GUJARAT HIGH COURT

Patel Ramjibhai Danabhai

Vs.

A.S. Tambe

Spl. C.A. No. 191 and Nos. 1378 of 1968 and 1643 of 1969 and 8 of 1970

(P.N. Bhagwati, C.J. and T.U. Mehta, J.)

08.07.1970

JUDGMENT

T.U. Mehta, J.

1. The petitioners in all these petitions have challenged the vires of Section 33(6) of the Bombay Sales Tax Act of 1959 (hereafter referred to as the Act of 1959) and Section 14(6) of the Bombay Sales Tax Act of 1953 (hereafter referred to as the Act of 1953) on the ground that they offend the provisions of Article 14 of the Constitution, in as much as, the class of persons covered by these sections is also covered by Section 35 of the Act of 1959 and Section 15 of the Act of 1953 and hence, the authorities administering the provisions of these two Acts, have unfettered liberty to pick and choose indiscriminately for action contemplated by these sections.

2. Before dealing with the controversial points, it would be necessary to state shortly the facts relating to each of these petitions.

3. Taking first Special C.A. 191/68, the facts are that petitioners Nos. 1, 4, and 6 previously formed partnership under the name of M/s. Laxmi Vijay Saw Mill and that partnership was run from 2-11-55 to 31-10-1959. After 31-10-59 i.e. from 1-11-59, petitioners Nos. 1 to 7 together with one Patel Muljibhai Premjibhai, formed another partnership and a deed thereof was drawn between the partners on 1-2-1960. This partnership was dissolved on 10-11-1964. Thereafter on 16-11-1964, the Sales Tax Officer, Anand was informed about this dissolution.

4. Thereafter, on 11th November, 1965, the Sales Tax Officer issued notices in form No. 13 under Section 14 of the Act of 1953 requiring the petitioners to show cause why they should not be assessed under Sub-section (6) of Section 14 of the said Act and why penalty should not be imposed for failure to apply for registration of their firm even though they were liable to pay sales tax. These notices cover the period from 1-4-1955 to 31-12-1959.

5. In reply to these notices, the petitioners raised a contention that the old partnership firm which was formed in the year 1955 between petitioners Nos. 1, 4 and 6 as well as the new partnership firm which was formed on 1-11-1959 between the petitioners Nos. 1 to 7 and above referred Muljibhai Premjibhai, were dissolved and since there was no machinery under the Act of 1953 to assess a dissolved firm, the proposed action was illegal. They further raised a contention that the assessment, which was proposed by the show cause notices was time barred.

6. This petition was filed when the matter was still at the stage of the above referred notice.

7. So far as Special C.A. 1378/68 is concerned, the facts are that the petitioner claims 10 be the owner of a concern named Jay Bharat Ice Factory at Godhra. According to him, his turn over in his business of manufacturing and sale of ice has never exceeded the limits of Rs. 9,000/-in the past and, therefore, he has never incurred any liability to get himself registered as a dealer under the Act of 1959. According to him, therefore, he was also not obliged to file any sales tax returns. However, an inquiry was instituted by the Vigilance Branch of the State against him regarding his business, and pursuant to this inquiry, the second respondent, who is the Sales Tax Officer concerned, issued notice on 16-2-1968 under Section 33(6), 36(2)(a) of the Act of 1959 to show cause why he should not be assessed for a period running from 1-4-1960 to 30-12-1967 and why a penalty for non-registration of his firm should not be imposed. It is found that after this notice, the petitioner took certain objections but ultimately on 9-9-68 he was assessed under Section 33(6) of the Act of 1959 on the basis of his best judgment assessment. 7A. As a result of this best judgment assessment, an amount of Rs. 9,771.45 Ps. was determined as tax arrears and a further amount of Rs. 10,000/- was also determined by way of penalty. A notice making demand of both these amounts was also issued on 12-9-68.

8. So far as Spl. C.A. 1643/69 is concerned, the facts are that the petitioner is carrying on business of manufacturing and selling wooden boxes, Bamboo Timbers etc. in the name of M/s. Manilal Ranchhoddas at Kalol. On 1-6-65 he was served with a notice under Section 33(6) of the Act of 1959 for the period running from 1-1-60 to 31-8-64. Best judgment assessment as contemplated by Section 33(6) of the said Act was completed on 7-8-65 and penalty as contemplated by Section 36(2) for the failure to get the firm registered was also imposed. Against this order, the petitioner preferred an appeal to the Assistant Commissioner of Sales Tax. The said appeal was partly allowed on 10-11-67 only so far as the question of penalty was concerned. The petitioner thereafter preferred Second Appeal before the Sales Tax Tribunal but the same was dismissed by the said Tribunal on 28-4-1969.

9. As for Special C.A. 8/70, the facts are that the petitioner is a partnership firm and claims to be carrying on its business at Bombay. Its business consists of taking catering contracts from the Railway Administration The petitioner, therefore, is running a dining car on Western Railway, especially in Saurashtra Express running between Bombay and Ahmedabad and Delhi Janta running between Bombay and Delhi.

10. The petitioner was served with a notice in form No. 27, under Section 33 dated 25-3-69 calling upon it to show cause why for want of registration of its firm under the provisions of the Sales Tax Act, applicable in the State of Gujarat, action contemplated by Sub-section (6) of Section 33 should not be taken and best judgment assessment for the period from 1-5-60 to 28-2-69 should not be made.

