IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SALES TAX REFERENCE NO.41 OF 2009
IN
REFERENCE APPLICATION NO.52 OF 2002

M/s. Sunstar Finance & Leasing Ltd.,
108, Maker Chambers-V,
Nariman Point,
Mumbai – 400 021. .... Applicant

- Versus -

The Commissioner of Sales Tax,
Maharashtra State,
Mumbai. .... Respondent

Mr. Subhash Surte with Mr. P.V. Surte for the Applicant.

Mr. Dushyant Kumar, Asstt. Government Pleader, for the Respondent.

CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.

DATE : MARCH 21, 2017

ORAL ORDER (Per Shri S.C. DHARMADHIKARI, J.)**:**

1. This reference at the instance of the dealer by the Tribunal seeks an answer and opinion on the following

questions:-

> "*(i) Whether on the facts and in the circumstances of the case, the Tribunal was justified in rejecting the exemption from tax available under section 16(4) of Maharashtra Act XXII of 1997 dated 24.4.1997?*
>
> *(ii) Whether on the facts and in the circumstances of the case, the Tribunal was justified in confirming the interest charged under section 36(3)(b) by holding it as consequential?*"

2. The facts necessary for answering these questions are that, the applicant before us is engaged in the business of selling yarn, cloth, machinery and leasing. On 10-3-1992, he purchased two trucks from M/s. Vimal Star Leasing Corporation for a sum of Rs.5,50,000/-. There was no other transaction of sale or purchase during the year except these purchases.

3. The Sales Tax Officer, Mumbai, assessed the applicant under Section 33(4) of the Bombay Sales Tax Act, 1959 (for short, "the said Act") and passed an Assessment Order on the basis of best Judgment on 31-8-1996. The Sales Tax Officer levied purchase tax on the two trucks at 15%. The tax

demand was to the tune of Rs.82,590/-. In addition, he charged interest under Section 36(3)(b) of the said Act at Rs.1,00,760/-. He imposed a penalty under Section 36(4A) of the said Act at Rs.500/-. Thus, a total demand of Rs.1,83,850/- was raised.

4. Being aggrieved and dissatisfied with this Order, the applicant/dealer preferred an appeal to the Assistant Commissioner of Sales Tax (Appeals). That appeal was dismissed on 25-3-1997.

5. The applicant/dealer preferred a Second Appeal bearing No.723 of 1997 to the Tribunal. The Tribunal dismissed it on 25-1-2002.

6. Thereafter, an application was filed seeking rectification being Rectification Application No.19 of 2002 invoking Section 62 of the said Act with a request to consider the retrospective amendment made by the Maharashtra Act No.XIX of 1996, dated 13-8-1996, with effect from 15-1-1975. The Tribunal was requested to rectify the mistake, but that

application was also dismissed on 21-11-2003.

7. Then, a Reference Application was preferred and with the assistance of the proviso to Section 61(1) of the said Act. Hence, these questions are referred.

8. Mr. Surte, appearing for the dealer, would submit that the dealer is right in seeking a reference of these two questions to this Court. Mr. Surte would submit that the Amendment Act has been completely misread and misinterpreted by the First Appellate Authority and the Tribunal. The authorities completely omitted to make a reference to the Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 1996 whereunder in sub-sections (4) and (5) of Section 16 of this Amendment and Validation Act, the Legislature substituted the two sub-sections and they shall be deemed to have been substituted with effect from 29-6-1996. Mr. Surte would submit that the ingredients of these substituted provisions are completely satisfied in this case. The Tribunal should have considered this matter in the light of these substituted

provisions. Once a dealer has objected to the assessment and by raising specific grounds before the First Appellate Authority, which position is not seriously disputed by that authority as also the Tribunal, then, there was no warrant in restricting the request of the applicant/assessee only to the quantum of interest and penalty. Thus, the applicant was not only seeking an exemption from the tax as a whole, which included this component of interest and penalty, but the amended and substituted provisions as well. That has not been understood and in correct legal terms. That is why given the clear language of these substituted provisions, the questions should be answered in favour of the applicant and against the Revenue.

9. Mr. Surte has invited our attention to the specific statement that the entire demand as confirmed, namely Rs.1,83,850/-, was disputed and challenged. In the circumstances, he would submit that there is complete misconstruction in law by denying the benefit of the amended provisions.

10. Mr. Dushyant Kumar, appearing on behalf of the Revenue, supports the Appellate Order of the Tribunal. He would submit that the language of the legislation is clear. In the teeth of the same, the benefit could not have been derived by the applicant/dealer. Therefore, the questions of law be answered in favour of the Revenue and against the dealer.

11. After hearing both sides and perusing the paper-book, we are unable to agree with the Revenue. The Maharashtra Tax Laws (Levy, Amendment and Validation) (Amendment) Act, 1997 - the Maharashtra Act No.XXII of 1997 - was published in the Government Gazette on 24-4-1997. It was an Act to further amend the Bombay Sales Tax Act, 1959 and the Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 1996. The controversy has been rightly understood by the First Appellate Authority and equally by the Tribunal while narrating the facts. The transaction of purchase of the two trucks from M/s. Vimal Star Leasing Corporation resulted in the levy of purchase tax. While levying that tax, the authority relied upon the provisions which were amended. The authorities have rightly

understood why this transaction has been brought to tax. That is because by insertion of Explanation-II with effect from 15-1-1975 of the Maharashtra Act No.XIX of 1996, sales or purchases of every capital asset, as defined in the Income Tax Act, 1961, have been brought under the scope of word business. For the purposes of purchase of the two trucks, therefore, the applicant/dealer can be said to be covered by the said Act. Due to the amendment carried out, the purchase of the vehicles by the applicant in the course of business would make him a dealer within the meaning of Section 2(ii) of the said Act. The purchase tax under Section 13 therefore can be levied.

