

(1960) 02 AP CK 0002

In the Andhra Pradesh High Court

Case No : Writ Petition No. 1261 of 1958

Budhan Khan

APPELLANT

Vs

State of Andhra Pradesh and Others

RESPONDENT

Date of Decision : 17-02-1960

Acts Referred:

COMPANIES ACT, 1956 — Section 230
Constitution of India, 1950 — Article 226
General Clauses Act, 1897 — Section 6
Income Tax Act, 1961 — Section 3, 4

Citation : (1961) 12 STC 829

Hon'ble Judges : Seshachalapati, J

Bench : Single Bench

Advocate : T. Dhanurbhandu, S. Venkateswara Rao and K.S.S. Tatachari, for the Appellant; The Third Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Seshachalapati, J.—This is a petition under Article 226 of the Constitution of India for the issue of a writ of mandamus directing the respondents from proceeding against the petitioner under the provisions of the Hyderabad Sales of Motor Spirit Taxation Regulation, No. XXIV of 1358 Fasli, in pursuance of the notices dated 13th November, 1958, issued by the 3rd and 4th respondents, the Commercial Tax Officer of the First Circle and of the Third Circle, Hyderabad, respectively. The petitioner is the proprietor of "City Petrol Service" and "Dominion Petrol Service" both of which are located in Hyderabad. He states in his affidavit that he was paying the taxes due under the Hyderabad Sales of Motor Spirit Taxation Regulation. The Regulation was repealed by Section 13 of the Madras Sales of Motor Spirit Taxation (Andhra Pradesh Extension and Amendment) Act, 1958 (Act V of 1958). Act V of 1958 has extended to the Telangana area the provisions of the Madras Act VI of 1939. The present petitioner filed W. P. No. 215 of 1957 for the issue of a writ of mandamus directing the State Government and other appropriate authorities from giving

effect to the provisions of Act V of 1958. Various contentions were raised in that petition, assailing the constitutionality and validity of that Act. By a judgment dated 5th November, 1958, my Lord the Chief Justice and Srinivasachari, J., dismissed with costs the W.P. No. 215 of 1957 and other similar petitions. Since reported as Mohammad Bhudan Khan and Others Vs. The State of Andhra Pradesh, Hyderabad and Others, Thereupon, the Commercial Tax Officer, First Circle, and the Commercial Tax Officer, Third Circle of Hyderabad, issued to the petitioner two notices with respect to two petrol selling shops owned by him, viz., "City Petrol Service" and the "Dominion Petrol Service". In the notice given by the 3rd respondent the petitioner was told to file returns and pay the tax due under the Hyderabad Sales of Motor Spirit Taxation Regulation on or before 13th November, 1958, for the period commencing from April, 1957, to March, 1958, failing which assessment would be completed to the best judgment of the officer in conformity with Section 8(1) of the Regulation. In the notice given by the 4th respondent, the petitioner was informed that he had failed to submit the return showing the sale of petrol and motor spirit, and that a return should be submitted within three days from the date of the receipt of the notice and a treasury receipt for the amount of tax due should also be sent along with the return and that in default the 4th respondent would levy an assessment to the best of his judgment u/s 8(1) of the Regulation. It is the legality of these two notices that is challenged in the present petition and their further implementation is sought to be interdicted by the issue of a writ of mandamus.

2. On behalf of the petitioner two principal contentions were advanced :-

(1) that the Hyderabad Sales of Motor Spirit Taxation Regulation was repealed by Section 13 of Act V of 1958 (Andhra Pradesh) which came into force with effect from 25th March, 1958, and that no action could be taken against the petitioner under the repealed Regulation, as prior to the repeal there was no assessment and, as such, the petitioner had not incurred any liability within the meaning of the proviso to Section 13(1) of Act V of 1958.

(2) that even on the assumption that it is permissible for the respondents 3 and 4 to take action against the petitioner with a view to assess the liability, inasmuch as no monthly returns were made within the meaning of Section 6(b) of the Regulation, there should be no assessment in the manner proposed.

3. It would be necessary to examine these contentions. Section 13 of the Madras Sales of Motor Spirit Taxation (Andhra Pradesh Extension and Amendment) Act, 1958, is in these terms:-

The Hyderabad Sales of Motor Spirit Taxation Regulation, 1358 F. (No. XXIV of 1358 F.), in so far as it applies to, and is in force in the transferred territories, is hereby repealed :

Provided that such repeal shall not affect the previous operation of the said Act or any right, title, obligation or liability already acquired, accrued or incurred thereunder and subject thereto anything done or any action taken (including any

appointment, notification, notice, order, rule, form, certificate, licence or permit) in the exercise of any power conferred by or under the said Act shall be deemed to have been done or taken in the exercise of the powers conferred by or under the principal Act extended by this Act, as if that Act were in force in the transferred territories on the date on which such thing was done or action was taken ; and all arrears of tax due at the commencement of this Act may be recovered as if they had accrued under the principal Act extended by this Act.

