

(1976) 02 BOM CK 0046

Bombay High Court

Case No: S.T.R. No. 5 of 1972

The Commissioner of Sales Tax

APPELLANT

Vs

Modern Mercantile Works

RESPONDENT

Date of Decision: Feb. 16, 1976

Acts Referred:

- Bombay General Clauses Act, 1904 - Section 7, 77(1), 77(3)
- Bombay Sales Tax (Amendment) Act, 1959 - Section 19(1), 34, 76, 77
- Bombay Sales Tax Act, 1953 - Section 16(4)

Citation: (1976) 5 CTR 372

Hon'ble Judges: Madon, J; Kania, J

Bench: Division Bench

Advocate: K.H. Bhabha, for the Appellant; H.K. Shah, for the Respondent

Judgement

Madon, J.

This Reference u/s 34(1) of the Bombay Sales Tax Act, 1953, has been made at the instance of the Commissioner of Sales Tax. The Respondent firm, which is the assessee in this case, is a sole proprietary concern of which upto December 20, 1963 the sole proprietor was one R. A. Parikh. Parikh died on December 20, 1963 leaving him surviving as his heir and legal representative, his widow. After Parikh's death his widow continued the business of the Respondent firm. The Respondent firm was registered as a dealer under the Bombay Sales Tax Act, 1953 (hereinafter referred to as "the 1953 Act"), and was at all material times registered as a dealer under the Bombay Sales Tax Act, 1959, (hereinafter referred to as "the 1959 Act"). For the period April 1, 1959 to December 31, 1959 the Respondent firm was assessed to sales tax by the Sales Tax Officer by his assessment order dated June 13, 1962. On December 13, 1963 the Assistant Commissioner of Sales Tax served a notice of suo motu revision u/s 31(1) of the 1953 Act calling upon the Respondent firm to show cause why the said order of assessment should not be revised as to impose penalty u/s 16(4) of the 1953 Act for late payment of tax in respect of the last quarter of the

year 1959. Before the Assistant Commissioner of Sales Tax a contention was raised on behalf of the Respondent firm that after the death of the said Parikh, penalty proceedings could not be continued or taken against his legal representative, namely, his widow, and no penalty could be imposed upon her. This contention was negated by the Assistant Commissioner who by his order dated September 22, 1964 imposed a penalty under the said section 16(4) in the sum Rs. 8,690.31 P. The appeal filed by the Respondent firm to the Deputy commissioner of sales Tax proved unsuccessful and the Respondent firm thereupon approached the Tribunal in revision. The Tribunal upheld the contention of the Respondent firm and held that the provision of the 1959 Act could not be invoked to sustain the impugned order of penalty, and set aside the said order. It is out of this judgment and order of the Tribunal that this Reference arises. The question referred to us by the Tribunal is :

"Whether in the facts and circumstances of the case the Tribunal was justified in law in holding that the respondent's case is not governed by the provisions of section 19 of the Bombay Sales Tax Act, 1959, notwithstanding the fact that the deceased dealer, liable to pay the tax under the Bombay Sales Tax Act, 1959, died after the Bombay Sales Tax Act, 1959, came into force ?"

The question as framed by the Tribunal does not bring out the real controversy between the parties, and we accordingly reframe the question as follows :-

"Whether in the facts and circumstances of the case the Tribunal was correct in law in holding that by reason of the provision of the Bombay Sales Tax Act, 1959, penalty u/s 16(4) of the Bombay Sales Tax Act, 1953, could not be imposed on the legal representative of a dealer who died after the coming into force of the Bombay Sales Tax Act, 1959, in a case where the legal representative continues the business of such dealer after his death ?".

2. Both learned Counsel are agreed that under the 1953 Act there was no provisions whereunder any penalty u/s 16(4) could be levied upon the legal representative of a deceased dealer. It may be mentioned that this is also the view taken by a Division Bench of this High Court in C.S.T. vs. Allimullah Haji Salamat (1968) 22 S.T.C. 165. That was, however, a case in which the dealer died prior to January 1, 1960, being the date on which the 1959 Act came into force. Before us Mr. Bhabha, learned Counsel for the Applicant, has submitted that by reason of the provisions of the 1959 Act the legal position has altered and a new liability has been created under the 1959 Act whereby penalty for late payment of tax due under the 1953 Act by a deceased dealer who dies after the coming into force of the 1959 Act would be imposed upon his legal representative. In support of this submission Mr. Bhabha has relied upon the preamble to the 1959 Act as also upon the wordings of section 19(1) and 34 of the 1959 Act. As the long title of the 1959 Act and its preamble show, the 1959 Act is a consolidating and amending Act. Prior to the coming into force of the 1959 Act there were several Sales Tax Acts in force in the reorganized State of Bombay and in order to assimilate these different Act into one uniform code for the

