GUJARAT HIGH COURT

Vishwa and Co.

Vs.

State of Gujarat

Sales Tax Ref. No. 10 of 1965,

(J.M. Shelat, C.J. and P.N. Bhagwati, J.)

13.10.1965, 14.10.1965

JUDGMENT

Bhagwati, J.

1. Two questions of law are submitted for our opinion in this reference; one raises the issue as to which is the proper entry of Schedule B to the Bombay Sales Tax Act, 1953 under which fans are liable to be taxed, entry 52 or the residuary entry 80 and the other relates to the validity of the imposition of penalty on the assessee under Section 16(4) of the Act. In order to appreciate the contentions bearing on these questions, it is necessary to state briefly a few facts giving rise to the reference.

2. At all material times the assessee was a registered dealer under the provisions of the Act and carried on business as a dealer in electric fans and sewing machines. In the course of the assessment of the assessee to sales tax for the assessment period 1st April 1957 to 31st March 1958, the question arose whether the sales of electric fans made by the assessee were taxable under Entry 52 of Schedule B or under Entry 80 of Schedule B. The revenue claimed that electric fans were domestic electrical appliances within the meaning of Entry 52 of Schedule B and the sales of electric fans were, therefore, taxable under that entry whereas the assessee contended that electric fans were not eletrical appliances and that, in any event, even if they were electrical appliances, they were not domestic electrical appliances since their essential or primary use was not for homes or houses but they were meant for use also in offices and commercial and industrial establishments and they were, therefore, not covered by Entry 52 of Schedule B and since there was no other specific entry covering them, they fell within the residuary entry 80 or Schedule B. The contention of the assessee was rejected and the claim of the revenue to tax the sales under Entry 52 of Schedule B was upheld by all the appellate and revisional authorities and the Tribunal also took the same view. The Tribunal held that in the context in which the words "domestic electrical appliances" occurred in Entry 52 of Schedule B and on a consideration of

corresponding entries in the previous sales tax statutes, it was clear that these words had an enlarged meaning which included electric fans and electric fans were, therefore, covered by Entry 52 of Schedule B. This decision of the Tribunal is now challenged before us on the present reference under question No. 1. So far as question No. 2 is concerned, the facts are very simple. The assessee was admittedly liable to submit quarterly returns under Rule 4 of the Bombay Sales Tax (Procedure) Rules, 1954, and the assessee accordingly submitted a return for the quarter ending 30th June 1957 on or about 6th August 1957. The tax due according to the return was Rs. 33,221.09 nP. and under Section 16(2) and Rule 10 it was required to be paid into Government Treasury before furnishing the return. But the assessee paid only Rs. 10,000 before submitting the return and the balance was paid later on or about 8th May 1958 after the return was submitted. The Sales Tax Officer, therefore, held that the assessee had rendered itself liable to penalty under Section 16(4) and he accordingly claimed to recover penalty from the assessee. The assessee challenged the claim of the Sales Tax Officer and the contention of the assessee was that on a proper construction of the provisions enacted in Section 16, no liability to payment of penalty was incurred under sub-section (4) by reason of non-payment of the amount of the tax before the filing of the return and that such liability could arise only if the assessee failed to pay the amount of the tax within the time limited under the notice issued under sub-section (5) and since no such notice was issued to the assessee, the assessee was not liable to pay any penalty. This contention was, however, rejected by all the appellate and revisional authorities including the Tribunal and the imposition of the penalty was held valid. Question No. 2 challenges the correctness of the decision of the Tribunal on this point.

3. The first question raises the point as to which is the proper entry under which electric fans fall : Entry 52 of Schedule B or the residuary Entry 80 of Schedule B. Entry 52 of Schedule B relates to "Domestic Electrical Appliances other than torches, torch cells and filament lighting bulbs" and, therefore, unless electric fans can be called domestic electrical appliances, they would not fall within that entry and if they are not covered by that entry, they would, in the absence of any other specific entry covering them, fall within the residuary Entry 80 of Schedule B. The narrow question which, therefore, arises for consideration is whether electric fans are domestic electrical appliances within the meaning of Entry 52 of Schedule B. Mr. S. L. Modi, learned advocate appearing on behalf of the assessee, contended that electric fans are not domestic electrical appliances and the reasons which he gave in support of this contention were two. The first was that they are not "electrical appliances" as understood in common parlance, which limits the meaning of that expression to articles like cooking ranges, heaters, waffle irons, etc., and the second was that in any event, even if they can be called electrical appliances, they are not domestic electrical appliances since their principal and primary use is not for the home or the house but they are also used extensively for offices and commercial and industrial establishments. Mr. A. D. Desai, learned Assistant Government Pleader appearing on behalf of the revenue, contested the validity of both these reasons and urged that tans are domestic electrical appliances according to the popular sense in which that expression is understood and even if the ordinary natural connotation of that expression is taken, it would still include electric