(2) Notwithstanding anything contained in Sub-section (1)-

(a) any person who has been registered as an importer, a wholesale dealer or a retail dealer under the said Act, shall get himself registered under the principal Act extended by this Act;

(b) any proceeding commenced under the said Act and pending at the commencement of this Act before any officer or authority shall, after such commencement, be transferred to and disposed of by the officer or authority who would have had jurisdiction to dispose of it under the principal Act extended by this Act, if it had been in force in the transferred territories on the date on which the proceeding was commenced.

4. The argument that was pressed upon me is that what is saved by the repeal enacted under Sub-section (1) of Section 13 is an obligation or liability already incurred under Regulation XXIV of 1358 F. A mere liability to taxation without the actual tax being assessed and levied is something in the nature of an inchoate right which cannot fall within the meaning of the expression "liability already incurred". In support of that contention, the learned counsel placed strong reliance upon certain decisions, and in particular, on the decision of the Orissa High Court in *Chakoo Bhai Ghelabhai v. State of Orissa and Ors.* [1956] 7 S.T.C. 36 Ori . In construing paragraph (20) of the Adaptation of Laws Order of 1950 issued by the President of India and its bearing on the liability of the petitioner in that case, the learned Judges of the Orissa High Court observed that paragraph (20) of the Adaptation of Laws Order must exclude the application of Section 6 of the General Clauses Act, and in that view it was held :-

If I am right so far in the view I have taken of the effect of the Adaptation of Laws Order, the question that would next fall to be considered is whether the liability had been "already incurred" before the Adaptation Order operated. It was contended by the learned Advocate-General that the liability is incurred u/s 4 of the Orissa Sales Tax Act the moment the turnover of a dealer exceeds the figure mentioned in the Act. This argument proceeds on a wrong assumption that chargeability to tax is the same thing as liability to pay. "Liability" means no more than "to be under an obligation" and does not necessarily connote an existing liability. Thus a person is liable to maintain his wife and children, but no liability to pay is actually incurred until the amount of maintenance is ascertained. The unsuccessful party in a suit is liable to pay the costs of his opponent, but the liability is not incurred until the costs are actually assessed.

The Sales Tax Act itself makes a distinction between "liability to be assessed" and "liability to pay".... Until the tax has been determined-and it cannot be determined unless the Collector is satisfied with the return furnished by the dealer-the tax does not become payable nor is the liability to pay "incurred" under the Act. When Clause 20 of the Adaptation of Laws Order speaks of a "liability already incurred" it can only mean that the assessment has already been made.

5. With all respect to the learned Judges, this view seems to be unsustainable both on principle and on authority. In the first place, the liability under a fiscal enactment does not spring from the assessment. The liability arises from what is called the charging provision. In a passage which has since become a classic, Lord Dunedin in his speech in *Whitney v. Commissioners of Inland Revenue* [1926] A.C. 37 at 52 has observed thus :__

Now, there are three stages in the imposition of a tax : there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment." That, *ex-hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay.

6. In *Chatturam and Ors. v. Commissioner of Income Tax, Bihar* [1947] 15 ITR 302 the Federal Court of India in construing the provisions of the Income Tax Act, held that the liability to pay tax is founded on Sections 3 and 4 of the Income Tax Act, which are the charging sections, and that Section 22 and the sections that follow are the machinery sections for the purpose of quantification of the liability and the collection of the tax. Their Lordships of the Federal Court cited with approval passage from the speech of Lord Dunedin in *Whitney v. Commissioners of Inland Revenue* [1926] A.C. 37 . In *Wallace Brothers & Co., Ltd. v. Commissioner of Income Tax, Bombay City* [1948] 16 ITR 240 Lord Uthwatt speaking for the Privy Council held that "the rate of tax for the year of assessment may be fixed after the close of the pervious year and the assessment will necessarily be made after the close of that year. But the liability to tax arises by virtue of the charging section alone, and it arises not later than the close of the previous year, though quantification of the amount payable is postponed". It seems to me in the light of these authorities which amplify and sustain a well-known principle that the liability to tax is not dependent upon the quantification of the liability, which is a distinct and separable process. I am unable, with very great respect to the learned Judges of the Orissa High Court, to follow their observations. In *M. Abramai Vs. Commissioner of Sales Tax and Others, Vaidyalingam, J.*, has dissented from the views expressed in *Chakoo Bhai Ghelabhai v. State of Orissa* [1956] 7 S.T.C. 36 Ori and I am in respectful agreement with the learned Judge.

7. The expression "liability already incurred", in my judgment, certainly refers to the liability to pay the tax under the Regulation which has been declared in

Section 3 thereof which reads:-

Subject to the provisions of this Regulation there shall be levied on all retail sales of motor spirit effected after the commencement of this Regulation a tax at the rate of two annas per gallon ; and such tax shall be payable by the person effecting the sale....

