(1984) 11 BOM CK 0083

Bombay High Court

Case No: Sales Tax Reference No. 3 of 1979 in Reference Application No. 48 of 1974

Commissioner of Sales Tax		APPELLANT
	Vs	
Khimji Velji and Co.		RESPONDENT

Date of Decision: Nov. 7, 1984

Acts Referred:

- Bombay Sales Tax Act, 1959 - Section 18, 19, 20, 27, 37
- Central Sales Tax Act, 1956 - Section 9, 9(2)

Citation: (1985) 58 STC 95

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

Bench: Division Bench

Judgement

Kania, J.
This is a reference on a case stated by the Sales Tax Tribunal u/s 61(1) of the Bombay Sales Tax Act, 1959 (hereinafter referred to as "the said Act").

2. The facts giving rise to this reference are as follows :

The respondent-firm is a registered dealer under the said Act. In respect of the assessment of the respondent for the periods 1st April, 1961, to 31st March, 1962, and 1st April, 1962, to 31st March, 1963, it was found by the Sales Tax Officer concerned that the respondent had collected amounts of Rs. 1,115.67 and Rs. 993.66 respectively in excess of the tax payable by the respondent under the said Act. The Sales Tax Officer ordered the forfeiture of these amounts on the ground that they represented the excess collection of tax by the respondent. The respondent preferred first appeals before the Assistant Commissioner against the orders of the Sales Tax Officer in respect of the aforesaid two assessment periods but these appeals were dismissed. The respondent filed two second appeals to the Tribunal being Second Appeals Nos. 229 of 1967 and 230 of 1967. The Second Appeal No. 229 of 1967 related to the period 1st April, 1961, to 31st March, 1962, and Second Appeal No. 230 of 1967 related to the period 1st April, 1962, to 31st March, 1963. Both these

second appeals were allowed on the ground that the proper procedure for passing an order of forfeiture was not followed by the Sales Tax Officer in so far he had not issued notices in form 29 as required by law. Thereafter, the Sales Tax Officer concerned issued notices in form 29 to show cause why forfeiture order should not be passed, and after hearing the respondent, the Sales Tax Officer passed orders forfeiting the excess collections of tax represented by the aforesaid amounts. The first appeals preferred by the respondent against these decisions were dismissed. The respondent then filed two second appeals before the Sales Tax Tribunal. In these second appeals, the Tribunal took the view that the forfeitures relating to the period prior to 15th July, 1962, were bad in law, inasmuch as the second part of sub-section (2) of section 46 was amended on 15th July, 1962, and the forfeiture relating to the earlier period was bad in law. Accordingly, the Tribunal allowed Second Appeal No. 1522 of 1972 which related to the period 1st April, 1961, to 31st March, 1962, and partly allowed Second Appeal No. 1523 of 1972 which pertained to the period 1st April, 1962, to 31st March, 1963. Arising from this decision of the Tribunal in Second Appeal No. 1522 of 1972, the Tribunal posed the following two questions for our determination in this reference which relates only to the period 1st April, 1961, to 31st March, 1963 :

"(1) Whether the Tribunal was correct in law in holding that section 46(2) first part would not cover the case of a registered dealer ?

(2) Whether the Tribunal was correct in law in holding that the forfeiture orders for the period up to 15th July, 1962, are bad in law ?"

3. We propose to consider the second question first, because, in our view, that is the crucial question which arises in the reference. In connection with this question, the submission of Mr. Jetly is that by section 18 of Maharashtra Act 21 of 1962 (referred to hereinafter as "the amending Act of 1962"), the provisions of section 46 of the said Act were amended retrospectively and by the said amendment, it was provided that the words "and no registered dealer shall collect any amount by way of tax in excess of the amount of tax payable by him under the provisions of this Act" were deemed always to have been inserted after the words "any other person" in section 46. It was pointed out by him that this amending Act came into effect on 15th July, 1962. It was submitted by Mr. Jetly that in view of the retrospective amendment effected by the said amending Act, the view of the Tribunal was clearly erroneous and the law applicable to forfeiture under the said Act before 15th July, 1962, must be held to be the same as the law in that regard after that date. It was on the other hand submitted by Mr. Patel, who assisted us as amicus curiae, that in view of the provisions of article 20 of the Constitution of India, section 46(2) even after the amendment, should be interpreted in such a manner that no forfeiture would be permissible under the same in respect of excess of collections of tax made before the coming into effect of the said amending Act. It was submitted by him that if the interpretation canvassed for by Mr. Jetly was placed on section 46, it would violate

the provisions of article 20 and would become invalid. In view of this, it should be interpreted and if necessary, read down so as not to confer on the Sales Tax Officer any power to levy forfeiture where it would not have been open to him to do so prior to 15th July, 1962. The second submission of Mr. Patel was that in any event the order of forfeiture is invalid and illegal in view of the provisions of section 27 of the said amending Act.