fans since electric fans are electrical appliances used for domestic purposes. He disputed the correctness of the test of principal and primary use and pointed out that if that test were correct, torches and filament lighting bulbs would be clearly not domestic electrical appliances since they are not principally or primarily meant for use in homes or houses but are also used on a vast scale at other places and if they are not domestic electrical appliances, it was not necessary to specifically except them from the category of domestic electrical appliances in order to take them out of Entry 52 of Schedule B. But they were specifically excluded by using the words "other than torches, torch cells and filament lighting bulbs" and this, in the submission of Mr. A. D. Desai, showed that the test suggested on behalf of the assessee is not correct and the expression "domestic electrical appliances" has an enlarged connotation which includes torches, torch cells and bulbs and if such enlarged connotation includes torches torch cells and bulbs, it must also include electric fans. The answer which Mr. S. L. Mody gave to this last argument urged on behalf of the revenue was that the words "other than torches, torch cells and filament lighting bulbs" were used by the Legislature ex abundanti cautela in order to obviate a possible argument that the items excluded were within the normal connotation of the expression "domestic electrical appliances" and it was not right to give an artificially expanded meaning to that expression by reference to the words of exclusion following it. It was urged by Mr. S. L. Mody that wherever the Legislature wanted to make a provision for exclusion ex abundanti cautela, the legislative device adopted by the Legislature was to use the words "other than" and when the Legislature wanted to exclude something not ex abundanti cautela but because it was otherwise included in the category of goods described in the entry, the Legislature used the word "excluding" and the use of the words "other than" in the entry in question, therefore, clearly indicated that these words of exclusion were used by way of abundant caution to exclude a possible argument that the items excepted were domestic electrical appliances and not because those items would, but for the exception, have been within the entry as domestic electrical appliances. Now it is undoubtedly true that when we turn to various entries in Schedules A and B, we find that the Legislature has at some places used the words "other than" and at some other places used the word "excluding". But there does not seem to be any legislative scheme or design behind the use of these different words and they do not seem to have been used deliberately as different legislative devices intended to provide for different situations. Take for example, Entry 7 of Schedule B which talks of raw wool, wool tops and woollen yarn "other than knitting yarn". Knitting yarn would certainly be woollen yarn but the Legislature has yet used the words "other than". Another entry which may be noted in this connection is Entry 58 of Schedule B which relates to "furs and skins (other than those of cattle, sheep and goats)". Here also the skins of cattle, sheep and foats would be included in the generic term "skin" and yet the words used by the Legislature are "other than" and not "excluding". It is therefore not possible to found any argument on the basis of a supposed distinction arising from the use of different words by the Legislature. Mr. S. L. Mody is, however, right when he says that the words "domestic electrical appliances" must be construed according to their proper meaning and no artificially enlarged meaning should be given to them because of the succeeding words of exclusion. Of course, if the words "domestic electrical appliances" are ambiguous or susceptible of two meanings, the words

of exclusion following them not only can but must be taken into account for the purpose of arriving at their true meaning. But where the meaning of the words is clear and does not admit of any doubt, it would not be right to place an artificial or unnatural meaning on the words on the ground that the words of exclusion would otherwise be rendered unnecessary. It is not uncommon in modern legislation to find the Legislature using words of exclusion as also words of inclusion out of abundant caution in order to make its intention plain and clear so that there may be no doubt or debate as regards the true meaning of what it has said. In this very statute with which we are dealing in the present reference, the Legislature has used words of exclusion out of abundant caution in a number of entries of which we may cite only a few, namely, entry 41 of Schedule A and entries 33, 41, 64 and 79 of Schedule B. It is not necessary to cite any authorities in support of the proposition that words of inclusion as also words of exclusion may be used by the Legislature ex abundanti cautela but if any authority were needed, it is to be found in *In re, Power; Public Trustee v. Hastings*[1], This case tamed on the construction of a certain clause in a will made by the testator which was in the following terms : "All moneys requiring to be invested under this my will may be invested by the trustee in any manner in which he may in his absolute discretion think fit in all respects as if he were sole beneficial owner of such moneys including the purchase of freehold property in England and Wales". The contention was that the words "including the purchase of freehold property in England and Wales" in the clause must be constructed as extending the effect of the clause so as to authorise the purchase of freehold property otherwise than as an investment for otherwise those words would be rendered meaningless. This contention was refected by the learned Judge who observed :

