
(2010) 04 BOM CK 0127

In the Bombay High Court

Case No : Sales Tax Reference No. 2 of 2005

Zenith Computer Ltd.

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 01-04-2010

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 20(5), 33(3), 33(4), 33(5), 35(1)
Central Sales Tax Act, 1956 — Section 8(5), 9(2A)

Citation : (2011) 38 VST 168

Hon'ble Judges : V.C. Daga, J; K.K. Tated, J

Bench : Division Bench

Advocate : P.C. Joshi, for the Appellant; V.A. Sonpal, A Panel Counsel, for the Respondent

Judgement

K.K. Tated, J.—The Maharashtra Sales Tax Tribunal by its order dated February 21, 2004 made this reference under sub-section (2) of section 61 of the Bombay Sales Tax Act, 1959 on the following questions of law :

(a) Whether, on the facts and upon the circumstances and upon true interpretation of section 36(2)(c) of the Bombay Sales Tax Act, 1959, the Tribunal was justified in holding that the Deputy Commissioner of Sales Tax (Appeals III) can initiate the action for imposition of penalty for the first time ?

(b) Whether, on the facts and under the circumstances of the case, and upon proper interpretation of section 36(2)(c), Explanation (2), the Tribunal was correct in holding that the Deputy Commissioner (Appeals) has jurisdiction for imposition of penalty u/s 9(2A) of the Central Sales Tax Act, 1956 read with section 36(2)(c) of the Bombay Sales Tax Act, 1959 ?

(c) Whether, on the facts and under the circumstances of the case, the Tribunal was justified in holding that the penalty u/s 9(2A) of the Central Act read with section 36(2)(c) read with Explanation (2) can be levied, for the months for which returns were in fact filed in time ?

(d) Whether, on the facts and under the circumstances of the case, the Tribunal was justified in holding that the penalty u/s 9(2A) of the Central Act read with section 36(2)(c) can be imposed for the first time in appeal proceedings even when no tax was found due in appeal by the appellate authority ?

(e) Whether, on the facts and under the circumstances of the case, the Tribunal was justified in holding that the appellate authority had the original jurisdiction of imposing the penalty for the first time even though there was no concealment nor any tax determined to be payable in an order u/s 55 ?

The facts

2. The applicant herein is a manufacturer of computers and in the context of his business activities, the applicant is a registered dealer under the provisions of the Bombay Sales Tax Act, 1959 (hereinafter referred to as, "the Bombay Act") as also the Central Sales Tax Act, 1956 (hereinafter referred to as, "the Central Act").

3. The applicant was assessed for a period from May 1, 1986 to April 30, 1987 under the Central Act vide assessment order dated March 20, 1990 passed by the Assistant Commissioner of Sales Tax (Assessment) where-under the tax liability was determined in the sum of Rs. 5,03,095. It was subsequently enhanced to Rs. 5,38,304 under the rectification order dated September 1, 1990 passed by the assessing authority u/s 9(2) of the Central Act read with section 63 of the Bombay Act.

4. The extra demand as per rectification order in the sum of Rs. 2,95,904 was towards tax; Rs. 17,063 towards penalty u/s 36(3) and Rs. 2,25,377 was by way of interest u/s 36(3)(b) for delayed payment of tax. The total extra demand worked out in the sum of Rs. 5,38,304.

5. Being aggrieved by the said order passed by the assessing authority, the applicant filed an appeal before the Deputy Commissioner of Sales Tax (Appeals). The said appeal was admitted on part payment of Rs. 4,83,943. The said appeal was decided by the Appellate Deputy Commissioner vide its order dated June 24, 1991. The applicant during the course of appellate hearing produced some C forms on the basis of which the Deputy Commissioner granted some relief in the tax as also reduced penalty levied u/s 36(3), however, concessional tax rate of eight per cent u/s 8(5) of the Central Act in respect of the inter-State sales of computers made to educational institutions was denied holding that the computer could not be held to be a scientific equipment/instrument within the meaning of notification dated February 21, 1972 issued u/s 8(5) of the Central Act. The applicant's contention with regard to levy of interest u/s 36(3)(b) was upheld holding that differential tax duty as per the assessment/rectification order did not pertain to the period after April 21, 1987 as the provision relating to levy of interest did not have retrospective effect. The Deputy Commissioner thus fully deleted the levied amount u/s 36(3)(b) vide its order dated June 24, 1991 and partly allowed appeal awarding refund in the sum of Rs. 1,93,273.

