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(1986) 02 BOM CK 0041

Bombay High Court

Case No: Sales Tax Reference No. 7 of 1980

Gwalior Investment Co. Pvt. Ltd.	APPELLANT
Vs	
The State of Maharashtra	RESPONDENT

Date of Decision: Feb. 13, 1986

Acts Referred:

- Bombay Sales Tax Act, 1959 - Section 2(37), 3, 32, 33, 33(1)

Citation: (1986) 62 STC 363

Hon'ble Judges: Sujata V. Manohar, J; M.H. Kania, J

Bench: Division Bench

Judgement

Sujata V. Manohar, J.
This is a reference u/s 61(1) of the Bombay Sales Tax Act, 1959. The reference relates to assessment for the period 7th July, 1970, to 31st March, 1971. An assessment order for the above period was made u/s 33 of the Bombay Sales Tax Act, 1959, on 17th February, 1972 by the Sales Tax Officer "C" Ward. In the order, the right to levy penalty u/s 36(2)(c) was reserved because for this assessment period of about nine months, the tax paid by the applicants was less than 80 per cent of the amount of tax assessed. Thereafter a show cause notice dated 18th April, 1972 was issued by the Sales Tax Officer for levy of penalty u/s 36(2)(c). The applicants replied to this notice on 28th April, 1972. Thereafter the Sales Tax Officer dropped the penalty proceedings on 18th April, 1973. A similar show cause notice was again issued on 18th August, 1973. However, penalty proceedings were again dropped in respect of this show cause notice.

2. Ultimately the Assistant Commissioner, Sales Tax, issued a notice dated 20th December, 1973 u/s 57 of the Bombay Sales Tax Act, 1959 to revise the order of the Sales Tax Officer dated 18th April, 1973. In these proceedings by his order dated 15th April, 1974, the Assistant Commissioner levied a penalty of Rs. 450 on the applicants.

The applicants preferred an appeal from this order. In appeal, the order of the Assistant Commissioner was confirmed by the Deputy commissioner on 11th August, 1976. The applicants preferred a revision application against the order of the Deputy Commissioner to the Sales Tax Tribunal. The Tribunal referred the question relating to interpretation of the relevant provisions of section 36(2)(c) arising in this case to a Special Bench. The Special Bench held that under Explanation (1) of section 36(2)(c) of the said Act penalty can be levied for a part of the year also. On this finding, the Tribunal dismissed the revision application preferred by the applicants.

3. From the decision of the Tribunal dated 4th December, 1978, the following question has been referred to us u/s 61(1) of the Bombay Sales Tax Act, 1959 :

"Whether the Tribunal, in the facts and circumstances of the case, was justified in holding that the penalty u/s 61(2)(c) read with Explanation (1) of the Act can be levied for a part of the year when the assessment is for a part of the year ?"

Under section 36(2)(c) of the Bombay Sales Tax Act, it is provided as follows :

"36(2). If, while assessing or reassessing the amount of tax due from a dealer under any provisions of this Act or while passing an order in any appeal or revision proceedings, it appears to the Commissioner that such dealer -

(a) * * *

(b) * * *

(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."

Under Explanation (1) therefore, where the total amount of tax paid by the dealer for any year is found to be less than 80 per cent of the amount of tax assessed, he shall be deemed to have concealed the turnover, or knowingly furnished inaccurate turnover liable to tax for the purpose of clause (c) of section 36(2). He would, therefore, become liable to penalty as provided in that sub-section. We are not concerned with the other provisions of the explanation in the present case.

4. The Explanation has been interpreted by the department to cover cases where the assessment pertains to a part of the year. Penalty is levied on the basis of the tax paid being less that 80 per cent of the tax assessed for an assessment period which is a part of the year. It is the contention of the respondents that the phrase "the total amount of tax paid by the dealer for any year" would include the total amount of tax paid by the dealer for any part of the year.

5. To examine the validity of this contention it is necessary to refer to some of the provisions of the Bombay Sales Tax Act, 1959.

