

The State of Gujarat Vs. Ilac Ltd.

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Court : Gujarat

Decided On : Oct-19-1981

Reported in : [1982]50STC24(Guj)

Judge : B.K. Mehta and; D.C. Gheewala, JJ.

Acts : Bombay Sales Tax Act, 1959 - Sections 5, 11(1), 11(2), 20, 37, 37(1), 46, 46(2) 61(1) and 64(1)

Appeal No. : Sales Tax Reference No. 23 of 1978

Appellant : The State of Gujarat

Respondent : ilac Ltd.

Advocate for Def. : K.N. Raval, Adv. for B.R. Shah, Adv.

Advocate for Pet/Ap. : J.R. Nanavati, Government Pleader, i/b., H.V. Chhatrapati, Adv. for Bhaishanker Kanga and;Girdharlal

Judgement :

Mehta, J.

1. At the instance of the State of Gujarat, the following question has been referred to us for our opinion under section 61(1) of the Bombay Sales Tax Act, 1959 (hereinafter referred to as 'the Bombay Act') :

'Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the whole or any part of the collection Rs. 6,361.31 made by the opponent under the head, 'sales tax paid to the manufacturer' from the opponent's purchasers was not made 'by way of tax' ?'

2. The above question has been referred to us in the following circumstances :

The assessee is a registered dealer under the Bombay Act. The business of the assessee-company was reselling textile goods, cotton waste, cotton thread, etc. During the assessment period, commencing from 1st April, 1964, to 31st March, 1965, the assessee-company had purchased cotton waste from a manufacturer who was a registered dealer and had resold the same in the State of Gujarat. In the bills of the sale of the said goods, the assessee had charged 2 per cent 'sales tax paid to the manufacturer' on the price mentioned in the bill. It appears that the assessee-company had purchased the goods of cotton waste from the manufacturer whose name is not specified in the statement of case or in the orders of the authorities below. On this purchase, the assessee had paid sales tax to the selling manufacturer of Rs. 4,209.12. However, on the resales made of this lot of goods, the assessee appears to have recovered in all Rs. 6,361.31 under the head described in the different bills of sale of the said lot of goods as 'sales tax paid to the manufacturer' at the rate of 2 per cent on the price of the goods shown in the bills.

3. In the course of the assessment proceedings, the assessee contended before the Sales Tax Officer that it had not collected the disputed amount of 2 per cent by way of tax in respect of the sales of cotton waste within the meaning of section 46(2) of the Bombay Act, and that the said respective amounts had been collected as amounts of tax paid to the manufacturer at the time of purchasing cotton waste and therefore, the said collection could not be treated as collection by way of tax with the consequence that the power contained in section 37(1) of the Bombay Act could be invoked for purposes of forfeiting the said amount. The Sales Tax Officer was not impressed with the contention and therefore, rejected the above plea and directed that the whole amount of Rs. 6,361.31 should be forfeited under section 37(1) of the Bombay Act on the ground that the opponent had illegally collected it

by way of tax even though it was not itself liable to pay tax thereon.