12. However, the real issue for consideration was whether the applicant/dealer was entitled to the benefit of sub-section (4) of Section 16 as per the Maharashtra Act No.XXII of 1997. That provision reads as under:-

> *"(4) When any Registered dealer who, before the date of commencement of this Amendment Act, has effected.-*
>
> *(a) any purchases from a person who is not a dealer; or*

(b) the sale of capital assets pertaining to his business,

has objected to levy of the tax on such purchases or sales, or has not paid the tax only on the ground that such purchase tax is not payable on the purchases effected from the person who is not a dealer or, as the case may be, such sales tax is not payable on the sales of capital assets of a business and that no such tax could have been levied or collected but for the amendments made in the Bombay Sales Tax Act, by this Amendment Act; and,-

(1) where such dealer has been assessed, he has filed an appeal, or as the case may be, an application for reference against such levy on the grounds as aforesaid; or

(2) where such dealer has not been assessed, he has not paid such tax on the grounds as aforesaid or has paid the tax under protest,

then, notwithstanding anything contained in the Bombay Sales Tax Act as amended by this Amendment Act, he shall not be liable to pay the purchase tax or, as the case may be, the sales tax, in respect of such purchases or sales."

13. A bare perusal of this provision would indicate as to how, when any registered dealer who, before the date of commencement of the Amendment Act, has effected any purchases from a person who is not a dealer, or the sale of

capital assets pertaining to his business, but has objected to the levy of the tax on such purchases or sales, or has not paid the tax only on the ground that it is not payable on the purchases effected from the person who is not a dealer, and where such dealer has been assessed and he has filed an appeal, or as the case may be, an application for reference against such levy on the grounds as aforesaid, then, notwithstanding anything contained in the said Act as amended by the Maharashtra Act No.XIX of 1996, he shall not be liable to pay the purchase tax in respect of such purchases. However, the burden is upon him to prove that the ingredients of this sub-section are satisfied. That the provision is therefore attracted is a burden squarely on the dealer.

14. On record, therefore, we have an appeal memo. The Assessment Order is dated 31-8-1996. That confirms the demand of Rs.1,83,850/-. In the grounds of appeal the ground is that the Sales Tax Officer wrongly levied the penalty under Section 36(3)(b) and Section 36(4A), but the further portion has been omitted by the authorities, namely, the First Appellate

Authority and the Tribunal from consideration. The ground of appeal says that the total demand of Rs.1,83,850/- should be fully deleted. If this is the ground of appeal and equally for the very period, namely 1-4-1991 to 31-3-1992 when this Appellate Order was challenged before the Tribunal, the entire section as amended and the substitution is referred, benefit is claimed so as to delete this entire demand, then, we do not see how the Tribunal says that the demand has been assessed, he has filed an appeal but has not raised the ground or the objection to the levy of tax on such purchase. He has squarely said that this tax is not payable. It may be that the amended provision is attracted and that is a question answered in favour of the Revenue, but to say that the dealer never objected to the purchase tax is not a proper reading of the challenge raised by the dealer.

15. At pages 12 and 13 of the paper-book, in paras 8 and 9 of the impugned order, the Tribunal correctly understood this controversy. It first perused the legal provision. Then it referred to the ingredients or requirements thereof. It also referred rightly to the burden placed on the dealer and squarely while

claiming the benefit to satisfy the authorities that he/she had objected to the levy of purchase tax. Then the present case and the facts therein are referred. The Tribunal has come to the conclusion that the dealer has not taken any objection to the levy of purchase tax on the purchase of vehicles, even though a first appeal is filed. In that first appeal also he has failed to take any ground. To our mind, the Tribunal should have read the First Appellate Authority's order and in its entirety. The Tribunal should have clearly perused the ground as a whole. Once the demand of Rs.1,83,850/- as a whole is impugned and challenged, and which demand includes the component of interest and penalty, then, we fail to understand as to how the Tribunal could have recorded the above finding. The ground of appeal mentions the quantum and as above. The appeal is not restricted only to the quantum of interest and penalty. If the demand should be deleted is the main ground then the wording thereof should have been considered. It is in these circumstances, we are of the opinion that the dealer was entitled to take the benefit of the exemption. Even the argument of the dealer's representative before the First Appellate Authority and the Tribunal has been noted and to be on the above lines. The Tribunal agrees with him that the appeal being a continuation of the proceedings commencing from the Assessment Order, even at the second appellate stage the ground could have been raised and highlighted. In such circumstances and when the argument on the benefit of this amended provision and available to the dealer was clearly ignored, then, a hyper-technical view of the matter was not justified at all.

16. Even the orders of the Tribunal relied upon by the dealer's representative are erroneously distinguished. The para 9 of the grounds of appeal has been misread to include only the component of interest and penalty.

17. When we read the grounds of appeal in the manner noted above, then, there was no warrant in denying the benefit of the amended provisions to the applicant/dealer before us.

18. As a result of the above discussion, we answer the

questions of law, reproduced above, in favour of the applicant/dealer and against the Revenue.

19. The reference is disposed of in the above terms.

(B.P. COLABAWALLA, J.) (S.C. DHARMADHIKARI, J.)