11. In reply to this notice, the petitioner pointed out that it was already registered as a dealer at Bombay and that since all its purchases, storage and turn-over were made at Bombay, it was not legally liable to get itself registered under the provisions of Sales Tax Act prevalent in the State of Gujarat. According to the petitioner, since its business activity of running dining car is confined only to a running train, it cannot be said that it is a dealer doing its business in Gujarat and liable to be registered under the provisions of the Sales Tax Act, as applied to the State of Gujarat. While the matter was still at the stage of show cause notice, the petitioner has preferred this petition.

12. It is evident from the above stated facts that the Sales Tax Department is either proposing to take action, or has taken action, against all the petitioners for their failure to get themselves registered as dealers under the provisions of the Sales Tax Act. Except in Spl. C.A. 191/69, the action is either proposed to be taken, or actually taken, under the provisions of Section 33(6) and 36(2) of the Act of 1959. So far as Spl.C.A. 191/69 is concerned, similar action is proposed to be taken under the Act of 1953.

13. As stated above, the main contention which is common between the parties in all these petitions is as regards the vires of Section 33(6) of the Act of 1959 and Section 14(6) of the Act of 1953. The provisions of the latter section are in pari materia with the former. As both deal with the same subject and contains similar provisions, whenever we make a reference to Section 33(6) of the Act of 1959, it should be understood as a reference also to Section 14(6) of the Act of 1953. Similarly, reference to Section 35 of the Act of 1959 should be understood as a reference also to Section 15 of the Act of 1953 because even these two provisions are in pari materia with each other.

14. In order to appreciate the contentions raised by the parties, it would be necessary to quote the relevant sections from the Act of 1959 and 1953. Sections 33 and 14 respectively of both these Acts relate to assessment of taxes and Sub-section (6) thereof contemplates the cases of a dealer who is liable to pay tax in respect of any period, but who has failed to apply for registration within time as contemplated by the Act Sections 35 and 15 of these Acts contemplate the cases of escaped assessment and re-assessment of turn-over, which has escaped assessments. With this background, we quote these sections, which are in the following terms:

> "33(6). If the commissioner has reason to believe that a dealer is liable to pay tax in respect of any period, but has failed to apply for registration within time as required by

Section 22, the Commissioner shall, after giving him a reasonable opportunity of being heard, assess, to the best of his judgment, the amount of tax (if any) due from the dealer in respect of such period, and any period subsequent thereto."

14(6). If upon information which has come into his possession, the Collector, is satisfied that any dealer has been liable to pay the tax in respect of any period but has failed to apply for registration, the Collector shall, after giving the dealer reasonable opportunity of being heard, assess to the best of his judgment the amount of tax, if any, due from the dealer in respect of such period and all subsequent periods.

35. "(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 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) . . . . . .

(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 reassess 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,

Provided further that, where in respect of such turnover an order has already been passed in appeal or revision under this Act, 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 deem fit. (2) Nothing in Sub-section (i) shall apply to any proceeding (including any notice issued) under Section 33 or 57 or 62. (3) Nothing in Section 57 or 62 shall affect a proceeding under this section."

15. "If in consequence of any information which has come into his possession the Collector is satisfied that any turnover in respect of sales or purchases of any goods chargeable to the tax has escaped assessment in any year or has been under assessed or assessed at a lower rate or any deductions have been wrongly made there from, the Collector may, in any case where he has reason to believe that the dealer has concealed the particulars of such sales or purchases or has knowingly furnished incorrect returns, at any time within five years, and in any other case, shall give in respect of such turnover a notice containing all or any of the requirements which may be included in a notice under Sub-section (3) of Section 14 and may proceed to assess or reassess the amount of the tax

due from such dealer and the provisions of this Act shall apply accordingly as if the notice were a notice served under that subsection:

Provided that the amount of the tax shall be assessed after making the deductions permitted from time to time under the Bombay Sales Tax Act, 1946, the Bombay Sales Tax (No. 2) Ordinance, 1952, and this Act, as the case may be, at the rate at which it would have been assessed had the turnover not escaped assessment or full assessment, as the case may be:

Provided further that where in respect of such turnover or deduction, as the case may be, an order Las already been passed under Section 30 or Section 31, the Collector shall make a report to the appropriate appellate or revising authority as the case may be, which shall thereupon after giving the dealer concerned a reasonable opportunity of being heard, pass such order as it deems fit."

15. Now the contention of the petitioners in all these petitions is that the classifications which are contemplated by Sub-section (6) of Section 33 and Section 35 are over-lapping with the result that the authority administering the Act would be at liberty to pick and choose the dealer concerned under any of these two sections without any restrain. It was pointed out that both these provisions of law, cover the same class of persons viz. those whose turn-over of business has escaped assessment. Therefore, in absence of any guiding principles it would be open to the Commissioner to give different treatment to the persons belonging to the same class. This would obviously infringe Article 14 of the Constitution. 15A. In this connection, it would be necessary to state that the main difference between the provisions contained in Sub-section (6) of Section 33 and Section 35 of the Act of 1959 is that while Section 35 contemplates a period of limitation for taking action, Sub-section (6) of Section 33 does not contain any such period of limitation. Another point of difference is that while acting under Section 35, the officer concerned has to make an assessment on merits arid on the strength of evidence which is offered by the concerned dealer, if the said officer prefers to act under Sub-section (6) of Section 33 he is not bound to make the assessment on merits as acting under it he is expected to arrive at his best judgment at the time of quantifying the amount of tax. It is, therefore, evident that if an action is taken under Sub-section (6) of Section 33 of the Act of 1959, the assessee would find it more onerous than if the action is taken under Section 35 of the Act. Therefore, the point which is canvassed on behalf of the petitioners is that if the classifications, which are sought to be made by these two provisions of the Act, are over-lapping, the officer concerned would be able to discriminate between the cases of assessees belonging to the same class, and if that is allowed to be done, provisions of Article 14 of the Constitution would be infringed. In support of this contention the petitioners have put reliance on the decision given by the Supreme Court in *Anandji Haridas and Co. v. S.P. Kasture and Ors. reported in*[1]

