

BOMBAY HIGH COURT

Bissesar House

Vs.

State of Bombay

Special Civil Appln. No. 345 of 1957

(M.C. Chagla, C.J., Gokhale and Badkas, JJ.)

23.07.1958

JUDGMENT

M.C. Chagla, C.J.

1. An interesting and important question with regard to the question of limitation under the Central Provinces and Berar Sales Tax Act, 1947 arises in this Full Bench. The facts giving rise to this Full Bench are these. The petitioner is a registered dealer and his chargeable accounting year is from the 1st July to the 30th June. He made his return and paid the tax which according to him was due for the years 1-7-1951 to 30-6-1952, 1-7-1952 to 30-6-1953 and 1-7-1953 to 30-6-1954. On 8-12-1956 the Commissioner of Sales Tax issued a notice under Section 11(2). This notice was served upon the assessee with regard to the first year on 4-1-1957 and with regard to the second year on 8-1-1957. The contention of the assessee was that this notice was bad because it was served three-years after the end of the chargeable accounting year and this petition was filed in this Court challenging the notice and for an order preventing the Commissioner to act upon the notice.

2. In order to understand the question that we have to decide, it is necessary to look at the scheme of the Sales Tax Act. The scheme of the Sales Tax Act in many respects is very different from the scheme of the Income Tax Act in the first place, under the Sales Tax Act an assessee has not to pay tax in respect of the income for the previous year. He pays tax in respect of the chargeable accounting year itself. In the second place, there is no notice which has to be served upon an assessee to file his return. The statute itself constitutes a notice which renders every registered dealer liable to make a return. The third distinction is that with the return an assessee has to pay into the Govt. treasury the full amount of tax due from him under the Act according to the return that he has made. Therefore, under the Income-tax Act assessment proceedings are initiated by a notice, then follows a return, on the return an assessment order is passed and after the assessment order is passed the assessee has to pay the tax. Under the Sales Tax Act the return is made

obligatory under the Act itself and even the payment of tax according to the return is made obligatory. Therefore, the assessee has not to wait till the assessment order is passed before he becomes liable to pay tax. When these fundamental differences between the two acts are recognized, the question that we have to decide will perhaps assume simpler proportions.

3. Let us turn to the relevant sections in the Sales Tax Act. Section 2(1) defines "year" and that is the twelve months upto the 31st March, or, if the assessee has any other year, according to his option and in this case the year of the assessee as pointed out is from the 1st July to the 30th June. Then Section 4 is the charging section and it provides :

"(1) (a) In Madhya Pradesh excluding the merged territories every dealer whose turnover during the year preceding the commencement of this Act exceeded the limits specified in Sub-Section (5) shall be liable to pay tax in accordance with the provisions of this Act on all sales effected after the commencement of this Act."

Then Section 8 is with regard to registration of dealers and in this case the assessee is a registered dealer. Then we come to Section 10 which provides :

"(1) Every such dealer as may be required so to do by the Commissioner by notice served in the prescribed manner and every registered dealer shall furnish such returns by such dates and to such authority as may be prescribed." So it will be noticed that in the case of a dealer who is not registered, a notice has to be served by the Commissioner and with regard to a registered dealer the section itself casts an obligation to furnish the return by such date and to such authority as may be prescribed. Section 11 deals with the returns made and Sub-Section (1) provides :

"If the Commissioner is satisfied that the returns furnished by a dealer in respect of any period are correct and complete, he shall assess the dealer on them."

It will be noticed that under this Sub-Section the act of the Commissioner is a formal act. The return having been made, the tax having been paid, the Commissioner being satisfied with the return, he has to pass the formal order of assessment. Assessment in this case would be nothing more than appropriating the amount paid by the assessee to the revenue of the State. Then comes Sub-Section (2) :-

"If the Commissioner is not so satisfied he shall serve the dealer with a notice appointing a place and day and directing him -

- (i) to appear in person or by an agent entitled to appear in accordance with the provisions of Section 11-B;
- (ii) to produce evidence or have it produced in support of the returns; or
- (iii) to produce or cause to be produced any accounts, registers, cash memoranda or other documents as may be considered necessary by the Commissioner for the purpose."

So that this notice would really initiate proceedings in a case where the Commissioner is not satisfied with the return made by the assessee. The Commissioner would want to either increase the amount of the tax, or correct the return by including sales or deals which were not included in it, or in any other way amend or alter the return made by the assessee. In such a case it is obligatory upon him to serve this notice. Then Sub-Section (3) provides :

"After hearing the dealer or his agent and examining the evidence produced in compliance with the requirements, of Clause (ii) or Clause (iii) of Sub-Section (2) and such further evidence as the Commissioner may require, the Commissioner shall assess him to tax."