4. The assessee, therefore, carried the matter in appeal before the Assistant Commissioner of Sales Tax which was of no avail. The assessee, therefore, carried the matter in further appeal to the Gujarat Sales Tax Tribunal. In the course of hearing of the appeal, it was contended on behalf of the assessee that what was in fact collected by the assessee was on account of the tax paid to the manufacturer which was the amount of sales tax paid at the rate of 2 per cent of the purchase price and if in the course of resales the assessee had recovered a larger amount in fact, than what he has paid to the manufacturer, it was a matter of contract between the assessee and its purchasers and therefore, could not be said to be any amount collected by way of tax in excess of the amount of tax payable by the assessee under the provisions of the Bombay Act and therefore, the order of the sales tax authorities was beyond their competence. On the other hand, on behalf of the State Government, it was contended that having regard to the unequivocal statement made in the respective bills where different amounts have been collected under the head 'sales tax paid to the manufacturer' at the rate of 2 per cent, the assessee could not avoid the liability as in effect and substance he collected the amount by way of tax in excess of the amount of tax payable by him under the Act and therefore, the sales tax authorities were perfectly justified forfeiting the entire amount. The Tribunal referred to the decision of this Court in *Kantilal Babulal and Bros. v. H. C. Patel*, Sales Tax Officer, Surat [1965] 16 STC 973 and was of the opinion that the ratio of that decision would apply with all its force to the facts of this case and therefore, if there was no prohibition in the relevant provisions of the Bombay Act under which the present reference arises, and there was none as found by this Court in *Kantilal Babulal's* case [1965] 16 STC 973, because that was also a reference arising under the very Act, against the collection of sales tax from the purchasers, any excess collection would be a matter of contract and therefore, not liable to be forfeited under the Act. The Tribunal referred to Section 46(2) of the Bombay Act and found that the latter portion of sub-section (2) would not be applicable to the facts of the present case as the appellant had not collected any amount by way of tax in excess of the amount of tax payable by it. The Tribunal noted that admittedly in the instant case as the sales were resales of the goods purchased from the registered dealer there

is no question of paying tax on the amount of the sales. The Tribunal, therefore, concluded that in its view as the collection was not made by way of tax, the question of forfeiture under section 37 of the Bombay Act did not arise. In that view of the matter, the appeal of the assessee was allowed and the order of the Sales Tax Officer as confirmed in appeal by the Assistant Commissioner forfeiting the entire amount was set aside. The State Government, therefore, prayed for reference which was granted and the question set out above has been referred to us for our opinion.

5. At the outset of the hearing of this reference, a preliminary objection was taken on behalf of the assessee that since there is a clear finding of fact made by the Tribunal that what has been collected by the assessee was not by way of tax and since no reference has been prayed for by seeking the question challenging the validity of that finding, this Court is not entitled to go beyond that finding and answer the question as has been referred to us by the Tribunal.

6. We do not think that there is much substance in this contention. The Tribunal has merely read the statement made in the respective bills of the assessee and head 'sales tax paid to the manufacturer' which was not by way of tax and, in any case, in excess of the amount of tax payable by the assessee, because admittedly the sales were resales of the goods purchased from the registered dealer on which there was no question of tax to be paid on the sale. We do not think that this can be, by any stretch of imagination without violence of the language, said to be a finding of fact. It is an inferential reasoning by which the the Tribunal, on reading the respective bills by which the goods in question were sold by the assessee who was claiming deductions of the resales of the goods purchased from the registered dealer that the Tribunal opined that what has been collected was not by way of tax, because it was not in excess of the tax payable under the Act. We do not think, therefore, that the question referred to us is such which would precluded us from answering it. Even the question which has been framed and referred to us by the Tribunal requires us to advice, whether the Tribunal was justified in law in holding that the whole or any part of the collection made by the assessee under the head, 'sales tax paid to the manufacturer' from its purchasers was not made by way of tax. In other words, we have to answer whether the inference drawn by the

Tribunal was justified or not. We do not think, therefore, that the learned Advocate for the assess was justified in raising the preliminary objection.

7. The short question, therefore, which we have to answer is whether the Tribunal was justified in holding that the power of forfeiture cannot be invoked on the facts and in the circumstances of the case, and if the power of forfeiture can be invoked, to what extent the power can be exercised. In other words, whether the entire amount of the collection is liable to be forfeited or only the excess amount is a question to be considered. In order to answer this question it would be profitable to set out the relevant provisions contained in section 46 so far as material for the purposes of this reference. Section 46 makes prohibition against the collection of tax in certain cases. The material part of section 46, so far as relevant for purposes of this reference, provides as under :

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

(2) No person, who is not a registered dealer and liable to pay tax in respect of any sale or purchase, shall collect on the sale of any goods any sum by way of tax from any other person (and no registered dealer shall collect any amount by way of tax in excess of the amount of tax payable by him under the provisions of this Act) : Provided that, this sub-section shall not apply where a person is required to collect such amount of the tax separately in order to comply with the conditions and restrictions imposed on him under the provisions of any law for the time being in force.'

