

(1961) 11 BOM CK 0004

Bombay High Court

Case No: Misc. Application No. 245 of 1960

Chaturbai Naraindas

APPELLANT

Vs

H.B. Munshi, Deputy
Commissioner of Sales Tax

RESPONDENT

Date of Decision: Nov. 28, 1961

Acts Referred:

- Bombay Sales Tax Act, 1959 - Section 14, 15, 2, 2(1), 20

Citation: (1962) 13 STC 350

Hon'ble Judges: V.M. Tarkunde, J

Bench: Single Bench

Advocate: Advani and J.I. Mehta, for the Appellant; Bhabha and Andhyarujina (Jr.), for the Respondent

Judgement

1. This petition seeks a writ or order under Article 226 of the Constitution for quashing a certain notice dated 17th June, 1960, issued by the Deputy Commissioner of Sales Tax, Bombay, who is the respondent to the petition. The petitioner's deceased husband was the proprietor of a firm named Messrs Pohumull Bros. (India) and this firm was registered as a dealer u/s 8 of the Bombay Sales Tax Act, 1946. After her husband's death, the petitioner's name was entered in the registration certificate as the proprietress of the firm in June, 1950. In respect of the period between 1st April, 1949, and 31st October, 1952, the petitioner was assessed to sales tax by an order passed by the Sales Tax Officer, C Ward, Bombay, on 17th June, 1953. It appears that the firm, Messrs Pohumull Bros. (India), had two other branches one at Delhi and one at Calcutta; and during the period of assessment, the firm had sent to these branches goods of the value of Rs. 8,35,710-5-9 and Rs. 87,925-9-0 respectively. At the relevant time there was a proviso to section 6(1) of the Bombay Sales Tax Act, 1946, which authorised the Taxing Officer to levy tax at half the usual rate on the value of the goods sold or exported outside the Province or State of Bombay. Relying on this provision, the Sales Tax

Officer levied sales tax at half the usual rate on the value of the goods despatched by the firm to its branches at Delhi and Calcutta. The petitioner preferred an appeal to the Assistant Collector of Sales Tax and contended that the despatches of goods to Delhi and Calcutta were not by way of sales and that the Sales Tax Officer was not justified in subjecting them to sales tax. The Assistant Collector of Sales Tax accepted this argument, and by his order dated 26th October, 1956, deducted the aforesaid amount from the petitioner's turnover with the result that the petitioner became entitled to a refund of about Rs. 28,000. Nearly four years thereafter the respondent (the Deputy Commissioner of Sales Tax, Bombay) issued a notice, in exercise of his revisional powers u/s 31 of the Bombay Sales Tax Act, 1953, calling upon the petitioner to show cause why the order of the Sales Tax Officer dated 17th June, 1953, as well as the appellate order of the Assistant Collector of Sales Tax dated 26th October, 1956, should not be revised by including the purchase price of the aforesaid goods in the taxable turnover of the petitioner. This notice was later withdrawn, and the impugned notice dated 17th June, 1960, was issued by the respondent instead. It appears to be the case of the respondent that the petitioner's firm had purchased the above goods under a licence which absolved the firm from liability to pay the sales tax on the ground that the goods were intended for resale, and that since the goods were despatched by the firm to its branches in Delhi and Calcutta and were thus not resold, the goods must be deemed to have been utilised by the firm for purposes other than those specified in its licence, and that under a certain proviso which then existed in clause (ii) of Rule I contained in sub-section (3) of section 6 of the Bombay Sales Tax Act, 1946, the value of the goods ought to have been included in the taxable turnover of the firm. We are not concerned in this petition with the merits of the claim made by the respondent. The Bombay Sales Tax Act, 1946, was repealed by the Bombay Sales Tax (No. 2) Ordinance, 1952; the said Ordinance was repealed by the Bombay Sales Tax Act, 1953; and the Bombay Sales Tax Act of 1953 was also repealed by the Bombay Sales Tax Act, 1959, which had come into effect before the impugned notice of the respondent dated 17th June, 1960. According to the petitioner, it is no longer open to the respondent to increase the assessment of the firm by recourse to the revisional powers contained in section 31 of the Bombay Sales Tax Act of 1953. The petitioner claims that the respondent's right to enhance the amount of assessment in respect of the period from 1st April, 1949, to 31st October, 1952, was already time-barred when the impugned notice was issued on 17th June, 1960, and prays that the notice should therefore be quashed by an appropriate writ or order under Article 226 of the Constitution.

