
(1997) 09 BOM CK 0042

Bombay High Court

Case No: Sales Tax Reference No. 20 of 1995

Commissioner of Sales
Tax, Maharashtra State
Bombay

APPELLANT

Vs

Bharat Heavy
Electricals

RESPONDENT

Date of Decision: Sept. 5, 1997

Acts Referred:

- Bombay Sales Tax Act, 1959 - Section 61(1)

Hon'ble Judges: Pratibha Upasani, J; B.P. Saraf, J

Bench: Division Bench

Judgement

DR. B.P. Saraf, J.

By this reference u/s 61(1) of the Bombay Sales Tax Act, 1959 ("the Act"), made at the instance of the Revenue, the Maharashtra Sales Tax Tribunal has referred the following question of law to this Court for opinion :

"Whether, on the facts and in the circumstances of the case and on a true and correct interpretation of section 36(3) read with section 32(3) and section 38(3) of the Bombay Sales Tax Act, 1959, the honourable Tribunal was justified in law in holding that no penalty u/s 36(3) of the Bombay Sales Tax Act, 1956 is legally leviable on the late payment of extra tax dues according to the revised return, which is filed late ?"

2. This reference pertains to the period April 1, 1982 to March 31, 1983. The facts of the case giving rise to this reference are in a narrow campus.

The assessee M/s. Bharat Heavy Electricals Limited is a Government of India undertaking. During the quarter ending June 30, 1982, it sold certain goods to M/s. Rashtriya Chemicals and Fertilizers Limited ("R.C.F.L."), which is also a Government of India undertaking. In the return submitted by the assessee under the Bombay Sales Tax

Act, 1959 ("the Act") for the quarter ending June 30, 1982, these sales were claimed to be sales supported by form 15. However, later R.C.F.L. refused to give form 15 to the assessee. The assessee, therefore, filed revised returns for the quarter ending June 30, 1982 showing the above sales as taxable and paid the sales tax due thereon as per the said revised return. The original return for the quarter had been submitted by it on July 17, 1982 and the tax due as per that return amounting to Rs. 19,587 was also paid within the prescribed time. The revised return was filed on January 18, 1985 and the additional tax due as per the revised return amounting to Rs. 28,276 was paid on that very day. The Sales Tax Officer imposed penalty u/s 36(3) of the Act on the extra amount paid by the assessee as per the revised return amounting to Rs. 28,276. The penalty was calculated for the period from July 17, 1982, the date of submission of the original return, to January 18, 1985, the date when the revised return was submitted. The penalty so imposed was Rs. 17,200. The assessee appealed to the Assistant Commissioner of Sales Tax (Appeals) against the above order of the Sales Tax Officer. The Assistant Commissioner dismissed the appeal. The assessee went in further appeal to the Maharashtra Sales Tax Tribunal ("the Tribunal"). It was contended on behalf of the assessee before the Tribunal that the assessee having paid the extra amount due from it as per the revised return within the prescribed time, no penalty could be imposed u/s 36(3) of the Act. The Tribunal accepted this contention of the assessee and held that no penalty was leviable u/s 36(3) of the Act. Hence, this reference at the instance of the Revenue.

3. Mr. R. V. Desai, learned counsel for the Revenue, submits that u/s 36(3) of the Act, the Revenue is entitled to impose penalty on the excess amount that was due on the basis of the revised return from the date of submission of the original return till the date of payment. According to him, the excess amount should be treated as the amount due as per the original return and the delay in payment of the same construed as delay in payment of the tax due as per return.

4. We have carefully considered the above submission. However, on a careful perusal of relevant provisions of the Act, we find it difficult to accept the same. Section 36 of the Act provides for imposition of penalty in certain cases. Sub-section (3) thereof deals with penalty for failure, without reasonable cause, to pay tax within the time required by or under the provisions of the Act. Sub-section (3), as it stood at the material time, so far as relevant, reads :

"(3) If a dealer does not, without reasonable cause, pay tax within the time he is required by or under the provisions of this Act to pay it, the Commissioner may, after giving the dealer an opportunity of being heard, by an order in writing, impose upon the dealer by way of penalty, in addition to the amount of tax a sum equal to -

(a) one and one half per cent of the amount of tax for each month for the first three months, after the last date by which the dealer should have paid that tax, and

(b) two per cent of the amount of tax for each month thereafter, during the time the dealer continues to make default in the payment of tax :

Provided that, the Commissioner or any appellate or revisional authority, may remit the whole or any part of the penalty payable in respect of any period."

On a reading of the above provision, it is clear that penalty can be imposed upon a dealer under the above provision only if he does not pay tax, within the time required under the provisions of the Act. If tax is paid within the time required under the provisions of the Act, question of imposition of penalty under this provision cannot arise. To find out as to when the tax is payable, we may refer to section 38 of the Act. Section 38, so far as relevant, reads :

"38. Payment of tax and deferred payment of tax, etc. - (1) Tax shall be paid in the manner herein provided, and at such intervals as may be prescribed.

