57 of the Act, which confers revisional powers on the Commissioner, so far as relevant, reads as under :

"57. Revision. - (1) Subject to the provisions of section 56 and to any rules which may be made in this behalf, -

(a) the Commissioner may, of his own motion, call for and examine the record of any order passed (including an order passed in appeal) under this Act, or the Rules made thereunder by any officer or person subordinate to him and pass such order thereon as he thinks just and proper."

6. It is clear from a plain reading of the above section that the power vested in the revisional authority under this section is in the nature of power of supervision. In exercise of this power, the revisional authority may, of its own motion, call for and examine the record of any order passed under this Act by any officer subordinate to him and pass such order thereon as he thinks just and proper. Though the section does not lay down any pre-condition for the exercise of power thereunder or passing of any order thereon, it is obvious that the power of revision can be exercised bona fide and judiciously. This section cannot be construed to confer unrestricted and unbridled power on the Commissioner to initiate proceedings for revision arbitrarily and whimsically with a view to making fishing enquiries in matters decided by the subordinate authorities in exercise of power conferred on them by the Act. It is only on a prima facie satisfaction of the revisional authority arrived on examination of the records of the order of the subordinate authority, called for by it in regard to the necessity of revising the order of the assessing authority or any other subordinate authority, that proceedings can be initiated for suo motu revision. The object of conferment of this power of suo motu revision of the orders of the subordinate authorities is to keep those authorities within the bounds of their authority and to make them act according to law. Such a power is necessary because the Sales Tax Department or the Commissioner has no right of appeal against the orders of the assessing authorities or the appellate authority. Besides, the power of suo motu revision under this section can be exercised only to revise "an order" passed by any subordinate authority under any of the provisions of the Act. Powers are conferred on the various authorities under different provisions of the Act to pass necessary orders. Section 33 deals with the assessment of tax and empowers the authorities specified therein to pass necessary orders of assessment thereunder. This section, so far as relevant, is in the following terms :

"33. Assessment of taxes. - (1) The amount of tax due from a dealer liable to pay tax shall be assessed separately for each year during which he is so liable :

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(2) If the Commissioner is satisfied that the returns furnished by a registered dealer in respect of any period are correct and complete, he shall assess the amount of tax due from the dealer on the basis of such returns.

(3) If the Commissioner is not satisfied that the returns furnished by a registered dealer in respect of any period are correct and complete, and he thinks it necessary to require the presence of the dealer or the production of further evidence, he shall serve on such dealer in the prescribed manner a notice requiring him on a date and at a place specified therein, either to attend and produce or cause to be produced all evidence on which such dealer relies in support of his returns, or to produce such evidence as is specified in the notice.

On the date specified in the notice, or as soon as may be thereafter, the Commissioner shall, after considering all the evidence which may be produced, assess the amount of tax due from the dealer.

(4) If a registered dealer fails to comply with the terms of any notice issued under sub-section (3), the Commissioner shall assess, to the best of his judgment, the amount of tax due from him.

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(7) Any assessment made under this section shall be without prejudice to any penalty, or prosecution for an offence, under this Act." Section 36(2) of the Act deals with imposition of penalty and confers powers on the various authorities specified therein to exercise the same and pass necessary orders thereunder. Sub-section (2) of section 36, so far as relevant, reads :

"(2) If, while assessing or reassessing the amount of tax due from a dealer under any provisions of this Act or while passing any order in any appeal or revision proceedings, it appears to the Commissioner that such dealer -

(a) has wilfully failed to apply for registration as required by section 22; or

(b) has, without reasonable cause, failed to comply with any notice in any proceeding u/s 33 or section 35; or

(c) has concealed the particulars of any transaction or knowingly furnished inaccurate particulars of any transaction liable to tax,

.....

the Commissioner may, after giving the dealer an opportunity of being heard, by order in writing, impose upon the dealer by way of penalty, in addition to any tax assessed or reassessed or found due in the appeal or revision proceedings, as the case may be, a sum not exceeding one and one-half times the amount of the tax."

Sub-section (2) of section 36 thus specifically provides when power thereunder can be exercised by different authorities. It can be exercised by the assessing authority while assessing or reassessing the amount of tax due from a dealer

under the provisions of the Act. The revisional authority can exercise the same and impose penalty while passing any order in revision proceedings. Thus the stage at which power under this sub-section can be exercised having been specifically indicated in the provision itself by the Legislature, it can be exercised only at that stage and no other stage. That being the legal position, the assessing authority cannot exercise powers u/s 36(2) of the Act after it has completed the assessment. It can exercise the power only while making the assessment. Similarly, the appellate or the revisional authority can exercise this power only while passing any order in appeal or revision. Section 57 therefore, has to be read in the light of the above requirement of sub-section (2) of section 36 of the Act. Section 57 empowers the Commissioner to call for and examine the record of any order passed under this Act or the Rules made thereunder by any officer or person subordinate to him. Thus the power u/s 57 can be exercised only to revise any order passed under this Act by any authority subordinate to the revisional authority. In the instant case, there is no order passed u/s 36 of the Act by any authority which could have been revised by the revisional authority u/s 57 of the Act. No order, has therefore, been passed by the revisional authority u/s 57 of the Act. Nor the revisional authority has revised the order of assessment u/s 33 of the Act. Had it done so, it could have also levied penalty u/s 36(2) of the Act while passing its order in revision of the order of assessment. But that is not the case here. In fact, in the instant case, the Commissioner has issued notice for imposition of penalty u/s 36(2) of the Act independent of any revisional proceedings. In our opinion, the Commissioner could not have done so, because the admitted position in this case is that he was not exercising any power of revision. He was not passing any order in revision against any order passed by any authority subordinate to him and hence the imposition of penalty u/s 36(2) of the Act was not "while passing any order in revision." Power u/s 57 and power u/s 36(2) of the Act are two independent powers conferred on the revisional authority. In exercise of power u/s 57, the revisional authority can only revise an order passed by an officer subordinate to him. But by virtue of the power conferred by section 36(2) of the Act, while passing an order in revision against an order, say for example an order of assessment, it may also levy penalty u/s 36(2) of the Act if the conditions precedent for levy of the same specified in that section are found to exist. This he can do in exercise of the power conferred on him by section 36 and not section 57. It is in fact a power given to the revisional authority under that section in addition to its revisional power u/s 57 of the Act. It is not a part of the powers of revision conferred u/s 57 of the Act. This power appears to have been conferred on the revisional authority to take care of situations, where in the light of orders proposed to be passed in exercise of revisional power, modifying the order of assessment, etc., concealment of turnover is detected which might justify imposition of penalty u/s 36(2) of the Act. In such a case, while passing the order in revision u/s 57 of the Act, the revisional authority may itself impose penalty u/s 36(2) of the Act, though no such penalty had been imposed by the assessing authority while assessing or reassessing the amount of tax.

7. From the above discussion, it is obvious that under the facts and circumstances of the case, the Tribunal was not justified in upholding the levy of penalty u/s 36(2) of the Act by the revisional authority. We, therefore, answer the question referred to us in the negative and in favour of the assessee.
8. Under the facts and circumstances of the case, we make no order as costs.
9. Reference answered in the negative.