6. Section 2, sub-section (37) defines "year" as follows :

"2(37). "year"

(a) means the financial year;

(b) in relation to any particular registered dealer for the purpose of this Act (except section 3 and Chapter IV thereof) means the year by reference to which the accounts of that dealer are ordinarily maintained in his books, but the dealer may by written declaration made by him in this behalf opt for the financial year :"

7. u/s 3 of the Bombay Sales Tax Act, 1959, every dealer whose turnover of all sales or of all purchases made during the year ending on 31st March, 1959, or the year commencing on the 1st day of April, 1959, has exceeded or exceeds the relevant limit specified in sub-section (4) shall be liable to pay tax under this Act on his turnover of sales and on his turnover of purchases made on or after the appointed date. The incidence of tax, therefore, is on the turnover of sales or purchases made during the year.

8. u/s 32, however, every registered dealer shall furnish returns for such period, by such dates, and to such authority as may be prescribed. Section 33 deals with assessment of taxes. Section 33(1) provides as follows :

"33 (1). The amount of tax due from a dealer liable to pay tax shall be assessed separately for each year during which he is so liable :

Provided that, the Commissioner may, subject to such conditions as may be prescribed, and for reasons to be recorded in writing, assess the tax due from any dealer during a part of a year :

Provided further that, when a registered dealer fails to furnish any return relating to any period of any year, buy the prescribed date, the Commissioner may, if he thinks fit, assess the tax due from such dealer separately for different parts of such year."

Under section 35(1), if, after a dealer has been assessed u/s 33 or u/s 4 or u/s 41, for any year or part thereof, the commissioner has reason to believe that any turnover of sales or turnover of purchases of any goods has in respect of that year or part thereof escaped assessment, the Commissioner may reassess the turnover escaping assessment as provided in that section. Section 36 deals with imposition of penalty. The relevant parts of this section have already been set out earlier.

9. If one looks at these provisions of the Bombay Sales Tax Act, 1959, it is clear that a "year" is defined to means the financial year, or the accounting year of the registered dealer concerned, as the case may be. The incidence of tax is on the turnover of sales or purchases during the year. Assessment of tax is also for the year. The Commissioner may however assessee tax for a part of part of the year. Returns may also be filed for a part of the year if so prescribed in various sections of the Act where, e.g., returns have to be filed or assessment made for a part of the year the relevant section expressly so provide. Thus for example, u/s 33 there is a power to assess the tax due from a dealer during a part of the year. Section 35 which deals with reassessment expressly refers to the turnover in respect of "that year or part thereof" which has escaped assessment. The Act, therefore, when it uses the term "year" refers to the financial year or the year by reference to which the accounts of a given dealer are ordinarily maintained in his books as specified in section 2, sub-section 37. Where a section covers a part of a year also, an express provision is made to that effect, as for example, in sections dealing with assessment or reassessment.

10. The explanation to section 36(2)(c) refers to the total tax paid during the year. The plain language of the explanation, therefore, does not cover a art of the year. Under the explanation in cases where the total amount of tax paid by the dealer for any year is found to be less than 80 per cent of the amount of the tax so assessed, he is deemed to have concealed the turnover or knowingly furnished inaccurate particulars of turnover. This attracts penal provisions of section 36.

11. It was submitted by Mr. Thakore, learned counsel for the respondents, that the Explanation should be interpreted in such a manner as to further legislative intent. According to him legislative intent will be furthered only if the Explanation is so interpreted as to mean that penal provisions will be attracted when tax paid for a part of the year is less than 80 per cent of the tax assessed for that part of the year. He submits that the Explanation should not be interpreted on the basis of its plain language. There is no need to go into the wider question whether the provisions in a taxing statute can be widely construed on the basis of any supposed legislative intent. Because we do not see how any legislative intent can be furthered by interpreting the Explanation in the manner suggested by the respondents.

