

The State of Gujarat Vs. Premier Auto Electric Ltd.

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Court : Gujarat

Decided On : Nov-20-1978

Reported in : [1980]45STC220(Guj)

Judge : B.K. Mehta and; P.D. Desai, JJ.

Acts : Bombay Sales Tax Act, 1959 - Sections 61

Appeal No. : Sales Tax Reference No. 14 of 1976

Appellant : The State of Gujarat

Respondent : Premier Auto Electric Ltd.

Advocate for Def. : S.L. Modi, Adv.

Advocate for Pet/Ap. : G.T. Nanavati, Adv. for Bhaishanker Kanga and Girdharlal

Judgement :

Desai, J.

1. In this reference made by the Gujarat Sales Tax Tribunal (hereinafter referred to as the 'Tribunal') at the instance of the State of Gujarat under section 61 of the Bombay Sales Tax Act, 1959 (hereinafter called the 'Act'), the following question has been referred for the opinion of this Court :

'Whether, on the facts and in the circumstances of the case and in view of the directions of the Gujarat High Court in Sales Tax Reference No. 5 of 1974 decided on 13th August, 1974, the Tribunal was justified in not deciding the rate of tax to be levied on the sales of scrap batteries in general and in holding that the rate of tax on the scrap batteries sold to the opponent is 10 per cent under entry 42B of Schedule C to the Bombay Sales Tax Act, 1959, inasmuch as the department while making the assessments of the vendors of the opponent had levied the tax at the rate of 10 per cent on their sales and for which the vendors of the opponent had already issued certificates ?'

2. In order to answer the question, it would be necessary to set out a few facts.

3. The assessee is a company dealing in automobile parts and automobile batteries and accessories on wholesale and retail basis. At the material time, the assessee was a registered dealer under the provisions of the Act. During the assessment period from 1st July, 1965, to 30th September, 1966, the assessee had purchased scrap batteries from certain dealers within the state of Gujarat and it had sold them outside the State of Gujarat. According to the assessee, the dealers from whom it had purchased the scrap batteries had charged sales tax at the rate of 10 per cent on the sales effected in favour of the assessee on the basis that the goods in question were liable to tax at the said rate under entry 42B of Schedule C. The total price of the batteries purchased by the assessee was Rs. 35,342 and, on the aforesaid basis, the assessee was charged Rs. 3,534 by way of sales tax. At the time of its assessment for the relevant period, the assessee claimed a set-off of the sales tax recovered as aforesaid on the sales of scrap batteries effected in its favour. The set-off was claimed under rule 43(1)(a) of the Bombay Sales Tax Rules, 1959 (hereinafter referred to as the said 'Rules'), and the amount of set-off claimed was in the sum of Rs. 3,534. The Sales Tax Officer, who was seized of the assessment proceedings in relation to the assessee, was of the view that scrap batteries were liable to bear sales tax at the rate of 6 per cent under residuary entry 22 of Schedule E and that, therefore, the opponent was entitled to set-off any to that extent and not more. Accordingly, the Sales Tax Officer allowed set-off to the extent of Rs. 2,329. Against the aforesaid order of the Sales Tax Officer, the assessee preferred an appeal before the Assistant

