

(1981) 10 GUJ CK 0009
In the Gujarat High Court
Case No : Sales Tax Reference No. 22 of 1978

Vithaldas and Co.

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 14-10-1981

Acts Referred:

Central Sales Tax Act, 1956 — Section 10, 6, 8(2), 9, 9(1)

Gujarat Sales Tax Act, 1969 — Section 5(3), 66, 66(2), 69, 69(1)

Citation : (1982) 49 STC 227

Hon'ble Judges : D.C. Gheewala, J; B.K. Mehta, J

Bench : Division Bench

Advocate : R.D. Pathak, for the Appellant; J.R. Nanavati, Government Pleader, instructed by H.V. Chhatrapati for Bhaishanker Kanga and Girdharlal, for the Respondent

Judgement

Mehta, J.—At the instance of the assessee, the Gujarat Sales Tax Tribunal, Ahmedabad, has referred the following question to us for our opinion u/s 69(2) of the Gujarat Sales Tax Act, 1969 (hereinafter referred to as "the Gujarat Act"), read with section 9(2) of the Central Sales Tax Act, 1956 (hereinafter referred to as "the Central Act") :

"Whether, in the facts and circumstances of the case, the Tribunal was justified in holding that the applicant was not justified to claim exemption on the sale of Rs. 11,32,257 u/s 10 of the Central Sales Tax (Amendment) Act, 1969 ?"

2. The aforesaid question has been referred to us on the facts and in the circumstances stated hereinunder :

The assessee, a partnership firm, is a dealer in cotton waste. It was duly registered under the Bombay Sales Tax Act, 1959, as well as under the Central Act. During the period of assessment made under the Central Act, commencing from 18th July, 1968, to 31st March, 1969, the assessee had effected inter-State sales to tune of Rs. 12,04,287. Out of these sales, no amount of tax was

collected on the sales of Rs. 11,32,259 under the Central Act. However, in respect of the remaining sales of Rs. 72,029 the amount of tax at the rate of 3 per cent was separately collected and paid along with the returns. In the quarterly returns filed for the respective quarters commencing from 18th July to 30th September, 1968, 1st October, 1968, to 31st December, 1968, and 1st January, 1969, to 31st March, 1969, the sales on which no amount of tax was separately collected were shown as free of tax and consequently no amount of tax was paid on these sales along with the returns. At the stage of assessment, the assessee claimed that these sales of Rs. 11,32,259 were not liable to tax u/s 10(1) of the Central Sales Tax (Amendment) Act, 1969 (hereinafter referred to as "the Central Amendment Act"), on the ground that there was no tax liability in respect of these sales as prescribed u/s 10 of the Central Amendment Act. It should be noted at this stage that the assessee had produced before the Sales Tax Officer at the time of assessment declarations in form C in respect of the aforesaid sales of Rs. 11,32,259 having found that the Sales Tax Officer was inclined to subject these sales to tax at 10 per cent. The claim of the assessee was, however, negated by the Sales Tax Officer, who found that inasmuch as the assessee had obtained declarations in respect of the sales effected in the course of inter-State trade and commerce and, therefore, though in the quarterly returns the assessee claimed these sales as exempted from the tax liability and no tax was paid on account thereof, nevertheless the prices at which the goods were sold were inclusive of tax and, therefore, the sales in question were liable to be subjected to tax at 3 per cent because the declarations in form C were produced in respect of these sales.

3. The assessee, therefore, carried the matter in appeal before the Assistant Commissioner of Sales Tax who was of the opinion that having regard to the fact that the condition mentioned in the bills for the sale of the goods was that they were subject to production of declarations in form C, it must be held that the prices at which the goods were sold were inclusive of tax and, therefore, the tax having been collected by inclusion in the sale price, the assessee was not entitled to claim exemption for those sales u/s 10(1) of the Central Amendment Act. He, therefore, dismissed the appeal of the assessee.

4. Being aggrieved by this order of the Assistant Commissioner, the assessee carried the matter in further appeal before the Tribunal which also was not impressed with the claim of the assessee, inter alia, on the ground that the assessee had not been able to prove that non-collection of tax under the Central Act was on the ground that no such tax could have been levied or collected in respect of such sales. The Tribunal, therefore, dismissed the appeal of the assessee.

5. A reference was sought by the assessee u/s 69(1) of the Gujarat Act read with section 9(2) of the Central Act that the Tribunal should refer the following questions to this Court for its advice :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was

justified in holding that the applicant has not discharged its burden of proving that non-collection of tax on the sales of Rs. 11,32,257 in the course of inter-State trade and commerce was on the ground that it could not be levied or collected ?

(2) Whether, on the facts and in the circumstances of the case, the findings of the Tribunal that the story of the applicant that the declarations in form C were obtained by it in 1973 appears to be false; is vitiated being perverse and without taking into account the relevant documentary evidence and facts ?

(3) Whether, on the facts and in the circumstances of the case, the findings of the Tribunal to the effect that the applicant could not get declarations in form C in respect of sales to Ajudhia Textiles Corporation relating to the period of assessment as the record of the mills were spoiled in 1971 and could not be available in 1973; is vitiated for not taking into account the relevant facts and documents ?

(4) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the applicant was not entitled to claim exemption on the sales of Rs. 11,32,257 u/s 10 of the Central Sales Tax (Amendment) Act, 1969 ?"

