Mec Corporation and another Vs V.G. Mahishkar, Assistant Commissioner of Sales Tax (Adm.), Bombay City Division, Range-IV, Bombay and others

Court: Bombay High Court

Date of Decision: Dec. 18, 1987

Acts Referred: Bombay Sales Tax Act, 1959 â€" Section 33, 37, 37(1), 46, 46(2)

Citation: (1988) 1 BomCR 440 : (1988) 90 BOMLR 28 : (1988) 70 STC 25

Hon'ble Judges: S.M. Daud, J

Bench: Single Bench

Judgement

S.M. Daud, J.
This petition under article 226 of the Constitution of India is aimed against an order purporting to fall u/s 57 of the Bombay

Sales Tax Act, 1959 (""BST Act"" or ""the Act"").

2. Petitioner No. 1 is a firm registered under the Partnership Act whereof Petitioner No. 2 is a partner. The firm is registered under the BST Act as

also the Central Sales Tax Act, 1956. For the Samvat Years 2033 and 2034, corresponding to 24th October, 1976 to 11th November, 1977 and

12th November, 1977 to 31st October, 1978 respectively, the partnership was assessed u/s 33 of the BST Act. This assessment was made by

the Sales Tax Officer, respondent No. 2. The said officer did not pass any order of forfeiture/penalty u/s 37 read with section 46 of the BST Act.

On a scrutiny the first respondent felt that during the Samvat years in question the petitioners had collected Rs. 2,24,405.00 and Rs. 93,522.29 as

sales tax. This collection was contrary to law and was therefore liable to be forfeited. A show cause notice calling upon the petitioners to reply as

to why the aforementioned sum should not be forfeited and a penalty levied, elicited a reply which may be summarised thus :

Petitioners were resellers of various manufacturers including M/s. Morarji Dorman Smith Pvt. Ltd. When purchasing goods, i.e., electrical goods,

from the said company, the petitioners were billed as per the price list, less a trade discount whereupon was calculated the excise duty and sales

tax payable by the seller. When reselling the goods some part of the trade discount was passed on by the petitioners to their purchasers. In order

not to let these purchasers know the exact profit margin, the petitioners were recovering from them a surcharge to reimburse themselves for the

amounts paid towards excise duty and sales tax. In other words, the petitioners were not recovering sales tax qua a tax payable by them to the

State but reimbursing themselves for the price paid by them to their seller. This could not be said to constitute a violation of the statute. In support

of this stand, the petitioners placed before the 1st respondent, affidavits and certificates issued by their customers. The material tendered and

submissions advanced did not carry conviction with the 1st respondent. He held that illegal collections had been made, that amounts collected had

to be forfeited and the full penalty of Rs. 2,000 levied. Consistent with these findings, the first respondent passed the forfeiture and penalty orders

impugned in this petition.

3. Petitioners reagitate the submissions advanced by them before the 1st respondent. It is contended by them that ""surcharge in lieu of sales tax

which was the expression construed by the 1st respondent in passing the impugned orders, did not mean that they had recovered from their

customers amounts payable as sales tax unto the State Government. While purchasing the goods from their purchaser they had paid components of

a price made up of amongst other items, excise duty, and sales tax. To recoup the price they could not but recover amounts paid by them under

the heads ""excise duty and sales tax"". At the same time they had passed on a part of the trade discount received by them from their seller. Not

willing to disclose their exact profit margin, they had calculated the surcharge on account of excise duty and sales tax on the net sale price charged

by them to their customers. This practice was common and known to be prevalent far and wide, in the trade. The affidavits and certificates

tendered by them conclusively established that there had been no infraction of section 46. Therefore, no order for forfeiture or penalty could be

imposed u/s 37 against them. This apart, respondent No. 2 had not taken any action against them u/s 37 read with section 46 of the BST Act. u/s

57 of the Act, the Commissioner could revise an order passed by a subordinate officer. He could not suo motu exercise the powers conferred

upon a Sales Tax Officer u/s 37 read with section 46 of the Act. For these reasons also the orders impugned were illegal. The said orders

deserved to be quashed and the respondents directed to refrain from enforcing the same.