Commissioner of Sales Tax. The appeal was, however, dismissed. The assessee thereupon carried the matter in second appeal before the Tribunal. The Tribunal took the view that whatever might have been the tax legally recoverable on the sales of scrap batteries, the assessee was entitled to claim set-off of the whole amount which had been recovered from it by the selling dealer. The Tribunal arrived at the aforesaid conclusion on an interpretation of the expression 'recovered' used in rule 43 without going into the question whether, in fact, scrap batteries were covered by entry 42B of Schedule C or entry 22 of Schedule E. It appears that before the Tribunal the revenue had bone admitted the fact that the selling dealers had charged sales tax at the rate of 10 per cent on the sales of scrap batteries effected in favour of the assessee. Under the circumstances, the Tribunal remanded the case to the Assistant Commissioner of Sales Tax to record a finding on the question as to what was the amount of sales tax recovered by the selling dealers from the assessee, with a further direction to allow the set-off of the whole amount of tax recovered from the assessee by the selling dealers. At the instance of the revenue, the Tribunal referred to this Court fro its opinion the question whether, on the facts and in the circumstances of the case, it was justified in holding that under the provisions of the relevant rule, the whole of the amount of tax recovered by way of sales tax by the selling dealer from the assessee was required to be refunded by way of set-off and not the amount which was legally recoverable by way of sales tax on the goods sold by such selling dealers (Sales Tax Reference No. 5 of 1974). The reference came up for hearing before a Division Bench of this Court consisting of J. B. Mehta and T. U. Mehta, JJ., on 13th August, 1974, and the Division Bench found in the curse of its judgment delivered on the same day that the Tribunal had posed a hypothetical question. The observations which the Division Bench made in this context are as follows :

'The whole reference would have been unnecessary if the Tribunal had gone into the relevant question which arose before the Tribunal. If 10 per cent rate was the legal rate of sales tax chargeable for this item, the entire amount would have been claimed as legal set-off as well It is only on aa hypothetical assumption that the Tribunal has posed this hypothetical question which would not arise if the Tribunal had first disposed of the lead question which arose before it as to the

interpretation of the tax entry. It is only if the tax entry is interpreted as giving the correct rate of tax of 6 per cent under residuary entry 22 of Schedule E that this hypothetical question would arise in the present reference to be answered by this Court Therefore, the Tribunal must decide the question left open in para 5 of its order and, thereafter, if the present question of law arises, it shall make proper reference.'

4. When the matter went back to the Tribunal, on the disposal of the reference in the aforesaid terms, the assessee produced the certificates of several vendors who had sold scrap batteries to the assessee during the assessment period in question and those certificates showed that during the course of the assessment proceedings of those selling dealers, the concerned Sales Tax Officers had taken the view that the sales of scrap batteries made by those dealers in favour of the assessee were chargeable to sales tax at the rate of 10 per cent as the goods in question were covered by entry 42B of Schedule C. It was also stated on behalf of the assessee before the Tribunal that these selling dealers had acquiesced in the decision of the concerned Sales Tax Officers and that they had not preferred any appeal against the assessment orders in their cases. The contention which was urged for the consideration of the Tribunal on behalf of the assessee on the basis of the aforesaid facts and circumstances was that the levy of sales tax was at the rate of 10 per cent on scrap batteries 'for the purposes of this case' and that the revenue should be held to be legally 'estopped' from contending that the tax legally recoverable was 6 per cent and not 10 per cent. The contention, as reproduced by the Tribunal in the course of its judgment, was in terms as follows :

'When the department had realised the tax at the rate of 10 per cent from the vendors of the appellant on the sales of scrap batteries made to it, it is not open for the department now to say that the scrap batteries were liable to tax at the rate of 6 per cent when the appellant claimed set-off of tax recovered under rule 43(1)(a) of the Rules.'

5. As against the aforesaid contention of the assessee, the submission of the revenue was that this Court, having given a specific direction to the Tribunal to

determine the rate of tax on the scrap batteries purchased by the assessee, the Tribunal should decide the said question independently of the fact that during the course of the assessment to sales tax of the vendors of the assessee, the concerned Sales Tax Officers had found that the sales effected in favour of the assessee were liable to bear sales tax at the rate of 10 per cent. The Tribunal considered these rival submissions made before it and recorded its finding thereon in the following words :