6. The Deputy Commissioner while disposing of the appeal had a view that the appellant/assessee was liable to pay penalty u/s 9(2A) of the Central Act read with section 36(2)(c), Explanation (2) of the Bombay Act subject to affording an opportunity to show cause as to why penalty u/s 36(2)(c), Explanation (2) should not be levied for failure to submit the returns within the prescribed time for the months of May, June, July, August and October of 1986 and January, February and March of 1987.

7. The Deputy Commissioner, after hearing the appellant/assessee on penalty, passed a separate order dated June 24, 1991 directing payment of penalty in the sum of Rs. 82,000 u/s 9(2A) of the Central Act read with section 36(3)(c), Explanation (2) of the Bombay Act.

8. Being aggrieved by the aforesaid order the applicant filed a second appeal being No. 1169 of 1991 before the Tribunal.

9. In the aforesaid second appeal the applicant raised an objection about denial of benefit of concessional tax at eight per cent u/s 8(5) of the Central Act in respect of the inter-State sales of computers to the educational institutions. Similarly levy of penalty u/s 36(3) was also challenged.

10. The aforesaid second appeal was decided by the Tribunal by its judgment dated February 26, 1993 granting remission of penalty but denying benefit u/s 8(5) was affirmed.

11. Aggrieved by the above judgment, the applicant filed a Reference Application No. 26 of 1993, since the benefits u/s 8(5) *ibid*, were denied. The said reference application was allowed by the Tribunal. The questions arising from the judgment of the Tribunal were referred to this court for decision u/s 61 of the Bombay Act.

12. This court by its judgment dated February 24, 1995 (*Zenith Computers Ltd. v. State of Maharashtra* [1996] 101 STC 242) decided the questions in favour of the applicant/assessee holding that the computers were scientific equipments as contemplated by the relevant notification as such the benefit of the concessional tax rate at eight per cent of the Central Act was held legally admissible to the applicants in respect of the inter-State sales of computers effected in favour of the educational institutions.

13. The Tribunal while implementing the judgment of this court given in reference, passed an order dated April 4, 1998 in Second Appeal No. 1169 of 1991 allowed the concessional rate of eight per cent u/s 8(5) of the Central Act.

14. The applicant was required to carry another appeal before the Tribunal bearing Appeal No. 102 of 1992 against the separate order dated June 24, 1991 passed by the Appellate Deputy Commissioner u/s 36(2)(c), Explanation (2) wherein penalty was imposed. The said appeal was heard and dismissed by the Tribunal vide its judgment dated December 23, 1994 and order of penalty was affirmed.

15. The applicant challenged the aforesaid penalty order on various grounds contending that the Deputy Commissioner had no power and/or jurisdiction to levy penalty for the first time in exercise of appellate powers. It was also contended that the relevant assessment period ended on April 30, 1987 and that the assessee had not effected any transactions after April 21, 1987. It was also challenged on the ground that no extra tax was found payable while deciding the appeal against the order of assessment. Alternatively, it was urged that non-filing of returns for the months of October 1986, January and February 1987 was erroneously shown as cause for levying penalty in the sum of Rs. 60,770 especially, when returns were in fact filed within the statutory prescribed time-frame as such the amount of penalty to the extent of Rs. 60,770 was unwarranted and liable to be set aside. However, the Tribunal rejected all these contentions and dismissed the appeal filed by the applicant against the order of penalty.

16. Not satisfied with the above order passed by the Tribunal, the applicant filed Reference Application (Reference Application No. 8 of 1995) raising substantial questions of law arising from the said judgment and prayed for reference to this court u/s 61 of the Bombay Act. The said reference application was dismissed by the Tribunal by its judgment dated July 31, 1999.