> "Having established that proposition, Mr. Winterbotham's next step is to say that the addition of the words 'including the purchase of freehold property in England or Wales' must be construed as extending the effect of the clause so as to authorise the purchase of freehold property otherwise than as an investment, because he says that, if that were not so, these words would be meaningless. He has referred me to the well-known, case of *Dilworth v. Commissioner of Stamps*[2], in support of the proposition that the effect of the word 'including', when introducing expressions explanatory of the meaning of another word, is prima facie to enlarge the meaning of that word. It seems to me that the words 'including the purchase of freehold property in England or Wales' can be sufficiently accounted for by regarding them as having been inserted by the draftsman as ex super abundanti cautela to make sure that no one would suggest that this clause did not extend to the purchase of freehold property as an investment. I think it is pressing the argument altogether too far to say that me effect of inserting those words must be to introduce some process which is not investing at all."

This case of course related to words of inclusion but like words of inclusion, words of exclusion may also be inserted by the draftsman of the statute ex super abundanti cautela to make sure that no one would suggest that the category of goods described in the entry extends to the items specifically excepted. We should not therefore, while construing the words "domestic electrical

appliances", allow ourselves to be guided unduly by the succeeding words of exclusion which occur in entry 52 of Schedule B. We must first examine the true import of these words as they stand and only if we find that they are capable of bearing two meanings, one including torches, torch cells and bulbs and the other excluding them, then we would be justified in taking the aid of the words of exclusion for the purpose of preferring the first meaning.

4. Now turning to the construction of the words "domestic electrical appliances", it is a well settled rule of construction of sales tax statutes that words used by the Legislature in entries in various Schedules to describe different kinds of goods for prescribing different rates of tax should be construed not in any technical or scientific sense but as understood in common parlance. The words "domestic electrical appliances" must therefore be construed according to their popular sense, meaning "that sense which people conversant with the subject matter with which the statute is dealing would attribute to it". See *Ramavatar Budhaiprasad v. Assistant Sales Tax Officer, Akola*[3], Now what is the sense in

[1](1947) 1 Ch. D. 572 [3]1961-12 STC 286
[2](1899) AC 99

which the words "domestic electrical appliances" are understood in common parlance? No better guidance can be found on this point than in Encyclopedia Britannica and when we turn to that famous work we find that "domestic appliances" are equated with household appliances and under the heading of "household Appliances" we find the following passage which throws considerable light on what are domestic appliances, electrical as well as non-electrical :

> "Modern household appliances developed to meet this need can be divided into two main headings, electrical and non-electrical appliances. Under the classification of electrical appliances are grouped; irons, toasters, waffle irons, heaters, coffee percolators, vacuum cleaners, washing machines, floor polishers, refrigerators, dish washing machines, cookers and stoves, ventilators, water heaters. In the non-electric group may be noted : gas cookers, stoves and furnaces, gas refrigerators, hot water heaters, kitchen cabinets and tables,....."

This passage is further elaborated in so far as it refers to accessory heat and ventilation and this is what Encyclopedia Britannica has to say under the sub-heading Accessory Heat and Ventilation" :

> "Although the small electric fan has a certain popularity in the south of the United States and sells rapidly during a few weeks or months in the very warm weather, elsewhere electrical ventilation has never received the public response or use that is possible. Manufacturers provide domestic ventilation fans in a variety of units....."

These passages from the Encyclopedia Britannica which we have quoted above clearly show that

electric fans are commercially regarded as domestic electrical appliances. To the same effect we also find observations in another well-known Encyclopedia, namely, Encyclopedia Americana where, under the heading "Electrical Appliance" it is stated as follows :

> "Electrical Appliance : A term given to many devices operated by electricity which are used in the home for domestic purposes. Such appliances may be divided into two general classes : those operated by heat, and those operated by power. In such appliances as the toaster, grill, flatiron, waffle iron, or oven, the electric current heats a wire or conductor to red heat, and the heat thus produced performs the function of the device ..... Where power is required to operate appliances such as washing machine, vacuum cleaner, refrigerator, fan, or water pump, a small motor operated by electricity is used....."