12. Section 3 of the Act imposes incidence of tax on the basis of the entire year although under sections 32, 33 and 35 a provision can be made for a registered dealer furnishing returns for a part of the year and for assessment or reassessment being made for a part of the year. In the case of penalty however, u/s 36(2)(c), the Explanation makes it clear that the tax assessed and the tax paid for the entire year should be taken into account for the purpose of levying penalty. This does not seem to be in any manner contrary to any legislative intent of levying penalty.

13. It was submitted in this connection by Mr. Thakore that in cases where an assessment cannot be made of the entire year the legislative intent would be defeated because penalty cannot be levied. This submission proceeds on a wrong interpretation of the Explanation. There may be cases where assessment will have to be made for a part of the year, for example, when the assessee-firm is closed down in the middle of the year. In such cases assessment will have to be made for a part of the year. But in such a case also if the total amount of tax paid during the year is less than 80 per cent of the amount of tax assessed, penalty may be levied u/s 36(2)(c). Penalty, however, will have to be levied at the end of the year [as defined in section 2(37)] because that is when the tax paid and tax assessed during the year will be ascertained.

14. The language of the Explanation also supports this interpretation. Penalty proceedings may be initiated in the course of assessment or reassessment which may be for a part of year. But tax assessed and paid during the year will have to be taken into account before invoking the deeming provisions of the Explanation.

15. The first part of the Explanation refers to a dealer furnishing returns who has been assessed or reassessed under the various sections is set out in the Explanation. This part does not prescribe that the assessment or reassessment should be for the entire year. There is, therefore, no requirement of a yearly assessment or reassessment. The second part of the Explanation sets out that the total amount of tax paid by the dealer of any year should not be less than 80 per cent of the amount of tax so assessed or reassessed. In other words before the penalty is levied the department has to consider the tax paid by the dealer for the entire "year" as defined in section 2(37) as also the tax assessed or reassessed for period or periods covering the entire "year". In other words even if the assessment or reassessment is for a part of the year, penalty can be levied only after the tax paid and the tax assessed or reassessed for the entire year are ascertained. Penalty proceedings may be initiated at the stage of assessment or reassessment. The Explanation does not prevent initiation of penalty proceedings. But penalty cannot be levied unless it is ascertained whether the tax paid by the dealer for the year is less than 80 per cent of the tax assessed for that year. Even in cases where the assessment cannot be (made) for the entire year because the dealer has not carried on business for the entire year, or for any other such reason, it is possible to levy a penalty under the Explanation.

Because in the unlikely event of the assessment proceedings pertaining to that period being competed before the end of that year, penalty proceedings may be initiated but they should not be completed until the end of that year. If the tax paid during that year is found to be less than 80 per cent of the tax assessed, penalty may be levied thereafter. There is, therefore, no question of any legislative intent being defeated by interpreting the Explanation on the basis of the language used. In our view there is also no ambiguity in the language of the Explanation. The tax paid during the year and the tax assessed during the year should be considered while applying the deeming provisions of the Explanation.

16. It was contended by the respondents that in the present case even if the tax assessed and the tax paid for the entire year are taken into account, it would make no difference to the penalty proceedings because the tax assessed and the tax paid in the rest of the year, that is to say, from 1st April, 1970, to 7th July, 1970 is nil. The respondents, therefore, submit that the finding of the Tribunal should not be disturbed. However, in a reference u/s 61(1) of the Bombay Sales Tax Act we have to consider the question as submitted to us. We cannot go into other facts which are not before us and pronounce upon the findings of the Tribunal. The question which is before us is whether a penalty u/s 36(2)(c) read with Explanation (1) of the Act can be levied for a part of the year when the assessment is for a part of the year. Our answer is in the negative and in favour of the assessee for the reasons set out earlier.

17. When the reference goes back to the Tribunal it will be open to the Tribunal to decide the matter in accordance with law. If it is open to the Tribunal to institute or direct institution of any fresh penalty proceedings it may do so, if it thinks fit to do so in the circumstances of the case. The question is, therefore, answered in the negative, that is to say, in favour of the assessee and against the department.

18. The respondents to pay to the applicants costs of the reference. The deposit of Rs. 100 made before the Tribunal to be refunded to the applicants.

19. Reference answered in the negative.