6. The Tribunal refused to grant the reference since in its opinion the questions arising out of the order were pure questions of fact and no question of law arose out of its order. The assessee, therefore, moved this Court u/s 69(2) of the Gujarat Act for direction to the Tribunal to make a reference of all the aforesaid questions in respect of which the assessee prayed for reference before the Tribunal.

7. This Court by its order of 23rd November, 1977, in Sales Tax Application No. 8 of 1977 directed the Tribunal to draw a statement of case and raise and refer question No. (4) as aforesaid for the opinion of this Court. In pursuance of the order of this Court, therefore, the question set out above has been referred to us for our opinion.

8. Before we deal with the contentions urged on behalf of the assessee, it would be profitable to set out shortly the legal provisions pertaining to the claim of exemption from the liability to pay tax under the Central Act in respect of the transactions effected by the assessee in the course of inter-State trade and commerce.

9. In the State of Mysore v. Yaddalam Lakshminarasimhiah Setty & Sons [1965] 16 STC 231, the conflict which was prevailing amongst the different High Courts about the liability of payment of Central sales tax on the turnover of sales or purchases of goods which were not liable to sales tax under the appropriate State sales tax laws was set at rest. The facts in Lakshminarasimhiah Setty's case [1965] 16 STC 231 were that the assessee, who was a dealer in powerloom and handloom textiles was assessed u/s 9 of the Central Act, for the assessment period 1957-58, as it stood at the relevant time. The contention of the assessee

was that he was not the first or the earliest amongst the line of successive dealers in respect of the said turnover and, therefore, not liable to be taxed under the Mysore Sales Tax Act, 1957, and consequently, therefore, also not liable to be taxed under the Central Act. The contention found favour with the High Court of Mysore which held that by virtue of section 8(2) of the Central Act, any exemption given by a State Act or the point determined by it at which a sale was to be taxed applied also to assessments under the Central Act. The State Government carried the matter in appeal before the Supreme Court. The majority Court held that the expression "levied" in section 9(1) of the Central Act, as it stood then, referred to the expression "levied" in section 5(3)(a) of the State Act and, therefore, the Central Act had not made a departure in the manner of levy of tax on the specified goods which were taxed only at a single point under the State Act. With a view to meet with the effects and consequence ensuing as a result of this decision of the Supreme Court in *Lakshminarasimhiah Setty's case* [1965] 16 STC 231, the Central Sales Tax (Amendment) Ordinance, 1969, was promulgated with effect from 9th June, 1969, which was followed by an Act which replaced the Ordinance, namely, the Central Sales Tax (Amendment) Act, 1969, which was put into effect on 30th August, 1969. The said Ordinance and for that matter the Central Amendment Act sought to validate the assessments and reassessments and levy and collection of any tax made by the authorities and anything done or purported to have been done for the enforcement of such assessments or reassessments. This validation was sought to be effected by substituting sub-section (1A) of section 6 of the Central Act. The new sub-section (1A) provided as under :

"(1A) A dealer shall be liable to pay tax under this Act on a sale of any goods effected by him in the course of inter-State trade or commerce notwithstanding that no tax would have been leviable (whether on the seller or the purchaser) under the sales tax law of the appropriate State if that sale had taken place inside that State."

10. This substitution was retrospectively made with effect from 1st October, 1958, by providing that sub-section (1A) shall be and shall be deemed to have been substituted in the Central Act with effect from the 1st day of October, 1958. However, in order to protect the dealers who have failed to collect tax on the transactions of sales in the course of inter-State trade or commerce effected during the period between 10th November, 1964, and 9th June, 1969, an exemption provision was made in section 10 of the Central Amendment Act. The construction of the provision contained in section 10 is the bone of dispute between the parties before us. Section 10 reads as under :

"10. Exemption from liability to pay tax in certain cases. - (1) Where any sale of goods in the course of inter-State trade or commerce has been effected during the period between the 10th day of November, 1964, and the 9th day of June, 1969, and the dealer effecting such sale has not collected any tax under the principal Act on the ground that no such tax could have been levied or collected

in respect of such sale or any portion of the turnover relating to such sale and no such tax could have been levied or collected if the amendments made in the principal Act by this Act had not been made, then, notwithstanding anything contained in section 9 or the said amendments, the dealer shall not be liable to pay any tax under the principal Act, as amended by the Act, in respect of such sale or such part of the turnover relating to such sale.

(2) For the purposes of sub-section (1), the burden of proving that no tax was collected under the principal Act in respect of any sale referred to in sub-section (1) of in respect of any portion of the turnover relating to such sale shall be on the dealer effecting such sale."

11. Having read section 10, we are of the opinion that these provisions can be invoked if the following five conditions are satisfied :

(a) Sales in respect of which exemption is claimed must have been effected in inter-State trade or commerce during the period between the 10th day of November, 1964, and 9th day of June, 1969.

(b) The dealer effecting such sales must not have collected any tax under the Central Sales Tax Act.

(c) Such non-collection must be on the ground that no such tax could have been levied or collected.

(d) Such non-collection must pertain to such sales or any portion of the turnover relating to such sales.

(e) No such tax could have been levied or collected but for the Amendment Act.