Therefore, this assessment is different from the assessment under Section 11(1) in the sense that in the case of Section 11(1) it is a formal assessment as pointed out and in the case of Section 11(3) it is an assessment after initiation of proceedings by a notice under Sub-Section (2) after examining the dealer and his agent and taking evidence. Then Sub-Section (4) deals with best judgment assessment and that Sub-Section applies if no returns are furnished or returns are not furnished pursuant to the notice in Sub-Section (2) of Section 11 or if he has not employed any proper method of accounting. Then Sub-Section (5) deals with a case where the Commissioner receives information that a dealer who is liable to pay tax under the Act has failed to apply for registration and the Commissioner is given power to assess such a dealer, but a period of limitation is fixed and that period of limitation is any time within three calendar years from the expiry of such period during which the dealer was liable to pay tax. Then we come to Section 11-A which corresponds to Section 34 of the Income-tax Act and deals with escaped assessment and the period of limitation is three years. The next section to which attention might be drawn is Section 13(2) which provides :

"Before any registered dealer furnishes the returns required by Sub-Section (1) of Section 10, he shall pay into a Government treasury in the prescribed manner the full amount of tax due from him under this Act according to such returns and shall furnish along with the returns, a receipt from such treasury showing the payment of such amount."

4. Now, the position in this case is that the assessee has submitted his returns for the three relevant years. He has also paid the tax which is due according to him under Section 12(2) and the contention of the petitioner is that it is not competent to the Commissioner to issue a notice under Section 11(1) after the expiry of a period of three years. It will be noticed that Section 11 in terms does not provide for a period of limitation. We might in passing refer to the rules framed under this Act which seem to us to be inconsistent with the Act itself. It will be noticed that Section 11(1) does not require the serving of any notice by the Commissioner, The scheme of that Sub-Section is that if the Commissioner is satisfied with the return he automatically proceeds to assess the dealer. It is only in the case of his not being satisfied that the Act requires a notice to be served under Section 11(2). When we turn to the rules, the heading of R. 31 is :

"Notice under Sub-Ss. (1) and (2) of Section 11. On receipt of a return or returns required under Rules 19, 20 or 22 from any dealer, the assessing authority shall serve on him a notice in Form XI."

When we turn to Form XI, that Form also has the heading :

"Notice under Sub-Ss. (1) and (2) of S., 11". But when we look at the contents of that Form, it really is intended to be a notice under Sub-Section (2) rather than a notice under Sub-Section (1). We fail to understand why any notice is necessary under Section 11(1) if the Commissioner is satisfied with the return. It was suggested by Mr. Phadke (who appeared for the intervener) that the Commissioner should intimate to the assessee the fact of his having made the order of assessment. We fail to appreciate why such an intimation is necessary. The assessee having paid the tax and no notice having been served upon him under Section 11(2), it would necessarily follow that the tax that he paid was the proper tax and the assessing authority did not wish to initiate any further proceedings against him. Therefore, in our opinion, the only necessary notice which is requisite and which has to be served by the Commissioner is under Section 11(2) in the case of his not being satisfied with the return made by the assessee.

5. On the point of limitation, what has been urged before us is that we must import into Section 11(2) the limitation prescribed under Section 11(5) and Section 11-A. It is said that if the Commissioner cannot proceed against a dealer, who has not registered himself, beyond a period of three years and if the Commissioner cannot proceed with regard to an escaped assessment beyond the period of three years, it is inconceivable that the Commissioner could have the power to postpone the assessment or 'a dealer under Section 11(1) beyond the period of 8 years or that he could have the power to issue a notice under Section 11(2) beyond a period of three years and for the purpose of this contention strong reliance is placed on a judgment of the Bombay High Court in *Commissioner of Income-tax Bombay City v. Narsee Nagsee and Co., Bombay*¹, In that case a Division Bench of this High Court was dealing with the Business Profits Tax Act and to a certain extent the position that arose there was similar to the position that arises here. Section 11 of the Business Profits Tax Act dealt with the issue of a notice for furnishing a return of business profits. That section did not prescribe any period of limitation. Section 14 dealt with escaped assessment and that prescribed a period of limitation which was four years and what the Court held was that looking to the scheme of the Act as a whole and reading the Act as a whole, the Court must import into Section 11 the period of limitation prescribed in Section 14 and in the course of the judgment it was pointed out at page 169 (of ITR) :

