

- Read**
- 1) Application dt.22.05.87 by M/s. Inter Dye Industries, holder of Registration Certificate No.NIA-10314.
 - 2) This office show cause letter dt.24.08.87.
 - 3) Applicant's reply dt.17.09.87.
 - 4) Bombay High Court Decision dt.12.06.2009
 - 5) This office letters dt.21.08.09 and 26.08.09 calling the applicant for hearing.
- Heard** - Shri Inder Kumar Gupta (Proprietor) attended the hearing on dt.29.08.09.

PROCEEDINGS

(u/s. 52 (1) (e) of the Bombay Sales Tax Act, 1959)

No. DDQ-1187/Adm-5/175/B - 2

Mumbai, dt.10.09.2009

An application is received from M/s. Inter Dye Industries, of 5, Apeejay House, 130, Appollo Street, Ground floor, Fort, Mumbai-400023, requesting determination of the rate of tax applicable to the product "Ceto Stearyl Alcohol".

02. FACTS OF THE CASE

The applicant is a registered dealer under the Bombay Sales Tax Act, 1959. The applicant has effected purchases of the aforementioned goods from Bombay Port Trust who is a registered dealer. The transaction being not a sale transaction on the applicant's part, the applicant was served with a show cause as to why his application should not be rejected being non-maintainable. The applicant's attention was invited to the Bombay High Court decision in the case of Hemchand & Co. V/s. The Government of Maharashtra (Sales Tax Reference 28 of 1964 decided on 12th January, 1968). While deciding a similar issue, the Court had observed as follows :

"When this was pointed out to the counsel to find out what was the basis for making the application under section 52 of the Bombay Sales Tax Act to the Deputy Commissioner, it was suggested that possibly the question of liability of the applicants for the sales tax on the material supplied by the Port Trust might have given rise to the present dispute. If that was the basis for making an application there is hardly any justification for entertaining the application or for making a reference either. It is obvious that the liability of the applicants to pay, or not to pay, sales tax charged under the bills by the Port Trust for the material supplied by them, is purely a question resting on the terms of the agreement between the parties. The Revenue has nothing to do with it and the Commissioner of Sales Tax, nor the Tribunal nor this Court is a forum to adjudicate on the matter. This is a dispute solely between the parties inter se and no question of liability for revenue arises under such circumstances."

In view of the above, the applicant was asked to place his say in the matter. The applicant gave his reply as follows :

1. Section 52 provides Determination of disputed questions if any arises other than proceedings before a Court or the Commissioner on the points as mentioned in sub clause (a) (b) (c) (d) (e) of section 52. Our question falls in clause (e) of the said section i.e. any tax is payable in respect of any particular sale or purchase or if tax is payable the rate thereof. We seek your determination regarding rate of tax on the item as mentioned in our application.
2. There is no provision or restriction as to who can make application for determination of tax rate. It is obvious that the dealer who is suffering for loss will come forward for his own benefit.
3. Section 46(2) provides that no registered dealer shall collect any amount by way of tax in excess of the amount of tax payable by him under the provision of this Act.

As the selling dealer Bombay Port Trust is a registered dealer under BST Act, he is supposed not to charge excess of tax amount than prescribed rate and is doing so, we have to given them correct rate of tax and it is the Sales Tax Authority who can give correct determination for rate of tax. If the selling dealer charge wrong tax and do not want to seek determination from the authority, then naturally the purchasing dealer will come forward for getting correct rate of tax and after obtaining the correct rate, can ask the selling dealer to refund excess amount charged.

4. The extract of the High Court decision quoted by your goodselves in case of Hemchand & Co. v/s. The Government of Maharashtra (Sales Tax Reference 28 of 1964) judgment dt.12.1.1968 shows that the claim was not rejected on the ground that purchaser has made application for determination but was rejected on the ground that liability of tax payable whether by seller or buyer is between them to decide as per their contract.

Our case is absolutely different than this case. So the decision quoted by your goodselves can not be considered in our case.

Considering to the above, we feel, we are not wrong in seeking your determination for rate of tax on the item as specified in our application.

5. Further please note Bombay Port Trust is regularly selling the material either in Auction or in Tender and we are purchasing from them from time to time. As they are charging wrong tax, our huge amount is blocked unnecessarily. Delay in giving your determination for rate of tax not only blocks our fund, but of other parties also.

The applicant filed a Writ Petition in the Bombay High Court. The Court while disposing the application has held that the application is maintainable. It was further directed to dispose off the application within three months from the date of the order i.e dt.12.06.2009 after considering the reply of the applicant.

03. HEARING

The case was taken up for hearing on dt.25.08.09. The applicant was unable to attend on the said date. Hence, the hearing was refixed on dt.29.08.09. Shri. Indra Kumar Gupta (proprietor) of M/s. Inter Dye Industries attended. He submitted as follows :

1. In respect of the show cause as regard non-maintainability of the application, it is submitted that the same is maintainable as per Bombay High Court order dt. 12/6/09 and Maharashtra Sales Tax Tribunal judgment in Nagpur Distillery vs. State of Maharashtra [Appeal no. 15 of 1991 dt.05/04/91].
2. The item Ceto Stearyl Alcohol is a chemical and hence tax thereon would be 4%.
3. The reply dt. 17/9/87 covers all the arguments in respect of the show cause issued to him.
4. He has relied on the judgment in the case of Kulko Engg. vs. The State of Maharashtra [46 STC 454].

04. OBSERVATIONS

I have gone through the facts of the case. The applicant has stated in his reply that the present application is under the provisions of clause (e) of section 52 (1) of the Bombay Sales Tax Act, 1959. There was an amendment to the aforementioned clause (e) in the year 1992 which was brought for the period 1.5.92 to 8.9.92 and was again brought into force w.e.f 1.4.94. The reference made to the Bombay High Court judgment in the case of Hemchand & Co. v/s. The Government of Maharashtra (cited supra) is a decision given on 12th January, 1968 i.e prior to the amendment.