12. It is in the context of this legal background that we have to answer the question referred to us.

13. Two preliminary objections were raised by the learned Government Pleader appearing for the State Government. In the first place, he contended that the finding of the Tribunal that the failure of the assessee to collect tax was not on the ground that no such tax could have been levied or collected but was on other grounds as found by the Tribunal is purely a finding of fact arrived on appreciation of relevant evidence and material. In the second place he contended that no specific question has been referred to us challenging the finding of fact made by the Tribunal as without any evidence and, therefore, it is not open to the assessee to assail this finding.

14. Before we dispose of these contentions, we must remind ourselves of the exact limitation of the jurisdiction of this Court hearing references u/s 69 of the Gujarat Act.

15. In *The Commissioner of Income Tax, Bihar and Orissa, Patna Vs. S.P. Jain*, , a similar situation had arisen before the Supreme Court. Two questions were referred to the High Court of Patna by the Income Tax Appellate Tribunal, viz.,

(1) whether the Tribunal's finding that the purchase of the shares by the Rana was not a benami transaction was legally valid, and (2) whether on the facts the Tribunal was justified in deleting the sum of Rs. 10,80,000. The High Court answered both the questions in the affirmative. On appeal to the Supreme Court, it was held that though the questions referred to the High Court did not challenge the validity of the findings given by the Tribunal, since the Tribunal had failed to take into account the relevant material on record in arriving at its finding and had further acted on inadmissible evidence and misread the evidence and based its conclusion on conjectures and surmises, the High Court could ignore the findings of the Tribunal and re-examine the issues arising for decision on the basis of the material on record. The Supreme Court, speaking through Jaganmohan Reddy, J., referred to its earlier decision in *Karnani Properties Ltd. Vs. The Commissioner of Income Tax, West Bengal*, where the limitations imposed on the High Court dealing with references under the Income Tax Act were indicated. The Supreme Court in *Karnani Properties Ltd. Vs. The Commissioner of Income Tax, West Bengal*, held that the jurisdiction of the High Court in dealing with a reference u/s 66 is a very limited one and it must take the facts as stated in the statement of the case unless the question whether the findings of the Tribunal are vitiated for one or the other of the reasons recognised by law is before it. In *The Commissioner of Income Tax, Bihar and Orissa, Patna Vs. S.P. Jain*, the Supreme Court, while confirming the above legal position found that in the case before it, the Tribunal was moved on behalf of the revenue by actually raising the question about the finding being perverse having regard to the evidence on record but the reference was not granted by the Tribunal and that very question was again raised and repeated in application to the High Court u/s 66(2) but the High Court directed to make reference only on the questions specified above and, therefore, the Supreme Court ruled in the facts of the case before it that it was open to the revenue to assail the findings of fact though no specific question was raised and referred to the High Court. Jaganmohan Reddy, J., stated as under in that behalf :

"In our view there can be no doubt that unless the Tribunal has been asked to refer a question impugning the validity of the findings sustainable on any principle of law, the facts stated in the statement of the case would form the basis on which the legality or otherwise of the assessment would alone require to be considered by the High Court.

In this case the revenue had in its application u/s 66 of the Act asked for specific reference on the question :

* * * This question was repeated in its application u/s 66(2), but perhaps the High Court thought that questions Nos. (2) and (3) on which it directed the Tribunal to state a case would cover the scope and ambit of question No. (3) on which the revenue had asked for reference"

16. We need not repeat the facts, which we have stated herein above, but having regard to the application which the assessee had made before this High Court

where specifically the question assailing the finding of fact made by the Tribunal was raised as to whether on the facts and in the circumstances of the case the finding of the Tribunal that the non-collection of tax in the course of inter-State trade or commerce was not on the ground that it could not be levied or collected was justified, and that the finding that the obtaining of declarations in form C by the assessee in the year 1973 was not established as being perverse and without taking into account the relevant documentary evidence and facts. In the circumstances, therefore, if this Court has, having regard to the width and scope of question No. (4), which has been set out above, called for the reference on that question alone, it cannot justifiably and legally estop the assessee from assailing the findings of fact made by the Tribunal as a result of which the Tribunal negated the claim of exemption made by the assessee in respect of the sales to the tune of Rs. 11,32,259. The second preliminary objection raised by the learned Government Pleader should therefore be rejected.

17. The first contention has no merit in it because it is axiomatic to say that the High Court has always jurisdiction to interfere with findings of the Appellate Tribunal if it appears that the Tribunal has either misconstrued the statutory provision or reached a finding without any evidence, or contrary to the evidence or has acted on material partly relevant or partly irrelevant, or where the Tribunal bases its findings or conclusions on mere conjectures or surmises, or ignores any material or relevant evidence, or reaches conclusion which no person judicially acting and properly instructed as to relevant law could have come to the determination reached. In all these cases the findings arrived at are vitiated [vide *The Commissioner of Income Tax, Bihar and Orissa, Patna Vs. S.P. Jain*, .

