(1984) 03 BOM CK 0063

Bombay High Court

Case No: Sales Tax Reference No"s. 8 and 9 of 1971

Ramnath Jagannath	APPELLANT
Vs	
State of Maharashtra	RESPONDENT

Date of Decision: March 29, 1984

Acts Referred:

- Bombay Sales Tax (Registration, Licensing and Authorisation) Rules, 1954 - Rule 13(2)
- Bombay Sales Tax Act, 1953 - Section 14, 15, 16(4), 34(1), 9

Citation: (1984) 57 STC 46

Hon'ble Judges: Shah, J; M.H. Kania, J

Bench: Division Bench

Judgement

Kania, J.
These two references arise on a common statement of the case made by the Sales Tax Tribunal u/s 34(1) of the Bombay Sales Tax Act, 1953 (referred to hereinafter as "the said Act"). The facts in both the cases are, for all practical purposes, similar except that the periods under assessment are different. The period under assessment in Sales Tax Reference No. 8 of 1971 is from 1st April, 1955, to 31st March, 1956, and the period under assessment in Sales Tax Reference No. 9 of 1971 is 1st April, 1956, to 31st March, 1957. The question referred to us in both the references is identical. It is, in these circumstances, that both these references are being disposed of by this common judgment.

2. The question referred to us for determination in these references is as follows :

"Whether on a proper interpretation of the letter dated 28th July, 1965, and the arguments made before the Deputy Commissioner, the Tribunal was correct in holding that the dealer had agreed to get his claim for deduction under the proviso to section 9(1) of the Bombay Sales Tax Act, 1953, rejected unconditionally ?"

Although in the question sub-section (1) of section 9 has been referred to that is an apparent error, as there is no such sub-section. What is referred to clearly is proviso (1) or first proviso to section 9 of the Bombay Sales Tax, 1953. The question is, therefore, the consent re-framed as follows :

"Whether on a proper interpretation of the letter dated 28th July, 1965, and the arguments made before the Deputy Commissioner, the Tribunal was correct in holding that the dealer had agreed to get his claim for deduction under the first proviso to section 9 of the Bombay Sales Tax Act, 1953, rejected unconditionally ?"

3. The facts giving rise to these references are as follows :

The applicants are a partnership firm which carried on the business of buying and selling provision at Nasik Road. The applicants are registered dealers under the said Act. In respect of the assessment period 1st April, 1954, to 31st March, 1955, with which we are not concerned in these references, the assessees were assessed as registered dealers under the said Act, by an order of assessment passed by the Sales Tax Officer concerned on 9th October, 1956. In this assessment order, the claim made by the assessees for the deduction of certain sales from the taxable turnover of the assessees under the provisions of the first proviso to section 9 of the said Act was allowed to the extent of sales of Rs. 18,54,531. On 6th July, 1959, the Sales Tax Officer concerned issued a notice to the assessees u/s 15 of the said Act to show cause as to why the the assessees should not be reassessed on the ground that the aforesaid claim of the assessees under the first proviso to section 9 of the said Act had been shown to have been wrongly allowed as the deductions had been claimed and allowed on the basis of the declarations in K forms which were later, according to the Sales Tax Officer, found to be bogus; and as a result of this, taxable turnover had escaped the assessment. The Sales Tax Officer, by his order dated 31st December, 1959, reassessed the assessees in respect of the aforesaid period 1st April, 1954, to 31st March, 1955, and disallowed the aforesaid claim of the assessees on the ground that the assessees had produced bogus K form and obtained deductions on the footing of such bogus forms. On the same date, the Sales Tax Officer also passed an assessment order u/s 14 of the said Act in respect of the aforesaid assessment periods, namely, 1st April, 1955, to 31st March, 1956, and 1st April, 1956, to 31st March, 1957, respectively, whereby he disallowed similar claims made by the assessees on the footing of certain declarations in K forms. These claims were made as aforesaid under the first proviso to section 9 of the said Act. The assessees preferred appeals against the said assessment orders to the Assistant Commissioner of Sales Tax. The Assistant Commissioner dismissed the said appeals and levied penalty for late payment in respect of the assessment period 1st April, 1956, to 31st March, 1957. This penalty was levied under the provisions of sub-section (4) of section 16 of the said Act. The assessees then preferred revisional applications against the orders of the Assistant Commissioner to the Deputy Commissioner of Sales Tax. As far as the revision application in respect of the order pertaining to the assessment period 1st April, 1954, to 31st March, 1955, is concerned, it is clear from the statement of the