It is therefore clear that domestic electrical appliances as understood in common parlance include electric fans, and if that be so, it is not necessary to go into the question whether the test of principal or primary use is a correct test for determining whether an electrical appliance can be called a domestic electrical appliance. But since the test was strongly relied on behalf of the assessee, we will say a few words about it.

5. We find that the test of principal or primary use was first enunciated by the Maharashtra High Court in *Pashabhai Patel and Co. (P) Ltd. v. Collector of Sales Tax, Maharashtra State*[4], In that case the question was whether a tractor was agricultural machinery within the meaning of Entry 9 of Schedule B to the Bombay Sales Tax Act, 1953. The argument of the assessee was that a tractor was machinery generally used for agricultural purposes and was therefore agricultural machinery within the meaning of Entry 9 of Schedule B. This argument was rejected by the Maharashtra High Court which took the view that though a tractor may be used for the purpose of agriculture, that was not the principal or primary purpose of a tractor, since a tractor was used for many purposes other than agriculture such as "pushing down trees, pushing large piles of dirt or rocks, or loading scrapers and operating of steep grades or against the high rolling resistance of soft roads... .clearing and grubbing involving a complete disposal of all timber, roots, and brush from the vicinity of operations .... clearing small trees, for pulling or pushing loads, clearing jungles ploughing kans lands, digging canals or building dams, roads and pipe lines or for moving earth for soil erosion or flood control, etc". The Maharashtra High Court held that the principal and primary use of a tractor was not for agriculture and therefore a tractor could not be called an agricultural machinery within the meaning of entry 9 of Schedule B. The Maharashtra High Court thus laid down the test of principal or primary user and applied it in determining the question before it. This decision was strongly relied on by Mr. S. L. Mody on behalf of the assessee. As against this decision, Mr. A. D. Desai on behalf of the revenue cited before us a decision of the Mysore High Court in *State of Mysore v. Santoomal Kishnomal*[5], where the question was whether a crowbar is an agricultural implement exempted from sales tax under Schedule III of the Mysore Sales Tax Act, 1948, and a Division Bench held that it is an agricultural implement. The Mysore High Court observed :

> "It is not denied that a 'crow-bar' is generally used as an agricultural implement. The question whether it is predominantly used as such an instrument to our mind appears to be an irrelevant question. The use of the 'crowbar' for agricultural purposes is by no means a remote use. We are also in agreement with the contention of Mr. Gulur Srinivasrao, the learned counsel for the respondent, that the crow-bar is extensively used as an agricultural implement. That being so, we are in agreement with the conclusion reached by the Mysore Sales Tax Appellate Tribunal that 'crow-bar' is an agricultural implement'".

The Mysore High Court thus did not accept the test of principal or primary user as a valid test and observed that what was material to consider was not as to whether the principal and primary user of a crow-bar was for agriculture but whether crow-bar was generally used as an implement for the purpose of agriculture. Now it is not necessary for the purpose of the present reference to decide which of these two decisions is correct, for we are satisfied that whatever may be the position in regard to agricultural machinery or agricultural implements, different considerations must prevail when we are considering the question as to what is a domestic electrical appliance. We have to construe a totally different expression from that which fell for consideration before the Maharashtra High Court and the Mysore High Court. A domestic electrical appliance, in our opinion, would be an electrical appliance of a kind generally used for domestic purposes. It may also be

[4](1964) 15 STC 32 (Bom)
[5](1962) 13 STC 313 (Mys)

used at places other than the home or the house, but that would not destroy the character of a domestic electrical appliance which attaches to it by reason of its being a kind of an electrical appliance generally used for the household. There are several electrical appliances which are generally used in the household, such as electric irons, electrical sewing machines and electrical cooking ranges which are also used in other establishments. But these electrical appliances do not therefore cease to be domestic electrical appliances. It is of course not necessary that an electrical appliance, in order to satisfy the description of a domestic electrical appliance, must be actually used in the home or the house. What is necessary is that it must be of a kind which is generally used for household purposes and if that test is applied, there is no doubt that electric fans are domestic electrical appliances, and the Tribunal was therefore right in holding that they fall within Entry 52 of Schedule B.