8. Section 37(1) of the Bombay Act imposes penalty for contravening certain provisions. Section 37(1) as was in force at all the relevant times of this assessment provided as under :

'37. (1) If any person, -

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

section 46, or

(b)

9. He shall be liable to pay, in addition to any tax for which he may be liable, a penalty as follows :

(i)

(ii)

and in addition, in the case of a contravention referred to in clause (a), any sum collected by the person by way of tax in contravention of section 46 shall be forfeited to the State Government.'

10. The scheme contained in section 46 read with section 37 of the Bombay Act appears to be that no person is entitled to collect any sum by way of tax in respect of the tax-free goods as prescribed under section 5 of the Act, and similarly no person who is not a registered dealer and though liable to pay tax in respect of any sale or purchase is entitled to collect on the sales of any goods any sum by way of tax from any other person, while no registered dealer is entitled to collect any amount by way of tax in excess of the amount of tax payable by him under the provisions of the Act. If such person, who is not a registered dealer, or even if a registered dealer, collects any amount by way of tax in excess of the tax payable by him, or otherwise collects tax in contravention of section 46, he exposes himself to the penalty, and also to forfeiture of the sums so collected by him by way of tax in contravention of section 46. It is in this legal context that we have to answer whether the Tribunal was justified in drawing the inference as it did when it held that the whole or any part of the collection of Rs. 6,361.31 effected by the assessee under the head of sales tax paid to the manufacturer was not made by way of tax. We have not been able to appreciate how the Tribunal concluded that what has been collected by the assessee was not by way of tax. The reasoning which has found favour with the Tribunal does not recommend to us at all. The Tribunal has recorded its conclusion in the following terms :

'Now, in the instant case, the amount is collected as sales tax paid to the manufacturer. The purchaser may not know how the price is fixed by the vendor and on the face of it, the rate applicable is 2 per cent and in such case he might have accepted the collection as merely transferring to the purchaser the tax paid to its vendor by the seller. It is open to the purchaser to sue the vendor if he has collected something more than what has been actually paid to the manufacturer but so long as the bills are clear as to what is collected, the provisions of section 37 would not be applicable as it will be not a case of a registered dealer collecting any amount by way of tax in excess of the tax payable by him or otherwise collected tax in contravention of section 46

11. After referring to the gist of section 46(1) and (2) the Tribunal proceeds to record as under :

'The latter portion will not be applicable to the facts of the instant case as the appellant has not collected any amount by way of tax in excess of the amount of tax payable by it. Admittedly, in the instant case, as the sales are resales of goods purchased from registered dealers, there is no question of tax to be paid on the sales. What is collected is not the tax on the sale as clearly stated in the particulars though it comes to 2 per cent, that is, the rate applicable on the selling price. In our view, as the collection is not made by way of tax, the question of forfeiture under section 37 of the Act does not arise.'

12. This is, to say the least, with respect to the Tribunal, that the entire conclusion is based on 'no reasoning' at all. The bills of the sales of the lot of the goods of cotton waste given by the assessee clearly stated that the amounts of sales tax have been collected by the assessee, though this was on account of sales tax paid to the manufacturer. We have not been able to appreciate in spite of our efforts as to how the Tribunal reached the conclusion in spite of the clear and unequivocal statement in all these bills that the assessee has not collected any amount by way of sales tax. The argument is possible that this amount is not liable to be forfeited since there is no contravention of section 46(2). However, the validity of that argument arises on the premise that the condition prescribed in the latter part of section 46(2) is complied or not. The contravention of the prohibition prescribed