17. The applicant not satisfied with the above order moved this court by filing an application under the first proviso to sub-section (1) of section 61 of the Bombay Act. The said application was allowed by this court by its order dated July 25, 2003 directing the Tribunal to draw a statement of case and refer the questions of law as prayed by the applicant to this court. Pursuant to the said order, the Tribunal referred the questions of law extracted in the opening part of this order for consideration of this court.

Submissions

18. The learned counsel Mr. Joshi for the applicant submitted that the relevant period involved in the present reference is May 1, 1986 to April 30, 1987. The assessment under dispute relates only to the proceedings under the Central Sales Tax Act, 1956. He submitted that the assessed dues being less than 20 per cent of the taxes paid along with the return as well as set-off available to it, the applicant/assessee was not within the net of Explanation (1) to section 36(2)(c) of the Bombay Act. Despite this clear legal position and fact that the interest provisions were introduced for the first time in the statute book with effect from April 21, 1987 as such, the Assistant Commissioner could not have levied interest u/s 36(3)(b) in addition to the imposition of penalty u/s 36(3) on the delayed payment of tax. He further submits that the levy of interest u/s 36(3)(b) was inserted for the first time on April 21, 1987 and, therefore, the Deputy Commissioner of Sales Tax (Appeals) had rightly deleted the entire amount of interest. Consequently the first appellate order resulted in refund of Rs. 1,93,279. However, the Appellate Deputy Commissioner while disposing of appeal could not have taken steps to substitute deletion of interest with that of

levy of penalty u/s 9(2A) of the Central Act read with section 36(2)(c), Explanation (2) of the State Act under separate order. The said appellate authority, thus could not have issued a show-cause notice dated June 5, 1991 to the applicant calling upon its Explanation by July 3, 1991. The applicant had no option but to submit its written objections which was submitted on June 19, 1991. In the alternative it was pointed out that some of the returns referred by him in the show-cause notice were admittedly filed well within prescribed time as such no penalty was called for those months.

19. Mr. Joshi, learned counsel for the applicant submitted that the penal provisions contained in section 36(2)(c) needs to be strictly construed. He further submitted that the appellate authority, i.e., Appellate Deputy Commissioner, did not have any power to impose penalty for the first time in exercise of appellate powers. He submits that plain reading of section 36(2)(c) of the Bombay Act shows that the power of imposing penalty during the material time, namely, the period up to April 21, 1987 was conferred only upon the Commissioner and not on any other authority much less the appellate authority u/s 55. In his submission, the expression while passing any order in any appeal or revision proceedings, it appears to the Commissioner makes it amply clear that the satisfaction has to be arrived at in any appeal by the Commissioner and not by the Appellate Deputy Commissioner that too for the first time.

20. Mr. Joshi, learned counsel for the applicant, further submitted that section 55 of the Bombay Act as it was holding the field during the material time provided for an appeal under sub-section (1)(b) to the Deputy Commissioner against the order passed by the Assistant Commissioner. The applicant accordingly approached the concerned Appellate Deputy Commissioner against the order levying interest u/s 36(3)(b) which, according to the appellant, was not leviable during the period prior to April 21, 1987 since this provision came on the statute book only with effect from April 21, 1987. It had no retrospective effect.

21. Mr. Joshi submits that sub-section (2) had provided an option to the applicant to approach the Tribunal or the Commissioner in second appeal against the order passed in the first appeal by the Assistant Commissioner or the Deputy Commissioner. As such the applicant was rightly in first appeal before the Deputy Commissioner. It was not a second appeal. Therefore, the provisions of sub-section (2) were not applicable in the facts of the case.

22. Mr. Joshi further submitted that sub-section (6) of section 55 was the only provision providing for the powers of the appellate authority. According to him, plain reading of sub-clauses (a) and (b) also supports the contention that the concerned appellate authority did not have any power to impose penalty for the first time under the expression confirm or cancel such order or vary it so as to either to enhance or to reduce the penalty employed in section 55 (6) (b). It did not confer power to impose a fresh penalty for the first time nor did it confer any power on the Appellate Deputy Commissioner to pass any penalty order while deciding the appeal. In support of this submission, Mr. Joshi, relied on the

decision of this court in the case of Indoswe Engineers (P.) Ltd. v. State of Maharashtra reported in [1996] 101 STC 177.