case and it is common ground that the same was fully argued and it was dismissed by the Deputy Commissioner. We are not concerned with the order of the Deputy Commissioner dismissing that revision application, because the references arising from the decision and the decision of the Sales Tax Tribunal thereon are Sales Tax Reference No. 6 of 1971 and Sales Tax Reference No. 7 of 1971 which have both been disposed of by separate judgments. As far as revision applications to the Deputy Commissioner in respect of of the assessment periods 1st April, 1955, to 31st March, 1956, and 1st April, 1956, to 31st March, 1957, respectively are concerned, it appears that the said applications were heard by the Deputy Commissioner on 26th July, 1965. At that time, Mr. Surte, learned counsel who appeared on behalf of the assessee-dealers, made an oral offer that if the post-assessment penalty which was levied by the Assistant Commissioner was remitted in full, in order to put an end to the proceedings, the assessees were agreeable to pay the entire amount of tax to which they were assessed. One partner of the assesses-firm was also present at that time. It appears that the Deputy Commissioner asked Mr. Surte to put down the dealers" offer in writing and accordingly the letter dated 28th July, 1965, was addressed by Mr. Surte on behalf of the assessee-dealers to the Deputy Commissioner the relevant portions of which read as follows :

"As regards Revision Applications Nos. 657 and 658, it was submitted that my client is agreeable to pay the whole of the amount of tax assessed by the Sales Tax Officer, Nasik, District Nasik, Provided the post-assessment penalty leviable u/s 16(4) of the Bombay Sales Tax Act, 1953, is remitted in full and the chapter is closed once and for all."

It was further stated in the said letter as follows :

"In view of these facts, I am making a humble submission that the aforesaid proceedings may please be brought to a conclusion by accepting full amount of tax as per the order passed in appeal without insisting on the post-assessment penalty. This offer may please be consider and if accepted, may please be communicated to my client so as to enable him to pay off the full amount within the stipulated time .....

I, therefore, submit that the proposal may please be considered sympathetically and your decision may please be conveyed to the undersigned before the next date of hearing."

No communication was made to Mr. Surte by the Deputy Commissioner in pursuance of this letter. Thereafter, it appears that the revisional applications were heard on 10th May, 1966. From the copy of the notes of proceedings maintained by the Deputy Commissioner which form part of the paper-book, it appears that Mr. Surte made it clear that in respect of the aforesaid assessment periods, with which we are concerned, the only point was regarding the disallowance under the first proviso to section 9 of the said Act which had been pressed in the relevant revisional applications. From the notes of arguments made by the Deputy Commissioner, it appears that Mr. Surte had further stated that his clients were tired and did not want to contest, but requested that the

post-assessment penalty should not be levied. The words used by the Deputy Commissioner in recording this are as follows :

"sufficiently tired and does not want to contest, but requested that the post-assessment penalty should not be levied".

The Deputy Commissioner has further recorded in the said notes of the proceedings as follows :

"the only point pressed was regarding disallowance of section 9(1) claim. It is contended that the claims may be disallowed, but post-assessment penalty be waived".