whole of the State the 1959 Act was enacted. By section 76 of the 1959 Act all the Sales Tax Acts in force prior to the date of coming into force of the 1959 Act, namely January 1, 1960, which date is referred to in the 1959 Act as the "appointed day", were repealed. A consolidating Act is one which codifies and consolidates existing law, but a consolidating and amending Act does not merely codify or consolidate. It also amends and alters the law as then existing. It, however, does not follow that any amendment made by a consolidating and amending Act in the state of the law till then prevailing has been made with any retrospective effect. Whether any such alteration in the law has retrospective effect or not is to be judged in the same way as in the case of any other amending provision, namely by ascertaining whether a retrospective effect was intended to be given to the amending provision by the amending statute. Before, therefore, examining the language of sections 19(1) and 34 of the 1959 Act relied upon by Mr. Bhabha it is necessary to consider the repeal and saving clauses of the 1959 Act. Section 76 of the 1959 Act repeals all the Sales Tax Acts previously in operation in the reorganized State of Bombay which are compendiously described in the 1959 Act as "earlier law" Amongst the Acts so repealed was the 1953 Act. While section 76 is the repeal section, section 77 is the saving section. This section is divided in three sub-sections. The first sub-section continues the operation of all repealed Acts and rules, regulations, orders, notifications, etc. made thereunder for certain purposes set out in clause (a) of that sub-section. Clause (b) of that sub-section inter alia provides for the continuance of a registration certificate issued to a dealer under and earlier law, and clause (c) of that sub-section continues the authority of those practitioners who were authorized to appear in sales tax proceedings under the earlier law. Sub-section (2) deals with a recognition granted under an earlier law, and sub-section (3) inter alia provides that the provisions of section 7 of the Bombay General Act, 1904, shall apply in relation to the repeal of the earlier law as if the repealed Acts had been an enactment within the meaning of the said section 7. The provisions of section 77 material for our purposes are clause (a) of sub-section (1) and sub-section (3). Section 77(1)(a) and (3) provide as follows :-

Savings. (1) Notwithstanding the repeal by section 76 of any of the laws referred to therein,

(a) those laws (including any earlier law continued in force under any provisions thereof) and all rules, regulations, orders, notifications, forms and notices issued under those laws and in force immediately before the appointed day shall, subject to the provisions of section 42, continue to have effect for the purposes of the levy assessment, reassessment, collection refund or set-off of any tax, or the granting of a drawback in respect thereof or the imposition of any penalty, which levy, assessment, reassessment, collection, refund, set-off, drawback or penalty relates to any period before the appointed day, or for any other purpose whatsoever connected with or incidental to any of the purposes aforesaid;

(3) Without prejudice to the provisions contained in the foregoing sub-sections and subject thereto, section 7 of the Bombay General Clauses Act, 1904, shall apply in relation to the repeal of any of the laws referred to in section 76 as if the law so repealed had been an enactment within the meaning of section 7 of that Act.

Under clause (a) of section 77(1) the provisions of the earlier law continue to have effect for the purpose inter alia of the imposition of any penalty where such penalty relates to any period before the appointed day and for any other purpose. Thus, it is clear that u/s 77(1)(a) the statutory provisions that apply to the imposition of penalty in respect of the period prior to January 1, 1960 are not the provisions of the 1959 Act but of the 1953 Act, and, therefore, if there were no provisions in the 1953 Act for the imposition of a penalty in any particular case the provisions of the 1959 Act cannot be invoked for the purpose of imposing penalty. This is further made clear by sub-section (3) of section 77 whereby without prejudice to the provisions inter alia of section 77(1)(a), section 7 of the Bombay General Clauses Act, 1904, is made applicable to the repeal of the earlier laws. u/s 7 of the Bombay General Clauses Act, 1904, where a Bombay Act is repealed, then unless a different intention appears, the repeal does not revive anything not in force or existing at the time of the repeal or affect the previous operation of the repealed enactment or anything duly done or suffered thereunder or affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed enactment or affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the repealed enactment or affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment, and any such investigation, legal proceeding or remedy are to be instituted, continued or enforced, and any such penalty, forfeiture or punishment are to be imposed as if the repealing Act has not been passed. Thus, sub-section (3) further makes it clear that there is no scope for invoking any of the provisions of the 1959 Act for the purpose of imposing a penalty.