4. The return submitted by the first respondent supports the impugned order. It is contended that the petitioners had made illegal collection of sales

tax, though sales made by them were not taxable and though the collection made by way of sales tax had not been passed on to the Revenue.

Section 46(2) of the Act had been breached and for that reason the forfeiture and penalty imposed on the petitioners was justified. The impugned

order was well within the purview of powers concerned upon the Commissioner u/s 57 of the Act. The petition was premature inasmuch as the

petitioners had preferred appeals to the Deputy Commissioner of Sales Tax (Appeals) which appeals were pending. The appellate authority had

directed the petitioners to make part payment as a condition precedent for the admission of appeals. Petitioners had not complied with that

condition precedent nor got the same vacated by further proceedings under Act. Therefore, they could not approach this Court in exercise of its

extraordinary jurisdiction.

5. The petition''s outcome rests on answers to the three issues formulated below :

(A) Whether article 226 is the proper remedy qua the facts and circumstances of the case ?

(B) Is the order of respondent No. 1 ultra vires section 57 of the Act ?

(C) Whether the order of forfeiture and penalty is illegal ?

6. At the threshold the petitioners have to meet the objection that recourse to the writ jurisdiction of this Court is unwarranted. Two points are

made in this connection. Firstly, that the petitioners have not exhausted the remedies provided by the Act before moving this Court and next, that

the court is incapacitated from hearing this petition because it gives rise to disputed questions of fact. Petitioners do not dispute the fact of their

having preferred an appeal against the impugned order, the appellate authority directing them to deposit a portion of the sum payable, their not

making the deposit and their not impugning the same in a further appeal provided by the Act. The deviation is answered thus : The existence but

not availing of a statutory remedy is no bar because (i) the petition challenges an order outside the scope of section 57 as also section 37 read with

section 46 and (ii) pursuit of the statutory remedy is made conditional upon petitioners being required to deposit a sizeable sum and in any case is

time-consuming; (iii) whatever be the position as to the applicability of article 226, once a petition is admitted, there is no going back to questioning

the correctness of the admission. So far as the first ground is concerned, it is easily refuted by the answer that an appellate authority is not

incompetent to rule upon the legality of the order. It was argued that the writ court should not decline to deal with a petition that raises a question

of general importance as does this one. The question or questions that arise are no more than those already covered by a plethora of authorities.

More important, Judges exercising the power conferred by article 226 have to be careful lest they encroach upon the High Court''s power under

an enactment like the BST Act. The second and third issues aforementioned could have been the subject of a reference u/s 61 of the Act. Such a

reference would have to be heard by a Division Bench and one assisted by a completed adjudication into facts by the duly constituted authorities.

There is no gainsaying the fact that a Bench hearing a reference is better placed than the writ Judge in the context of what is stated above. The next

justification advanced is equally slender. The condition of deposit of a part of the amount, if onerous, could have been impugned in a second

appeal as is provided for by the BST Act. In any case, the petitioners having preferred an appeal could not forsake that proceeding because a

condition of admissibility was found to be onerous. Conceivably, they could have questioned by a writ petition the imposition of the onerous

condition. The last justification offered is little better than presenting the court with a fait accompli and compelling it to decide the petition whatever

be the difficulties that arise on account of disputed questions of fact. This brings me to the plea about a writ petition being inappropriate where

disputed questions of fact arise. In this petition parties are not at all agreed on the factual position. Petitioners assert that recovery of surcharge in

lieu of sales tax recited in the bills issued to purchasers from them is a recoupment for price paid by them to their vendors. That the levy is on price

charged the purchasers, is explained away as a device to conceal the trade rebate received by them and parted with in different proportions to

their different purchasers. Respondent No. 1 refutes this assertion and wants me to read the bills as inclusive of a representation that the purchasers

were required to pay sales tax which the petitioners were recovering from them prior to the transmission of the same to the Government. The

explanation offered by the petitioners and the certificates/affidavits tendered in support thereof, is dubbed a concoction to retain ill-gotten gains.