2. In order to appreciate the petitioner's case, it is necessary to refer to certain provisions of the Bombay Sales Tax Acts of 1946, 1953 and 1959. Section 11A of the 1946 Act dealt with cases where the turnover of a dealer had escaped assessment, and the section provided :-

"If in consequence of any information which has come into his possession, the Collector is satisfied that any turnover in respect of sales or supplies of any goods chargeable to tax under this Act has escaped assessment in any year or has been under-assessed or assessed at a lower rate or any deductions have been wrongly made therefrom, the Collector may proceed to assess or re-assess the amount of tax from such dealer ..."

3. A notice had to be issued to the dealer under that section and the section put a limitation on the Collector's power of re-assessment by providing that the notice was to be issued within five years of the end of the year of assessment in any case where the Collector had reason to believe that the dealer had concealed the particulars of his sales or supplies or deliberately furnished incorrect returns, and in any other case, within three years of the end of the year of assessment. Section 22 of the same Act (the 1946 Act) dealt with the revisional powers of the Collector and it provided :-

"Subject to such rules as may be prescribed and for reasons to be recorded in writing, the Collector may, upon application or of his own motion, revise any order passed under this Act or the rules thereunder by a person appointed to assist him"

4. An application to the Collector in the exercise of his revisional powers had to be made within a period of four months from the date of the order sought to be revised, but no period of limitation was provided when the Collector proceeded to revise any order on his own motion. The Bombay Sales Tax Act, 1953, came into operation from 25th March, 1953, and sections 48 and 49 of that Act provided in substance that all taxes and penalties imposed by the repealed enactments were to be assessed and recovered as far as may be in accordance with the provisions of the 1953 Act. Section 15 of the Act dealt with the Collector's powers of re-assessment and section 31 with his powers of revision. These sections do not differ in material particulars from the corresponding sections 11A and 22 of the 1946 Act. As in the former Act, the Collector was to exercise his powers of re-assessment u/s 15 of 1953 Act if, in consequence of any information which came into his possession, he was satisfied that any turnover in respect of sales or purchases of any goods had escaped assessment or had been under-assessed or had been assessed at a lower rate or any deductions had been wrongly made therefrom. Periods of limitations for action under this section were also provided. u/s 31, the Collector could exercise this revisional power either upon application or on his own motion, and no period of limitation was prescribed when the Collector proceeded on his own motion to revise any order passed under this Act. As already stated, it is under this section (section 31 of the 1953 Act) that the respondent issued the impugned notice of 17th June, 1960.

5. Before turning to the Bombay Sales Tax Act of 1959, it is necessary to refer to the amending Act No. 22 of 1959, by which section 15 of the Bombay Sales Tax Act of 1953 was amended. The occasion as well as the effect of this amendment have been

explained by a Division Bench of this Court in *Manordas Kalidas v. V. V. Tatke* [1960] 11 S.T.C. 87; 61 Bom. L.R. 1560.. Certain cases of this Court had taken the view that, when the Legislature has prescribed a period of limitation for re-assessment of a tax, corresponding period of limitation must by implication apply to the issue of a notice calling upon the assessee to make his initial return for the purpose of assessment. It was also implicit in those decisions that revisional powers for enhancing an assessment must be exercised within a reasonable period of time. By the amending Act No. 22 of 1959, the Legislature introduced a clause in section 15 of the 1953 Act to make it clear that the periods of limitation mentioned therein for the purpose of re-assessment did not apply to any proceeding for assessment u/s 14 or any proceeding for revision u/s 31 of that Act. The Legislature thus emphasized that, when the Collector proceeded suo motu in exercise of his revisional powers, he was not affected by any period of limitation express or implied.

6. When we turn to the Bombay Sales Tax Act of 1959, we find that the provisions contained therein relating to re-assessment and revision (sections 35 and 57 respectively) are materially different from the corresponding provisions of the earlier Acts. Before dealing with these provisions, however, it is necessary to emphasize that the effect of the repeal of the 1953 Act by the 1959 Act was also dissimilar from the effect of the repeal of the 1946 Act as provided by the 1953 Act. By virtue of section 48(2)(iii) of the 1953 Act, proceedings connected with assessment under the 1946 Act were to be continued, so far as may be, in accordance with the 1953 Act. The 1959 Act was a Consolidating Act, and by section 76 it repealed not only the Bombay Sales Tax Act, 1953, but several other laws including Acts and Ordinances prevailing in Marathwada, Saurashtra and the integrated areas of Central Provinces and Berar. Section 77 of the 1959 Act provided that all the repealed laws would continue to prevail in all matters connected with the assessment for any period prior to the commencement of the 1959 Act. There was, however, a qualification to this provision, The repealed laws were to continue to have effect "subject to the provisions of sections 35 and 42". Then section 78 laid down that any reference in any of the provisions of the repealed laws to an office, authority or tribunal shall, for the purpose of carrying into effect the provisions contained in section 77, be construed as a reference to the corresponding officer, authority or tribunal appointed or constituted by or under this Act (i.e., the 1959 Act). The Commissioner of Sales Tax was the authority under the 1959 Act corresponding to the Collector of Sales Tax under the 1953 Act. The result is that proceedings connected with assessment for any period prior to the commencement of the 1959 Act were to be conducted by or before the Commissioner and other officers appointed to assist him, but under the procedure laid down by the 1953 Act, subject however to the provisions of sections 35 and 42 of the 1959 Act.

