

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SALES TAX REFERENCE NO. 2 of 2004****With****TAX APPEAL NO. 80 of 2015****With****SPECIAL CIVIL APPLICATION NO. 2093 of 2015****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE JAYANT PATEL****and****HONOURABLE MR.JUSTICE S.H.VORA**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy of the judgment ?
- 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
- 5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT....Applicant(s)

Versus

JAGDISH OIL MILL....Respondent(s)

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Appearance:

MR.PRANAV TRIVEDI, AGP for the Applicant(s) No. 1

NOTICE SERVED BY DS for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE JAYANT PATEL**
and
HONOURABLE MR.JUSTICE S.H.VORA

Date : 09/02/2015

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE JAYANT PATEL)

1. In all matters common questions are arisen for consideration and the same can be formulated as under :

“Whether the Tribunal has erred in not appreciating that the assessment order passed under Section 41 (7) of the Sales Tax Act (hereinafter referred to as 'Act') would not be governed by the time limit prescribed under Section 42 (1) of the Act ?”

1.1 The second question additionally formulated as under :

“Whether the Tribunal erred in not appreciating that time limit prescribed under Section 42(1) of the Act is only for those cases wherein return as prescribed is filed and not to the cases where the returns were not filed within prescribed time limit or were not at all filed ?”

2. The short facts as can be gathered from the record of each matter are as under : -

Sales Tax Reference No.02 of 2004

The assessee was holding registration number from S.Y.2038 Kartak Sudh Ekam to 24/03/82 on the name of M/s. Jagdish Oil Mill vide registration no.65422824. The assessee was assessed by the Sales Tax Officer for the period of S.Y.2038 Kartak Sudh Ekam

to 24/03/82 after impounding the accounting material and after scrutiny and the total dues was found to be Rs.9,05,794.89 paisa including the penalties. The assessee preferred a First Appeal before the Assistant Commissioner of Sales Tax who insisted for condition of deposit of amount which was not deposited but the assessee insisted for deciding the appeal on the point of limitation without payment. Thereafter, the Assistant Commissioner passed the order dated 22.04.1993 and confirmed the order of the Sales Tax Officer. The matter was carried in appeal before the Tribunal and the Tribunal found that the assessment was bared by the limitation as provided under Section 42 of the Act. Under the circumstances, the present reference to this Court on the point of limitation.

Tax Appeal No.80 of 2015

The assessee was having registration no.45105491. The assessment was made for the total amount of Rs.2,20,693/- including the penalty under Section 41(3) read with 41(7) of the Sales Tax Act. In appeal, on the point of limitation, the order of the Assessing Officer was confirmed. The matter was further carried in appeal before the Tribunal and the Tribunal found that the assessment for S.Y.2043 was barred by limitation and, therefore, set aside the order. Under the circumstances, the present appeal before this Court.

Special Civil Application No.2093 of 2015

The assessee was having registration no.6471551. The assessment was made under Section 41(7) of the Sales Tax Act for

the total amount of Rs.1,09,997/- including the interest and penalty. The matter was carried in appeal and the Appellate Authority confirmed the order on the point of limitation. The matter was carried in Revision before the Tribunal and the Tribunal allowed the Revision by holding that the order of assessment for S.Y.2039 is barred by limitation. Under the circumstances, the present petition before this Court.

3. We have heard Mr.Trivedi, learned advocate appearing for the appellants in all the appeals. We may record that the Tribunal has recorded the reasons holding that if the assessment is made under Sections 41(3) or (4) or (5) read with 41(7) of the Act, the limitation under Section 42(1) of the act would apply and if the assessment order is not passed within the outer limit prescribed in Section 42 (1) of the Act, the assessment would be barred.