(2) A registered dealer furnishing returns as required by sub-section (1) of section 32, shall pay into a Government treasury, in such manner and at such intervals as may be prescribed, the amount of tax due from him for the period covered by a return along with the amount of penalty payable by him u/s 36.

(3) A registered dealer furnishing a revised return in accordance with subsection (3) of section 32, which revised return shows that a larger amount of tax than already paid is payable, shall first pay into a Government treasury the extra amount of tax."

Sub-section (4) of section 38 provides for payment of taxes in cases other than those covered by sub-sections (1), (2) and (3). Such taxes are required to be paid by such date as may be specified in a notice issued by the Commissioner for that purpose, being a date not earlier than thirty days from date of service of the notice.

It is clear from the reading of section 38, in particular, sub-section (3) thereof, that the amount due as per the revised return submitted in accordance with sub-section (3) of section 32 of the Act, has to be paid before the submission of the revised return.

Section 32 of the Act deals with returns, revised returns, etc. Sub-section (1) of section 32 requires every registered dealer to furnish returns by such dates and to such authority as may be prescribed. It provides :

"Every registered dealer shall furnish returns for such period, by such dates, and to such authority, as may be prescribed."

Sub-section (3) of section 32 provides for submission of revised return. It reads :

"(3) If any dealer having furnished returns under sub-section (1) or (2), discovers any omission or incorrect statement therein, he may furnish a revised return before the expiry

of three months next following the last date prescribed for furnishing the original return."

Under rule 22 of the Bombay Sales Tax Rules, 1959 ("Rules"), a registered dealer is required to furnish quarterly returns on or before the last day of the month, immediately succeeding. It is clear from a conjoint reading of the above provisions that it is obligatory on the part of a registered dealer to furnish quarterly returns before the last day of the month immediately succeeding. Failure to do so entails penal consequences. But that is not so in case of revised returns. Furnishing of "revised returns" under sub-section (3) of section 32 is voluntary. Sub-section (3) of section 32 is merely an enabling provision enacted with a view to affording an opportunity to a dealer who had made a return which he subsequently discovers contains any omission or incorrect statement to supply the omission or correct the incorrect statement within three months from the last date prescribed for furnishing the original return. If he avails of this opportunity and submits a revised return, u/s 38(3) he has to pay the additional tax that may be payable on the basis of such revised return before submission thereof. If he does not pay it, he may be liable to penalty u/s 36(3) of the Act at the rates specified in clauses (a) and (b) thereof from the last date by which he should have paid the same.

5. In the instant case, the revised return was submitted by the assessee on January 18, 1985. The amount due as per the said revised return, was admittedly, paid before the submission of the same. That being so, question of levying penalty u/s 36(3) of the Act cannot arise, because penalty can be imposed u/s 36(3) of the Act, only if a dealer fails to pay the additional tax due as per the revised return within the time he is required by or under the provisions of the Act to pay it. Under Sub-section (3) of section 38, such tax had to be paid before submission of the revised return. Penalty has also to be calculated from such date. In this case, tax due as per revised return has been paid by the assessee within the time required u/s 38(3). No penalty therefore can be imposed u/s 36(3) of the Act.

6. Moreover, even if there is a default or delay in payment of tax due as per revised return, penalty can be imposed only from the date of submission of the revised return till the date of payment. It cannot be computed from the date of submission of the original return. It may be pertinent to note that independent provisions have been made in the Act for return and revised return and different dates have been prescribed for payment of tax due as per the same. In case of original return, tax is payable before the submission of such return. In case of revised return, the relevant date is the date submission of the revised return. If a dealer fails to pay the tax, he is liable to penalty from the date when the tax was payable under the provisions of section 38 and not from the date of submission of original return. It is thus clear that section 36(3) is not attracted in this case, and no penalty is leviable.

7. The problem can also be looked at from a slightly different angle. Sub-section (3) of section 32, which enables a dealer to submit a revised return also contains a time-limit for submission of the same, and that time-limit is "before the expiry of three months next

following the last date prescribed for furnishing the original return". A revised return can be submitted only within that time. A revised return submitted beyond that time is not a revised return under sub-section (3) of section 32 and no action can be taken for non-payment or delayed payment of tax due as per such return. That being so, no penalty can be levied u/s 36(3) of the Act for non-payment or delayed payment of the tax due as per such return. In the instant case, admittedly, the revised return was filed after more than 2 years and 7 months of the last date prescribed for submitting the original return. In that view of the matter also, levy of penalty u/s 36(3) of the Act for alleged delay in payment of tax due as per such revised cannot be sustained.

8. Having regard to the above discussion, we are of the clear opinion that in the instant case, the tax due as per the revised return, admittedly, having been paid before the submission of the revised return, no penalty is leviable u/s 36(3) of the Act. The Tribunal was correct in coming to such a conclusion.

9. We, therefore, answer the question referred to us in the affirmative and in favour of the assessee.

10. Reference disposed of accordingly. No costs.

11. Reference answered in the affirmative.