6. Turning to the second question which impugnes the validity of the demand for penalty, a preliminary objection was raised by Mr. A. D. Desai on behalf of the revenue, namely, that the question was not one which could be referred by the Tribunal to the High Court under Section 34(1). Section 34(1) provides that within ninety days from the passing by the Tribunal of any order under Section 30(2) or Section 31(1) affecting any liability of any person to pay the tax, such person or the Collector may by application in writing ..... require the Tribunal to refer to the High Court any question of law arising out of such order and where the Tribunal agrees it shall

draw up a statement of the case and refer it to the High Court. The argument of Mr. A. D. Desai was that question No. 2 related only to imposition of penalty under Section 16(4) and penalty was not tax and the question, therefore, did not affect any liability of the assessee to pay tax and could not accordingly form the subject-matter of reference under Section 34(1). This contention is, in our opinion, not well founded, for it ignores the language of the Section and misreads what is a condition affecting the order of the Tribunal as a condition requiring to be fulfilled by the question of law arising out of the order. What the Section requires is that the order of the Tribunal in respect of which the reference application is made must be an order affecting any liability of any person to pay the tax. Once there is such an order, then any question of law arising out of such order can be referred by the Tribunal to the High Court. The object of the Legislature seems to be that not any and every order must form the subject-matter of reference to the High Court. The order must be one affecting the liability of a person to pay the tax and if there is such an order, any question of law arising out of such order can be referred to the High Court. It is not necessary that the question of law which is referred must affect any liability of any person to pay the tax. That condition is required to be satisfied by the order of the Tribunal and in the present case, there is no doubt that the order or the Tribunal satisfied that condition, for it does affect the liability of the assessee to pay the tax. It may be that the determination of the Tribunal in the order in regard to imposition of penalty does not affect the liability of the assessee to pay the tax though of course even that question is not free from doubt, for as held by the Tribunal it is a possible view to take that an order imposing penalty is an order affecting liability to pay the tax since penalty is in the nature of additional tax but the other determinations of the Tribunal contained in the order certainly affect the liability of the assessee to pay the tax and the order taken as a whole therefore, satisfies the condition specified in Section 34(1). That being so, question No. 2, which is admittedly a question of law arising out of the order of Tribunal, can form the subject matter of a valid reference to the High Court. The preliminary objection raised by Mr. A. D. Desai must, therefore, be rejected and we must proceed to consider question No. 2 on its merits.

7. So far as the merits of the second question are concerned, it is clear that the revenue can claim penalty from the assessee only if the case of the assessee falls within section 16(4). Now the condition which attracts levy of penalty under Section 16(4) is that the dealer should have failed to pay the amount of the tax within the prescribed time. This much was agreed on both sides but the controversy centered round the question as to what is the prescribed time in the case of payment of tax due according to the return. The contention of the revenue was - and that was the contention which found favour with the Tribunal - that the prescribed time for the purpose of payment of tax due according to the return was the time of furnishing the return, since Section 16(2) as also rules 4 and 10 required that the assessee must pay the full amount of tax due according to the return into the Government Treasury before filing the return. The Revenue urged that the tax due according to the return furnished by the assessee was Rs. 33,221.09 nP. and the assessee should have, therefore, paid the full amount of this tax into the Government Treasury before filing the return but the assessee failed to do so and paid only Rs. 10,000 and the condition