7. Section 35 of the 1959 Act is in the following terms :-

"(1) If the Commissioner has reason to believe that any turnover of sales or turnover of purchases of any goods chargeable to tax under this Act or any earlier law, has in respect of any year escaped assessment, or has been under-assessed or assessed at a lower rate, or that any deductions have been wrongly made, then the Commissioner may, -

(a) where such turnover has escaped assessment or has been under-assessed or assessed at a lower rate by reason of the fact that the provisions of sub-section (1) of section 2 of the Bombay Sales Tax (Validating Provisions) Act, 1957, were not then enacted, at any time within eight years,

(b) where he has reason to believe that the dealer has concealed such sales or purchases or any material particular relating thereto, or has knowingly furnished incorrect returns, at any time within eight years, and

(c) in any other case, at any time within five years, of the end of that year, serve on the dealer liable to pay tax in respect of such turnover, a notice containing all or any of the requisitions which may be included in a notice under sub-section (3) of section 33 and may proceed to assess or re-assess the amount of the tax due from such dealer; and accordingly, the other provisions of this Act shall apply as if the notice were a notice served under that sub-section :

Provided that, the amount of tax shall be assessed at the rates at which it would have been assessed had there been no under-assessment or escapement, but after making deductions (if any) permitted from time to time by or under this Act, or as the case may be, any earlier law :

Provided further that, where in respect of such turnover an order has already been passed in appeal or revision under this Act or the relevant earlier law, the Commissioner shall make a report to the appropriate appellate or revising authority under this Act, which shall thereupon after giving the dealer concerned a reasonable opportunity of being heard, pass such order as it deems fit.

(2) Nothing in sub-section (1) shall apply to any proceeding (including any notice issued) u/s 33 or 57 or 62.

(3) Nothing in section 57 or 62 shall affect a proceeding under this section."

8. It will be noticed that, under the corresponding provisions of the earlier Acts, proceedings for re-assessment were to be undertaken if the officer concerned was satisfied "in consequence of any information which has come into his possession" that any turnover in respect of sales or purchases of any goods had escaped assessment, or had been under-assessed or assessed at a lower rate, or any deductions had been wrongly made therefrom. u/s 35 of the 1959 Act, however, the powers of re-assessment can be exercised irrespective of whether the cause for re-assessment arose in consequence of any information which came into the possession of the officer concerned or whether it arose as a result of some mistake

which was discovered from the record of the proceedings for assessment. Powers which would otherwise have been regarded as revisional in character were thus included in section 35 in so far as the Commissioner proposed to enhance any assessment on the grounds mentioned in that section. Moreover, the first proviso to the section made it clear that the section is intended to be applied irrespective of whether an assessment was made under the 1959 Act or under any earlier law. Sub-section (2) of section 35 corresponds to sub-section (2) of the amended section 15 of the 1953 Act and as explained in the aforesaid decision in *Manordas Kalidas v. V. V. Tatke* [1960] 11 S.T.C. 87; 61 Bom. L.R. 1560, this provision appears to be designed to make it clear that the periods of limitation prescribed in section 35 will not affect proceedings of assessment u/s 33, of revision u/s 57 and of rectification of mistakes u/s 62. Sub-section (3), on the other hand, makes it clear that the periods of limitation provided in sections 57 and 62 will not affect a proceeding of re-assessment u/s 35.

9. Another significant change in the 1959 Act is to provide a period of limitation for the exercise of revisional powers by the Commissioner even when proceedings in that behalf are undertaken by the Commissioner on his own motion.

10. Section 57(1)(a) provides :-

"The Commissioner, of his own motion within two years from the date of any order passed by any officer appointed u/s 20 to assist him, may call for and examine the record of any such order and pass such order thereon as he thinks just and proper."