These notes have been initialled by the representative from the department and by Mr. Surte and underneath the same are the words "order written" with the initial of the Deputy Commissioner and the date mentioned as 16/5/. By his order dated 16th June, 1966, the Deputy Commissioner dismissed the aforesaid revisional applications. In his order, the Deputy Commissioner has recorded that the main point which was common in all the three revision applications before him was regarding disallowance of the dealers" claim u/s 9(1) and (2) of the said Act. The actual claim was under the first proviso to section 9 of the said Act. We have however set out as aforesaid, because the Deputy Commissioner has referred to the claim under the first and second sub-sections of section 9. The Deputy Commissioner has gone on to state as follows in paragraph 5 of his order which is relevant for our purposes :

"The only point now for all the three years is regarding the claim u/s 9(1). The learned Advocate explains that when the sales were effected, the applicants in good faith believed that the buying dealers were bona fide and would issue the certificates in form K. The Advocate in his letter dated 28th July, 1965, and again at the time of hearing to-day explained that he does not want to go into these details at this stage and the claim as disallowed by the Sales Tax Officer may be confirmed ..... The only request is that the post-assessment penalty should not be levied at all. It is pleaded that I should exercise my powers under the proviso to section 16(4). The Advocate further explains that if the penalty is waived, the applicants would pay the tax within three months."

The Deputy Commissioner held that he did not consider it as a proper and fit case to waive or reduce the post-assessment penalty and he dismissed the revision applications. A reading of this order makes it clear that, according to the Deputy Commissioner, Mr. Surte on behalf of the dealers had unconditionally given up the claim under the first proviso to section 9 and only argued for the waiver or reduction of the penalty. On receipt of this order, Mr. Surte on behalf of the assessee-dealers made an application for rectification wherein he contended that the offer made by him was not unconditionally giving up the contentions raised by him for deductions under the first proviso to section 9, but it was conditional on the post-assessment penalty being waived or given up. The Deputy Commissioner dismissed this rectification application by his order dated 10th

June, 1966, wherein he observed as follows :

"My findings are based on the tenor of the letter and the arguments that were urged on 10th May, 1966, when the case was heard. These arguments raised by the Advocate were reduced to writing and they were summed. While summing up, I had observed, "the only point pressed was regarding disallowance of section 9(1) claim. It is contended that the claim may be disallowed, but the post-assessment penalty be waived." It is apparent from the aforesaid that there is no mistake apparent on the record which can be rectified."

The dealers preferred a second revision to the Sales Tax Tribunal from the aforesaid decisions of the Deputy Commissioner, wherein it was contended on behalf of the dealers that the offer made by them before the Deputy Commissioner was not an unconditional offer giving up the claim under the first proviso to section 9 as held by the Deputy Commissioner but was conditional on the post-assessment penalty being waived and that as the Deputy Commissioner had not waived the said penalty, he was bound to decide on merits the claim under the first proviso to section 9 which he had failed to do so. The Tribunal rejected these contentions holding that the dealers had agreed to get their claim for deduction under the first provision to section 9 rejected unconditionally but did not agree to the post-assessment penalty. It is from this decision of the Tribunal that the aforesaid question has been referred to us for determination.

4. The contention of Mr. Surte was that the offer made by him on behalf of the dealers to the Deputy Commissioner was clearly a conditional offer to give up the claim for deduction under the first proviso to section 9 of the said Act, provided the Deputy Commissioner was willing to give up the post-assessment penalty levied and leviable in respect of the aforesaid assessment periods and it was urged by him and this was sufficiently clear from the aforesaid letter dated 28th July, 1965, addressed by him to the Deputy Commissioner and that at the personal hearing on 10th May, 1966, no further offer was made. It was, on the other hand, contended Mr. Jetley on behalf of the revenue that the offer made by Mr. Surte and certainly the offer as recorded in the notes of proceedings was an unconditional offer to give up the claim under the first proviso to section 9 of the said Act and the Deputy Commissioner as well as the Tribunal were right in holding that it was no longer open to the dealers to claim that their said claim for deduction should be decided on merits.

5. It is not necessary to set out the relevant provisions of the said Act. We may, however, very briefly refer to them. Section 9 of the said Act deals with the levy of general sales tax. The first proviso to the the said section 9 provides that no general sales tax shall be levied on the sales of goods to a dealer who holds a licence and furnishes to the selling dealer a certificate in the prescribed form declaring inter alia that the goods so sold to him are intended for resale by him. The form for the said declaration is prescribed in rule 13(2) of the Bombay Sales Tax (Registration, Licensing and Authorisation) Rules, 1954, and the said form is form K. Section 14 deals with the assessment of taxes under the said Act and section 15 contains the provisions for assessing the turnover which has escaped

assessment which is commonly known as reassessment. Section 16 deals with the payment of recovery of taxes. Sub-section (4) of section 16 deals with power to reduce or remit the penalty subject to the limits and conditions prescribed therein.