4. Learned Assistant Government Pleader appearing in all the matters, contended that there is a clear error on the part of Tribunal in not considering the distinction of a case whether the assessment is made under Section 41(7) of the Act. It was submitted that Section 41(7) of the Act is creating an independent mode of assessment in a case where the Assessing Officer finds that assessee has not employed any method of accounting or if in the opinion of the Assessing Officer, the assessment cannot be made properly on the basis of accounts maintained by the Dealer. It was submitted that when the assessment is made under Section 41(7) of the Act, Section 42(1) will have no applicability and therefore,

the Tribunal has committed an error and the question may be answered by the Court in affirmative by maintaining the assessment order.

5. In order to appreciate the contention, we need to examine the mechanism in the mode for assessment. Section 41 of the Act reads as under : -

“41. Assessment of taxes .

(1) The amount of tax due from a Registered dealer shall be assessed separately for each year during which he is liable to pay the tax or, on an application by any such dealer to that effect, for such period exceeding one year during which he is so liable as is specified in the application ;

Provided that when such dealer fails to furnish any declaration or return relating to any period of any year by the prescribed date, the Commissioner may, if he thinks fit, assess the tax due from such dealer separately for different parts of such year.

Provided further that the Commissioner may, subject so such conditions as may be prescribed, and for reasons to be recorded in writing, assess the tax due from any dealer during a parts of a year.

(2) If the Commissioner is satisfied that the declarations or 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 declarations or returns.

(3) If the Commissioner is not satisfied that the declarations or returns furnished in respect of any period are correct and complete, and he thinks it necessary to require the presence of the dealer or the production of further evidence; he shall serve on such dealer in the prescribed manner a notice

requiring him on a date and at a place specified therein, either to attend and produce or cause to be produced all evidence on which such dealer relies in support of his declarations or returns, or to produce such evidence as is specified in the notice.

On the date specified in the notice, or as soon as may be thereafter, the Commissioner shall, after considering all the evidences which may be produced, assess the amount of tax due from the dealer.

Provided that where a notice under this sub-section is not issued to the dealer -

(a) on or before the 31st March, 1992, in relation to any year commencing on any day before the 31st March, 1990, or

(b) within a period of one year from the date by which the last quarterly or, as the case may be, annual return is required to be furnished under sub-section (1) of section 40, in relation of any other year subsequent to year referred to in clause (a).

the dealer shall be deemed to have been assessed on the basis of and for the year for which quarterly returns or, as the case may be, annual return is furnished by the dealer.

Provided further that nothing in the preceding proviso shall apply -

(a) to a dealer whose turnover of purchases or turnover of specified sales or turnover of sales during a year exceeds [ten lakhs] rupees or the tax payable in respect of that year exceeds 3 [ten thousand rupees;

(b) to a dealer who has not made payment of the amount of tax within the time prescribed for its payment under sub-section (1), (2), or (3) of section 47 ;

(c) to a dealer who has not filed the return within the prescribed time ;

(d) to a dealer who makes on or before 31st March, 1992, or as the case may be, within a period of one year referred to in clause (b) in the preceding proviso, an application to the Commissioner for being assessed ;

Provided also that, the Commissioner may, subject to such conditions as may be ***prescribed***, including those relating to condonation of delay in payment of tax or filing of return, allow the deemed assessment in respect of such a dealer].

(4) If a 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.

(5) If a dealer does not furnish declarations or returns in respect of any period, by ***prescribed*** date, the Commissioner shall, after giving the dealer a reasonable opportunity of being heard, assess to the best of his judgment, the amount of tax (if any) due from him.

(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 29, the Commissioner shall, after giving him a notice in the ***prescribed*** form for 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, any any period subsequent thereto.

(7) Notwithstanding anything contained in this section, if a dealer liable to pay tax has not employed regularly any method of accounting or if

in the opinion of the Commissioner, assessment cannot be made properly on the basis of the accounts maintained by a dealer, the Commissioner shall assess to the best of his judgment, the amount of tax due from such dealer.

(8) Any assessment made under this section shall be without prejudice to any penalty or prosecution for an offence, under this Act.”

6. Section 42 of the Act provides for time limit to complete the assessment, which reads as under : -

“42. Time limit for completion of assessment.