11. It is necessary to note in this connection that the revisional powers which can be exercised by the Commissioner u/s 57 are not confined to revision of assessment orders. All orders passed under the Act by subordinate officers, including orders relating to registration, licences, etc. are revisable by the Commissioner u/s 57. Such was also the scope of the revisional powers under the earlier Acts. Moreover with regard to assessment orders passed by subordinate officers, revisional powers could be exercised for reducing as well as enhancing the amount of assessment. Section 35, on the other hand, is confined to cases where, on the grounds mentioned in that section, the Commissioner proposes to enhance the amount assessed on any dealer.

12. Section 77(1), in so far as it is relevant, provides that notwithstanding the repeal by section 76 of the Bombay Sales Tax Act, 1953, the repealed laws shall "subject to the provisions of sections 35 and 42, continue to have effect for the purposes of the levy, assessment, re-assessment, collection, refund or set off of any tax, or the granting of a draw-back in respect thereof, or the imposition of any penalty, which levy, assessment, re-assessment, collection, refund, set-off, draw-back 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". Then sub-section (3) of section 77 lays down :-

"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."

13. Now, the case of the respondent is that, in respect of the petitioner's assessment the period between 1st April, 1949, and 31st October, 1952, the respondent is entitled to exercise revisional powers u/s 31 of the 1953 Act, unaffected by the period of limitation which has been provided for the exercise of revisional powers u/s 57 of the 1959 Act. It is clear that, in view of the provisions of clauses (ii) and (iii) of sub-section (2) of section 48 of the 1953 Act, revisional proceedings in respect of the aforesaid assessment have to be carried out u/s 31 of the 1953 Act and not u/s 22 of the 1946 Act. In *Manordas Kalidas v. V. V. Tatke* [1960] 11 S.T.C. 87; 61 Bom. L.R. 1560., which was decided prior to the 1959 Act, it was held by the Division Bench inter alia that, after the commencement of the 1953 Act, revision of assessment orders passed under the 1946 Act was to be done according to the provisions of the 1953 Act. On the other hand, sub-sections (1)(a) and (3) of section 77 of the 1959 Act have the consequence that, in revising an order of assessment relating to a period prior to the commencement of that Act, the Commissioner is not required to act u/s 57 and is not affected by the period of limitation of two years specified in that section. It is accordingly claimed by the respondent that, although periods of limitation have now been provided by sections 35 and 57 for re-assessment as well as revision no period of limitation restricts the Commissioner's powers in revising assessment orders in respect of any period prior to the commencement of the 1959 Act.

14. In taking this stand, the respondent has overlooked the circumstance that section 77(1)(a) of the 1959 Act has continued the provisions of the 1953 Act with regard to prior assessments "subject to the provisions of sections 35 and 42". We are not concerned in this case with section 42. In matters covered by section 35 of the 1959 Act, the Commissioner (and the Deputy Commissioner as in the present case) has no right to adopt the procedure of any provision of the 1953 Act, including section 31 thereof. The impugned notice of the respondent shows that, according to him, the turnover of purchases of the petitioner's firm during the aforesaid period has escaped assessment. It is immaterial whether this view has been formed by the respondent from the record of the assessment proceedings or on the basis of information received de hors the record. The action which the respondent proposes to take is thus covered by the powers which are granted to the Commissioner by section 35. That being the case, the respondent is not entitled in view of section 77(1)(a) of the Act, to fall back on any of the provisions of the 1953 Act for the purpose of subjecting the escaped turnover to assessment. If the respondent were to follow the procedure of section 35 in the present case, the proceeding would be barred by the period of limitation provided in that section. This was not denied before me. Clauses (a) and (b) of section 35(1) do not apply to the present case, so

that action u/s 35 could be taken against the petitioner only within five years from the end of the year of assessment. For the period between 1st April, 1949, and 31st October, 1952, the last day of the last year of assessment ended on 31st March, 1953, and the impugned notice has been issued on 17th June, 1960. The position, therefore, is that the respondent cannot proceed to alter the assessment order to the prejudice of the petitioner by adopting the procedure of section 31 of the 1953 Act because that section cannot be availed of in matters covered by section 35 of the 1959 Act nor can he proceed u/s 35 of the 1959 Act for any action thereunder is barred by the period of limitation.