The factual stands of the rivals cannot be easily resolved, and certainly not, within the limits of an investigation permitted in a proceeding under

article 226. As I shall show later practically every sale made by the petitioners in Samvat Years 2033 and 2034 will have to be examined to reach

a proper conclusion. That is neither possible nor desirable having regard to the parameters within which a writ court functions.

7. Having regard to the foregoing, a question arises as to what should be done : To go on with the petition because it is pending since 1984 as was

sought to be canvassed by Mr. Patil or to dismiss it in limine as was the suggestion made on behalf of the respondents by Mr. Jetly. Dismissing a

petition which has been pending since 1984 may sound harsh, but there would be no other course open when it is impossible to decide the same

having regard to the many deficiencies it suffers from. Fortunately, there is a way-out and that is to state the law applicable, and, this with reference

to the differing stands of the parties. To this aspect of the matter, I shall revert after a resolution of the second and third issues.

8. Mr. Patil contends that section 57 of the Act was not available to respondent No. 1, seeing that respondent No. 2 had not even touched upon

the assessee''s alleged violation of section 37. By taking recourse to section 57 in the absence of the relevant question having been even touched

upon, respondent No. 1 is said to have transgressed the limitations upon a revising authority. The scope of the revisional power was considered at

length by the Supreme Court in K. M. Cheria Abdulla & Co.''s case reported at [1965] 16 STC 875. The said decision was noticed in Swastik

Oil Mills Ltd.''s case reported at Swastik Oil Mills Ltd. Vs. H.B. Munshi, Deputy Commissioner of Sales Tax, Bombay, . In the latter case, it was

observed :

In fact, when a revisional power is to be exercised, we think that the only limitations, to which that power is subject, are those indicated by this

court in State of Kerala Vs. K.M. Charia Abdullah and Co., . These limitations are that the revising authority should not trench upon the powers

which are expressly reserved by the Acts or by the Rules to other authorities and should not ignore the limitations inherent in the exercise of those

powers.

Now, it will be necessary to notice section 57 of the Act. The portion of that section material for our purposes reads thus :

57. (1) .....

(a) the Commissioner may, of his own motion, call for and examine the record any order passed (including an order passed in appeal) under this

Act or the rules made thereunder by any officer or person subordinate to him, and pass such order thereon as he thinks just and proper.

The impugned order was preceded by a notice which followed a scrutiny of the assessment orders passed by respondent No. 2. The notice

recited that the dealer had collected surcharge in lieu of sales tax at 10 per cent in respect of sales claimed to be second sales in the return and

allowed as resales in the assessment order and that it was proposed to forfeit the surcharge as also levy a penalty. The portion from section 57

reproduced above does not contain any limitation. The Commissioner is given the jurisdiction to send for and examine the record of any order

passed under the Act or the Rules. The order has that to be of an officer or person subordinate to him. After the prescribed hearing, the

Commissioner is empowered to pass such order as he thinks ""just and proper"". The power of forfeiture and imposition of a penalty assuming the

same to be vested in the authority of the first instance, would yet be the exercise of a power by an officer or person ""subordinate"" to the

Commissioner as contemplated by section 57(1)(a). The second respondent''s omission to notice the alleged transgression of section 37 by the

dealer was deemed unjust and improper. Therefore, the Commissioner has the jurisdiction to correct the omission by exercise of revisional power.

