

(1974) 08 GUJ CK 0020
In the Gujarat High Court
Case No : Sales Tax Reference No. 14 of 1974

The State of Gujarat

APPELLANT

Vs

D.K. Patel and Co.

RESPONDENT

Date of Decision : 13-08-1974

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 36(3), 38

Citation : (1975) 35 STC 63

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

Bench : Division Bench

Advocate : G.T. Nanavati and H.V. Chhatrapati, of Bhaishanker Kanga and Girdharlal, for the Appellant; R.D. Pathak, for S.L. Modi, for the Respondent

Judgement

T.U. Mehta, J.—The question which arises to be considered in this reference is whether the amount of set-off which becomes available to an assessee under rule 41 of the Bombay Sales Tax Rules, 1959, can be taken into consideration as "payment of tax" before the assessment at the time of applying the test of 20 per cent contemplated by sub-section (3A) of section 36, which provides for penalty in certain cases.

2. Short facts of this case are that the opponent-assessee is a dealer registered under the Bombay Sales Tax Act, 1959 (hereinafter referred to as the "Act"), and does the business of reselling timber and manufacturing sizes therefrom for sale. During the course of its assessment for S.Y. 2025, the tax which was found payable by it was determined for the assessment year at Rs. 3,771.98. The opponent-assessee had paid up along with the returns the amount of Rs. 1,405. During the course of the assessment it was found that the opponent-assessee was entitled to a set-off under rule 41 of the Rules, of the amount of Rs. 1,872.98. Rule 41 contemplates drawback, set-off etc., of tax paid by the manufacturer on the purchase of goods used for manufacture of taxable goods for sale. Since the tax payable was assessed at Rs. 3,771.98 and the amount of tax paid along with the return was Rs. 1,405, the Sales Tax Officer came to the

conclusion that sub-section (3A) of section 36 of the Act was attracted because the tax assessed exceeded the sum already paid prior to the assessment by more than 20 per cent of the sum so paid. Under the circumstances, the Sales Tax Officer imposed the penalty of Rs. 132. While calculating the above-referred difference of 20 per cent the Sales Tax Officer did not take into account the amount of Rs. 1,872.98 which was found due to the opponent-assessee as set-off under rule 41. Therefore, the grievance of the assessee is that this amount of set-off should have been treated as the amount "paid" before the assessment of tax and, therefore, he has incurred no penal liability under sub-section (3A) of section 36. The Tribunal accepted this contention of the assessee and, therefore, the State has preferred this reference.

3. We find that in order to point out the real controversy between the parties, it is necessary to recast the question referred to us by the Tribunal as under :

"Whether on correct interpretation of section 36(3A) of the Bombay Sales Tax Act, 1959, the Tribunal was right in holding that for the purpose of calculating the whole of the amount of tax paid, the amount of set-off due as per assessment order should be taken into consideration as sum already paid prior to assessment within the meaning of sub-section (3A) of section 36 of the Act."

Our answer to this question is in the affirmative for the reason which follow.

4. Before discussing the facts of the present reference, it would be proper to refer to a decision given by us in Sales Tax Reference No. 2 of 1973 dated 20th June, 1974 (State of Gujarat v. Sakurbhai Abedbhai ([1975] 35 S.T.C. 57)), where the question was 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 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. In that reference, after considering the necessary provisions of the Act, we have held that the penalty contemplated by the third category of cases covered by sub-section (3A) of section 36 is attracted only if the concerned assessee fails in making the required payment prior to the actual assessment of his total turnover. We have further held that in order to determine what was the sum paid prior to the assessment, all those amounts of tax paid at different dates, whether at the time of filing the return or otherwise before the assessment was actually made, have to be taken into account and that there is nothing in the language of sub-section (3A) of section 36 to suggest only the payments made along with the return should be taken into account. In that case the concerned assessee had made the payment of some amount in cash just before the assessment was carried out. In the instant case, no such cash payment is made by the assessee but he was found entitled to the set-off of Rs. 1,873 under rule 41 when the assessment was actually carried out by the Sales Tax Officer. Therefore, the question is whether this set-off would amount to a "payment", which would fall within the ratio of the decision given by us in S.T.R. No. 2 of 1973 (State of Gujarat v. Sakurbhai

Abedbhai ([1975] 35 S.T.C. 57)).

5. On this question, Shri Nanavati contended that the words "sum actually paid prior to such assessment" which are found used in sub-section (3A) of section 36 means "the sum which is paid u/s 38 and no other". It was contended by him that the set-off which is found due to an assessee is surely not "the sum paid" pursuant to the provisions of section 38 of the Act and, therefore, the amount of set-off which is found due to the assessee cannot be taken into consideration at the time of judging whether the test of 20 per cent deficiency contemplated by sub-section (3A) of section 36 is complied with or not.

6. On a close consideration of the language used by sub-section (3A) of section 36, we find that this contention of Shri Nanavati is not acceptable. It is undoubtedly true that the first two categories of cases contemplated by sub-section (3A) of section 36 do refer to section 38, which provides for the payment of tax along with the returns in the Government treasury. But so far as the third category is concerned, the words "sum already paid" do not necessarily mean only that payment which is made in the Government treasury, because the manner of that payment is not prescribed by sub-section (3A). It, therefore, follows that the expression "sum already paid" would mean "the sum already paid in any manner whatever". Now it cannot be gainsaid that refund or set-off under rule 41 can be claimed only with regard to the tax already paid. Therefore, when during the course of a particular assessment, the concerned assessee is found entitled to any amount of set-off with regard to that period of assessment, the set-off is of the amount of tax already paid by him. It does not matter whether this tax was paid by him to his vendor or to the Government directly because even tax which is paid by him to his vendor is presumed to have been collected by the revenue from that vendor, who must be a registered dealer. In Black's Law Dictionary, the words "pay" and "payment" are defined as under :

"Pay - To discharge a debt" to deliver to a creditor the value of a debt, either in money or in goods for his acceptance : *Beals v. Home Ins. Co.*, 36 N.Y. 522. *Carpenter v. Dammit*, 221.....etc.....The term, however, is sometimes limited to discharging an indebtedness by the use of money."

"Payment - The fulfilment of a promise, or the performance of an agreement. A discharge of an obligation or debt, and part payment, if accepted, is a discharge pro tanto : *Hattrem v. Burdick*, 18 Or. 660, 6 P. 2d 18, 19."

These definitions show that if something is accepted as sufficient to discharge a liability, either in full or in part, that amounts to a payment. In case of a set-off which is found due to an assessee for the assessment period in question, it cannot be disputed that the said set-off would work as partially or totally extinguishing the tax liability. If that be so, such a set-off can legitimately be considered as "the sum paid". Since this set-off is always with regard to the sum which is already paid prior to the assessment, we are of the opinion that all the requirements of the third category of cases contemplated by sub-section (3A) of

section 36 are satisfied. In our opinion, therefore, the question which is reframed by us should be answered in the affirmative. This reference is accordingly disposed of. The State shall bear the costs of the opponent-assessee in this reference.

7. Reference answered in the affirmative.