

(1964) 11 GUJ CK 0017
In the Gujarat High Court
Case No : Sales Tax Reference No. 42 of 1963

The State of Gujarat	Vs	APPELLANT
Tamakuwala and Sons		RESPONDENT

Date of Decision : 19-11-1964

Acts Referred:

Bombay Sales Tax Act, 1953 — Section 14, 15, 26(1), 26(2), 26(3)

Citation : (1966) 17 STC 390

Hon'ble Judges : P.N. Bhagwati, J; J.M. Shelat, J

Bench : Division Bench

Advocate : J.M. Thakore, General and M.G. Doshit, Additional Government Pleader, for the Appellant; S.L. Mody, for the Respondent

Judgement

Bhagwati, J.—This is a reference made at the instance of the State u/s 34 of the Bombay Sales Tax Act, 1953. The facts which have been

found by the Tribunal are few and may be briefly stated at the outset, for having regard to those facts, it is not possible to see how any conclusion

other than that in favour of the assessee can be reached in this reference. Prior to 3rd April, 1954, the respondent-firm, which consisted of five

partners, carried on business at two places, namely, Vasad in Kaira District and Padra in Baroda District. The business at Vasad was carried on in

the name of Messrs Tamakuwala & Sons, and that at Padra was carried on in the name of Messrs Trikamal Nagardas Tamakuwala. The

respondent-firm was a registered dealer under the provisions of the Act and was liable to pay tax on sales effected by it in the course of its

business. On 3rd April, 1954, the respondent-firm was dissolved and under an arrangement arrived at between the partners, the business of the

respondent-firm at Padra was taken over by three of the partners while the

business at Vasad was taken over by the remaining two partners in partnership with two other persons. This latter partnership constituted of two partners of the respondent-firm and two others, carried on business in the name of Messrs Gokalbhai Tribhovandas & Co., but it was not registered under the provisions of the Act nor did it obtain a certificate of registration until 16th September, 1954. Now at the date of dissolution, the respondent-firm had stock of goods of the value of Rs. 44,177 in respect of the business at Vasad and since the business at Vasad was taken over by Messrs Gokalbhai Tribhovandas & Co., this stock of goods was also transferred to Messrs Gokalbhai Tribhovandas & Co. along with the business of which it constituted an asset. It is in respect of the tax liability of this stock of goods that the present controversy has arisen between the parties.

2. In the course of the assessment of the respondent-firm to sales tax for the assessment period 1st April, 1954, to 3rd April, 1954, that being the last period during which the respondent-firm carried on business, the Sales Tax Officer included the sum of Rs. 44,177, being the value of the stock of goods transferred of Messrs Gokalbhai Tribhovandas & Co., in the turnover of sales of the respondent-firm and taxed the respondent-firm on such turnover, presumably relying on section 26(2) of the Act. The respondent-firm thereupon preferred an appeal to the Assistant Commissioner of Sales Tax. The respondent-firm contended before the Assistant Commissioner of Sales Tax that the business at Vasad was a distinct and independent business from the business at Padra and since the ownership of the business from the business at Vasad was entirely transferred by the respondent-firm to Messrs Gokalbhai Tribhovandas & Co., the case was covered by section 26(1) and the stock of goods transferred to Messrs Gokalbhai Tribhovandas & Co. along with the Vasad business was not liable to be included in the turnover of sales of the respondent-firm. Now it is difficult to see why reliance was placed by the respondent-firm on section 26(1). The Revenue sought to tax the stock of goods transferred to Messrs Gokalbhai Tribhovandas & Co. u/s 26(2) and the only argument which could therefore be profitably advanced before the Assistant Commissioner of Sales Tax that section 26(2) had no application to the facts of the case and not that the case was governed by

section 26(1). But presumably the argument that section 26(1) applied to the facts of the case was advanced because that section could apply only

if the ownership of the business was transferred in its entirety and if it could be said that when the business at Vasad was transferred to Messrs