under section 46(2) arises in case of a registered dealer when he collects any amount by way of tax in excess of the amount of tax payable by him under the provisions of the Act. On the plain reading of the prohibition, there is no escape from the conclusion that the assessee has collected some amount by way of tax, may be it is on account of his paying the tax to his seller. The reason or the ground of collection would not detract from the nature of the head under which it is collected. We are, therefore, of the opinion that the Tribunal has completely misdirected itself in holding that the amount which has been collected by the assessee was not on account of tax because in the opinion of the Tribunal it would not be a tax since the assessee was not liable to pay tax under the Act because the sales were in the nature of resales. This is, with respect, begging the question. There are two conditions which must be satisfied before it can be said that there is a contravention of the prohibition contained in section 46(2). The first condition is that some amount is collected by way of tax and the second condition is that it must be in excess of the amount of tax payable by the dealer under the Act. To determine the nature of the collection from his ultimate liability of paying the tax under the Act is, with respect to the Tribunal, reversing the entire process of logic. Mr. Raval, the learned Advocate for the assessee, was at great pains to persuade us that what has been collected is merely a component of the price and merely because the assessee has stated in the bills that what he was collecting was on account of his costs, which, inter alia, comprised of the tax paid to its vendors, the collection cannot be said to be by way of tax. This is too ingenious a contention which cannot be upheld for the simple reason that what the legislature has prescribed in the prohibition is that the person must not collect any amount by way of tax - may be - that may be an amount of tax which the dealer might have paid to his vendor. As stated above, merely because the amount which the present assessee was collecting was on account of the tax paid by it to its seller would not detract from the nature of collection. The nature of collection remains that of tax whether that is a tax which he has already paid to his sellers or a tax which he may have ultimately to pay to the State.

13. The next condition which has been prescribed for constituting the contravention is, whether it has been collected in excess of the amount of tax payable by the dealer under the provisions of the Act. To this essential requisite

we will address ourselves presently. However, before we do that, we deal with the attempt made by the learned Advocate for the assessee in supporting his contention which we are not inclined to agree with. In support of his contention, he relied on the decisions of the Supreme Court in *R. Abdul Quader and Co. v. Sales Tax Officer, Hyderabad* [1964] 15 STC 403 (SC), and *R. S. Joshi v. Ajit Mills Limited* [1977] 40 STC 497 (SC). We should remind ourselves that in *Abdul Quader's* case [1964] 15 STC 403 (SC), the Supreme Court was concerned with the validity of a similar provision of forfeiture of unlawful collections from the purchasers to the Government under sections 11(2) and 20(c) of the Hyderabad General Sales Tax Act, 1950. The Supreme Court, speaking through Wanchoo, J., observed in the course of the judgment that it was difficult to appreciate that where the sales tax legislation proceeds on the basis that the amount concerned is not a tax exigible under the law, but even so it should be paid over the Government merely because some dealers by mistake or otherwise had collected it as tax, how such a provision can be ancillary or incidental to the collection of tax legitimately due under the law made under the relevant taxing entry. Examining this contention, Wanchoo, J., speaking on behalf of the court, ruled as under :

'... We do not think that the ambit of ancillary or incidental power goes to the extent of permitting the legislature to provide that though the amount collected - may be wrongly - by way of tax is not exigible under the law as made under the relevant taxing entry, it shall still be paid over the Government, as if it were a tax. The legislature cannot under entry 54 of List II make a provision to the effect that even though a certain amount collected is not tax on the sale or purchase of goods as laid down by the law, it will still be collected as if it was such a tax. This is what section 11(2) has provided. Such a provision cannot in our opinion be treated as coming within the incidental or ancillary power which the legislature has got under the relevant taxing entry to ensure that the tax is levied and collected and that its evasion becomes impossible. We are therefore of opinion that the provision contained in section 11(2) cannot be made under entry 54 of List II and cannot be justified even as an incidental or ancillary provision permitted under that entry.'