The present application is of dt.22.05.87 i.e prior to the amendment. Hence, the ratio laid down, while interpreting the section, by the Bombay High Court in the case of Hemchand & Co. would be applicable as both the present application and the said judgment deal with the section as it stood prior to the amendment. This was also sought to be pointed out in the show cause notice. Now, the Bombay High Court in its decision dt.12.06.2009 has directed that the application is maintainable and the same should be disposed off after considering the reply of the applicant. Hence, I proceed as under :

Let me begin by referring to the said clause (e) : *“any tax is payable in respect of any particular sale or purchase, or if tax is payable, the rate thereof.”* The clause could be bifurcated into two parts - one before ‘or’ and the other after ‘or’. The first part requires a tax payable in respect of any particular sale or purchase. In the present case, the seller and the purchaser i.e Bombay Port Trust and the applicant, respectively are registered dealers under the Bombay Sales Tax Act, 1959. The applicant is the purchaser and Bombay Port Trust being a registered dealer, the purchase of the applicant is a purchase from a registered dealer and hence, the applicant is not liable to pay *any tax in respect of the particular purchase*. The situation would have been otherwise, had the purchase been from an unregistered dealer. In such a situation arising from a purchase from an unregistered dealer, the applicant would have been liable to pay tax purchase tax on the transaction as per the provisions of the Bombay Sales Tax Act,1959. It has been settled by a catena of decisions that ‘tax payable’ means ‘tax payable into the Government Treasury’. The responsibility to pay tax has been cast on the seller. The Bombay High Court in the case of Hemchand & Co. (cited supra) has very rightly captured the essence of a transaction between a seller and a purchaser. It has been observed that if the question of liability of the applicant for the sales tax on the material supplied by the Port Trust was the basis for making an application, then there is hardly any justification for entertaining the application or for making a reference either. *“It is obvious that the liability of the applicants to pay, or not to pay, sales tax charged under the bills by the Port Trust for the material supplied by them, is purely a question resting on the terms of the agreement between the parties. The Revenue has nothing to do with it and the Commissioner of Sales Tax, nor the Tribunal nor this Court is a forum to adjudicate on the matter. This is a dispute solely between the parties inter se and no question of liability for revenue arises under such circumstances.”*

In the present case, as pointed by the Court, the liability of the applicant to pay or not to pay tax is a matter to be decided by the parties to the transaction. Even in the present decision dt.12.06.2009, the High Court has pointed that the application under the section can be moved by a dealer or any person who is liable to pay tax and liable to pay tax means liable to pay tax into the

Government Treasury. The Act has cast a responsibility on the seller to pay sales tax on his sales and on the purchaser to pay purchase tax on his purchases from unregistered dealers. We have seen above that the purchase of the applicant being a purchase from a registered dealer, the applicant is not liable to pay any tax in respect of the particular purchase. Now, since it is seen that the applicant is not liable to pay any tax into the Government Treasury in respect of his purchase from a registered dealer, the question of interpreting the situation in terms of the words following "or" in the clause (e) does not arise at all. The words are "*if tax is payable, the rate thereof*". As no tax is payable, there is no question of ascertaining the rate of tax. The determination of the rate of tax is made contingent to the event of payability of tax.

The arguments placed by the applicant in his reply do not make a point. The applicant has sought to place reliance on the decision in the case of Nagpur Distillery vs. State of Maharashtra [cited supra]. I have perused the said judgment and it is seen that the same dealt with clause(c) section 52(1) of the Bombay Sales tax Act,1959 and not with clause(e) of the same section. Clause (c) pertains to "*any transaction is a sale or purchase, or where it is a sale or purchase the sale price or the purchase price, as the case may be, therefore,*". It can be seen that the wording of both the clauses is not the same. Hence, I am not inclined to discuss the case any further. The other case cited by the applicant is Kulko Engg. vs. The State of Maharashtra [cited supra]. I have perused the said judgment and it is seen that the same dealt with the question as to whether section 52 of the Bombay Sales tax Act,1959 created a bar to rectification power under section 62 of the said Act. The circumstances of the present case are in no way similar to the situation in the aforecited case.

In view of the above, the reply to the question posed for determination in the present proceedings is as follows :

1. No tax is payable into the Government Treasury by the applicant in respect of the transaction posed for determination between the applicant and Bombay Port Trust being a purchase from a registered dealer.
2. As no tax is payable, there is no question of determining the rate of tax thereon.

After deliberating as above, I may very briefly look at the other facts as follows :

The assessment order under the Bombay Sales tax Act,1959 covering the transaction in question was passed on dt.23.10.89. Thus, the commencement and completion of assessment proceedings in respect of the period covering the transaction has also made the present proceedings infructuous.

05. In view of the deliberations held hereinabove, it is hereby ordered as follows :

ORDER

(u/s. 52 (1) (e) of the Bombay Sales Tax Act, 1959)

No. DDQ-1187/Adm-5/175/B - 2

Mumbai, dt.10.09.2009

The present application preferred under the provisions of clause (e) of sub-section (1) of section 52 of the Bombay Sales Tax Act, 1959 is herewith answered as follows :

Question “any tax is payable in respect of any particular sale or purchase, or if tax is payable, the rate thereof.”

Answer

1. No tax is payable into the Government Treasury by the applicant in respect of the transaction posed for determination between the applicant and Bombay Port Trust being a purchase from a registered dealer.
2. As no tax is payable, there is no question of determining the rate of tax thereon.

SANJAY BHATIA
Commissioner of Sales Tax,
Maharashtra State, Mumbai.