4. Before considering the rival submissions of the learned counsel which we have set out earlier, it would be useful to take note of certain relevant provisions of law. Section 46 of the said Act contains a prohibition against collection of tax in certain cases. The material portion of that section for the purposes of this reference runs as under :

"46. (1) No person shall collect any sum by way of tax in respect of sales of any goods on which by virtue of section 5 no tax is payable.

(2) No person, who is not a registered dealer and liable to pay tax in respect of any sale or purchase, shall collect on the sale of any goods any sum by way of tax from any other person and no registered dealer shall collect any amount by way of tax in excess of the amount of tax payable by him under the provisions of this Act :

Provided that .....

(3) Notwithstanding ....."

The words "and no registered dealer shall ..... under the provisions of this Act" were inserted retrospectively into sub-section (2) of section 46 by section 18 of the aforesaid amending Act of 1962. The said section provided that the aforesaid words "shall be deemed always to have been inserted". Section 37 of the said Act, namely, the Bombay Sales Tax Act, 1959, deals with imposition of penalty for contravening certain provisions. At the material time, the material portion of the said section ran thus :

"37. (1) If any person -

(a) not being a dealer liable to pay tax under this Act, collects any sum by way of tax, or being a registered dealer collects any amounts by way of tax in excess of tax payable by him, or otherwise collects tax in contravention of the provisions of section 46, or

(b) .....

he shall be liable to pay, in addition to any tax for which he may be liable, a penalty of an amount not exceeding two thousand rupees, or doubt the amount of tax which would have been payable had there been no such failure, whichever is less; and in addition, in the case of a contravention referred to in clause (a), any sum collected by the person by way of tax in contravention of section 46 shall be forfeited to the State Government."

Section 63 deals with offences and penalties under the said Act. Under clause (h) of sub-section (1) of section 63, as it stood prior to the said amending Act of 1962, contravention of section 46 was an offence for which penalty was prescribed therein by way of simple imprisonment or fine or both. By the said amending Act, it has been retrospectively provided that penalty can be imposed only where the contravention is without any reasonable excuse. The said amending Act, namely, the Maharashtra Act 21 of 1962, was brought into effect from 15th July, 1962, by a Government notification. Section 18 of the said amending Act amended the provisions of sub-section (2) of section 46 retrospectively, as set out earlier. Section 27 of the said amending Act runs as under :

"Nothing in sections 18, 19, 20 and 25(4) of this Act, shall render any person liable to be convicted of any offence in respect of anything done or omitted to be done by him, before the date of commencement of this Act, if such act or omission was not an offence under the Bombay Sales Tax Act, 1959 but for the amendments made by these sections; nor shall any person in respect of such act or omission be subject to a penalty greater than that which could have been inflicted on him under the law in force immediately before the date of such commencement."

5. It is clear on perusal of sub-section (2) of section 46 that there is a prohibition against a registered dealer from collecting any amount by way of tax in excess of the amount of tax payable by him under the said Act. Under the provisions of sub-section (1) of section 37, as it stood, the said amount was liable to be forfeited. This was by reason of the retrospective amendment of section 46(2) as we have set out earlier. The question which we have to consider is whether giving such effect to the retrospective amendment would violate the provisions of article 20 of the Constitution, as suggested by Mr. Patel. It is clear, on a plain reading of the said provisions, that if retrospective amendment is to be given to the amendment portion of section 46 as provided by the said amending Act, the amounts collected prior to July 15, 1962, by the respondent in excess of the tax payable by the respondent would be liable to be forfeited. In this connection, we may refer to the decision of the Supreme Court in Shiv Dutt Rai Fateh Chand and Others Vs. Union of India (UOI) and Another, decided by a Bench comprising two learned Judges of that Court. The question before the Supreme Court in that case was regarding section 9(2) of the Central Sales Tax Act, 1956. That section was amended retrospectively in 1969. By reason of the amendment, section 9(2) of that Act empowered the local sales tax authority to assess, collect and enforce payment of tax, including any penalty payable under that Act as if the tax or penalty under that Act were a tax or penalty payable under the local General Sales Tax Act. There was no express provision in the local General Sales Tax Act itself authorising the levy of any penalty for delay or default in payment of the tax due under the Central Sales Tax Act or for other breaches contemplated by the local General Sales Tax Act in so far as they were adopted by section 9(2) of the Central Sales Tax Act. It was pointed out that in Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra, the Supreme Court