16. The learned Government Pleader, who opposes these petitions on behalf of the respondents, does not dispute the fact that the treatment meted out to the dealers under Section 35 and 33(6) of the Act is different. His contention, however, is that both the sections cover different classes of

persons and, therefore, there is no over-lapping between the two. According to the learned Government Pleader, Section 35 of the Act deals with that class of persons who are obliged to file returns under the Act and the turn-over of whose business has escaped assessment, while Section 33(6) deals with only unregistered dealers, who on account of the fact that they are unregistered, are not in law, obliged to file return unless they are called upon to do so by the Commissioner under Section 33(3) of the Act of 1959. Thus, according to the learned Government Pleader, Sections 35 and 33(6) of the Act of 1959, deal with different and distinct classifications and, therefore, they are not over-lapping. If they are not over-lapping there would be no question of picking up persons from the same classification and, therefore, there would be no infringement of the provisions of Article 14 of the Constitution.

17. It is obvious from the above referred contention of the learned Government Pleader that the same is based mainly on the ground that Section 35 deals with only those dealers, who are obliged to file returns. Therefore, in order to convince us that this is so, he has further contended that the main portion of Sub-section (1) of Section 35 of the Act, which contemplates the cases of escaped assessment, is controlled in its meaning by Clauses (b) and (c), which follow it. According to the learned Government Pleader, Clause (b) of that sub-section speaks of three categories of cases, namely, (1) those who have concealed their sales and purchases, (2) those who have concealed material particulars relating to

[1] A.I.R. 1968 SC 565

their sales and purchases and (3) those who have knowingly furnished incorrect returns. It was urged by the learned Government Pleader that all these three categories of cases contemplated by Clause (b) pre-suppose the filing of a return and if that is so, we should hold that Clause (b) contemplates only those cases wherein the dealers, whether registered or un-registered, are required to file their returns. It was further pointed out that Clause (c), which is a residuary clause, contemplates the cases which are not covered by Clause (b); none-the-less, even they would be the cases only of those dealers, either registered or un-registered, who are required to file the returns under the provisions of law. After urging us to construe both these clauses in this manner, the learned Government Pleader proceeded to contend that if this interpretation of Clauses (b) and (c) is accepted, we should further hold that the main part of Sub-section (1) of Section 35 takes its meaning from the above refereed interpretation of Clauses (b) and (c) and is virtually controlled by these two clauses. According to him, therefore, the cases of escaped assessment or under-assessment which are contemplated by the main part of Sub-section (1) of Section 35 should be construed as the cases only of those dealers who are required to file their returns. In this view of the matter, according to the learned Government Pleader, Section 35 of the Act of 1959 would cover only a specific class of dealers, namely, the dealers who under law are obliged to file the returns irrespective of the question whether they are required to be registered or not. It was pointed out that if this interpretation of Section 35 is accepted, then it would follow that Sub-section (6) of Section 33 is not over-lapped by Section 35 for the simple reason that this Sub-section (6) of sec. 33 contemplates a class of those dealers who are liable to pay tax but who are not registered and who, on account of the fact that they are not registered, are

not obliged to file returns so long they are not called upon to do so by the Commissioner under Sub-section (2) of Section 33 According to the learned Government Pleader, therefore, there is no over-lapping between the two provisions under discussion. He further pointed out that if the interpretation of Section 35, which is canvassed by him, is accepted, then the classification propounded by him would be quite reasonable having necessary nexus with the object, namely, the prevention of evasion of sales tax. According to him, therefore, there is no scope for any contention that Sub-section (6) of Section 33, which contemplates a classification of dealers not covered by the provisions of Section 35 infringes in any manner the provisions of Article 14 of the Constitution.

18. In view of these contentions, the first and the most pertinent question which arises to be determined is whether there is any element of over-lapping between Section 33(6) and Section 35 of the Act of 1959.

19. If a reference is made to the provisions contained in Sub-section (6) of Section 33, it would be found that it clearly contemplates a class of dealers, who, though liable to pay tax in respect of any period, have failed to apply for registration within time under the provisions of the Act. In case of such dealers the Commissioner can, after giving reasonable opportunity to the person concerned of being heard, assess the said dealer to the best of his judgment for the period in question. Therefore, the object of Sub-section (6) is obviously to bring the escaped turnover of a dealer, liable to pay tax, to assessment. In other words, Sub-section (6) of Section 33 clearly contemplates the cases of escaped assessment. This point cannot be over emphasized in view of the fact that reasonable opportunity, which is contemplated by Sub-section (6) of Section 33, is only with the ultimate purpose of subjecting the escaped assessment to tax, therefore, we have no doubt in our mind that Sub-section (6) of Section 33 contemplates the cases of escaped assessment.