specified in Section 16(4) was, therefore, satisfied attracting the applicability of that provision. So far as Section 16(5) was concerned on which, as we shall presently point out, reliance was placed on behalf of the assessee, the revenue submitted that that was a provision which merely prescribed the procedure to be followed before the revenue authorities could proceed to recover as an arrear of land revenue the amount of tax remaining unpaid at the time of furnishing the return. The provision had nothing to do with the prescription of the time for payment of the amount of tax due according to the return. The time for payment of the amount of tax due according to the return was prescribed by Section 16(2) and Rules 4 and 10 and according to those provisions, the default on the part of the assesses was complete as soon as the assessee failed to pay the full amount of tax before filing the return and the liability to pay penalty was incurred as soon as the default was committed and the arising of such liability did not depend on the issue of notice under section 16(5) or non-payment of the amount of tax within the time specified in such notice. The assessee, however, urged that this was not a correct way of looking at the various provisions of Section 16 and the argument of the revenue was defective in that it did not read the provisions of Section 16 as a connected whole but tried to read sub-sections (2), (4) and (5) of Section 16 in isolation from one another. His argument was that if sub-sections (2), (4) and (5) were read together as part and parcel of an integrated scheme, it was clear that sub-section (2) merely fixed the liability of the assessee to pay the full amount of tax due from him according to the return before furnishing the return and sub-section (5) empowered the revenue authorities to give notice to the assessee calling upon him to pay up the amount of the tax within a specified time in discharge of that liability and thereby prescribed the time for payment of the amount of the tax and it was only if the assessee failed to pay up the amount of the tax within the time limited by such notice that the assessee could be said to be in default and liable to penalty under sub-section (4) by reason of having failed to pay up the amount of the tax within the time prescribed under sub-section (5). These were the rival contentions urged before us and they raised a short but interesting question of construction of the provisions of Section 16.

8. Now sub-section (1) which is the starting point in the scheme of payment and recovery of tax embodied in Section 16 provides that "the tax shall be paid in the manner hereinafter provided at such intervals as may be prescribed". Subsections (2), (3) and (5) then proceed to provide for the manner in which the tax shall be paid. Sub-section (2) says that the full amount of tax due from the assessee according to his return must be paid by him into Government Treasury before he files the return. This sub-section thug fixes the liability of the assessee to make payment of the full amount of tax due from him according to the return before he furnishes the return, even though the assessment is not yet made on him. Sub-section (3) then provides for a case where the assessee, who has already filed the return, might want to revise it by showing additional turnover and in such a case he must pay into the Government Treasury the extra amount of the tax payable by him according to the revised return before he furnishes such revised return. That sub-section too fixes the liability of the assessee to pay up the extra amount of tax before he furnishes the revised return. These two sub-sections, namely, sub-sections (2) and (3), do not prescribe the time within which the tax is to be paid by the assessee. They merely fix the liability of the

assessee and if the assessee does not pay up the amount of the tax according to the return, whether original or revised, sub-section (5) provides for the issue of a notice by the Collector and says that the amount of the tax shall be paid by the assessee into the Government Treasury by such date as may be specified in the notice. The date to be specified in the notice must not be less than thirty days from the date of the service of the notice. The assessee may pay the amount of the tax at any time on or before the specified date and if he does so, the notice would be complied with and there would be no default. The Collector may also in a proper case, for reasons to be recorded in writing, extend the date of payment specified by him in the notice or allow the assessee to pay the amount of the tax by instalments. Sub-section (5) thus provides for prescribing the time within which the amount of the tax payable by the assessee under sub-section (2) or sub-section (3) shall be paid by the assessee. The prescribed time may be the date specified in the notice by the Collector or the extended date or the dates of various instalments fixed by the Collector under the proviso to sub-section (5). If the amount of the tax is not paid by the assessee within the time so prescribed, the assessee renders himself liable to penalty under sub-section (4) and that penalty is to be equal to one per cent of the amount of tax for each month for the first three months after the expiry of the prescribed time and two and a half per cent for each month subsequent to the first three months during which he continues to make default in payment of the tax. The amount of the tax remaining unpaid can also then be recovered as an arrear of land revenue by the revenue authorities. This is the integrated scheme of payment and recovery of the amount of tax due according to the return filed by the assessee, which emerges clearly on a proper reading of the various provisions of Section 16.

9. The argument on behalf of the Revenue, however, was that Section 16(2) requires the amount of tax due according to the return to be paid by the assessee before furnishing the return and the date of furnishing the return is therefore the prescribed time within the meaning of Section 16(4) for payment of the amount of tax due according to the return and consequently the assessee would be liable to penalty under Section 16(4) if he fails to pay the amount of tax due according to the return before furnishing the return. This argument is undoubtedly at first blush attractive but a close scrutiny shows that it is defective in several respects and we cannot accept it. In the first place let us examine the language of Section 16(2) on which the strongest reliance has been placed on behalf of the Revenue. Section 16(2) provides - and so do Rules 4 and 10 - that before a registered dealer furnishes the return, he shall pay into the Government Treasury the amount of tax due from him according to the return. This sub-section merely declares the liability of the asses-see to pay the full amount of tax due according to the return before furnishing the return; it does not prescribe the time within which the amount of tax due according to the return must be paid by the assessee. As a matter of fact it is difficult to see how the prescribed time for payment of the amount of tax due according to the return can be before the filing of the return. It is only on the filing of the return that it is possible to speak of the amount of tax due according to the return and the prescribed time for payment of the amount of tax due according to the return must, therefore, be sometime after the filing of the return and not the date of the filing of the return. It may also be noted that if Section 16 (2) were construed as prescribing the time within which the