23. According to Mr. Joshi as per the aforesaid decision the first appellate authority, namely, the Appellate Deputy Commissioner, did not have any power to impose penalty for the first time nor was he justified in resorting to Explanation (2) to section 36(2)(c) for some alleged delay in submission of the return, especially when the assessing authority had passed the order u/s 33(3) on the basis of the returns for all months submitted by the applicant in time or may be after some delay. He mainly relied on paragraphs 12 and 13 of the said judgment which read as under (pages 187 and 188 in 101 STC) :

12. We now turn to the questions referred to us by the Tribunal. However, before we proceed to consider the same, it may be expedient to set out section 36(2)(c) of the Act which provides for imposition of penalty in certain cases. This sub-section, so far as relevant, at the material time, read as follows :

36 Imposition of penalty in certain cases and bar to prosecution.--

(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,--

(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.

Explanation.--(1) Where a dealer furnishing returns has been assessed by the Commissioner under sub-section (3) or (4) of section 33, or assessed under sub-section (3) of section 41, or reassessed under clause (b) of sub-section (1) of section 35, or in whose case an order has been passed u/s 55 or clause (a) of sub-section (1) of section 57, and the total amount of tax paid by the dealer for any year is found to be less than eighty per cent of the amount of tax as so assessed or reassessed or found due in appeal or revision, then, for the purpose of clause (c), he shall be deemed to have concealed the turnover, or knowingly furnished inaccurate turnover liable to tax, unless he proves to the satisfaction of the Commissioner, that the payment of a lesser amount of tax was not due to gross or wilful neglect on his part.

Explanation.--(2) Where a dealer fails without sufficient cause to furnish returns in respect of any period by the prescribed date, then for the purpose of clause (c), he shall be deemed (until the contrary is proved) to have concealed the whole turnover liable to tax as assessed or reassessed or determined in an order passed u/s 55 or clause (a) of sub-section (1) of section 57.

13. It is clear from a plain reading of the above provision that the gist of offence

is that (i) the assessee has concealed the particulars of any transaction or, (ii) knowingly furnished inaccurate particulars of any transaction liable to tax. On commission of such an offence being established, the assessee would be liable to a penalty to the extent of one and one half times the amount of the tax.

24. Mr. Joshi also has relied upon the judgment of this court in the case of H. B. Munshi, Commissioner of Sales Tax, Bombay v. Oriental Rubber Industries Pvt. Ltd. reported in [1974] 34 STC 113 to contend that the Deputy Commissioner of Sales Tax was not delegate of the Commissioner. He relied on the judgment in the case of Commissioner of Sales Tax, Maharashtra State, Bombay v. Malabar Products reported in [1995] 99 STC 546 (Bom) in support of his submission. In this case this court had an occasion to consider the expression prescribed date employed in sub-section (5) of section 33 to mean in the context of the scheme of the assessment u/s 33 and the various sub-sections thereof when read harmoniously to mean that the power under that sub-section can be exercised even on the basis of the late return as well. On the basis of this Mr. Joshi urged that the question of law referred to this court for its opinion u/s 61(2) needs to be answered in favour of the applicant and against the Revenue.

Per contra

25. Mr. V. A. Sonpal, A Panel Counsel submitted that the main question raised by the applicant in the present reference is whether the Deputy Commissioner hearing the appeal could issue show-cause notice and levy penalty for the first time in exercise of the appellate powers. He submitted that the Deputy Commissioner had all powers as provided in section 20(5) of the Bombay Act which were of the Commissioner. In other words his contention is that he is the Commissioner though the area of his operation was limited to the area for which he was appointed. As such, there was no need to delegate powers of the Commissioner to the Deputy Commissioner since those powers were bestowed on him by the statute itself. According to him, for the purpose of clear understanding of the reference, the Deputy Commissioner needs to be construed as the Commissioner. In support of this submission he relied on the judgment in H.B. Munshi, Commissioner of Sales Tax, Bombay v. Oriental Rubber Industries Pvt. Ltd. reported in [1974] 34 STC 113.