20. Now if a reference is made to Section 35, it will be found that even this section contemplates the cases of escaped assessment. This is quite evident even from the plain reading of the first part of Sub-section (1) of that section. By now, it is settled that cases where no assessment at all is made, are the cases of escaped assessment. This position is clearly established by different decisions of the Supreme-Court including the decision given in *Ghanshyamdas v. Regional Assistant Commissioner of Sales Tax, Nagpur reported in*[2] Therefore, it follows that an unregistered dealer, who is liable to pay tax but who does not get himself registered under the provisions of the Act within time, is the dealer, the assessment of whose turn-over has never been made and, therefore, he is also a dealer, whose turn-over has escaped assessment within the meaning of Section 35(1) of the Act. Obviously, therefore, the cases of unregistered dealers, which are contemplated by Sub-section (6) of Section 33, are the cases which are also covered by Sub-section (1) of Section 35. On the face of it, therefore, this is clearly a case of over-lapping.

21. However, the contention of the learned Government Pleader is that since the meaning of the

opening part of Sub-section (1) of Section 35 is controlled by Clauses (b) and (c), which follow it, the cases of escaped assessment, which are contemplated by Section 35, are only those cases in which the dearers are required to file their returns. This argument of the learned Government Pleader is based on the peculiar interpretation which he wants us to put to the provisions of Section 35. We have already referred to the line of reasoning which he has canvassed in support of his argument. The pivot of this argument is the contention that the meaning of the first part of Sub-section (1) of Section 35 is controlled by Clauses (b) and (c). We, however, find that this contention is wholly untenable for the reasons which follow;

22. On a proper reading of Sub-section (1) of Section 35, it is found that Sub-section (1) thereof specified a broad classification of those dealers, whose turn-over has either escaped assessment or has been under-assessed or has been assessed at a lower rate or certain deductions have been wrongly given to him in the past. Clauses (b) and (c) are carved out from this broad classification only for the purpose of providing different periods of limitation for taking action under this section. In cases of concealment etc., a larger period of limitation, namely, 8 years is provided while in other cases, a small period of limitation, namely, 5 years is provided. But the fact remains that the sub-classifications, which are contemplated by Clauses (b) and (c) are carved out from the broader classification, which is contemplated by the first part of Sub-section (1). In our opinion, therefore, it is the main part of Sub-section (1) of Section 35, which would control the meaning of Clauses (b) and (c) and not vice versa, as suggested by the learned Government Pleader. This particular aspect of the case becomes more clarified if we keep in mind the fact that the Clause (b) uses the two important expressions, namely, "where" and "such sales and purchases". Clause (b) begins with the word "where" suggesting that the said clause applies only in those cases which are covered by the broad classification contemplated by the main part of Sub-section (1). The expression "such sales and purchases", which is found used in Clause (b) suggests those sales and purchases, which are referred to in the main part of Sub-clause (1). Therefore, in our opinion, the use of the

[2] A.I.R. 1964 S.C. 766

words "where" and "such sales and purchases" connotes an idea that Clause (b) is governed and controlled by its parent part which is found in the main portion of Sub-section (1) of Section 35.

23. Apart from what is stated above, the contention of the learned Government Pleader that all the three categories, which are contemplated by Clause (b), are the categories of those cases wherein filing of the return is contemplated, is also not acceptable. While summarizing the contentions of the learned Government Pleader, we have already pointed out to three categories of cases, which are covered by Clause (b). The two of these categories, namely, (1) concealment of material particulars relating to sales and purchases and (2) knowingly furnishing of incorrect returns do postulate the cases wherein returns must have been filed. But the first category which contemplates the cases of concealment of sales and purchases is broad enough to include within its ambit even those cases wherein the returns are not filed. The question is whether the concealment, which is contemplated by Clause (b) stipulates only the cases where the returns are

filed in the past. We are of the opinion that there are various methods by which turn-over of sales and purchases can be concealed. One of these methods is by refraining from filing the return. Therefore, when Clause (b) speaks of the category of cases wherein all sales and purchases are concealed, it covers the cases of even those dealers, who have made an attempt to conceal the turn-over of the sales and purchases by not filing of the return. If this be so, the contention of the learned Government Pleader that Clause (b) stipulates only the cases of those dealers, who are required to file returns, cannot be accepted.

24. When we come to Clause (c), it becomes quite evident that it covers the cases of all types of escapement whether the said escapement is by filing the return and making false statements therein, or whether it is made by totally refraining from filing a return.

25. In this connection, the learned Government Pleader put reliance upon some observations made by the High Court of *Bombay in Bombay Cycle Stores Co. Ltd. v. The State of Bombay, reported in*[3] In that case the provisions of Sections 11(5) and 11A of the Bombay Sales Tax Act of 1946 were considered. Section 11A of that Act was in pari materia with Section 35 of the Act of 1959. Speaking of the meaning of Section 11A of the Act of 1946, the learned Judges have observed as under:

> "Besides, it seems from the wording of Section 11A that the assessee contemplated under that section is one who has escaped assessment or has been under-assessed or assessed at a lower rate, but the wording seems to imply that there has been a return made by the assessee."

Relying upon these observations, the learned Government Pleader contended that similar interpretation should be given to the provisions of Section 35 of the Act of 1959 and it should be held that the wordings of this Section 35 imply that action under that section can be taken only in cases where a return has been filed by the concerned assessee. We find that the observations, which are relied upon, are not consistent with the decision given by the Supreme Court in the cases of Ghanshyamdas and Anandji Haridas (supra), that cases where turn-over of a dealer has not at all been assessed at any time in the past, are also the cases of escaped assessment. If that be so, the escaped assessment which is

[3] VIII Sales Tax Cases, 455

contemplated by Section 35 of the Act of 1959 would cover also the cases wherein no return is filed. This view of the Supreme Court is found to be quite contrary to the view taken by the Bombay High Court in the above cited case.

