

(1986) 03 CAL CK 0014
In the Calcutta High Court
Case No : C.R. No. 3442 (W) of 1981

Birendra Nath Adhikary

APPELLANT

Vs

Commercial Tax Officer and Others

RESPONDENT

Date of Decision : 06-03-1986

Acts Referred:

Constitution of India, 1950 — Article 226, 265

Citation : (1986) 62 STC 324

Hon'ble Judges : Ajit Kumar Sengupta, J

Bench : Single Bench

Advocate : Sumit Chakraborty, for the Appellant;

Judgement

Ajit Kumar Sengupta, J.—The petitioner carries on the business of manufacturing steel trunk. The accounting period of the petitioner runs from 1st day of April to 31st day of March. The petitioner started its business on 1st May, 1959. The gross turnover of the petitioner exceeded the taxable quantum of Rs. 10,000 on 20th August, 1970. The petitioner applied for registration u/s 7 of the Bengal Finance (Sales Tax) Act, 1941, in the year 1974. The registration was granted to the petitioner on 20th September, 1974. The respondent No. 1, Commercial Tax Officer, Sealdah Charge, held that the gross turnover of the petitioner exceeded the taxable quantum of Rs. 10,000 on 20th August, 1970, and therefore the petitioner was liable to pay tax u/s 4(2) of the Act with effect from 20th October, 1970. A proceeding thereafter was initiated u/s 11(2) of the Act and a notice in form VI was issued on 7th October, 1974, directing the petitioner to produce all the books of accounts and other relevant evidence for the period from 20th October, 1970, to 19th September, 1974, in respect of the assessment for pre-registration period. The petitioner complied with said requisition. The petitioner took an objection before the Commercial Tax Officer that no consolidated assessment for the period from 20th October, 1970, to 19th September, 1974, could be made by the Commercial Tax Officer as the statute does not provide for such composite assessment for several years. Even then the Commercial Tax

Officer completed the assessment for the entire period from 20th October, 1970, to 19th September, 1974, and imposed tax on the petitioner.

2. The petitioner preferred an appeal before the Assistant Commissioner. The petitioner paid a total sum of Rs. 5,551.10 in respect of the tax for the period from 20th October, 1970, to 19th September, 1974. The Assistant Commissioner, Commercial Taxes, Dharamtala Circle, respondent No. 2, accepted the contention of the petitioner and held that the assessment was a nullity. He held that the assessment made by the Commercial Tax Officer could not be upheld and the assessment was annulled. Thereafter no further proceedings had been initiated by the respondents.

3. The petitioner thereafter asked for refund of the said sum of Rs. 5,551.10 as no assessment could be made or sustained for the period from 20th October, 1970, to 19th September, 1974, in respect whereof the said amount of the tax was paid. But the prayer of the petitioner was not acceded to. The petitioner thereupon moved this Court under Article 226 of the Constitution.

4. No affidavit has been filed by the respondents. No one has appeared either on behalf of the respondents at the time of hearing.

5. Mr. Chakraborty, learned Advocate on behalf of the petitioner, has submitted that the respondents cannot retain the money collected from the petitioner as there was no valid assessment under the law and he, accordingly, submitted that the entire amount paid should be refunded to the petitioner. This contention of Mr. Chakraborty is well-founded.

6. In *G. Lakshminarayana Vs. Commercial Tax Officer and Another*, the assessee was assessed to tax for the year 1959-60 and had also paid advance tax as demanded by the sales tax authorities. On appeal the Assistant Commissioner set aside the assessment order and remanded the case for fresh disposal. Subsequently, the authorities closed the assessment proceedings without passing any order of assessment. The assessee filed a writ petition for refund of the amount paid as advance tax.

7. It was contended on behalf of the department that the liability to pay tax arose as soon as the taxable event occurred and that as the assessee had admittedly made sales, the turnover of which was liable to tax, he was not entitled to claim any refund. It was held by the Andhra Pradesh High Court that as there was no assessment order against the assessee, there was no amount of tax payable by him and, therefore, the assessee was entitled to claim refund of the whole of the advance tax paid by him.

8. Similar view has been in the case of *Deep Chand Jain Vs. Income Tax Officer, C-Ward and Others*, . There, the assessee paid the advance tax under the Income Tax Act, 1961. The said advance tax collected had to be related to the final assessment order and since no final assessment order could be made the same having become barred by limitation, the collection of "the advance tax

itself became illegal and so also its retention. In *R. Gopal Ramnaryan Vs. Third Income Tax Officer, Circle-II, Bangalore*, the Karnataka High Court held that until and unless the quantum of tax was determined in accordance with the procedure laid down by law, the revenue has no right to collect the tax and if tax by way of advance tax or on self-assessment or having been deducted at source had been paid the same could not be retained contrary to the requirements of Article 265 of the Constitution.

9. The principles laid down in the aforesaid decisions equally apply to the facts of this case. No consolidated assessment could be made by the Commercial Tax Officer and accordingly the assessment was annulled by the Assistant Commissioner. The petitioner therefore had no liability to pay any taxes in respect of the period for which no assessment nor any quantification of liability was made. The State has no right to collect or retain unauthorised taxes or illegal taxes. Unless the taxes are lawfully and properly collected, the State cannot retain such taxes. If the taxes are realised which are not due such taxes have to be refunded. The taxes which were collected from the petitioner in this case was for the pre-registration period and, therefore, the question of the dealer collecting taxes from its customers did not arise. In this case the liability was of the dealer and the dealer has to pay the taxes demanded by the tax officer, he could not pass the liability to its customers. He is, therefore, entitled to demand refund of the taxes which were not due at all but realised by the State.

10. In that view of the matter the rule is made absolute. Let appropriate writs be issued. The respondents are directed to refund the tax collected along with interest as admissible within 8 weeks from the communication of this order.