14. The learned Advocate for the assessee made an attempt to elaborate his contention by relying on the above observation of the Supreme Court in *Abdul*

Quader's case [1964] 15 STC 403 (SC), that if the impugned collection is not by way of the amount of tax, it cannot be forfeited legitimately under the power of forfeiture prescribed under a particular sales tax legislation because that would be contravening the ratio of Abdul Quader's case [1964] 15 STC 403 (SC). We are afraid that in advancing this contention the learned Advocate for the assessee has overlooked the pertinent point which has been referred to in Abdul Quader's case [1964] 15 STC 403 (SC). The pertinent point has been clearly brought out by the Supreme Court in its latter decision in Ajit Mill's case [1977] 40 STC 497 (SC) in the judgment of the majority view of six Judges express though Krishna Iyer, J. The crucial ratio of Abdul Quader's case [1964] 15 STC 403 (SC) has been brought out in the following terms :

'The crucial ratio lies in the underscored passage. Had there been a penalty including forfeiture, coupled with a prohibition against collecting any amount wrongly by way of tax from purchasers, it 'may have been justified as a penalty for the purpose of carrying out the objects of the taxing legislation'. In a sense, Abdul Quader's case [1964] 15 STC 403 (SC); [1964] 6 SCR 867 demarcates the constitutional watershed between merely laying hands upon collection by way of tax by traders although they are not exigible from traders (a provision for which the State is under-powered by entry 54 of List II, even expanding it by the doctrine of implied powers) and the policing by penalising, including forfeiting illegal exaction, of the working of a taxing statute and inhibiting injury to the public.'

15. The ratio which has been carved out by the Supreme Court in Ajit Mills' case [1977] 40 STC 497 (SC) is expressed in the following terms in Abdul Quader's case [1964] 15 STC 403 (SC) itself :

'..... Section 11(2), in our opinion, has nothing to do with penalties and cannot be justified as a penalty on the dealer. Actually section 20 makes provision in clause (b) for penalty in the case of breach of section 11(1) and makes the person committing a breach of that provision liable, on conviction by a Magistrate of the first class, to a fine In this connection we may refer to clause (c) of section 20, which provides that any person who fails 'to pay the amounts specified in sub-section (2) of section 11 within the prescribed time' shall on a conviction by a

Magistrate, by liable to fine. It is remarkable that this provision makes the person punishable for this failure to pay the amount which is not authorised as a tax at all under the law, to Government. It does not provide for a penalty for collecting the amount wrongly by way of tax from purchasers which may have been justified as a penalty for the purpose of carrying out the objects of the taxing legislation. If a dealer has collected anything from a purchaser which is not authorised by the taxing law, that is a matter between him and the purchaser, and the purchaser may be entitled to recover the amount from the dealer. But unless the money so collected is due as a tax, the State cannot by law make it recoverable simply because it has been wrongly collected by the dealer

16. We are, therefore, of the opinion that the learned Advocate for the assessee was not justified in contending as he did by placing reliance on the decision the Supreme Court in Abdul Quader's case [1964] 15 STC 403 (SC). As stated above, the learned Advocate for the assessee has missed the cardinal and pertinent point which has been brought out succinctly by Krishna Iyer, J., in Ajit Mills' case [1977] 40 STC 497 (SC). The learned Advocate for the assessee, therefore, in this connection, invited our attention to certain observations made in the concurring opinion of Kailasam, J., Ajit Mills' case [1977] 40 STC 497 (SC), which read as under :

'An attempt to justify the provisions of section 11(2) on the ground that it was by way of penalty was not accepted as in the opinion of the court section 11(2) cannot be justified as a provision for levying a tax or as incidental or ancillary provision relating to the collection of tax. But the court added that the provision did not provide for a penalty for collecting the amount wrongly by way of tax from purchasers which may have been justified as a penalty for the purpose of carrying out the objects of the taxing legislation. The decision therefore is not only an authority for the proposition that unless the money collected is due as a tax, the State cannot by law make it recoverable because it has been wrongly collected by the dealer, but also declares that the State Government may provide for a penalty for collecting the amount wrongly as the levy would have been justified as a penalty for the purpose of carrying out the objects of the taxing legislation. If what is levied under section 37(1)(a) of the Bombay Sales Tax Act, 1959, with which we

are concerned, is a penalty for the proper enforcement of the taxing legislation it will be valid while if it is a device to collect the amount unauthorisedly collected without the levy being a penalty it will not be competent.'