(1) No order of assessment for a year commencing on the 1st day of April 1998, or part of such year or any year thereafter or part of such year shall be made under sub-section (3) or (4) of section 41 at any time after the expiry of three years from the end of the year in which the last monthly, quarterly or, as the case may be, annual return is filed.

(2) Where the **Commissioner** issues a notice under sub-section (6) of section 41, to any dealer for assessment of tax in respect of any period, no order of assessment shall be made for such part of the period, if any, as is prior to -

(a) a period of eight years ending on the last date of the year immediately preceding the year in which such notice is issued, in a case where the **Commissioner** has reason to believe that such dealer has failed to apply for registration within intention to defraud Government revenue; and

(b) a period of four years ending on the last date as aforesaid, in any other case :

Provided that for the purpose of this section if it is considered necessary so to do, the State **Government** may, subject to such conditions as it

may deem fit, and the **Commissioner** may, subject to such conditions as may be prescribed by a general or special order, extend, either generally or specially, the period specified in sub-section (1) :

Provided further that where a fresh assessment is required to be made in pursuance of any order under section 65, 67 or 69 or in pursuance of any order of any court or authority, such fresh assessment shall be made at any time within three years from the date of such order :

Provided also that in computing the period of limitation for the purpose of this section, any period by which the period of limitation is extended under the first proviso or any period during which assessment proceedings are stayed by an order or injunction of any court or authority shall be excluded.”

7. The aforesaid both the provisions show that the assessment of taxes can be under Sections 41(3), (4) and (5) of the Act in contradiction to the assessment to be made under Section 41 (6) of the Act. To put it differently, when the Assessing Officer is not satisfied with the declaration or the return furnished are not complete or not correct, he may call upon the assessee to produce the evidence and then may make the assessment in a case where the material is available and produced by the assessee, the assessment will be made under Section 41(3) of the Act but in a case where the dealer / assessee fails to comply with any notice issued under Subsection 3 of section 41 of the Act, the Assessing Officer may assess the amount of tax as per his best judgment. Further, in a case where the dealer has not furnished any declaration or return by the prescribed date, the Assessing Officer

after giving opportunity of hearing to the assessee, may assess the tax to the best of his judgment and in those cases, the assessment would be under Section 41(3) read with Section 41(5) of the Act. But the important aspect is that, the process for the best judgment would be available even in cases where the assessee has not employed regularly any method of accounting, Assessing Officer cannot make proper assessment on the basis of accounts maintained by the Dealer and such situation is taken care of by Section 41(7) of the Act. But be it recorded that principal assessment, in cases where subsection 7 of Section 41 of the Act is applied and the dealer is having registration, would be under Section 41(3) read with 41(4) of the Act if the returns are filed but the assessment may be under Section 41(5) of the Act if the returns are not filed. However, in cases where the assessee or the Dealer, has not obtained any registration as required, a separate procedure under subsection 6 of the Section 41 of the Act has been provided. But even in those cases, it may be open to the Assessing Officer to invoke the provision of Section 41(7) of the Act. But in those cases, the assessment will be made under Section 41(6) read with 41(7) of the Act. The aforesaid shows two separate modes of assessment broadly; one of a dealer who is registered with the sales tax authority and the one of a dealer who is not at all registered with the Sales Tax authority. As observed earlier, even in a case where the dealer is registered with the Sales Tax authority, two situations are separately considered, one in a case where the return is filed but not found to be complete or correct and another in a case where the return is not at all filed or not filed within the prescribed time limit. In a case, where the registration of dealer is there,

Revenue is aware about the existence of the business and, therefore, it is very convenient to enforce the provisions of the Sales Tax Act including filing of the return or non filing of the return. But in a case, where there is no registration by a dealer, the Revenue may not be aware about the existence of the business of a dealer and, therefore, separate contingency has been provided by virtue of section 41(6) of the Act. It is with the said purpose, two broad separate time limits have been provided in completion of the assessment. Section 42(1) of the Act provides that when the assessment is made under subsection 3 or under subsection 4, the period shall be three years from the end of the year, in which last monthly or quarterly return may be filed whereas in case of proceedings under subsection 6 of Section 41, the period provided is of 8 years on the last date of the year immediately preceding year in which such notice is issued and further in any other case 4 years ending on the last date as aforesaid, barring the period during which there was stay of any competent court against the assessment.