18. It is equally well-recognised that the decision of a Tribunal may be set aside if the Tribunal has excluded or ignored admissible and relevant evidence, or has taken into account inadmissible evidence [vide *G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax*, , *Udhavdas Kewalram Vs. Commissioner of Income Tax, Bombay City I*, and *Commissioner of Income Tax, Bombay City I Vs. Greaves Cotton and Co. Ltd.*, . If, therefore, the assessee can satisfy us that the Tribunal has ignored or disregarded the material and important evidence, or has misread the evidence, or has acted on material which is partly relevant and partly irrelevant, the findings are vitiated and liable to be set aside. The first preliminary objection should, therefore, also be rejected since this is precisely the grievance of the assessee that the Tribunal has not only misread the evidence and acted on irrelevant material but has ignored the material and important evidence which substantiated the claim of the assessee for exemption.

19. Before we deal with the grounds urged on behalf of the assessee, we will shortly state as to what weighed actually with the Tribunal is reaching the conclusion that the assessee had failed to discharge the burden of proving that no tax was collected under the Central Act on the ground that such tax could not have been levied or collected in respect of the inter-State sales to the tune of Rs. 11,32,259. Broadly stated, the following five factors impressed the Tribunal in

reaching the conclusion as it did :

- (a) The sales in question were declared to be subject to declarations in form C.
- (b) All the contracts of the sales in question were f.o.r. destination.
- (c) The assessee obtained declarations in form C in respect of the sales for which the exemption was claimed u/s 10.
- (d) Inconsistent conduct on the part of the assessee in recovering the tax inasmuch as it recovered the tax on similar transactions from the same parties during the course of the period under reference.
- (e) Subsequent conduct of the assessee in collecting the tax on similar transactions from different parties.

20. The first grievance made on behalf of the assessee before us is that the Tribunal has wrongly placed the burden of proof on the assessee contrary to what has been provided by sub-section (2) of section 10 of the Central Amendment Act. The Tribunal has found ultimately, as stated in the statement of case, that the assessee was not able to discharge the burden of proving the fact that no tax was collected under the principal Act on the ground that such tax could not have been levied or collected in respect of such sales. Sub-section (2) of section 10 provides in effect that the burden of proving the factum of non-collection of tax in respect of any sale or turnover relating to such sale would be on the dealer effecting such sale. The grievance made on behalf of the assessee is that the dealer is not obliged by the Act to establish the prescribed ground for non-collection of tax. In the submission of the learned Advocate for the assessee the ground is to be established objectively from the material and evidence that may be collectively adduced before the taxing authorities by the assessee as well as by the department. Though there is some force in this contention of the learned Advocate for the assessee, we do not think that after both the parties have adduced and placed the evidence before the authorities, the question of burden of proof would assume any importance. It is the totality of the effect of such evidence which is to be evaluated for finding out whether the Tribunal was right in concluding that the assessee is not entitled to the exemption which it was claiming u/s 10 of the Central Amendment Act in respect of the sales effected by it in the course of inter-State trade or commerce during the period under reference. The learned Advocate for the assessee, therefore, urged that the final conclusion of the Tribunal that the assessee has not been able to establish that non-collection of tax was on the ground that no tax could have been levied or collected in respect of such sales is vitiated since the Tribunal has ignored the material evidence in this behalf. The evidence which according to the learned Advocate for the assessee has been ignored by the Tribunal comprises of the claim of exemption made in the quarterly returns and the assertions made in the two letters addressed by the assessee to the Sales Tax Officer as well as the Assistant Commissioner of Sales Tax in June, 1973. The letter addressed to the Sales Tax Officer is dated 21st June, 1973, and the letter addressed to the

Assistant Commissioner of Sales Tax is dated 26th June, 1973. It is really a matter of surprise as to how the Tribunal completely ignored these two important letters which establish the grounds on which the assessee decided not to collect the tax from its up-country constituents. It is greater surprise to us that when the Tribunal considered even the subsequent conduct of the assessee in collecting the tax on similar transactions in the period immediately following the period under reference, it ignored completely the evidence of the conduct which is contemporaneous and exhibited at all relevant times of assessment. In the letter addressed to the Sales Tax Officer dated 21st June, 1973, the assessee referred to the final hearing given by the Sales Tax Officer to the assessee on 2nd May, 1972, in which hearing the applicability of section 10 was, according to the assessee, considered. The assessee pointed out that they had not collected any Central sales tax on the sales of Rs. 11,32,259 the particulars of which are given in the said letter, and that they have not paid any tax along with their quarterly returns in respect of the turnover including the turnovers in question. The statements of the assessee thereafter in para 2 onwards are very significant and, therefore, we have set out in details the same hereunder :

"2. ... Non-payment of tax and no-collection of tax on our part was on account of the fact that we were under the belief that no Central sales tax is payable by us on such sales in view of the decision of the Supreme Court in the case of the State of Mysore v. Yaddalam Lakshminarasimhiah Setty & Sons [1965] 16 STC 231.

3. It was on account of these circumstances, you had allowed these sales as deduction and no tax was determined as payable by us on these sales.

4. Thereafter, after some months, you asked for the names and addresses of the above dealers for the purposes of cross-verification. In spite of the fact that the hearing was already over on 2nd May, 1972, we were orally informed that the cross-verification was required on account of the instructions raised by the Assistant Commissioner of Sales Tax (Adm.), Range II, as there is a practice prevalent in the sales tax department that the Sales Tax Officer has not to pass any order after the hearing in a case in which the refund exceeds Rs. 2,000. In this connection I had seen the learned Assistant Commissioner of Sales Tax (Adm.), Range II, for times without number also.