17. We have not been able to appreciate as to how the decision of the Supreme Court in Abdul Quader's case [1964] 15 STC 403 (SC), can take the cause of the assessee any further. The authority of Abdul Quader's case [1964] 15 STC 403 (SC) is for a limited proposition that in the absence of prohibition against collecting any amount wrongly by way of tax from the purchasers, the penalty provision was not competent. Any reading of that decision more than what is warranted would not be helpful. The short question which we are confronting in the present reference is in two parts as stated above, viz., (i) whether the assessee has collected any amount by way of tax, and (ii) whether that collection is in excess of what he is liable to pay. In our opinion, on the first part the Tribunal has on erroneous reasoning and complete misconstruction of the relevant bills reached the conclusion that the assessee has not collected the tax. The construction of the bills is erroneous because it is patently against the admission made therein. The reasoning is fallacious since the Tribunal has reached the conclusion that the assessee had not collected the tax because he was not liable to pay tax under the Act. This is, as stated above, merely begging the question.

18. The next important question is as to whether the impugned collection was in excess of what the assessee was liable to pay under the provisions of the Bombay Act. It cannot be urged, and rightly no attempt was made in that direction, that the State was not entitled to collect tax on the turnover of the sales of cotton waste in question. The assessee was no doubt entitled to claim deduction of the turnover of the sales because they were in effect the resales of the goods purchased from the registered dealers. Therefore, it cannot be urged successfully that the State was not entitled to collect the tax over these transactions. It is only if a dealer is able to establish that there were turnovers of resales of the goods purchased from the registered dealers that he is entitled to exclude those turnovers from his taxable turnover return for every quarter. In the present case, it is not doubt true that the assessee has been able to establish that the turnover of the sales of the goods of cotton waste were in fact and in law resales of the goods purchased from the

registered dealers and therefore, he was entitled to exclude them from his taxable turnovers. In other words, the effect of this successful claim of deduction of these turnovers is that he is not liable to pay any tax on the said turnovers. Now, if in respect of these turnovers he has collected any amount by way of tax, it would be obviously in excess of what he is liable to pay under the provisions of the Bombay Act.

19. The second constituent element of the prohibition contained in section 46(2) of the Bombay Act is also satisfied. The learned Advocate for the assessee, however, urged that whatever amount the assessee has collected under this head of sales tax also includes the amount of sales tax which the assessee has paid to its seller, namely, the manufacturer of cotton waste and therefore the assessee should not be exposed to the liability of forfeiture of the entire amount if the court is inclined not to agree with the earlier contention of the assessee. Section 37(1) in so far as it provides for forfeiture besides the prescribed penalty therein reads as under and it requires to be restated even at the cost of repetition :

'..... and in addition, in the case of a contravention referred to in clause (a), any sum collected by the person by way of tax in contravention of section 46 shall be forfeited to the State Government.'

20. The material words are 'any sum collected' by way of tax in contravention of section 46. Now section 46 prohibits a registered dealer from collecting any amount by way of tax in excess of the amount of tax payable by him. On plain reading of section 37(1), in so far as it relates to forfeiture, and the latter part of section 46 where prohibition is qua registered dealer, it cannot be urged that the entire excess amount is liable to be forfeited. The learned Government Pleader, therefore, urged that the contention urged on behalf of the assessee that the amount collected under the head of sales tax also includes the amount of tax paid by the assessee to its seller has no relevance because in order to determine what is the amount liable to be forfeited only relates to the amount collected by way of tax. We do see some force in this contention, but after all everything said and done it is the maximum liability to which a dealer is exposed in the matter of forfeiture of such unauthorised collection of tax. It does not follow, therefore, that

the entire amount is liable to be forfeited ex facie. In this connection the observation of Krishna Iyer, J., in *Ajit Mills' case* [1977] 40 STC 497 (SC), speaking on behalf of the majority view, are worth bearing in mind in order to determine this question which has been referred, which implies as to whether the whole amount is liable to be forfeited. At page 515 the significance of the difference between the forfeiture and the liability to forfeiture has been brought out :