'In our view, this submission of the learned Government agent cannot be accepted. While deciding the question as to whether the scrap batteries in the present case were liable to tax at the rate of 10 per cent or 6 per cent, we cannot ignore that fact that the concerned Sales Tax Officers have imposed sales tax at the rate of 10 per cent on the sales made to the appellant by the vendors while making the assessment thereof, because that fact, in our view, would preclude the department from the contending that the rate of tax on scrap batteries should be 6 per cent and not 10 per cent. When at the sale side, the tax had been imposed and realised at the rate of 10 per cent, it is not open for the department to say when set-off is claimed by the purchaser that the tax leviable is at 6 per cent and not 10 per cent Here, the position was that, at the time of assessments of the vendors of the appellant, the concerned Sales Tax Officers had held that the scrap batteries would fall under entry 42B of Schedule C liable to tax at the rate of 10 per cent and it is at the time when the set-off was claimed that the Sales Tax Officer who made the assessment of the appellant held that the scrap batteries would fall under entry 22 of Schedule E to the Act. Thus, in the present case, there are different conflicting views of different Sales Tax Officers about the rate of tax on scrap batteries. In our view, it is not open for the department to hold that the batteries sold to the appellant were liable to tax at the rate of 6 per cent when actually the sales tax at the rate of 10 per cent has been realised from the vendors thereof'

6. The Tribunal, having taken the aforesaid view, proceeded to consider whether, in fact, the selling dealers had recovered sales tax at the rate of 10 per cent from the assessee when they effected sales of scrap batteries in its favour and, relying upon the certificates produced by the assessee before the Tribunal, it was found

that the assessee was entitled to set-off at the rate of 10 per cent on purchases made by it from those of the dealers who had given the certificates in question and the appeal was allowed to that extent. With respect to purchases made from the dealers other than those who had issued such certificates, the order of the Assistant Commissioner of Sales Tax relating to the grant of set-off at the rate of 6 per cent was confirmed.

7. At the instance of the revenue, the question set out at the commencement of this judgment has been referred by the Tribunal for the opinion of this Court. It appears to us that, in order to bring out the real controversy between the parties, the question needs to be reframed as under :

'Whether, on the facts and in the circumstances of the case, and in view of the directions of the Gujarat High Court in Sales Tax Reference No. 5 of 1974 decided on 13th August, 1974, the Tribunal was required to decide the question as to whether, on a true and correct interpretation, the scrap batteries, the sales of which were affected by various dealers in favour of the assessee during the assessment period in question, were covered by entry 42B of Schedule C or entry 22 of Schedule E and whether the Tribunal erred in failing to decide the said question upon its erroneous view that while assessing the vendors of those scrap batteries tax having been levied at the rate of 10 per cent on such sales by treating those goods as covered by entry 42B of Schedule C, the revenue was precluded from contending that such scrap batteries were covered by entry 22 of Schedule E and were, therefore, liable to be taxed at the rate of 6 per cent ?'

8. It is this question reframed as above which we shall proceed to answer.

9. Now, there is no manner of doubt that the Tribunal was directed by the decision rendered by this Court in Sales Tax Reference No. 5 of 1974 to precisely determine the question as to what was the correct rate of sales tax chargeable in respect of sales of scrap batteries effected in favour of the assessee by its vendors. In terms, this Court had observed that it is only if the tax entry was interpreted as giving the correct rate of tax at 6 per cent under residuary entry 22 of Schedule E, that the question, which was referred by the Tribunal in the said sales tax reference, would arise and require to be answered by this Court. These

observations have to be read against the background that, when the said reference was made, the Tribunal had left open the question as to what was the tax legally recoverable on the sales of scrap batteries effected in favour of the assessee by its vendors. When so read, the observations leave no scope for any doubt or debate that the precise issue which the Tribunal was required to decide was as to whether the scrap batteries which were sold to the assessee during the relevant assessment period by its vendors were covered by entry 42B of Schedule C or entry 22 of Schedule E, on a true and correct interpretation. When we turn to the order of the Tribunal out of which this reference arises, however, one finds that the Tribunal has failed to determine this precise question. Nowhere in the course of its decision the Tribunal has applied its mind to the issue as to whether the scrap batteries in question were covered by one or the other entry referred to earlier. It appears to have been the view of the Tribunal that the question as to which entry was attracted could not be decided independently of the fact that the Sales Tax Officers who had assessed the selling dealers had found that sales tax at the rate of 10 per cent was leviable on the sales made by those dealers in favour of the assessee and that because of that fact the revenue was precluded from taking up any inconsistent stand and that it was not open to the revenue to contend, when set-off was claimed by the assessee, that the tax was leviable at 6 per cent because the goods in question were covered by entry 22 of Schedule E and not at the rate of 10 per cent because the goods were not covered by entry 42B of Schedule C. The Tribunal, in other words, invoked the doctrine of estoppel and, applying the said doctrine, declined to determine the legal rate of sales tax leviable on the transactions of sales of scrap batteries effected in favour of the assessee by the selling dealers and it, consequently, failed to determine the precise question whether the goods in question were covered by one or the other entry. In so doing, the Tribunal failed to determine the precise question which it was required to decide in view of the decision of this Court in Sales Tax Reference No. 5 of 1974.