5.

6. It appears that in spite of our above plea, the cross-verification was made and the statements of our purchases were obtained by you. We understand that on cross-verification by you, all the dealers have specifically stated to you that no Central sales tax has been charged by us from them and we have not collected any tax from them.

7. It is regrettable, therefore, that in spite of all these, you propose to levy tax on our above sales at the rate of 10 per cent. We want to draw your attention that in such circumstances, we should be allowed declarations in form C from the

above dealers without prejudice to our contention that no tax is at all payable in view of section 10 quoted above. We want to adopt this course with a view to minimise our tax liability and for abundant caution.

8. In the circumstances, we have to request you to give us one month's time for production of declarations in form C after obtaining from the above dealers."

21. It appears that five days after the aforesaid letter, the assessee addressed a letter to the Assistant Commissioner of Sales Tax setting out its grievance that the Assistant Commissioner has instructed the Sales Tax Officer to assess the assessee in pursuance to pre-audit scrutiny made by him though the assessee was clearly given to understand by the Sales Tax Officer that the assessee was not liable to pay tax on the inter-State sales where no tax was collected by it and exemption was claimed in quarterly returns in view of the Supreme Court judgment in *Lakshminarasimhiah Setty's* case [1965] 16 STC 231 u/s 10(1) of the Central Amendment Act. The assessee also placed on record by its letter that he had personally called upon and met the Assistant Commissioner for a number of times since the submission of the case papers in the middle of May, 1972. The assessee also pointed out that the instruction by the Assistant Commissioner to the Sales Tax Officer to subject the exempted sales to Central sales tax would, in the absence of declarations in form C, expose the assessee to a substantial tax liability. The following statement in the said letter requires to be set out and produced in this order :

"..... The instructions to assess the Central sales tax would mean that in the absence of C forms higher rate of tax is payable. The question of C form arises only at present. There was no point up to the date regarding the levy of Central sales tax and hence the question of obtaining C form was out of place. It is the duty of the Sales Tax Officer therefore to allow my client a sufficient time to obtain C forms from the parties outside the State.

I have therefore requested the Sales Tax Officer on 21st June, 1973, to grant me a month's time to obtain C forms etc. However, he has refused to grant me any further time.

As you know, the tax liability in the absence of C form would be very high and it would also create some legal points and would deprive the rights of my clients. I, therefore, request you to intervene in the matter and the Sales Tax Officer, Mr. M. G. Merchant, may be asked to grant me at least one month's time in the matter. I hope, the department would not be grossly unjust in a case where more than one year was taken for deciding the issue and particularly against the assessee with an unparalleled interpretation."

22. It is common ground that the Tribunal has not referred to these two letters at all in its order. The grievance of the assessee is that the statements in these two letters constitute a very important evidence about the conduct of the assessee at the relevant time of assessment to establish that the non-collection of tax was on the ground of the decision of the Supreme Court in *Lakshminarasimhiah Setty's*

case [1965] 16 STC 231 that no such tax could have been levied or collected in respect of such sales. In submission of the learned Advocate for the assessee, if such an important material evidencing the conduct of the assessee is ignored, the entire finding that the assessee has failed to establish the non-collection on the ground of non-liability is vitiated. The learned Government Pleader, however, sought to repel this contention by urging that these letters have not been relied upon and referred to by the learned Advocate for the assessee in his arguments before the Tribunal. We have not been able to appreciate the precise implication of this contention of the learned Government Pleader. It is not contended and it is not possible to contend that this question of exemption in respect of these sales in the course of inter-State trade and commerce was not before the Tribunal. It was precisely and the only question which was before the Tribunal. The Tribunal has, while summarising the contentions urged on behalf of the assessee before it, recorded that at the stage of assessment on behalf of the assessee (appellant before the Tribunal) it was contended that in respect of the sales of Rs. 11,32,259 the purchases were made from local registered dealers and, therefore, there was no tax liability in respect of these sales under the Bombay Sales Tax Act as per the decision of the Supreme Court in Lakshminarasimhiah Setty's case [1965] 16 STC 231 and accordingly while filing the returns these sales were shown as not liable to tax under the Central Act. The Tribunal has further recorded in paragraph 5 of its order as under :

"5. Shri Pathak, very strongly relying on the manner in which the returns were filed, namely, where the tax was recovered, the sales were shown as taxable and the tax was paid and where the tax was not recovered, the sales were shown as not liable and also in view of the facts stated above, said that the sales in dispute are covered by the provisions of section 10(1) of the Central Amendment Act and, therefore, there is no tax liability so far as these disputed sales are concerned.