That is the answer given by Mr. Jetly and he relies upon Commissioner of Sales Tax Vs. Jammatlal Prahaladrai, in support of this submission. That

was a decision arising upon a reference made at the instance of the Commissioner of Sales Tax to the M.P. High Court. The assessing authority

and the first appellate authority had not considered the imposition of a penalty upon the dealer. The Commissioner took the matter in suo motu

revision being of the view that the appellate order was erroneous and prejudicial to the interests of the Revenue. The penalty imposed by the

Commissioner in revision was impugned in an appeal to the Tribunal. The Tribunal set aside the order. Upon an application made, the Tribunal

made a reference to the High Court. The High Court held that the appellate authority while hearing an appeal and finding that the circumstances of

the case showed that the dealer was guilty of concealment of turnover, could take proceedings for imposition of penalty. By failing to take action

and refraining from imposing penalty, the appellate authority had passed an order which was liable to be revised by the Commissioner. A decision

more apposite is that in Commissioner of Sales Tax, Maharashtra State, Bombay v. Indian Tube Company Ltd. [1981] 47 STC 448 (Bom) . In

that case, the Sales Tax Officer did not include in the taxable turnover, the turnover of certain sales assessable to tax. The Division Bench speaking

through Madon, J. (as his Lordship then was), held that the Sales Tax Officer in not including the turnover of sales in the taxable turnover, had

acted with impropriety and irregularity in the assessment proceedings. The power of revision was one vesting the revisional authority with the

jurisdiction to examine the correctness, legality and propriety of the order under consideration. In a case giving rise to an examination of the

correctness, legality and propriety of an order, the revisional jurisdiction was attracted. Quoted in support of the view taken was an observation

from the Swastik Oil Mills Ltd. Vs. H.B. Munshi, Deputy Commissioner of Sales Tax, Bombay, :

Whenever a power is conferred on an authority to revise an order, the authority is entitled to examine the correctness, legality and propriety of the

order and to pass such suitable orders as the authority may think fit in the circumstances of the particular case before it.

The amplitude of the power being wide, the impugned order cannot be quashed on the ground that it is beyond the scope of revisional power

lodged in section 57 of the Act.

9. So far as the last question is concerned, the true facts will have to be ascertained by the statutory authorities. Petitioners had placed before

respondent No. 1 affidavits and certificates reciting the case set forth by the petitioners. Their assertion was that the bills issued by them in relation

to the sales when they pertained to the item of ""surcharge in lieu of sales tax"" related to nothing more than their seeking to recoup themselves for a

portion of the price paid by them to their vendors. That the surcharge was calculated upon the net price was only with a view to preserve a trade

secret, viz., conceal from the customer the exact rebate the petitioners had received from the manufacturers. Mr. Patil supports this submission by

pointing out that the bills issued in favour of the customers also recited a recovery made under the head ""surcharge (lieu of excise duty)"". It was

argued that this method of billing was only to enable the petitioners to recover the price which they had paid under different heads to their vendor,

and at the same time, prevent their customer from knowing the exact trade discount that vendor had granted to them. Some of the bills issued by

the petitioners to their customers have been placed on record and a scrutiny of any one of them will suffice to assess the contentions of parties. On

14th October, 1978, the petitioners issued a bill in the name of Schemes Engineers of Bombay. That party had purchased two items, the price

being Rs. 1,698. Therefrom, the party was given a discount at 15 per cent coming to Rs. 254.70. This brought the net price to Rs. 1,443.30. The

petitioners added to this net price two items of surcharge - first, in lieu of excise duty, and, the second, in lieu of sales tax. The surcharge in lieu of

sales tax was upon the sum representing the total of the net price plus excise duty. The customer was billed for a total sum of Rs. 1,667. The word

surcharge"" has been defined in the Chambers 20th Century Dictionary as ""an overcharge"", ""an extra charge"". Where this word is prefixed to items

like excise duty and sales tax, it can be understood in the sense petitioners wanted it to be understood. To that effect is the assertion of petitioners

as also the customers whose signatures are appended to the certificates and affidavits relied upon. The 1st respondent declined to go by this

material. According to him, the computation in the bills showed :

that it is not the intention of the assessee to include only the exact taxes and excise duties paid either by assessee or his vendor or vendors while

purchasing the goods from his vendors. Because from the unit price charged in the beginning of the Bill No. 658 dated 14th October, 1978 dealer

has deducted 15 per cent as discount and on the price so arrived, added 5 per cent excise duty. Thus discount varies from item to item, party to

party but surcharge in lieu of excise duty surcharge in lieu of sales tax is calculated at the rate of flat 5 per cent and 10 per cent therefore ..... it is

clear that the dealer does not reimburse himself the exact amount of sales tax paid by him on his purchases while effecting sales to his customers.