15. On behalf of the respondent, Mr. Bhabha urged that in section 77(1)(a) the continuation of earlier laws has been made subject to the provisions of sections 35 and 42 but not to the provisions of section 57 as well. From this it follows that revision of orders relating to assessment in respect of prior periods is not affected by the period of limitation provided in section 57. This consideration, however, is immaterial where the action which the Commissioner proposes to take falls within his powers u/s 35. Since the continuation of the 1953 Act for the purposes mentioned in section 77(1)(a) has been specifically made subject to section 35, the respondent cannot take recourse to any provision of the 1953 Act for re-assessing the petitioner except by showing that the proposed action is not covered by the powers granted to the Commissioner u/s 35.

16. Mr. Bhabha further argued that sub-section (3) of section 77 provides that section 7 of the Bombay General Clauses Act applied to the repeal of the Bombay Sales Tax Act, 1953, and that u/s 7 of the Bombay General Clauses Act, any investigation, legal proceeding or remedy may be instituted, continued or enforced as if the Repealing Act had not been passed. It was accordingly urged by Mr. Bhabha that the repeal of the 1953 Act does not affect the revisional powers conferred on the Collector (which could now be exercised by the Commissioner) by section 31 of the earlier Act. It is to be noticed, however, that sub-section (3) of section 77 provides for the application of section 7 of the Bombay General Clauses Act "without prejudice to the provisions contained in the foregoing sub-sections and subject thereto". It must, therefore, follow that the exercise of the revisional powers u/s 31 of the 1953 Act is subject to the provisions contained in section 77(1)(a) and those revisional powers cannot, therefore, be exercised in matters covered by section 35 of the 1959 Act.

17. Reliance was also placed by Mr. Bhabha on a ruling of a Division Bench consisting of the Chief Justice and Mr. Justice V. S. Desai in Special Civil Application No. 124 of 1959, decided on 6th August, 1959, prior to the 1959 Act. In that case, several years after an assessment order had been passed, it was discovered that the assessee had suppressed his real turnover, and a notice was issued on him u/s 31 of the 1953 Act for revision of the assessment order. When the notice was issued, the period of limitation provided for re-assessment u/s 15 of that Act had already

expired. The Division Bench held that, even where the Collector received the information about the suppression of the real turnover from sources other than the record of the assessment proceeding, the Collector could take action in the exercise of his revisional powers u/s 31 and was not restricted by the periods of limitation provided for re-assessment by section 15 of that Act. This decision shows that powers of re-assessment and of revision may overlap to a certain extent, but the decision is otherwise of little assistance in deciding the present case. I am not here concerned with the question whether the scope of section 31 of the 1953 Act is wide enough to include the power of re-assessment u/s 15 of that Act. On the contrary, the question before me is whether, in view of the wide powers of re-assessment granted to the Commissioner by section 35 of the 1959 Act, the Commissioner (or the Deputy Commissioner) is entitled to exercise the same powers by recourse to section 31 of the 1953 Act so as to escape the period of limitation provided by section 35 of the 1959 Act. The provision of section 77(1)(a) requires that this question must be answered in the negative.

18. In an effort to show that the proposed action of the respondent is not covered by section 35 of the 1959 Act, Mr. Bhabha argued that an order of re-assessment u/s 35 can be made only by the authority which initially passed the order of assessment and not by a superior authority, and since in this case the original order of assessment was passed by a Sales Tax Officer and the subsequent appellate order by an Assistant Collector of Sales Tax, the respondent being a Deputy Commissioner could not have proceeded to re-assess the petitioner by recourse to section 35 of the 1959 Act and was, therefore, entitled to proceed u/s 31 of the 1953 Act. There is nothing in section 35 of the 1959 Act which requires me to accept Mr. Bhabha's argument that an order of re-assessment under that section can only be made by the officer who passed the initial order of assessment. The second proviso to sub-section (1) of section 35 shows that, where the prior order was passed in appeal or revision, the Commissioner is to make a report to the appropriate appellate or revising authority and thereupon such appellate or revising authority is to pass an appropriate order u/s 35. There was no reason why the respondent could not follow the procedure of section 35 in the present case except for the period of limitation prescribed by that section.

19. In the result, I must hold that the respondent is not entitled to proceed against the petitioner for the purpose of re-assessment u/s 31 of the Bombay Sales Tax Act, 1953. Accordingly, the notice dated 17th June, 1960, issued by the respondent (and produced as Exhibit E to the petition) is quashed and the respondent is directed not to act in furtherance thereof. Rule is made absolute in terms of prayers (a) and (b). The respondent will pay the petitioner's costs of the petition. Costs quantified at Rs. 500.

20. Petition allowed.