Gokalbhai Tribhovandas & Co., there was transfer of the ownership of the business in its entirety, that would exclude the applicability of section

26(2) which applied only where the ownership of a part of the business was transferred. The Assistant Commissioner of Sales Tax, however,

negated this contention based on the applicability of section 26(1) and held that the business of the respondent-firm at Vasad and Padra was one

single business and the transfer of ownership of the business at Vasad alone could not, therefore, be said to be transfer of ownership of the entire

business of the respondent-firm so as to fall within section 26(1). The Assistant Commissioner of Sales Tax took the view that since there was

transfer of ownership of a part of the business of the respondent-firm, namely, that at Vasad, at respondent-firm was liable to pay tax in respect of

the stock of goods transferred to Messrs Gokalbhai Tribhovandas & Co., by reason of section 26(2). The respondent-firm carried the matter in

revision before the Deputy Commissioner of Sales Tax, but the revision application was unsuccessful and the respondent-firm thereupon preferred

a further revision application to the Tribunal. Before the Tribunal, the view of the revenue authorities that the case fell within section 26(2) was

challenged on behalf of the respondent-firm and the challenge was upheld by the Tribunal.

3. The Tribunal took the view that on a true construction of section 26(2), what was required for the applicability of the section was that the

transferor should transfer the ownership of a part of his business to the transferee and the other part of the business should remain with the

transferor and it is only in such a case that the transferor would be liable to pay tax in respect of the stock of goods transferred to the transferee as

if the goods had been sold by him, provided of course, the transferee did not hold a certificate of registration and did not obtain it within the

prescribed period. The Tribunal held that since in the present case the respondent-firm was dissolved and the business of the respondent-firm was

distributed between the two sets of partners, no part of the business was retained by the respondent-firm when the Vasad business was transferred

by the respondent-firm to Messrs Gokalbhai Tribhovandas & Co. Both the parts of the business were transferred by the respondent-firm, one to

the three partners of the respondent-firm and the other to Messrs Gokalbhai Tribhovandas & Co. at the same time under an arrangement arrived

at between the partners and no part of the business could, therefore, be said to have remained with the respondent-firm when the Vasad business

was transferred to Messrs Gokalbhai Tribhovandas & Co. In this view of the matter, the Tribunal held that the condition requisite for the

applicability of section 26(2) was not fulfilled and the value of the stock of goods transferred to Messrs Gokalbhai Tribhovandas & Co. was not

liable to be included in the turnover of sales of the respondent-firm. An alternative argument was also advanced on behalf of the State before the

Tribunal and that argument was that, in any view of the matter, even if section 26(2) did not apply, the case was covered by section 26(3)(i) and

the value of the stock of goods transferred to Messrs Gokalbhai Tribhovandas & Co. should be taxed under that provision. This argument was

also negative by the Tribunal and two grounds were given by the Tribunal in support of their view. The first ground was that it was not open to the

Revenue at the stage of the revision application before the Tribunal to change the basis of assessment from section 26(2) to section 26(3)(i) and

the second ground was that, in any event, the machinery of assessment prescribed by section 14 was not available this decision of the Tribunal,

made an application for a reference and on the application, the following three questions were referred for the opinion of this Court :-

1. Whether on the facts and in the circumstances of the case the Gujarat Sales Tax Tribunal was justified in holding that the provisions of section

26(2) of the Bombay Sales Tax Act, 1953, could not be applied to the facts of the case ?

2. Whether on the facts and in the circumstances of the case the Tribunal was justified in holding that the basis of the assessment could not be

allowed to be changed from the basis u/s 26(2) to the basis u/s 26(3) for the first time at the Tribunal stage ?

3. If the answer to question No. 2 is in the negative whether the Gujarat Sales Tax Tribunal was justified in holding that the provisions of sections

14 and 15 of the Bombay Sales Tax Act, 1953, could not be applied to an assessment u/s 26(3) of the said Act ?