3. Mr. Bhabha, learned Counsel for the Applicant, on behalf of the Department, however, submitted that the saving section must be construed in the light of the other provisions of the 1959 Act, and so construed, special provision with respect to imposing a penalty upon the legal representative of a dealer dying after the appointed day in respect of assessment period prior to that date have been enacted in the 1959 Act and would govern the case before us. There provisions according to Mr. Bhabha are to be found in sections 19(1) and 34 of the 1959 Act. Before we turn to the provisions of these two sections we may as well note that though section 7 of the Bombay General Clauses Act, 1904, which provides for the affect of a repeal, is made subject to a different intention appearing in the repealing statute, there is no such provision in section 77 of the 1959 Act, and the usual clauses namely, unless there is anything repugnant in the subject or context or unless a different intention appears, is not to be found in section 77.

4. Section 19(1) of the 1959 Act, as it stood at the material time, provided as follows :-

Special provision regarding liability to pay tax in certain cases

(1) Where a dealer, liable to pay tax under this Act, dies then,

(a) If the business carried on by the dealer is continued after his death by his legal representative or other person, shall be liable to pay the tax due from such dealer under this Act or under any earlier law, and

(b) If the business carried on by the dealer is discontinued after his death, his legal representative shall be liable to pay out of the estate of the deceased, to the extent to which the estate is capable of meeting the charge, the tax (including any penalty) due from such dealer under this Act or under any earlier law, whether such tax (including any penalty) has been assessed before his death but has remained unpaid or is assessed after his death."

This sub-section contemplated two cases; one the case of a dealer dying and his business being carried on after his death by his legal representative or any other person, and the other that of a dealer dying and his business being discontinued, after his death. In the first case the legal representative or other person continuing the business is made "liable to pay the tax due from such dealer under this Act or under any earlier law", while in the second case the legal representative is "liable to out of the estate of the deceased to the extent to which the estate is capable of meeting the charge the tax (including any penalty) due from such dealer under this Act or under any earlier law".

5. The first thing that strikes one on a bare reading of section 19(1) of the 1959 Act is the difference in the language used in clause (a) and that in clauses (b). While clause (a) speaks of a liability of the legal representative continuing the business of a deceased dealer "to pay the tax due from such dealer", clause (b) speaks of the liability of the legal representative where the business is discontinued to pay "the tax (including any penalty)" due from such dealer". The words "(including any penalty)" which occur in clause (b) are conspicuous by their absence in clause (a). Mr. Bhabha, learned Counsel for the Applicant, however, submitted that this did not make any difference because penalty was a part of tax. In support of this submission Mr. Bhabha relied upon the concluding portion of section 19(1) which uses the phrase "whether such tax (including any penalty) has been assessed before his death but has remained unpaid, or is assessed after his death". According to Mr. Bhabha, the phrase "such tax (including any penalty)" in this concluding portion clearly shows that the word "tax" in clauses (a) must also mean tax including penalty. We are unable to accept this submission. When the legislature in two clauses of the same sub-section designedly uses in the first the word "tax" and in the other the words "the tax (including any penalty)", it cannot be said that both these expressions mean or were intended to mean one and the same thing. The

meaning to be attributed to the concluding portion of section 19(1) is that the legal representative is liable, to the extent specified in clause (a) or (b) as the case may be, for tax or penalty or both, and not that he is liable for both tax and penalty, irrespective of the fact whether clause (a) or clause (b) applies. Clause (32) of section 2 of the 1959 Act defines "tax" as meaning "a sales tax, general sales-tax, purchase tax, or retail sales tax, payable under this Act". Thus, the definition of the word "tax" does not include penalty. Mr. Bhabha, however, relied upon the opening part of section 2, which is the definition section, by which the definitions given by the various clauses of the said section apply "unless the context otherwise requires". In Mr. Bhabha's submission, the context of section 19(1)(a) of the 1959 Act requires that the word "tax" should be construed so as to include penalty. We are unable to accept this submission also. It is true that in the context of the phrase "any earlier law" in section 19(1)(a) the word "tax" (cannot mean tax under the 1959 Act, and, therefore, in clauses (a) and (b) of section 19(1) where the word "tax" is used with reference to tax due under any earlier law, it must mean the tax due under the Sales Tax Acts repealed by the 1959 Act, but does not and cannot mean that the word "tax" in this context would also mean penalty. That the word "tax" does not ordinarily mean penalty has now been held by the Supreme Court in *Khemka & Co. (Agencies) Pvt. Ltd. vs. State of Maharashtra* (1975) 35 S.T.C. 571. In that case Ray, C.J., who spoke for majority, said (at p. 581) :-