23. Therefore, this question was very much before the Tribunal. Whether the claim of the assessee was justified or not was not doubt to be adjudicated by the Tribunal. The two letters on which strong reliance has been placed by the learned Advocate for the assessee before us were also admittedly before the Tribunal. These two letters have been annexed as documents forming part of the statement of case submitted to us by the Tribunal. In this state of affairs, we do not appreciate, as stated above, the precise implications of the contention of the learned Government Pleader that since the Tribunal has not referred to these two letters, it should be held that they were not relied upon by the learned Advocate appearing on behalf of the assessee. That precisely is the grievance of the assessee that even though these letters were before the Tribunal, the Tribunal has failed to refer them much less evaluate them. We do not think that the learned Government Pleader is justified in urging that no reliance could be allowed to be placed on these letters by the assessee for purposes of substantiating its claim, The learned Government Pleader, therefore, made an attempt to persuade us that assuming that these assertions were made in these

two letters, it was a matter which was to be inquired into and adjudicated upon and since the Tribunal has found that non-collection was not on the ground that no tax could have been levied or collected on such sales, the omission to refer to these letters would not constitute an infirmity which would vitiate the findings which were otherwise validly made. We are afraid this is too specious a contention to which we can adhere to. The question, as we have stated above, is as to what was the conduct of the assessee in not collecting the tax. There is no dispute that there was a non-collection of tax in the majority of cases. The Tribunal has as a matter of fact found so. The only point which was in dispute between the department and the assessee was whether this non-collection was on the ground that no tax could have been levied or collected. The very fact that the Supreme Court has pronounced the law in Lakshminarasimhiah Setty's case [1965] 16 STC 231 indicates that no tax could have been levied on such transactions. This decision had been rendered on 10th November, 1964, and with effect from this date the assessee could not have levied or collected the tax in respect of such inter-State sales as held by the Andhra Pradesh High Court in Reddy & Company, Tenali v. State of Andhra Pradesh [1973] 32 STC 399 since the assessee is supposed to know the law. Apart from this decision of the Andhra Pradesh High Court, even if it is required to be proved de hors the decision of the Supreme Court, that the non-collection was on the ground that no such tax could have been levied or collected, it requires evidence of the conduct of a dealer in question and in our opinion the aforesaid two letters establish clearly that the assessee did not collect the tax as it could not have and it did not in fact collect in the light of the decision of the Supreme Court in Lakshminarasimhiah Setty's case [1965] 16 STC 231. The assertion in the two letters addressed to the sales tax authorities in June, 1973, is not an afterthought as the assessee claimed the exemption for the said sales in the quarterly returns filed before the sales tax authorities. The statement in the letter addressed to the Sales Tax Officer that he agreed and upheld the claim of the assessee before he submitted the claim of refund before the higher authorities as required for purposes of pre-audit remains almost uncontroverted. The learned Government Pleader vehemently urged that the sales tax authorities are not bound to reply to the letters of the assessee more particularly when some casual allegations are made in such letters. We do not intend to say that the sales tax authorities like private parties should join issues and put the record straight by replying to the letters of the assessee before them. What we are trying to emphasise is that neither in the order of the Sales Tax Officer nor in the proceedings before the higher authorities any material has been brought on record to indicate that the assertion made by the assessee in the aforesaid letters was not warranted on the facts and in the circumstances of the case. Apart from this omission on the part of the authorities the fact remains that the Tribunal has not addressed itself as to what is the effect of this evidence of the conduct on the part of the assessee. No doubt the statement made in the said letters are in the nature of assertions in favour of the assessee; but that does not mean that the Tribunal should ignore this evidence and decide the question without considering what is its cumulative effect as

appreciated in the light of the other circumstantial, oral and documentary evidence adduced before the authorities. We do not feel any doubt in our mind that these two letters written at the relevant time of the assessment coupled with the claim of exemption made in the quarterly returns do constitute a very important evidence which may go a long way in establishing and substantiating the claim of the assessee for exemption on the ground that non-collection of tax by the assessee was because the tax could not have been levied or collected on such sales. In the ultimate analysis, it is on the comparative evaluation of the evidence of the conduct of the assessee that this question as to whether non-collection was on the ground that no tax could have been levied or collected on such sales can be resolved. In so far as the Tribunal has failed to consider this important piece of evidence of the conduct of the assessee in proper perspective that has vitiated its findings. The learned Government Pleader, however, urged that even if we consider this evidence, the finding which has been made by the Tribunal which is under challenge in this reference before us, was well-founded and justified on the evidence of the other conduct of the assessee which has been considered and evaluated by the Tribunal. The learned Advocate for the assessee, however, joined issue with the learned Government Pleader that the finding of the Tribunal was valid and legal since in the submission of the learned Advocate for the assessee the Tribunal has laid wrong emphasis on the circumstances which are perfectly innocuous and entirely irrelevant and could not have warranted the conclusion reached by the Tribunal. We are of the opinion that the submission of the learned Advocate for the assessee has great force in it. The reasons of our agreement with him are obvious. In the first place, the Tribunal has attached great importance to the fact that the assessee had obtained declarations in C form of the sales in question, and that in the bills for the supply of the goods it has been stated that the sales are subject to declarations in C form. In our opinion, the Tribunal in laying the emphasis as it did on this fact has again overlooked the very important circumstance which has been borne out from the correspondence between the assessee and the Sales Tax Officer as well as the Assistant Commissioner of Sales Tax. In the aforesaid letter addressed to the Sales Tax Officer on 21st June, 1973, the assessee, having realised that the Sales Tax Officer, pursuant to the direction received from the Assistant Commissioner of Sales Tax, was inclined to subject the said sales to the Central sales tax at the rate of 10 per cent, asked for time to produce the declarations in C form so as to limit its tax liability to 3 per cent only. However, this course which recommended itself to the assessee was not adopted by him so as to prejudice its main contention that the said sales were not liable to be taxed under the Central Sales Tax Act. In terms, the assessee has stated in paragraph 7 that in spite of the Sales Tax Officer having at the earlier stage of assessment agreed and upheld this claim of the assessee, he was of the view of bringing the said sales to tax in the light of instructions received from the higher authority which would expose the assessee to tax liability on these sales at the rate of 10 per cent and, therefore, they should be allowed to obtain declarations in form C from its up-country constituents without pre-judice to its contention that no tax