10. This, however, is not the only error into which the Tribunal has fallen. The Tribunal erred in law in invoking, in substance, the principle of approbate and reprobate and in placing a bar of estoppel against the revenue. Reference may be made in this connection to the decision in *Commissioner of Income-tax v. V. MR.*

P. Firm, Muar [[1965] 56 I.T.R. 67 (S.C.)]. It was contended that the assessee in that case having opted to accept a scheme whereunder its losses suffered during subsequent assessment years were allowed to be set-off against profits for the preceding years on the condition that any subsequent recoveries relatable to such losses would be taxable income and, the assessee having derived benefit thereunder, it was precluded, on the principle of 'approbate and reprobate', from pleading that the income it derived subsequently the realisation of the revived debts was not taxable income. The Supreme Court repelled this contention in the following words :

'The doctrine of 'approbate and reprobate' is only a species of estoppel; it applies only to the conduct of parties. As in the case of estoppel, it cannot operate against the provisions of a statute. If a particular income is not taxable under the Income-tax Act, it cannot be taxed on the basis of estoppel or any other equitable doctrine. Equity is out of place in tax law; a particular income is either exigible to tax under the taxing statute or it is not. If it is not, the Income-tax Officer has no power to impose tax on the said income.'

11. To the similar effect are the observations in Commissioner of Income-tax v. Durga Prasad More [[1971] 82 I.T.R. 540 (S.C.)], wherein was observed as under :

'It is true that neither the principle of res judicata nor the rule of estoppel is applicable to assessment proceedings.'

12. In Mathra Parshad and Sons v. State of Punjab [[1962] 13 S.T.R. 180 (S.C.)], which was a case arising out of the East Punjab General Sales Tax Act, 1948, one of the contentions was that the State Government having assured to give certain concessions in the matter of levy of sales tax, it was estopped from reversing its policy as embodied in such assurance. This argument was rejected in the following words :

'There can be no estoppel against a statute. If the law requires that a certain tax is to be collected, it cannot be given up, and any assurance that it would not be collected, would not bind the State Government, whenever it chose to collect it.'

13. These decisions clearly lay down the principle that the doctrine of estoppel has no place in assessment proceedings because equity is out of place in a tax law and that, therefore, a particular sale is either exigible to tax under the taxing statute at a certain rate or it is not and that the Sales Tax Officer has no power to impose tax on the transaction of sale at a rate different than that which appropriately applies to such transaction. On the facts and in the circumstances of the present case, therefore, the Tribunal could not have placed the bar of estoppel in the way of the revenue and, on that basis, it could not have refused to determine, independently of the facts of this case, as to what was the true rate of tax leviable on the sales of scrap batteries effected in favour of the assessee on the basis whether those scrap batteries were covered by entry 42B of Schedule C or entry 22 of Schedule E.

14. The foregoing discussion would show that the Tribunal erred in law in failing to determine whether, on a true and correct interpretation, the goods in question were covered by entry 42B of Schedule C or entry 22 of Schedule E and that it also fell into an error in invoking the doctrine of estoppel on the facts and circumstances of the case.

15. The question reframed by us will accordingly stand answered in the affirmative, that is to say, in favour of the revenue and against the assessee. The assessee will pay the costs of this reference to the Commissioner of Sales Tax.

16. Reference answered accordingly.