26. Under the circumstances, we find that Section 35 covers a broad category of all cases in which turn-over has escaped assessment. It cannot be limited only to that class of dealers, who are under law obliged to file returns. In other words, Section 35 covers the same class of dealers, which is covered by Section 33(6) of the Act.

27. If this is so, the next question which arises to be considered is what is the effect of this situation. We find that if once it is held that Section 35 covers the same class of dealers, who are covered by Sub-section (6) of Section 33, the case at once falls within the ratio of the Supreme Court case of *Suraj Mall Mohta and Co. v. A.V. Visvanatha Sastri and Anr*[4]*.,* In that case their Lordships of the Supreme Court considered whether Section 5(4) of Taxation on Income (Investigation Commission) Act, 1947, (Act XXX of 1947) dealt with the same class of persons who are covered by Section 34 of the Indian Income Tax Act of 1922, and if so, whether it offended the provisions of Article 14 of the Constitution. Their Lordships of the Supreme Court gave an answer to this question in the affirmative as they found that Section 34 of the Indian Income Tax Act of 1922 and Section 5(4) of the Act of XXX of 1947, dealt with the same class of assessees and, therefore, there was plenty of scope for pick and choose for the purpose of taking action under one or the other section. While Section 34 of the Indian Income Tax Act of 1922 provided many limitations upon the authority concerned including the limitation as regards the period during which the action can be taken, no such limitations were found in Section 5(4) of the Act XXX of 1947. Therefore, in the opinion of their Lordships of the Supreme Court, the provisions contained in Section 5(4) of the Act XXX of 1947 were more onerous than those of Section 34 of the Indian Income Tax Act of 1922. In view of this finding, their Lordships held that Section 5(4) of the Act XXX of 1947 offended the provisions of Article 14 of the Constitution. While coming to this conclusion, their Lordships have made the following observations, which are pertinent so far as the cases before us are concerned:

> "It is well-settled that in its application to legal proceedings Article 14 assures to everyone the same rules of evidence and modes of procedure; in other words, the same rule must exist for all in similar circumstances."

Speaking of the petitions before us, we find that since the provisions of Section 35 and 33(6) are over-lapping, if the Commissioner thinks to take action under Section 35 with respect to a particular dealer, who has failed to get himself registered under the provisions of the Act, then that dealer would be in a better position in comparison to the other dealer, who though similarly situated, is proceeded against under Sub-section (6) of Section 33 of the Act. The one who has been proceeded against under Section 35 would not only get the advantage of limitation provided under that section, but would also be entitled to lead evidence and obtain the assessment order on merits; but the one who is proceeded against under Sub-section (6) of Section 33, would not only not get the advantage of limitation and can be proceeded against, at any time, but he would also not get any advantage of leading evidence, which he wants to adduce, because this sub-section contemplates the

[4] A.I.R. 1954 SC 545

assessment only on the basis of the best judgment of the Commissioner. It is thus found that Sub-section (6) of Section 33 makes a hostile discrimination against the dealer who is

proceeded against under that section, and compared to a dealer, 'who is proceeded against under Section 35, he is in a disadvantageous position even though both these dealers are covered by same classification. We, therefore, conclude that Sub-section (6) of Section 33 clearly offends Article 14 of the Constitution.

28. We, moreover, find that the facts of all the petitions before us are completely covered by the ratio of the Supreme Court case of Anandji Haridas (supra). Since the ratio of that Supreme Court decision, in our opinion, fully applies to the facts of these petitions, we would deal with the facts of that case at some length.

29. Their Lordships of the Supreme Court in Anandji Haridas's case (supra) dealt with the relevant provision of Central Provinces and Berar Saks Tax Act 1947. Section 11(4)(a) of that Act is similar to Sub-section (5) of Section 33 of the Act of 1959 because it also contemplates the case of a registered dealer, who does not furnish returns in respect of any period by the prescribed date. Section 11A of that Act, is, to a large extent, in pari materia with Section 35 of the Act of 1959 and contemplates the cases of escaped assessments. While Section 11(4)(a) of that Act did not provide for any period of limitation for taking action, Section 11A did provide a period of limitation of three calendar years. Therefore, if an action was taken under Section 11A of that Act, that action was governed by the period of limitation of three years, but if an action was taken under Section 11(4)(a) of that Act, it would not be governed by any period of limitation. The question which the learned Judges of the Supreme Court considered in Anandji's case was whether the provisions of Section 11(4)(a) and those of Section 11A were over-lapping and whether the classification contemplated by both these provisions had any nexus with the object, which was proposed to be served by these sections. The judgment recorded by the majority shows that Section 11(4)(a) was struck down by their Lordships of the Supreme Court both on the ground that its provisions were over-lapping with the provisions of Section 11A as also on the ground that classification between registered and unregistered dealers as found in that section and Section 11A did not bear a reasonable relation to the object sought to be achieved. By reference to para 8 of the majority judgment, it is found that, on behalf of the Revenue, it was specifically urged that Section 11(4)(a) dealt only with registered dealers who had certain advantages under the Act, whereas Section 11A dealt with the dealers who did not come either under Section 11(4) or Section 11(5) of that Act and therefore there was a valid classification. But this argument was rejected by the majority holding that to be a valid classification, the same must not only be founded on an intelligible differentia which distinguishes persons and things that are grouped together from other left out of the group but that differentia must have a reasonable relation to the object sought to be achieved. So far as the question of over-lapping is concerned, their Lordships of the Supreme Court have, after considering the meaning of the expression "escaped assessment" and after holding that the assessment would escape even in cases where no assessment has been made, observed that the provisions of Section 11A also include therein the cases which are covered by Section 11(4)(a) of that Act.