at all is payable in view of section 10 of the Central Amendment Act. The prayer has been made as specified in the circumstances narrated in the letter particularly paragraphs 4, 6 and 7. If the assessee requested the Sales Tax Officer to grant time to obtain declarations in C form so as to limit its tax liability without prejudice to its main contention that no tax at all was payable on such sales in view of section 10 of the aforesaid Act, we do not appreciate how the Tribunal has considered this circumstance of obtaining and production of the declarations in C form before the Sales Tax Officer as a circumstance of conduct negating the claim of the assessee that the non-collection was because no tax could have been collected or levied on it. In our opinion this circumstance is an irrelevant circumstance which cannot be loaded against the assessee so as to prejudice its claim for exemption more particularly when at the fag-end of the assessment proceedings in view of some development taking place when the Sales Tax Officer was inclined to bring such sales to tax in the light of instructions received from the higher authorities the assessee prayed for grant of some time so as to enable it to obtain the declarations which the assessee in its aforesaid letter claimed without prejudice to its main contention for exemption. It should be noted at this stage that the assessee was required to move the Assistant Commissioner for appropriate directions to the Sales Tax Officer to grant him time so that the assessee may obtain declarations in C form with a view to limit its liability if at all the authorities were inclined to charge the said sales under the Central Act. The emphasis which the Tribunal has, therefore, laid on this factum of production of the declarations in form C is not at all justified in view of what has been clearly stated by the assessee in its aforesaid two letters. The mere fact that in the bills for the supply of the goods a general statement has been made that the sales are subject to declarations in C form cannot be over-emphasised. It is, in our opinion, an innocuous circumstance which does not tilt the balance either way. The second circumstance which has weighed with the Tribunal is that the contracts of sales were f.o.r. destination. We have not been able to comprehend as to how the Tribunal has construed this condition against the assessee. The Tribunal has found that in the majority of the cases except in a couple of transactions the assessee had not collected tax. It is nobody's case that the tax was not collected by the assessee since the condition in the contract for sale of the goods was delivery of the goods f.o.r. destination. The Tribunal has also linked with this condition the evidence that the price of the goods was inclusive of sales tax as stated in the letter of one of the up-country constituents of the assessee, namely, M/s. Ajudhia Textile Mills. The Tribunal was of the opinion that having regard to this two fold condition of the contract, namely, the goods were to be delivered f.o.r. destination, and that the price was an inclusive price at least in the case of one of the up-country constituents, it must be held that the non-collection of tax by the assessee in all these sales which were to the tune of Rs. 11,32,259 was not on the ground that no tax could have been levied or collected on such sales. It should be noted that except in the letter of M/s. Ajudhia Textile Mills addressed to the Sales Tax Officer in reply to the inquiry made by the Sales Tax Officer to verify the claim of exemption advanced by the

assessee, no other dealer has stated in terms that the price was inclusive of sales tax. Even in case of M/s. Ajudhia Textile Mills, the evidence of Shri Mithal who was the manager in-charge of the said mills on behalf of the National Textiles Corporation which had taken over the said unit as it had fallen sick at the time when the Sales Tax Officer inquired, that the statement in the letter of the company addressed to the Sales Tax Officer saying that the price was inclusive of sales tax implied only that if there was any tax liability it was to be borne by the assessee. The Tribunal has, in our opinion, not correctly read the evidence and has laid a wrong emphasis on this fact that the price was inclusive of sales tax. In our opinion, the condition of the contract that the goods were to be delivered f.o.r. destination or that the price was inclusive of sales tax would be though relevant but innocuous circumstance, inasmuch as it has bearing only so far as the non-collection of the tax is concerned. The condition would only mean that in case if there is a tax liability that would be borne by the assessee. It cannot have bearing on the real question as to whether non-collection was on the ground that no tax could have been collected or levied under the Central Act. That question has to be determined independently by any cogent evidence in that behalf. The Tribunal has also laid down emphasis on what is called inconsistent conduct on the part of the assessee in so far as the assessee collected inconsistent conduct on the part of the assessee in so far as the assessee collected the tax on similar transaction from the same up-country constituents for the period under reference. The Tribunal has referred to this conduct in paragraph 2 of its order in the following terms :

"2. The appellant has not followed any consistent policy so far as the charging of the tax separately or otherwise is concerned. It appears that the Sales Tax Officer had addressed letter to some up-country dealers to whom the appellant had sold the goods. Some of the up-country dealers replied to the Sales Tax Officer saying that the appellant had not charged any sales tax on the sales effected to them So far as M/s. Delhi Textile Traders is concerned, it has sent a reply to the Sales Tax Officer as stated above wherein it has stated that it had purchased certain goods from the appellant from 1st April, 1968, to 31st March, 1969, on which the appellant had not charged any sales tax. It, however, appears that in respect of certain other bills issued to this dealer in respect of sales amounting to Rs. 52,106.12 the appellant has charged and collected the amount of sales tax at 3 per cent and paid the same to the Government along with the returns. Similarly in case of M/s. Bharat Textile and General Industries, this party has stated that it had purchased goods worth Rs. 1,836.79 on which the appellant has not charged any sales tax. However, during the same period, the appellant has sold goods worth Rs. 10,946.24 to the same party from whom sales tax at 3 per cent has been recovered and paid along with the returns."