"Tax and penalty like tax and interest are distinct and different concepts under the Indian Income Tax Act. The word "assessment" could cover penalty proceedings if it is used to denote the whole procedure for imposing liability on the taxpayer as happened in [C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and Another](#), . Penalty is within assessment proceedings just as tax is within assessment proceedings when the relevant Act by substantive charging provision levies tax as well as penalty."

"Penalty is not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment. It is not merely machinery. Penalty is in addition to tax and is a liability under the Act. Reference may be made to section 28 of the Indian Income Tax Act, 1922, where penalty is provided for concealment of income. Penalty is in addition to the amount of Income Tax. This court in [Jain Bros. and Others Vs. The Union of India \(UOI\) and Others](#), , said that penalty is not a continuation of assessment proceedings and that penalty partakes of the character of additional tax."

In that case penalty u/s 16(4) of the 1953 Act was imposed upon the assesseees for default in payment of taxes under the Central Sales Tax Act, 1956, within the prescribed time. The Central Sales Tax Act provided for imposition of penalty in certain cases but not for default in prompt payment of taxes. Under that Act the authorities empowered under the general Sales Tax law of a State to assess, reassess, collect and enforce payment of tax were, on behalf of the Government of

India, to assess reassess, collect and enforce payment of tax, including any penalty, payable under the Central Sales Tax Act, 1956. The Supreme Court held that it was not possible to invoke the provisions of section 16(4) of the 1953 Act for imposing penalty for a failure by a dealer to pay within the prescribed time tax under the Central Sales Tax Act, 1956. It may also be noted that the Central Sales Tax Act, 1956, does not contain any definition of the term "tax".

6. Mr. Bhabha, learned Counsel for the Applicant, relied upon another decision of the Supreme Court, namely, [Commissioner of Income Tax, Andhra Pradesh Vs. Bhikaji Dadabhai and Co.](#), as supporting his submission that the word "tax" includes penalty. A perusal of the Judgment in M/s. Bhikaji Dadabhai and Co.'s case shows that the decision does not lay down any such proposition as canvassed by Mr. Bhabha. What had happened in that case was that by the Finance Act, 1950, the Hyderabad Income Tax Act was repealed. The repealing section, however, expressly kept alive the Hyderabad Act "for purposes of the levy, assessment and collection of Income Tax and super tax" in respect of certain periods. It was urged on behalf of the assesseees that the provisions of the Hyderabad Act were kept alive only for the purposes of levy, assessment and collection of tax and not of penalty. This contention was repelled by the Supreme Court pointing out that depending upon the context in which it was used the word "assessment" had different meanings, that it sometimes meant the computation of income, sometimes the determination of the amount of tax payable, and sometimes the whole procedure laid down in the Act for imposing a liability upon the taxpayer. On a construction of the relevant provisions of the Hyderabad Act and of the repealing and saving section of the Finance Act, 1950, the Supreme Court held that the word "assessment" included not merely the assessment to tax but also the imposition of penalty. The question thus before the Supreme Court was whether the phrase "levy, assessment and collection of Income Tax and super tax" included any imposition of penalty as part of the whole process of assessment. The question before the Supreme Court was not the distinction between tax and penalty when a statute specifically has made a distinction between the two. That distinction was considered by the Supreme Court in the case of Khemka & Co. (Agencies) Pvt. Ltd., where it has been pointed out that there penalty and tax are levied by substantive charging provision, they would fall under assessment proceedings, but are in their nature different, and not mean the same thing. Mr. Bhabha next relied upon a decision of the Supreme Court in Murarilal Mahabir Prasad and others vs. B. R. Vad and others (1976) 37 S.T.C. 77. We fail to see what relevance that decision has to the question which falls to be decided by us. In that case the question before the Supreme Court was whether under the 1953 Act a firm which had been dissolved could be assessed to tax after its dissolution in respect of assessment periods preceding its dissolution. The question of penalty or of the distinction between tax and penalty did not at any stage arise for the consideration of the Court in that case, and we see no necessity of further referring to this decision. Mr. Bhabha also relied upon a decision of the High Court