amount or tax due according to the return must be paid by the assessee, the "prescribed time" would not be a definite punctum of time prescribed by the Legislature but would be dependant on the assessee in that it would vary according to the time when the assessee chooses to file the return which he may do at any time within the period prescribed by the Rules or even beyond such period and that surely could not be the connotation of "prescribed time" within the meaning of Section 16(4) which is intended to have penal consequence for disobedience. Moreover it must be remembered that sub-sections (2), (4) and (5) of Section 16 form part of a connected whole and they must be so construed as to make a consistent and harmonious enactment of the whole Section. If the construction contended for on behalf of the Revenue were accepted, the assessee would be in default as soon as he files the return without payment of the full amount of the tax and he would render himself liable to penalty which would be mounting from day to day under Section 16(4). But even so, under Section 16(5), he would be entitled to notice of not less than thirty days within which to pay up the amount of the tax remaining unpaid. He would even be entitled in a proper case to obtain extension of time for payment of the amount of the tax and also instalments if sufficient reasons are shown. It is a little difficult to imagine that the Legislature should have given a minimum of thirty days' time to a defaulting assessee who had already incurred penalty and against whom penalty was mounting from day to day and should have also made it possible for him to obtain extension of such time as also instalments for making payment of the amount of the tax. This provision in Section 16(5) is clearly inconsistent with the construction pressed for our acceptance by the Revenue. The construction of the Revenue makes nonsense of this provision in its application to the amount of tax remaining unpaid at the time of furnishing the return. Mr. A. D. Desai however in an attempt to reconcile Section 16(5) with the construction suggested on behalf of the Revenue urged that the provision in Section 16(5) is intended merely to provide the procedure which must be followed by the Revenue authorities before they can proceed to recover the amount of tax remaining unpaid as an arrear of land revenue and it has nothing to do with the prescription of the time within which the amount of tax due according to the return must be paid by the assessee which if a matter dealt with by Section 16(2) and there is, therefore, no inconsistency between the provisions of Section 16 (2) and Section 16 (5) but this argument is also without substance and for reasons which we shall presently state, we are unable to accept it.

10. Now in order to understand the true meaning and effect of Section 16(5) we will first take a case covered by clause (i)(b) of that sub-section where the amount of tax is assessed for any period under Section 14 or 15 and is unpaid. The prescribed time for the purpose of Section 16(4) in such a case would be clearly the time prescribed under Section 16(5). That is now well settled by the decision of the Bombay High Court in *Mahomed Tayoob Daruwala v. State of Bombay*[6], In that case the assessee contended that by reason of the definition contained in Section 2 (10), the expression "prescribed" meant prescribed under the rules and since there was no provision in the rules prescribing the time for payment of tax assessed under Section 14 or 15, there was no prescribed time within the meaning of Section 16(4) and the taxing authorities had, therefore, no power to levy penalty for nonpayment or late payment of tax after assessment. A