30. This decision of the Supreme Court fully covers the facts of all these petitions. It is, of course, true that their Lordships of the Supreme Court were concerned with the case of a registered dealer, who had not furnished returns and in these petitions we are concerned with the case of the dealers, who, though liable to pay tax, have failed to apply for registration within time. But this aspect of the matter does not take the facts of the petitions before us out of the ratio of the above referred decision of the Supreme Court. One important aspect which is common to these petitions and the Supreme Court case above referred to, is that provisions relating to the escapement of income are found to be covering all cases of escapement and, therefore, there would be a case of over-lapping, which would enable the officer concerned to pick and choose indiscriminately.

31. The learned Government pleader tried to show that the classification contemplated by Sub-section (6) of Section 33 is quite valid and reasonable because it deals specifically with the case of dealers, who, though liable to pay tax, have not taken care to get themselves registered in time. It was pointed out that this classification would be valid because it has a clear nexus with the object of preventing evasion of tax. The learned Government Pleader, therefore, contended that with a view to harmonies both the provisions, namely, Sub-section (6) of Section 33 and Section 35 of the Act, we should construe Section 35 in such a manner as to exclude the cases covered by Sub-section (6) 6f Section 33 out of its perview. We find that no such attempt is permissible in view of the majority decision of the Supreme Court in the above referred case of Anandji Haridas. As a matter of fact, the judgment recorded by the minority did make an attempt to take the cases of registered dealers out of the perview of Section 11A of C.P. and Berar Sales Tax Act, but this was not approved of by the majority. Under the circumstances, even here we cannot find ourselves in agreement with the learned Government Pleader.

32. The alternative contention, which was raised on behalf of the revenue, was that even if it is believed that the provisions contained in Sub-section (6) of Section 33 of the Act of 1959 are ultra-vires the provisions of Article 14 of the Constitution, the petitioners cannot succeed in this case in view of the fact that notices, with which they are served, can be construed as notices under Section 35 of the Act. The contention of the learned Government Pleader in this connection was that it was open to the revenue to take action under Clause (b) of Sub-section (1) of Section 35 within the period of 8 years with a view to bring the escaped assessment to book. He, therefore, contended that notices which are served on the petitioner, should be treated as notices under Section 35. In support of this view, he heavily leaned on some of the observations made by the Supreme Court in the above referred case of Anandji Haridas going to show that since the escapement of assessment coming within the scope of Section 11(4)(a) of the C.P. and Berar Sales Tax Act, is also an escapement of assessment under Section 11A of that Act, a notice issued under Section 11(4)(a) would be a valid notice in support of a proceeding under Section 11 A.

33. The question whether the notices, which are served on the petitioners under Section 33 of the

Act of 1959, can be construed as notices also under Section 35 thereof, strictly arises only in petitions Nos. 1643/69 and 8/70 because in rest of the petitions i.e., Nos. 1378/68 and 191/68, the assessments in accordance with the best judgment of the Commissioner, are already completed. However, with regard to the latter two petitions, the contention of the learned Government Pleader was that even if the completed assessments in these cases are held to be void, notices issued in these cases, if found valid, can stand and the revenue would in that case, be able to take further action on these notices.

34. In view of this contention, it is first necessary to consider the actual contents and nature of the notices, which have been served by the revenue on the petitioners. All these notices are admittedly in form No. 27. According to Rules Nos. 32 and 33 framed under the Act of 1959, prescribed form No. 27 is required to be used whenever a notice is required to be given under Section 33 of the said Act. As noted above, Section 33 contemplates the method and procedure for the assessment of sales lax. Sub-section (1) thereof says that the amount of tax due from registered dealer, shall be assessed separately for each year during which he is liable to pay the tax. Sub-section (2) says that if the Commissioner is satisfied that the returns furnished in respect of any period are correct and complete, he shall assess the amount of tax due from the dealer on the basis of such returns. Sub-section (3) says that if the Commissioner is not satisfied that the returns furnished for any period are correct and complete then he should give an opportunity to the concerned dealer to produce further evidence and should also give him notice to attend and to produce all evidence on which the dealer wants to rely. Sub-section (4) says that if the dealer fails to comply with the terms of any notice issued under Sub-section (3) the Commissioner shall assess, to the best of his judgment, the amount of tax due from him. Sub-section (5) says that if that dealer does not furnish returns in respect of any period, the Commissioner shall assess the tax to the best of his judgment after giving reasonable opportunity to the dealer. Then comes Sub-section (6), which is already discussed above. Now the prescribed form of notice, which is issued in accordance with Rules 32 and 33 under the above referred Section 33 of the Act, shows that it is comprehensive in nature covering all the various situations, which are stipulated by above referred different sub-sections of Section 33. One of the terms mentioned in the notices and which is relevant for our purpose calls upon the dealer to show cause why he should not be assessed under Sub-section (6) of Section 33 and why penalty under Clause (a) of Sub-section (2) of Section 36 of the Act, should not be imposed upon him. This item, which obviously refers to Sub-section (6) of Section 33 is found in every notice, which is served upon the petitioners of each of these petitions. Another relevant item of these notices says that whereas the dealer has been found liable to pay tax under Bombay Sales Tax Act of 1959 in respect of a particular period and whereas he has failed to apply for registration under Section 22 on the said Act, he is directed to attend at a particular place and to produce the documents specified in, the notices. Other items of these notices refer to other sub-sections of Section 33 but if we refer to the original notices, which are produced by the petitioners in each of these petitions, it will be found that all of them make a special reference to the alleged failure of the dealer to apply for registration under Section 22 of the Act and make a further reference to the action proposed to be

taken under Sub-section (6) of Section 33 of the Act.