So far as the second and third questions were concerned, we need not say anything more about them beyond stating that the State cannot rely on

section 26(3)(i) in the present case since that section, in so far as it purports to tax allotment of goods of a firm amongst partners on dissolution, is

ultra vires the State Legislature as held by us in a decision given on 8th November, 1963, in Sales Tax Reference No. 5 of 1962 (Since reported

as *State of Gujarat v. Ramanlal Sankalchand and Co.* [1965] 16 S.T.C. 329. These two questions will, therefore, have to be answered

accordingly by saying that the State is not entitled to tax the stock of goods transferred to Messrs Gokalbhai Tribhovandas & Co. u/s 26(3)(i).

4. That takes us to the first question which deals with the applicability of section 26(2) of the facts of the present case. The determination of that

question turns on the interpretation of section 26(2). Section 26(2), as it stood at the material time, was in the following terms :-

26. (2) When a dealer liable to pay the tax transfers the ownership of a part of his business the transferor shall be liable to pay the tax in respect of

the stock of goods transferred along with that part of his business, which is not so transferred, as if the goods have been sold by him, unless the

transferee holds a certificate of registration or obtains it within the prescribed period.

5. It is clear on a plain grammatical construction of the language of the section that there are three conditions which must be fulfilled before a stock

of goods transferred by a transferor to a transferee can be taxed under the section. First, there must be transfer of ownership of a part of the

business of the transferor. Secondly, the other part of the business which is not transferred must remain with the transferor, and thirdly, the

transferee must not hold a certificate of registration and must not obtain it within the prescribed period. These three conditions are cumulative

conditions and it is only if all these three conditions are satisfied that the section can be invoked by the State for taxing the stock of goods

transferred by the transferor to the transferee. Now the business which was carried on by the respondent-firm was a business at Vasad and Padra.

The business at Vasad, which was a part of the business carried on by the respondent-firm, was transferred by the respondent-firm to Messrs

Gokalbhai Tribhovandas & Co., and the first condition was, therefore, satisfied. Messrs Gokalbhai Tribhovandas & Co. did not hold a certificate

of registration nor did they obtain one within the prescribed period which was one month from the date of transfer of the part of the business. The

transfer of the part of the business took place on 3rd April, 1954, whereas a certificate of registration was obtained by Messrs Gokalbhai

Tribhovandas & Co. 16th September, 1954. The third condition was also therefore satisfied. The question, however, is whether the second

condition was satisfied. It was the fulfilment of this second condition which was disputed on behalf of the respondent-firm. Now it is difficult to see

how the second condition could be said to have been fulfilled in the present case. The finding of fact reached by the Tribunal was that on the

dissolution of the respondent-firm on 3rd April, 1954, the arrangement arrived at between the parties was that the business Padra should be taken

over by three of the partners, the other two partners not having any interest in the said business, while the business at Vasad should be taken over

by the other two partners in partnership with two others, the first three partner not having any interest in the said business. It is clear from this

finding of fact that the transfer of the business at Padra to three of the partners and the transfer of the business at Vasad to the remaining two

partners along with two others were simultaneous in point of time under an arrangement arrived at between the partners and if that be so, it cannot

be disputed that when the business at Vasad was transferred to Messrs Gokalbhai Tribhovandas & Co., consisting of two partner of the

respondent-firm and two others, no part of the business remained with the respondent-firm, because simultaneously the other part of the business,

namely, that at Padra, was transferred to the other three partners of the respondent-firm. The second condition was, therefore, clearly not fulfilled

and the State is not entitled to rely on section 26(2) for taxing the stock of goods transferred to Messrs Gokalbhai Tribhovandas & Co. The first

question must, therefore, be answered in the affirmative.

6. The State will pay the costs of the reference to the respondent-firm.

7. Reference answered accordingly.