Division Bench of the Bombay High Court consisting of S. T. Desai and V. S. Desai JJ. negatived this contention holding that sub-sections (4) and (5) of Section 16 must be read together and if they were so read it was clear that the Legislature itself had prescribed in sub-section (5) of Section 16 time for payment of the tax assessed under Sections 14 and 15 and therefore default in paying the amount of the tax assessed within the time specified in the notice issued under Section 16, sub-section (5), would invite the operation of Section 16, sub-section (4). The Division Bench pointed out that the Legislature, when it states that a particular act or thing shall be done within a prescribed time, may leave the matter of prescribing the time to the rule-making authority or it may itself in the very provision or in some other provision in the enactment itself prescribe the time for the doing or performance of that act. There is no principle of drafting and no rule which prevents the Legislature itself from prescribing the time for the doing or performance of any act or discharging any duty simply because it speaks of a prescribed time and in the definition clause it has said that the expression "prescribed" shall mean "prescribed under the rules". It was, therefore, held that in the case of tax assessed under Section 14 or 15 "prescribed time" within the meaning of Section 16 sub-section (4) was time prescribed under Section 16 sub-section (5). Now if Section 16 sub-section (5) prescribes the time for payment of the amount of the tax in case of tax assessed under Section 14 or 15, it is difficult to imagine that so far as the amount of tax due according to the return is concerned, the sub-section does not perform the function of prescribing the time for payment of the amount of the tax but merely lays down a condition precedent which must be fulfilled before the amount of tax remaining unpaid can be recovered as an arrear of land revenue. As a matter of fact it is difficult to conceive of any reason which could have induced the Legislature to give time to the assessee to make payment of the amount of tax due according to the return before proceeding to recover it as an arrear of land revenue, if the assessee was already in default and had rendered himself liable to penalty under Section 16 sub-section (4). Ordinarily recoverability would follow as soon as default is made and there would be no point in postponing recoverability when default is already made and penalty has started running. It would indeed be a strange scheme which entitles a defaulting assessee against whom penalty is mounting from day to day to a minimum of thirty days time within which to pay up the amount of the tax and even to obtain extension of time and also instalments before any steps can be taken to recover the amount of the tax from him as an arrear of land revenue. Moreover it is difficult to appreciate why an assessee should be made liable to running penalty when he has sufficient reasons for not being able to pay the amount of the tax which would entitle him to extension of time even beyond the period of not less than thirty days given by the notice under Section 16 sub-section (5) and also to instalments. The only rational and intelligible way of construing Section 16 sub-section (5) is by taking the view that as in

[6]1960-11 STC 612 (Bom)

the case of the amount of tax assessed under Section 14 or 15, so also in the case of the amount of tax due according to the return when the return is furnished without full payment of such amount the Legislature provided that a notice of at least thirty days should be given to the assessee for payment of the amount of tax before any consequences arising from default, either

by way of penalty or proceedings for recovery, should be visited on him. But then, it was urged on behalf of the revenue, if such were the intention of the Legislature, why should Section 16, sub-section (2) have provided that the assessee shall before furnishing the return pay the full amount of tax due from him according to the return. The answer is simple. It was necessary to make this provision in order to declare the liability of the assessee to make payment of the full amount of tax due from him according to the return and it was because this liability was imposed on the assessee that the Collector could be empowered under Section 16(5) to issue a notice calling upon the assessee to pay up the amount of the tax remaining unpaid. If Section 16(2) were not enacted declaring the liability of the assessee, the Collector could not possibly have demanded payment of the amount of tax due from the assessee according to the return and would have had to wait until the assessment was made. It is, therefore, clear that Section 16(2) merely declares the liability of the assessee to pay the amount of tax due according to the return before furnishing the return and where the return is furnished without payment of the full amount of tax due according to the return. Section 16(5) prescribes the time within which the amount of tax due according to the return or the balance thereof remaining unpaid should be paid by the assessee on pain of incurring penalty under Section 16(4) and recovery proceedings being initiated under Section 16(5), and consequently no liability to penalty would be incurred by the assessee unless notice is issued to him under Section 16(5) and he makes default in complying with such notice.

11. This is the view which we are inclined to take on principle but we find we are fortified in this view by a decision of the Mysore High Court in *B. V. Aswathiah and Brothers v. Commercial Tax Officer*[7], where construing a similar provision made in Section 13 of the Mysore Sales Tax Act, 1957 read with the second proviso to Rule 18 of the Rules made under that Act, the Mysore High Court took the view that in the case of tax due according to the return filed by the assessee, the assessee could be said to have committed default in making payment of the amount of tax within the prescribed time only if the assessee failed to comply with the notice issued under the second proviso to Rule 18 and nonpayment of the amount of tax before filing of the return did not attract the applicability of the penal provision contained in Section 13(2). Section 13(2) of the Mysore Act corresponds to our Section 16(4) and the second proviso to Rule 18 corresponds to our sub-section (5) of Section 16. This decision based on an allied provision considerably supports the view which we are taking on a construction of the provisions of Section 16.

12. Our answers to the questions referred to us, therefore, are –

Question No. 1 - in the affirmative.
Question No. 2 - in the negative.

There will be no order as to costs of the Reference.
Answered accordingly.

[7](1963) 14 STC 467 (Mys)