of Punjab and Haryana in *Charanjit Lal Des Rai vs. The Sales Tax Tribunal, Union Territory Chandigarh* (1974) 33 S.T.C. 271. In that case tax had already been assessed and penalty imposed upon an assessee, and the question was whether the word "tax" u/s 22(1) of the Punjab General Sales Tax Act, 1948, which provided for a reference to the High Court in respect of any question of law arising out of the Tribunal's order "affecting any liability on any dealer to pay tax", included penalty so as to enable a reference to the High Court to be made. The High Court came to the conclusion that the word "tax" in the said section 22(1) included both the assessed and the penalty imposed. After considering the provisions of the Act the High Court held that the penalty imposed became a part of the tax assessed and was recoverable in the same manner as the tax and that if the reference was not allowed, anomalous situation might arise in some cases, for instance, where a dealer has been assessed both to tax and penalty and a reference was made on the question of tax and the dealer succeeded therein, the order of penalty against him would none the less stand even though the High Court had held that there was no liability on him to pay tax. The question in that case was an entirely different one. In that case both the tax had been assessed and the penalty had been imposed. Before us the question is of the power to impose penalty. Further, the Punjab General Sales Tax Act, 1948, did not define the term "tax" while the 1959 Act defines that term. This case, therefore, throws no light on the matter.

7. According to us on a clear reading of the statutory provisions concerned, the argument that in a case such as the one before us the Department was entitled to impose penalty on the legal representative of a deceased dealer whose business was continued after his death cannot be supported is not borne out by the provisions of the 1959 Act. Though we have reached this conclusion independently of the legislative history or section 19(1), it would be none the less interesting to refer to this legislative history. In the Bill as originally introduced, clause 19, which has ultimately emerged as section 19, provided for the legal representative's liability to pay the tax, including any penalty due from the deceased dealer under the 1959 Act or under any earlier law even in a case where the business of the deceased dealer was continued after his death. The Bill was then referred to the Select Committee, and the report of the Select Committee shows that the majority of the Members of the Committee felt that the liability to penalty should not attach to the estate or legal representative after the assessee's death in cases where the business was continued after his death, while the minority of the Members, though they differed from the majority in various respects, not only agreed with the majority on this point but went further and opined that even where the business was discontinued, there should be no liability to penalty attaching to the estate or the legal representative of the deceased dealer. It was in view of this report of the Select Committee that section 19 of the 1959 Act emerged in the form in which it was enacted (See Bombay Government Gazette, Part V, pages 418, 430, 661, 676 and 693).

8. It remains now to examine Mr. Bhabha's arguments based on section 34 of the 1959 Act. Section 34 provides as follows :-

"Applicability of all the provisions of this Act or earlier law to person liable to pay tax u/s 19. - Where in respect of any tax (including any penalty) due from a dealer under this Act or under any earlier law, any other person is liable for the payment thereof u/s 19, all the relevant provisions of this Act or, as the case may be, of the earlier law, shall in respect of such liability apply to such person also as if he were the dealer himself."

Mr. Bhabha laid considerable emphasis upon the phrase "any tax (including any penalty)" in this section and stated that since under the 1953 Act the penalty was due from the said Parikh, his legal representative, by virtue of the provisions of section 34, became liable in the same manner as the said Parikh was. We find the construction sought to be placed upon section 34 to be fallacious. Section 34 is only attracted where u/s 19 of the 1959 Act some person other than the dealer from whom tax, including penalty, is due becomes liable for the payment of such tax and penalty. As we have seen under the provisions of clause (a) of section 19(1) of the 1959 Act the legal representative of the said Parikh did not become liable for penalty, though she became liable for tax, and accordingly the provisions of section 34 of the 1959 Act were never attracted to this case.

9. In the result, we answer the question as reframed by us in the affirmative.

10. The Applicant will pay to the Respondents the costs of the Reference fixed at Rs. 250.