26. Mr. Sonpal further submitted that it is well-settled that the proceedings in appeal are extension of the original assessment proceedings and that the appellate authority had all the powers which were available to the assessing authority. According to him, while challenging the order of the Assistant Commissioner the Deputy Commissioner who passed the assessment order, had all the powers of assessment as if it was the revisional proceeding. He submitted that the powers of the appellate authority were co-terminus with the assessing authority. In support of this proposition, he relied on the judgment in the matter of Indoswe Engineers (P.) Ltd. Vs. State of Maharastra, . According to him, the powers of the appellate authority are co-terminus with the assessing authority and as such the power of assessment also vests in the appellate authority and,

therefore, the power of the Commissioner at the time of assessment as provided u/s 36(2)(c) are also available to the Deputy Commissioner while hearing the appeal.

Statutory provisions

27. The main question which needs to be considered in this reference is whether the Deputy Commissioner of Sales Tax (Appeals) is justified in imposing the penalty of Rs. 82,000 on the applicant for filing some of the tax returns late u/s 9(2A) of the Central Sales Tax Act, 1956 read with section 36(2)(c), Explanation (2) of the Bombay Sales Tax Act relevant for the period July 1, 1981 to April 30, 1987.

28. Charging section 36(2)(c) of the Bombay Sales Tax Act which was on the statute book during the period from July 1, 1981 to April 20, 1987 reads thus:

36. (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)...

(b)...

(c) has concealed the particulars of any transactions 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.

Explanation.--(1),

Explanation.--(2) Where a dealer fails without sufficient cause to furnish returns in respect of any period by the prescribed date, then, for the purpose of clause (c), he shall be deemed (until the contrary is proved) to have concealed the whole turnover liable to tax as assessed or reassessed or determined in an order passed u/s 55 or clause (a) of sub-section (1) of section 57.

29. As against the above section, let us see now the said section as amended with effect from April 21, 1987. In order to appreciate this, it is also necessary to extract the said section after its amendment with effect from April 21, 1987 which is as below :

36. (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 or rectification proceedings, it appears to the Commissioner or the Tribunal that such dealer has :

(a)...

(b)...

(c) failed to disclose any transaction of sale or purchase or has failed to show in the return the appropriate liability to pay tax or has claimed inaccurate deduction or drawback, set-off, refund, remission or reimbursement or has failed to disclose fully and truly all material facts necessary for the proper and correct quantification of the tax liability,

then the Commissioner or, as the case may be, the Tribunal, 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 or rectification proceedings, as the case may be :--

(i) to (iii)...

Explanation (1).--...

Explanation (2).--Where the dealer fails to furnish returns in respect of any period by the prescribed date, then for the purpose of clause (c), he shall be presumed (until the contrary is proved) to have failed to disclose the whole turnover of sales or purchases as assessed or reassessed or determined in an order passed u/s 55, 57 or 62.

Consideration

30. After hearing both sides at length, the substantial questions of law framed hereinabove are liable to be answered in favour of the applicant -assessee and against the respondent-Revenue for the reasons recorded herein.

31. Subsequent to the amendment of section 36(2) *ibid* with effect from April 21, 1987, the words rectification of the proceedings have been inserted in section 36(2) and clause (c) has been changed materially. In clause (c) before the amendment, the opening words used were has concealed the particulars of any transaction or knowingly furnished inaccurate particulars of any transaction. Now in the amended clause (c), the opening words are :

failed to disclose any transaction of sale or purchase or has failed to show any return the appropriate liability to pay tax or has claimed inaccurate deduction or draw back, set-off, refund, remission or reimbursement or has failed to disclose fully and truly all material facts necessary for the proper and correct quantification of the tax liability.

32. The above change in clause (c) *ibid* has made sea of difference. Before the amendment came into force on April 21, 1987 the provisions of Explanation (2) to section 36 *ibid*, which is a rule of evidence could not be resorted to unless there was charge against the assessee of concealing and knowingly furnishing inaccurate particulars of any transaction liable to tax and in that case initial onus lay on the Department and on discharge of the initial burden, the assessing authority with the help of Explanation (2) could charge the assessee of having concealed the whole turnover liable to tax as assessed or reassessed or

determined in an order passed u/s 55, 57 or 62 unless he proved to the satisfaction of the Commissioner that such failure was for sufficient cause.