8. As per the above referred discussion, in cases where the notice under Section 41(6) of the Act is issued, the period may be eight years or the four years as the case may be, but in cases where the assessment under Section 41(3) or 41(4) of the Act and even in cases when the assessment is made under Section 41(5) of the Act, the limitation would be of three years from the end of the year in which the last monthly or quarterly annual return is filed or was to be filed.

9. The attempt was made on the part of learned Assistant Government Pleader to contend that in a case where no annual return is filed, such would be an assessment under Section 41(7) independently for which no limitation has been provided or if considered under Section 41(6), the assessment order can be said as within the outer limit either eight years or four years as the case may be.

10. We cannot countenance the submission made by learned Assistant Government Pleader for two reasons, one is that for applying the time limit as provided under Section 42(2) of the Act, the condition precedent is issuance of notice under subsection 6 of the 41 of the Act, and only, thereafter the question of applying time limit of eight years or four years may arise. But not in a case where no notice under Section 41(6) of the Act has been issued. Therefore, all assessment barring the assessment made after issuance of the notice under Section 41(6) of the Act, would stand covered by the provisions of Section 42(1) of the Act for the time limit within which the assessment has to be completed. The second reason is that subsection 6 of Section 41 of the Act does not include the contingency of non filing of the return, but rather the basic requirement is that the registration is not obtained or the person who has failed to apply the registration within the time prescribed. In any event as observed by us herein above, Section 41(7) is no independent mode of assessment but rather a step in furtherance to the assessment which is applicable to both type of assessment, either under Section 41(3), 41(4) and also 41(5) of the Act as well as for Section 41(6) of the Act. It cannot be said that merely

because a mode was undertaken under Section 41(7) of the Act, the limitation provided under Section 42(1) of the Act for completing the assessment, would not be applicable.

11. The attempt was also made by learned Assistant Government Pleader to contend that language of Section 41(7) of the Act is with a non abstain clause and, therefore, it be treated as independent mode of assessment. We find that such an attempt, is ill founded inasmuch as the word non abstain clause is to give overriding effect for the procedure prescribed in the earlier provision for the best judgment by calling for the details or in a case where the return is filed or in a case where return is not filed, but it cannot be termed as an independent mode of assessment because the language is for the maintenance of method of accounting or of the books of accounts, to be maintained by the Dealer. It is hardly required to be stated that even in case where the assessment is to be made, the examination of books of accounts or the consideration of books of accounts will be one of the aspects, to be considered before finalising the assessment. If the appropriate books of accounts are maintained, the details of return can be verified, but if not maintained, and the conditions are satisfied, subsection 7 of Section 41 of the Act may be invoked. But thereby, it cannot be said that such is an independent mode of assessment. Further, Section 42 of the Act recognizes only two type of assessment, one in a case where the notice under subsection 6 of the Section 41 has been issued and the another assessment would be under Section 41(3) or 41(4) with 41(5) of the Act. Therefore, the said contention cannot be accepted.

12. In view of above, it cannot be said that the Tribunal has committed error in holding that the assessment was barred by Section 42(1) of the Act and hence, the question would stand answered in favour of the assessee and against the revenue.

13. Under the circumstances, we do not find that any case is made out for interference to order of the Tribunal, which is impugned in the Tax Appeal. The Reference also shall stand answered accordingly. The Reference as well as Tax Appeal as well as Special Civil Application shall stand disposed of accordingly. No order as to cost.

(JAYANT PATEL, J.)

(S.H.VORA, J.)

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