35. Notices, which are required to be issued under Section 35 of the Act, are, in accordance with Rule 34 of the Sales Tax Rules, in form No. 28. These notices clearly call upon the dealer to produce or caused to be produced any evidence other than the evidence specifically mentioned in the notices for determining the correct amount of tax payable by him for the period in question. Thus, notices issued under Section 35 of the Act, clearly call upon the dealer to produce any evidence touching the merits of his case. But so far as the notices, which are issued for the purpose of Sub-section (6) of Section 33 are concerned, they call upon the dealer to produce only the specified documents and clearly propose to take action under that sub-section which contemplates assessment by the best judgment of the Commissioner. This is the main difference between the notice issued under Section 35 and the one issued with a view to take action under Sub-section (6) of Section 33.

35A. Now the contention of the learned Government Pleader is that since in this case all the notices are issued in form No. 27 under Section 33 of the Act, they fulfill the same requirements, which are expected to be fulfilled by the notice issued in form No. 28 under Section 35 of the Act, and therefore, these notices can be held valid for the purpose of enabling the revenue to take further actions against the petitioners under Section 35 of the Act if Sub-section (6) of Section 33 of the Act is found to be ultra vires.

36. We find that there are two good reasons why the above contention of the learned Government Pleader cannot be accepted. The first reason is that if a reference is made to Section 35 of the Act, it will be found that before issuing a notice contemplated by that section, the Commissioner must have reason to believe that some turn-over of sales or purchases of any goods chargeable to tax has escaped assessment. If the Commissioner wants to take action under Clause (b) which contemplates the period of 8 years limitation, he must have further reason to believe that the dealer concerned has concealed such sales and purchases or other material particulars relating thereto etc. Therefore, in cases where provisions of Clause (b) are invited, the Commissioner must reach two types of satisfaction before he can initiate action under Section 35. The first satisfaction comes when he has reason to believe that the turnover of sales has escaped assessment and the second satisfaction would come when he has reason to believe that the dealer concerned has concealed such sales and purchases. Thus satisfaction of both the types constitute a condition precedent before the notices contemplated by Section 35 are issued. Therefore, if we want to construe the notices, which are issued under Section 33 of the Act, as notices issued under Section 35, we should first find whether this condition precedent contemplated by Section 35, is satisfied. Now if we make a reference to the notices themselves, we find that they do not show anywhere that the Commissioner had reasons to believe that a particular turnover of sales and purchases has escaped assessment and that the dealer concerned had concealed such sales and purchases. Even by reference to the affidavit-in-reply filed on behalf of the revenue, we do not find anything going to suggest that the Commissioner had reasons to believe either that some

turn-over of sales chargeable to tax has escaped assessment or that the dealer concerned had concealed the sales and purchases in question. The learned Government Pleader, in order to meet this point, drew our attention to the fact that all these notices specifically call upon the petitioners to show cause why a penalty under Clause (a) of Sub-section (2) of Section 36 of the Act should not be imposed. He also drew our attention to the fact that Section 36(2)(a) of the Act provides that if while assessing the amount of tax due from a dealer under Section 33, it appears to the Commissioner that the dealer wilfully failed to apply for the registration as required by Section 22, he would be liable to penalty contemplated by that section. It was argued that when the Commissioner invited the petitioners to show cause why such a penalty should not be imposed on them, he should be held to have applied his mind to the facts of the case and to have come to a conclusion that the petitioners had intentionally refrained from applying for registration with a view to conceal their turnover of sales and purchases. He further pointed that the very fact that the Commissioner issued notices under Sub-section (6) of Section 33, shows that he had reason to believe that the turn-over of the sales and purchases of a dealer had escaped assessment for want of registration under the Act. According to him,-therefore, though the notices are, in fact, issued under Section 33 of the Act, they fully fulfill the requirements of Section 35 and, therefore, they should be construed as notices issued under Section 35.

37. We find that it can be contended with good deal of force that when the Commissioner issued notices under Sub-section (6) of Section 33 of the Act, which requires reasons to believe that the dealer liable to pay tax has failed to apply for registration within time, he should be presumed to have a reasonable belief as to the escapement of turn-over of sales and purchases for the period in question. But as noted above, there are two categories of reasons to believe, which form condition precedent before an action is proposed to be taken under Clause (b) of Sub-section (1) of Section 35 of the Act. The second category is about reasons to believe that the dealer has concealed some turn-over of his sales and purchases. This category cannot be said to have been satisfied by the mere fact that the Commissioner has made a reference to penalty leviable under Clause (a) of Sub-section (2) of Section 36. That clause refers to wilful failure to apply for registration. Wilful failure means an intentional omission to apply for registration. The intention in question has reference to the non-registration under the Act but failure, however, intentional it may be, to apply for registration does not necessarily involve an idea to conceal turn-over of sales and purchases. There would be cases wherein a dealer would be under a bona fide belief that the turn-over of the goods in which he is dealing is not liable to sales tax under the provisions of the Act. If would be under that belief that he would refrain from obtaining registration. That would be an intentional act and can be called a "wilful failure" to apply for registration. But that wilful failure to apply for registration may not amount to an attempt to conceal the turn-over of sales and purchases. The word "concealment" involves some wilful act. "To conceal" means to 'hide or to keep secret'. It involves mens rea, which is positive in its character. But a mere omission to obtain registration under a bona fide belief that the turn-over is not liable to tax would not amount to a "concealment" of turn-over. A question somewhat similar to this arose before the High Court of Bombay under the provisions of the Indian Income Tax

Act 1922 in *D.A. Dahunukar v. Commissioner of Income-Tax, Bombay reported in*[5] This question arose with reference to Section 28(1)(c) of that Act, which contemplates concealment of income. Making distinction between the mere omission and concealment, Following observations are found to have been made by the learned Judges in that case:

> "Moreover, on the facts and circumstances of the case, there does not appear to be any evidence on record from which the assessee could be said to have either concealed or deliberately furnished inaccurate particulars. There can be no doubt, in our opinion, that the mere omission will neither amount to concealment nor a deliberate furnishing of inaccurate particulars unless there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assessee to hide or conceal the income so as to avoid the imposition of tax thereon."