Because the actual purchase price is always less than whatever advantages are passed on to the customers by way of variable discounts. Thus he

collects amounts in excess of taxes paid on purchases.

Simply put, respondent No. 1 negatived the plea of the petitioners that they were recouping themselves for the price paid to their vendor who had

billed them under different heads, and had in their turn, billed their customers under different heads, and at the same time, preserved a trade secret.

The law on the subject was laid down long ago [see Mather and Platt Ltd. Vs. State of Maharashtra,]. That judgment was delivered by the

Division Bench upon two references made by the Sales Tax Tribunal at the instance of dealers. The sales in those cases were covered by two

types of bills, one reciting ""3 per cent sales tax"" and the other ""surcharge on account of sales tax paid by us"". The judgment of the Bench was

delivered by Chief Justice Madon and his observations made on the occasion, to the extent relevant, were thus :

The bill which is on record in Sales Tax Reference No. 10 of 1978 describes the amount collected as ''3 per cent surcharge on account of sales

tax''. There is nothing to show in this bill that this is the amount which the applicants had themselves paid to their vendors in respect of the amount

of sales tax which the vendors were liable to pay to the Government on their sales to the applicants ..... There is nothing on the face of the bill to

show that this amount was to reimburse the applicants in respect of the amount of sales tax recovered from them by their vendors. On the contrary,

it would lead a person to believe that this surcharge represents the amount which the applicants would be liable to pay to the Government by way

of sales tax .... The real question is what representation the applicants made to their customers. Such representation is contained in the bills issued

by the applicants, and the representation contained therein is that this amount was the amount of sales tax which the applicants were liable to pay to

the Government while in fact they were not liable to pay any sales tax to the Government. This was thus a clear violation of section 46(2) and the

amount so collected was, therefore, liable to be forfeited u/s 37(1) and was thus rightly forfeited.

Dealing with the other type of bill, His Lordship observed :

Further, even in respect of the type of bill in which the amount is collected by the applicants on account of sales tax paid by them, such amount is

calculated not on the actual price paid by the applicants to their vendors, but on the price charged by them to their own customers. Here too the

amount collected by the applicants is thus in excess of the amount paid by them to the vendors. The question, therefore, which falls to be decided

is, whether in such cases what is required to be forfeited is only the excess amount or the entire amount collected by the applicants for there is no

dispute that had the applicants in these cases collected from their customers the exact amount recovered from them by their own vendors such

amount would not be liable to forfeiture .... If a purchaser from whom his seller has so recovered the amount of tax recoups such amount paid by

him from his own purchaser when he comes to resell the goods, he is not prohibited by the Act from doing so, so long as he does not represent to

his own purchaser that this is the amount of tax which he was liable to pay by way of tax. In thus recouping himself he is really increasing his sale

price with a view to reimburse himself for an extra item of cost. There is no prohibition under the Act against a reseller thus reimbursing himself by

increasing his selling price and in our opinion whether he does so by increasing the selling price or by showing the amount by way of tax collected

from him by his own vendor as a separate item in the bill makes no difference. So long as the purchaser is not led to believe that the amount

charged to him is the amount which the seller would be liable to pay as tax to the Government when he is not liable to pay it, there would be no

contravention of section 46(2). In the type of bills we are considering the representation made by the applicants was that their vendors had

collected from them certain amount by way of sales tax which their vendor were liable to pay to the Government and they, that is, the applicants

were reimbursing themselves in respect of such amount. However, here the applicants have recovered from their customers a larger amount than

the amount paid by them to their vendors on account of sales tax. This excess amount was not payable to way of tax and in the particular facts and

circumstances of this case and the type of bills we have before us, such excess amount must be taken to be an amount collected by way of tax

when in fact it was not payable by way of tax. It is, therefore, only the excess amount so collected by the applicants which can be said to be in

contravention of section 46(2) and not the entire amount so collected by them.