had held that the levy of penalty under the local General Sales Tax Act in question was not permissible in the absence of any provision in the Central Act for imposition of penalty for delay or default in payment of tax thereunder. Consequently, in 1976 Parliament, by an amending Act, amended section 9 by introducing therein sub-section (2A) which inter alia provided that all the provisions relating to offences and penalties of the general sales tax law of each State shall, with necessary modifications, apply in relation to the assessment, collection and the enforcement of payment of any tax required to be collected under this Act (that is, the Central Sales Tax Act) in such State or in relation to any process connected with such assessment, reassessment, collection or enforcement of payment as if the tax under this Act were a tax under such sales tax law. The said amending Act of 1976 gave retrospective effect to the amendment of section 9 in relation to the period commencing from January 5, 1957. The petitioners filed writ petitions in the Supreme Court challenging the validity of sub-section (2A) inserted in section 9 of the Central Sales Tax Act, as aforesaid. One of the grounds on which the said provision was challenged was that as the provision validated penalties levied prior to the coming into force of the amending Act it was violative of article 20(1) of the Constitution of India. It was held by the Supreme Court that the word "penalty" used in article 20(1) of the Constitutional could not be construed as including a penalty levied under the sales tax laws by the departmental authorities for violation of statutory provisions. A penalty imposed by the sales tax authorities was only a civil liability, though penalty in character. It was held that the protection given in article 20 was a constitutional protection given to persons who were charged with a crime before a criminal Court and did not confer any protection against penalties levied under the sales tax laws by the departmental authorities for violation of statutory provisions, which, as aforesaid, were only civil liabilities. The reasoning accepted by the Supreme Court in this case clearly applies also to a penalty imposed under sub-section (1) of section 37 of the said Act for a breach of the latter portion of sub-section (2) of section 46 although the breach might have occurred prior to the coming into force of the said amending Act, and hence the submission of Mr. Patel that if retrospective effect is given to the amended portion of sub-section (2) of section 46 as contended by Mr. Jetly it would violate the safeguard of article 20, must be rejected.

6. Coming next to the provisions of section 27 of the said amending Act, the submission of Mr. Patel was that the penalty referred to in this section included a pecuniary penalty imposed by a departmental authority for a statutory violation. It was argued by him that there was no reason why the connotation of the term "penalty" in section 27 should be confined to penalties imposed by criminal Courts in respect of criminal offences. It was open to the Court to give a wider interpretation to the said term so as to afford better protection to the assessee and hence general principles of interpretation of statutes required that such wider interpretation should be given. In this connection, Mr. Patel referred to the

observations of the Supreme Court in State of Bombay v. Automobile and Agricultural Industries Corporation, Bombay [1961] 12 STC 122 which run as follows :

".... If the Legislature has failed to clarify its meaning by the use of appropriate language, the benefit thereof must go to the taxpayer. It is settled law that in case of doubt, that interpretation of a taxing statute which is beneficial to the taxpayer must be adopted."

In considering this submission, we have to bear in mind that section 27 of the amending Act clearly seems to have been inserted with a view to obviate challenge to the provisions of the said amending Act under article 20 of the Constitution of India. Clause (1) of that article runs as follows :

"No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

It is true that the language of section 27 of the amending Act is not identical with the language of clause (1) of article 20 of the Constitution in the sense that the point of time referred to in clause (1) of article 20 is the time of the commission of the offence whereas in section 27 of the amending Act, the point of time referred to is the date of the commencement of the amending Act. This, however, in our view, does not make much difference because the language of section 27 is substantially similar to the language employed in clause (1) of article 20. A perusal of the amending Act makes it clear that certain amendments were retrospectively made by the amending Act in the Bombay Sales Tax Act, 1959, and in view of this, it is clear that the intention of the legislature in enacting section 27 was to protect these retrospective provisions from the challenge of article 20. It is true that if the word "penalty" used in section 27 of the amending Act could be reasonable interpreted so as to include even a penalty imposed by a department authority, such an interpretation would be normally accepted by a Court. Considering, however, the background of the legislation and the clear purpose for which that section was enacted, it would not be reasonable to give an interpretation to the term "penalty" used in section 27 so as to include therein a departmental penalty which as pointed out constitute civil liability although penal in character. If such an interpretation were to be given to the term "penalty", the result would be that the respective amendment to sub-section (2) of section 46 would be rendered completely nugatory and in spite of the clear words of section 18 of the amending Act, no retrospective effect would be given to the amendment. Thus, the words "shall be deemed always to have been inserted" in section 18 of the amending Act would be rendered totally nugatory by such an interpretation. In these circumstances, it is not possible to give such an interpretation to the term "penalty" in section 27. It is not possible to accept that the legislature by section 18 of the amending Act intended to make the

amendment retrospective and by section 27 of the very Act intended to render the retrospective part of the amendment completely nugatory. In our view, the submission of Mr. Patel in this connection is also liable to be rejected.

7. In the result, question No. (2) referred to us is answered in the negative and against the dealer. In view of the answer which we have given to question No. (2), it is common ground that it is not necessary to decide question No. (1), because it becomes wholly redundant and we do not propose to answer that question.

8. Considering the facts and circumstances of the case, including particularly the fact that the respondent had not even chosen to appear to defend the decision of the Tribunal, we direct that there will be no order as to the costs of the reference.

9. Before concluding the judgment, we must that we are obliged to Mr. Patel for the assistance which was rendered by him as amicus curiae in this matter.