"In our opinion, every Act must be construed as a whole and the duty of the Court must be as far as possible to reconcile the various provisions of a statute." Then further on that page :

"Therefore, it is clear from Section 14 that the Legislature did not intend to put an

assessee to the peril of an indefinite apprehension with regard to the payment of tax in respect of profits made under the Business Profits Tax Act. The intention of the Legislature was clear that after four years of the end of the chargeable accounting period the assessee should not be proceeded against even if profits had escaped assessment or his profits had been under assessed or he had obtained a relief to which he was not entitled. Inasmuch as Section 11 does not indicate any period of time with regard to the issuing of a notice, would it or would it not be right for us to import into Section 11 the consideration which led the Legislature to fix a limitation of time for the purpose of issuing a notice under Section 14 ? If we were not to do that, we would arrive at this rather extraordinary conclusion that the Legislature, while saving the subject from harassment of proceedings with regard to escaped assessment or under-assessment, permitted that harassment with regard to the very initiation of proceedings after the lapse of four years. It is contended that the period of four years mentioned in Section 14 supplies an important

¹(1957) 31 ITR 164 : AIR 1957 Bom 1

indication of what the period of limitation should be with regard to the issue of a notice under Section 11. If income which has escaped assessment can only be taxed within four years by reason of Section 14, then it must inferentially follow that income must escape assessment at some point of time anterior to the period of four years mentioned in Section 14."

What is urged by Mr. Kolah is that this ratio applies in terms to the facts of this case. But there is an important distinguishing, feature to which Mr. Abhyankar has rightly drawn, our attention. In the case just referred to, assessment proceedings had to be initiated by a notice under Section 11 and what we in effect held was that after the period mentioned in Section 14 with regard to escaped assessment no proceedings for assessment can be initiated. Under the Sales Tax Act which we are considering, proceedings have not to be initiated in the sense in which they had to be initiated under the Business Profits Tax Act. Section 10, as we have already pointed out, casts a statutory obligation upon a registered dealer to furnish a return and also casts a statutory obligation under Section 12(2) to pay the tax. The return and the payment of tax have already been done within the period mentioned in Section 11-A. Can it be said that the passing of the assessment order under Section 11 puts the assessee to the peril of the apprehension that he would be liable to pay tax or additional tax ? The peril to which we referred in the case of Narsee Nagsee, 1957-31 ITR 164 : AIR 1957 Bombay 1 and which we said it was our duty to save the assessee from, does not exist in this case. An order of assessment made under Section 11 at any time cannot possibly prejudice the assessee in any sense whatsoever. That order would not make him liable to pay any additional tax. That order will not put any further liability upon him. It would be merely a formal acceptance by the authority of the tax which the assessee has already paid and there is no reason why in construing Section 11(1) we should import into it the period of limitation which the Legislature has incorporated in Section 11-A. The compelling necessity which drove us to do it in Narsee Nagsee's case 1957-31 ITR 164 : AIR 1957 Bombay 1 does not

exist. But the position is different with regard to Section 11(2). Section 11(2) is in the substantial sense an initiation of fresh proceedings by the Commissioner. It is open to the Commissioner to be satisfied with what the assessee has done and pass an order under Section 11(1). But if he is not satisfied, then he initiates fresh proceedings under Section 11(2) by issuing a notice. That undoubtedly is putting the assessee to the peril of the apprehension that as a result of the notice his tax might be enhanced. If the principle we have laid down in Narsee Nagsee's case 1957-31 ITR 164 : AIR 1957 Bombay 1, is correct, then that principle would undoubtedly apply to the issuing of a notice under Section 11(2). A notice under Section 11(2), as we have indicated, would never be issued unless the Commissioner wished to initiate proceedings as a result of his dissatisfaction with the return made by the assessee and the initiation of those proceedings and the issuing of that notice might and in all probability would, have serious consequences for the assessee.