'This signification of 'forfeiture' as 'liability to forfeiture' saves the equity of the statute. The Commissioner must have regard to all the circumstances of the case, including the fact that amounts illegally collected have been returned to the purchasers to whom they belong before passing the final order. We are clear in our minds that the forfeiture should operate only to the extent, and not in excess of, the total collections less what has been returned to the purchasers. We may go a step further to hold that it is fair and reasonable for the Commissioner to consider any undertaking given by the dealer that he will return the amounts collected from purchaser to them. The humanism of a provision may bear upon its constitutionalism. Counsel have argued, is it not unreasonable to forfeit huge sums and still to expose the dealer to several actions Is it not discriminatory to make the departmental punishment disproportionately onerous via-a-vis criminal inflictions under section 64(1)(h) Blessed are they who are prosecuted, for the criminal law is benign ! These possibilities only underscore the necessity, even on conviction, of deprivation of illicit collections as on departmental penalty imposts, coupled with discharge for dealers pro tanto plus inexpensive and prompt return of sums to purchasers by rough and ready verifications followed by money order remittances. While we uphold the legislation, we suggest such salvatory modifications, if constitutionality is to be impregnable. There is no last word in constitutional law.

.....

... After all, the functionary is exercising quasi-judicial powers and not insisting on maximum exactions. Every consideration which is just and relevant must enter his verdict lest the order itself be vitiated for being unreasonable or perverse exercise of discretion. The fulfilment of the undertaking must be ensured by necessary

guarantees so that the dealer may not play a double game and the purchaser stand betrayed. We are not giving any hide bound prescriptions but stating guidelines for taxing authorities who exercise these quasi-judicial powers

21. The benefit of the above observations was not available to the Tribunal and much less to the sales tax authorities at the Assistant Commissioner level or Sales Tax Officer level. It is true that the excess amount is liable to be forfeited but whether that power of forfeiting the entire amount should be exercised or not is a matter which is required to be considered from a number of angles some of which have been pointed out by the Supreme Court in its majority view as expressed by Krishna Iyer, J., in Ajit Mills' case [1977] 40 STC 497 (SC). The question which has been referred to us is limited in the sense that it poses the problem as to whether the Tribunal was justified in law in holding that the whole or any part of the collection of Rs. 6,361.31 made by the opponent under the head, 'sales tax paid to the manufacturer' from the assessee's purchasers was not made by way of tax. We have got to answer in the view of the matter which we are taking that the entire collection of Rs. 6,361.31 collected by the assessee was by way of tax and the Tribunal has committed an error of law in holding otherwise.

22. The consequential adjustment which the Tribunal shall, therefore, be required to make in view of our answer which we propose to give is to determine whether the entire amount of Rs. 6,361.31 is liable to be forfeited which will depend on the examination of various aspects of the question as indicated in the majority view of the Supreme Court in Ajit Mill's case [1977] 40 STC 497 (SC) expressed by Krishna Iyer, J., and the relevant part of which has been set out above. The Tribunal in adjusting this decision shall bear in mind the broad guideline prescribed by the Supreme Court in Ajit Mills' case [1977] 40 STC 497 (SC).

23. The result is that this reference is accepted and the question referred to us in answered in the negative, that is, against the assessee, that the Tribunal was not justified in holding that the amount of Rs. 6,361.31 collected by the assessee was not by way of tax. Having regard to the facts of the case, there should be no order as to costs.

24. Reference answered in the negative.