6. We propose first to consider the effect of the aforesaid letter, dated 28th July, 1965, addressed by Mr. Surte on behalf of the dealer-assessee to the Deputy Commissioner. That letter as well as the facts set out in the statement of the case make it clear that in respect on the Revisional Applications Nos. 657 and 658 which pertain to the relevant assessment periods, the claim of the dealers under the first proviso to section 9 had been pressed before the Deputy Commissioner and arguments advanced in that connection. On a plain reading of the said letter and in the light of the aforesaid facts, it is clear that the offer made in the said letter to give up the aforesaid claim was clearly a conditional offer conditioned on the post-assessment penalty levied and leviable being given up. It was urged by Mr. Jetley that this offer must be regarded as an unconditional offer, because it was not within the power of the Deputy Commissioner to give up the penalty completely, as suggested in the letter and hence the dealer could not have seriously made that offer. In our view, this contention cannot be accepted. That the offer was coupled with the conditions which was not reasonable or one which could not have been accepted in law completely, would not render unconditional the offer which was in terms made on a condition. If it was not possible to accept that condition, the only result would be that the said offer must be rejected. But where an offer is coupled with conditions which cannot be accepted fully, the offer cannot be treated as an unconditional offer merely on that count. The offer contained in the said letter was in terms conditional. This is clear from the plain language setting out the offer and the surrounding facts.

7. Coming next to the arguments on 10th May, 1966, and the notes of proceedings prepared by the Deputy Commissioner which have been initialled by Mr. Surte, we must appreciate, in the first instance, the these arguments could not have been recorded in the exact words of Mr. Surte. A plain perusal of the notes makes it clear that these are very brief sort of notes maintained by the Deputy Commissioner of the main points contained in the arguments advanced before him and no attempt has been made to take them down in the precise words of the counsel. Even these notes make it clear that the point regarding disallowance of the claim under the first proviso to section 9 was pressed in the relevant revisional applications. The words setting that "the dealers were sufficiently tired and did not want to contest, but requested that the post-assessment penalty should not be levied", must be interpreted in the light of these facts. As the point regarding disallowance of the claim under the first proviso to section 9 was already pressed, one fails to see why the dealers, merely because they were tire, should have given up that point unconditionally. That point has already been pressed and the dealer being tired would not make any difference to that. It is clear that the word "but" used in these notes was used in the sense of "provided that" or "if". Further support to this conclusion is lent by the very order of the Deputy Commissioner dismissing the revisional applications which is dated 16th May, 1966. The statement in paragraph 5 of the order which we have

set out earlier makes it clear that the Deputy Commissioner did not himself take the view that at the hearing on 10th May, 1966, the offer made by Mr. Surte in his letter dated 28th July, 1965, had been carried any further. It is clear that the Deputy Commissioner has treated both these offers as practically the same and has regarded them as unconditional offers. The Tribunal was, therefore, with respect, not justified in dealing with the matter as if a further offer was made at the hearing on 10th May, 1966. In our view, it is clear that the offer made by Mr. Surte on behalf of the dealer-assessees was a conditional offer and if the same was rejected by the Deputy Commissioner, he was bound to deal with the claim of the dealer-assessees for deductions under the first proviso to section 9 on merits. Mr. Jetley urged that in view of the findings given by the Tribunal, it is clear that there was no merit in this claim at all, and the claim could not possibly be sustained. That, however, is a question with which we are not concerned in this reference. If that is so, the claim will be disallowed by the authorities.

In the result, the question referred to us is answered in the negative and in favour of the dealers. Looking to all the facts and circumstances of the case there will, however, be no order as to the costs.

Deposits made by the dealers before the Tribunal at the time of the reference applications in question to be refunded to the assessees.