6. The matter may be looked at from a different point of view. Our attention has been drawn to various authorities which have taken the view that if no assessment has been made for any reason, even the inadvertence on the part of the assessing authority or omission on the part of the assessing authority, it would constitute escaped assessment or underassessment under Section 11-A and what has been urged before us is that if the assessing authority fails to make the order of assessment within three years under Section 11(1), then the income has escaped assessment and proceedings can only be taken under

Section 11-A, which proceedings would be barred by limitation. In our opinion, it is impossible to accept the contention that when an assessee has made a return and has paid tax and all that remains to be done is the appropriation of that tax to revenue, it could be said of that return which bears the tax that that income has escaped assessment. Not only it is not escaped assessment, but it has actually borne tax and the tax has been paid. It would be stretching the language of Section 11-A beyond the breaking point to suggest that in face of that return the income has escaped assessment. But the position is different with regard to Section 11(2). The very object of issuing a notice, we take it, is to try and see whether the assessee is not liable to pay increased tax or to make sure that the assessee has paid tax on the transactions which are liable to tax and that, he has paid tax according to the provisions of the Act. Therefore, if the Commissioner as a result of the notice comes to the conclusion that the assessee is liable to pay a larger amount of tax than his return shows or which he has already paid, to that extent he would be seeking to assess and tax the turnover which has escaped assessment. Turnovers escape assessment in the sense that for three years they have not been assessed to tax and after three years the taxing authority is seeking to tax them. In that sense we agree with the contention that it could be said that the failure on the part of the assessing authority to tax these turnovers would constitute an escaped assessment within the meaning of Section 11-A.

7. Therefore, the decision which we propose to come to fits in with the scheme of the Act and also with Narsee Nagsee's case, 1957-31 ITR 164 : AIR 1957 Bombay 1, to which reference has

been made. With regard to Section 11(1) the Legislature has provided no period of limitation and it would be wrong on our part to add to that section or to rewrite that section by providing something which the Legislature advisedly has not done. Therefore, once the return has been made and tax paid, there is no period of limitation for making the formal order under Section 11(1). We need hardly say that we expect of our public officers a sense of duty and responsibility. The Sales Tax Act is intended to tax business men who are busy doing business and not waiting at the beck and call of Sales Tax Officers. It is, therefore, essential that assessment orders under the Sales Tax Act should be made as expeditiously as possible. Therefore, although we say that no period of limitation is prescribed under Section 11(1), we expect of Sales Tax Commissioners a realisation that they should make the order, if they are satisfied, long before the period of three years and if they are not satisfied issue a notice under Section 11(2). If, on the other hand, a case arises for the issue of notice under Section 11(2), then it is clear that that notice must be issued within three years, because if the notice is issued after three years it would infringe the provision of Section 11-A because the Commissioner would be indirectly doing, if not doing directly, what the law prohibits him from doing, viz., to bring to assessment an escaped turnover which he could not do beyond the period of three years.

8. Our attention was drawn to a decision of the Madhya Pradesh High Court which seems to have taken a different view. It is our duty to look at that judgment with respect and indicate why we are not in a position to agree with the views taken by the learned Chief Justice and Mr. Justice Choudhuri in *Regional Assistant Commissioner v. Ghanshamdas*². In the first place, we find that the attention of the learned Judges was not drawn to the decision of the Bombay High Court in Narsee Nagsee's case 1957-31 ITR 164 : AIR 1957

² AIR 1958 Mad Pra 148

Bombay 1. The other reason why the learned Judges came to the conclusion is that in their opinion the question of escaped assessment under Section 11-A only arises after the first assessment has been made. In their opinion there could not be a case of escaped assessment unless there is an initial or ordinary assessment under the Act. With respect, this view is entirely contrary to the view of the Bombay High Court in *Commissioner of Income-tax, Bombay v. Pirojbai N. Contractor*³. There Sir John Beaumont, Chief Justice and Mr. Justice Rangnekar held that Section 34 of the Indian Income-tax Act is wide enough to include cases where no notice under Section 22(2) had been issued to the assessee and his income had not been assessed at all under Section 23. Therefore, in order that Section 34 or Section 11-A should apply, it is not necessary that there should be an initial assessment and after that a discovery should be made that some income has escaped assessment. These sections would equally apply if, in the first place, there was no assessment at all and it would be found that the assessee was liable to tax.

9. We will therefore answer the questions which have been submitted to us by the Division Bench of this Court. We will reframe the first question as follows :

"Whether a notice can be issued under Sub-Section (2) of Section 11 of the Act more than

three years after the expiry of the period for which it is proposed to make the assessment ?" and answer the question in the negative. We will also reframe the second question as follows :

"Whether the assessment under Sub-Section fl) of Section 11 can be made more than three years after the expiry of such period ? "

and answer the question in the affirmative.

10. We will therefore quash the two notices, Exs. C and F to the petition, issued by the Commissioner and also issue a writ of prohibition against the Sales Tax Commissioner prohibiting him from taking any proceedings pursuant to or under these notices Petitioner to get the costs.

Application allowed.

³(1937) 5 ITR 338