33. In the case in hand, when the assessing authority passed the assessment order on September 1, 1990, the amended provisions were not on the statute book. Therefore, unless there was charge of concealment or knowingly furnishing inaccurate particulars of any transaction liable to tax, the levy of penalty by the assessing officer, taking resort to the provisions of section 36(2)(c) read with Explanation (2) as it stood before the amendment (which came into force with effect from October 1, 1995) was not possible. Therefore, it could not be said that there was any infirmity in the assessment order dated September 1, 1990 on account of the failure of the assessing authority to impose penalty u/s 36(2)(c) read with Explanation (2) of the State Act which required to be corrected by the Deputy Commissioner of Sales Tax (Appeals) while deciding the appeal preferred by the applicant. Hence, the Tribunal was not justified in holding that the appellate authority had jurisdiction in exercise of revisional powers to impose the penalty for the first time even though there was neither concealment nor any tax determined or found to be payable in the year u/s 55 of the State Act.

34. On the above premises, in the facts and under the circumstances of the present case, and on the correct interpretation of section 36(2)(c) of the Bombay Sales Tax Act, 1959 the Tribunal was not justified in holding that the Deputy Commissioner of Sales Tax (Appeals) in exercise of appellate powers had jurisdiction to initiate action for imposition of penalty for the first time.

35. In the above mentioned facts and circumstances, as per section 55 (6) (a) and (b), the appellate authority concerned did not have any power of imposing penalty for the first time and expression confer or cancel such order or vary it so as to either to enhance or to reduce the penalty employed in section 55(6)(b) neither covered the power to impose a fresh penalty for the first time nor did it confer any power upon the Appellate Deputy Commissioner to pass any order of penalty while deciding the appeal.

36. The Tribunal was not justified in holding that the penalty u/s 9(2A) of the Central Act read with section 36(2)(c) read with Explanation (2) can be levied in the present case for the months for which returns were in fact filed in time. The order u/s 33(5) can arise only in the case where no returns were filed at all and did not cover the case where the returns were filed and taken on record although there was some delay. In the present case also though some of the returns were submitted beyond prescribed time, the same were taken on record and turnover of the sale and purchase mentioned therein were considered while deciding the gross turnover of the sales and purchases, respectively, while passing the order of assessment u/s 33(3).

37. Similarly on the facts and circumstances of the present case, at the costs of the repetition we hold that the Tribunal was not justified in holding that the penalty u/s 9(2A) of the Central Act read with section 36(2)(c) could be imposed

for the first time in appeal proceedings even when no tax was found due in appeal by the appellate authority. The Appellate Deputy Commissioner had no power or jurisdiction to impose for the first time penalty that was never thought of nor imposed by the assessing authority.

38. Hence questions (a) to (e) referred by the Sales Tax Tribunal by its order dated February 21, 2004 are answered accordingly in favour of the assessee/appellant and against the Revenue.

39. Similarly the Tribunal was not correct in holding that the Deputy Commissioner (Appeals) had jurisdiction for imposition of penalty u/s 9(2A) of the Central Sales Tax Act read with section 36(2)(c) of the State Act on the facts and in the circumstances of the present case. On proper interpretation of section 36(2)(c) Explanation (2), the Tribunal in the facts and circumstances of the present case, was not justified in holding that the penalty, u/s 9(2A) of the Central Act read with section 36(2)(c) read with Explanation (2) could be levied for the months for which the returns were in fact filed in time. Similarly, on the facts and circumstances of the present case, the Tribunal was not justified in holding that the penalty u/s 9(2A) of the Central Act read with section 36(2)(c) could be imposed for the first time in the appeal proceedings even when no tax was found due in the appeal by the appellate authority. The Appellate Tribunal was also not justified in the facts and circumstances of the present case in holding that the appellate authority had revisional jurisdiction of imposing penalty for the first time even though there was no concealment nor any tax determined to be payable in the year u/s 55 of the State Act. Hence, the questions (a) to (e) referred by the Maharashtra Sales Tax Tribunal by its order dated February 21, 2004 are accordingly answered in favour of the applicant and against the Revenue.