24. This inconsistent conduct has weighed with the Tribunal as one of the important circumstances justifying the conclusion. Along with this evidence, the Tribunal has relied on the subsequent conduct of the assessee in the period

following the period of assessment under reference. The Tribunal has noted in this behalf in its order as under :

"..... During the subsequent period, especially from 9th June, 1969, to 31st March, 1970, in majority of the transactions the appellant has not collected any amount by way of Central sales tax though the tax payable in respect of these sales has been paid along with the returns. However, there are certain transactions effected during this period wherein the appellant has collected separately Central sales tax at 3 per cent from the same dealer and paid to the Government"

25. The first grievance of the learned Advocate for the assessee is that the Tribunal has relied on irrelevant material also inasmuch as it has taken into consideration the subsequent conduct which cannot have a bearing on the question as to whether the assessee was entitled to claim exemption in respect of the sales effected in the course of inter-State trade and commerce in the course of the period of the assessment under reference and, therefore, the finding reached on the basis of the simultaneous consideration of the relevant and irrelevant consideration vitiated the findings. We do see force in this contention. We are however, of the opinion that the Tribunal has lost sight of the provision contained in section 10 where a dealer is entitled to claim exemption in respect of the sales effected during the prescribed period or any portion of the turnover relating to such sale. If, therefore, in a given assessment period, a dealer claims exemption in respect of certain sales or turnover of sales and on a part of which he has collected tax, his claim for exemption in respect of the remaining turnover cannot be negatived on the ground that because he has collected tax in respect of a part of the turnover he is not entitled to claim exemption on the rest. The non-collection of tax on the sales effected in the course of the prescribed period would entitle a dealer to claim exemption or would qualify him for exemption if it can be established that the non-collection was on the ground that no tax could have been levied or collected. The ground for non-collection can be substantiated by cogent, clear and satisfactory evidence of the conduct of the party in respect of the sales or turnover of such sales. Merely because a dealer has collected tax on a part of the sales effected during the specified period, it would not by itself disentitle him from claiming exemption in respect of the sales on which no tax has been collected, if he is able to establish that the non-collection was on the ground that no tax could have been levied or collected. This opinion of ours is fortified by the legislative intent which has been clearly manifested in the section because the exemption is permissible qua any portion of the turnover relating to such sales effected in the specified period. We are, therefore, of the opinion that the finding of the Tribunal based on the conduct for the relevant period of assessment under reference and subsequent period is vitiated for two reasons : (i) that it has considered relevant as well as irrelevant material and (ii) because it has failed to appreciate the legislative intent manifested in section 10.

26. The result is that in our opinion the assessee has been able to establish its claim in respect of the sales effected in the course of the period commencing from 18th July, 1968, to 31st March, 1969, that no tax had been collected on the sales amounting to Rs. 11,32,259 on the ground that no tax could have been levied or collected on such sales because in fact no tax was collected in respect of those sales as found by the Tribunal, and because the tax was not collected on the specified ground as evidenced by the conduct of the assessee as disclosed in the quarterly returns as well as the two letters addressed to the sales tax authorities.

27. Mr. Pathak, the learned Advocate for the assessee, has drawn our attention to the decision of the Mysore High Court in *Rallis India Ltd. v. Commercial Tax Officer, Bellary* [1970] 26 STC 36 where the Mysore High Court has upheld the claim of a dealer u/s 10 who had refunded the tax after its collection in the light of the Supreme Court's decision in *Lakshminarasimhiah Setty's case* [1965] 16 STC 231. The Kerala High Court has also in *V. S. Narayanan Nair & Co. v. Union of India* [1971] 28 STC 312 followed (sic) the decision of *Rallis India Ltd.'s case* [1970] 26 STC 36 and upheld the claim of a dealer u/s 10 who had not collected the tax either by mistake or who has returned it after collection. The Andhra Pradesh High Court in *Reddy & Company's case* [1973] 32 STC 399 has also upheld the claim of a dealer on the ground that as the period in the case before the Andhra Pradesh High Court was subsequent to the decision of the Supreme Court in *Lakshminarasimhiah Setty's case* [1965] 16 STC 231 the assessee must have been under bona fide impression that no such tax could have been levied or collected in respect of such inter-State sales and the assessee had not collected the Central sales tax in respect of that period on the ground that no tax could have been levied or collected. In other words, the Andhra Pradesh High Court has held that the non-collection of tax after the decision of the Supreme Court in *Lakshminarasimhiah Setty's case* [1965] 16 STC 231 must be held to be non-collection by the dealer on the ground that no such tax could have been collected or levied. In the ultimate analysis it is a question which is to be determined on the facts and in the circumstances of each case.

28. The result, therefore, is that this reference should be accepted we answer the question referred to us in the negative, that is, in favour of the assessee and against the State Government. The State Government shall pay costs of this reference to the assessee.

29. Reference answered in the negative.