[5]65 I.T.R. 280

It is thus clear that omission to apply for registration, which may justify action under Section 36(2)(a) of the Act would not necessarily mean concealment of turnover, and if that is so; simply by making a reference to the penalty contemplated by Section 36(2)(a) in the notices in question, the Commissioner cannot be heard to say that the condition precedent for taking the action under Section 35 of the Act was satisfied at the time when the notices were issued by him.

38. The learned Government Pleader then drew our attention to some observations made by the Supreme Court in Anandji Haridas and Co. (supra) going to show that a notice issued under Section 11l(4)(a) of C.P. and Beras Sales Tax Act, would be a valid notice in respect of a proceeding under Section 11A of the said Act. His contention was that in view of these observations we also should treat the notices issued under Section 33 as notices, which are required to be issued under Section 35. We find ourselves unable to accept this contention because the observations on which the learned Government Pleader puts reliance are made with reference to the peculiar facts of that case. If a reference is made to the reported decision in that case, it will be found that one important point which distinguishes that case from the petitions before us was that the only requirement of Sections 11l(4)(a) and 11A of C.P. and Beras Sales Tax Act was that before taking proceedings against the assessee under these sections, the assessee should be given a reasonable opportunity of being head. In fact, none of these two sections provided for giving any notice. This is not the position so far as these petitions are concerned, because Section 35 specifically requires that the dealer against whom the action is proposed should be given a notice containing all or any of the requisitions which may be included in a notice under Sub-section (3) of Section 33. Therefore, if the notices, which are already given to the petitioners, are to be construed as notices even under Section 35, then it is necessary to see whether these notices contain any requisitions which may be included in a notice given under Sub-section (3) of Section 33. As stated above, all these notices specifically call upon the assessees to produce only specified documents, and that too, with a view to enable the assessing authority to come to a best judgment. It may be recalled here that assessment under

Sub-section (6) of Section 33 can be made only on the basis of the best judgment of the assessing authority. Whenever the assessment is to be made on the basis of the best judgment of the authority concerned, the assessee would not be entitled to lead evidence on merits. But in all notices, which are required to be issued under Section 35, the assessee would have opportunity to adduce all evidence, which he requires for the proof of the merits of his case. Under the circumstances, the notices with which the petitioners are served, are found to be having a very limited purpose the purpose being to enable the assessing authority to arrive at the best judgment. These notices, therefore, do not enable the petitioners concerned to adduce necessary evidence for the proof of their case. Obviously, therefore, these notices do not fulfil the requirements of Section 35, This was not the case before their Lordships of the Supreme Court because neither Section 11l(4)(a) nor Section 11A requires that before taking action under any of these sub-sections any notice to the appellant-petitioner was necessary.

39. Another distinguishing feature is that the notice which was actually served on the assessee in the Supreme Court case was of comprehensive nature, which could be utilised either for the purpose of Section 11l(4)(a) or for the purpose of Section 11A of C.P. & Berars Sales Tax Act. The actual notice which was served on the dealer in that case is found re-produced in para 19 of the judgment recorded by the majority. The last paragraph of this notice shows that the dealer in that case was invited to produce books of accounts and documents mentioned in the Schedule as well as "any evidence" on which the dealer wanted to rely in support of his objections. Thus, it was the type of notice which could be utilised either for Section 11(4)(a) or for Section 11A of the Act. It was under these circumstances, that their Lordships were pleased to observe that a notice issued under Section 11(4)(a) would be a valid notice in respect of a proceeding under Section 11A of the Act. We, therefore, find that these observations of their Lordships of the Supreme Court do not help the revenue in any of these cases.

40. Under these circumstances, the respondents fail even on the second point.

41. In view of our finding that Sub-section (6) of Section 33 is ultra-vires the provisions of Article 14 of the Constitution, it is not necessary to decide the rest of the points, which are raised by the petitioners in their respective petitions. In Spl. C.A. 1378/68 vires of Section 36(2)(a) of the Act are also challenged. But in view of our findings recorded above, we don't think it is necessary to consider this question. In that petition, the respondents have challenged the petitioner's claim to the ownership of the Ice Factory but this point was not pressed by any of the parties during the course of hearing and, therefore, the same is not required to be considered.

42. In conclusion, we hold that Sub-Section (6) of Section 33 of the Act of 1959, and Section 14 of the Act of 1953, are ultra vires An. 14 of the Constitution. The declaration to that effect is hereby given. The assessment orders, which are passed in petition No. 1378/68 and 191/68 are quashed. It is further declared that the action proposed to be taken and already taken on the strength of the notices served on the petitioners under Sections 33(6) and 14(6) of the respective Acts, are illegal. These notices are also, therefore, quashed. The rule is made absolute with costs.

Rule made absolute.