To the extent the bills recited the item of surcharge in lieu of sales tax, the customer was put on notice that he was being required to pay an extra or

overcharge. The representation was not that the recovery was by way of tax payable by him to the Government which the petitioners were

recovering from him for eventual transmission to the Government. After all, it stands to reason that the petitioners who had paid their vendor a

certain price made up of different components such as catalogue price minus the trade discount, and, that the net price so arrived at, being

enhanced by increases on account of excise duty and sales tax, would recoup themselves, by passing on whatever burden could be passed on to

their customers. Mr. Patil points to the bills made out in favour of customers showing a surcharge on account of excise duty as supporting his

stand. Mr. Jetly''s answer is that the Excise Act may not be containing a provision similar to sections 37 and 46 of the Sales Tax Act and that the

point at issue will have to be decided on the basis of what the BST Act says. This is a somewhat extreme stand and when judging a situation, one

has to go by probabilities. The bills made out in favour of the petitioners by their vendors indicate that what the vendors were paid, represented a

total made up of different heads. These heads included the items of excise duty and sales tax. Petitioners are stockists of different manufacturers

and receive a discount from their principals. When dealing with their customers, some part of the discount is passed on by the petitioners to these

customers. The sales are in respect of goods which have what is known as a catalogue price. If the petitioners passed on a part of the trade

discount and did not recoup themselves for the charges on account of excise duty and sales tax, they would be incurring heavy losses. From this, it

follows that to the extent the surcharge in lieu of sales tax corresponds to a reimbursing of the amount paid by them to their vendor on that account,

the petitioners are not contravening section 37(1)(a)(ii) of the Act. It was argued that the bills as framed gave the impression of the petitioners

recovering sales tax from their customers and this because of their being liable to pay the same to the State Government, when in fact, the

petitioners were not so liable. Now, no party is to be penalised for mistakes in preparation of bills. In Mather and Platt Ltd. Vs. State of

Maharashtra, the first type of bill was the only evidence before the court, thus compelling it to hold that a false representation had been made to the

purchasers from the dealer. That is not the position here. Petitioners have documentary evidence in the sense of the bills issued in their favour by

their vendors and also the bills issued by them in favour of their purchasers. Next, it is not as if the word ""surcharge"" is susceptible of only one

meaning, viz., petitioners were recovering a sum by way of tax. As said earlier, the word ""surcharge"" appearing in the bills lends itself to the

interpretation of being an overcharge, an extra charge made by the petitioners to reimburse themselves for a component of the price paid by them

to their vendors. This however does not mean that the petitioners'' version has to be accepted in its entirety. In so far as the surcharge in lieu of

sales tax is calculated on the total of the net price plus the excise duty, it cannot be said that the petitioners are recovering no more than component

of the price paid by them to their vendors. To the extent, the sales tax is calculated in excess of the amount paid by them towards sales tax to their

vendors, there is a contravention of section 37(1)(a)(ii). It is the recovery of the excess amount collected by the petitioners which amounts to a

contravention of the law, and therefore, liable to forfeiture. This is the law as expounded in Mather and Platt Ltd. Vs. State of Maharashtra, and,

as applied to the facts of the present case, amounts to this :

1. Mere recovery of surcharge in lieu of sales tax is not a contravention of the law, provided however that the amount so recovered corresponds to

the amount paid by way of sales tax by the petitioners to their vendors.

2. To the extent there be excess, the petitioners have contravened the law. The excess amount so recovered shall be liable to forfeiture.

The first respondent will have to re-ascertain the factual position and them apply the law as set out above. The order passed by him will therefore

have to be quashed and the proceedings remitted back to him for a fresh determination in accordance with the observations made above and the

law applicable. Rule in these terms made absolute, with parties being left to bear their own costs.

10. Order accordingly.