8. The liability which is created in that charging section is certainly saved under the proviso to Section 13(1) of the Act V of 1958. The other view of the learned Judges of the Orissa High Court that paragraph (20) of the Adaptation Order of the President of 1950 must be considered as having the effect of excluding the operation of the General Clauses Act, seems to me to be of very doubtful authority after the pronouncement of the Supreme Court in *The State of Punjab v. Mohar Singh* AIR 1955 S.C. 84 which is as follows :-

Whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject the Court would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention.

The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities, but whether it manifests an intention to destroy them. The Court cannot therefore subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law.

9. Substantially the same view has been taken in the case of *Indira Sohanlal Vs. Custodian of Evacuee Property, Delhi and Others*, by the Supreme Court.

10. Nothing has been urged to show that the intention of the Act V of 1958 which provides for the application of the Madras Sales of Motor Spirit Taxation Act, 1939, to the Telangana area was either expressly or by necessary implication intended to destroy the liabilities incurred in and under the Regulation XXIV of 1358 F. Therefore, quite apart from the express savings contained in the proviso to Section 13(1) of the Act, it is permissible in the instant case to rely on, the provisions of Clause 8 of the Madras General Clauses Act, and the repeal therefore would not affect the previous operation of any enactment so repealed. Sub-clause (f) of Clause 8 provides that "the repeal will not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, fine, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such fine, penalty, forfeiture or punishment may be imposed,

as if the (1) Indira Sohanlal Vs. Custodian of Evacuee Property, Delhi and Others,

11. Repealing Act had not been passed." It therefore, seems to me quite clear that the liability to pay the tax under the Regulation XXIV of 1358 F. has been saved and, therefore, the 3rd and 4th respondents are certainly within their rights in calling upon the petitioner to submit the returns and pay the tax due under Sections 6(b) and 8(1) of the Regulation.

12. Assuming however, that the expression in the proviso to Section 13(1) of Act V of 1958, viz., "liability already incurred" is referable to not a general liability under the charging section but a quantified liability, I am of the view that by reason of Section 6(b) read with Section 7 of Regulation XXIV of 1358 F., there is also a quantified liability as long with the return the assessee has to pay the tax and, therefore, the liability that is now sought to be enforced is a liability that is incurred already within the meaning of the proviso. In this connection the observations of Chagla, C.J., in Bissesar House Vs. State of Bombay and Others, are well worth citation. The learned Judge pointed out the distinction between the Income Tax and the sales tax and observed as follows :-

The scheme of the Sales Tax Act in many respects is very different from the scheme of the Income Tax Act. In the first place, under the Sales Tax Act an assessee has not to pay tax in respect of the income for the previous year. He pays tax in respect of the chargeable accounting year itself. In the second place, there is no notice which has to be served upon an assessee to file his return. The statute itself constitutes a notice which renders every registered dealer liable to make a return. The third distinction is that with the return an assessee has to pay into the Government treasury the full amount of tax due from him under the Act according to the return that he has made. Therefore, under the Income Tax Act assessment proceedings are initiated by a notice, then follows a return, on the return an assessment order is passed, and after the assessment order is passed the assessee has to pay the tax. Under the Sales Tax Act the return is made obligatory under the Act itself and even the payment of tax according to the return is made obligatory. Therefore, the assessee has not to wait till the assessment order is passed before he becomes liable to pay tax.

13. It is unnecessary to refer to some of the decisions cited by "the learned counsel Mr. Dhanurbhandu for the petitioner, which, to my mind, have no direct bearing on the question. He referred to a decision of the Calcutta High Court in the matter of Recols (India) Ltd. [1953] 4 S.T.C. 271 Cal The question that arose for determination there was Whether the amount due as sales tax could be treated as a preferential debt within the meaning of Section 230 of the Indian Companies Act and, if so, from which date. The learned Judges held that the tax assessed became due and payable when the notice of demand was served before the company was wound up and therefore it was entitled to priority within the meaning of Section 230(1)(a) of the Indian Companies Act. The above decision has no bearing at all on the facts of this case. Equally inapplicable is the decision of the Calcutta High Court in In the matter of SUBURBAN BANK, LTD., IN RE.,

There -the question was whether a sum demanded u/s 18-A of the Income Tax Act was a tax which became due and payable within the meaning of Section 230 of the Indian Companies Act. The learned Judge took the view that the amount was not a tax that became due and payable. I do not think that this line of cases have any bearing on this question.

14. The second contention of the learned counsel for the petitioner is also without substance whatsoever. Admittedly, the petitioner has not filed the returns as required u/s 6(b) of the Regulation. He now states that since the monthly returns were not sent, there cannot be any assessment on him now for months which are long past. This contention is grounded on an obvious misapprehension. When there is a liability and it could not be crystallized by reason of the default of the assessee himself, it is permissible for the fiscal authorities to levy the assessment at any time. This very question fell to be decided by a Bench of the Madras High Court consisting of Curgenvin and Sundaram Chetty, JJ., in *M. S. GOPALASAMI CHETTIAR Vs. SECRETARY OF STATE FOR INDIA IN COUNCIL*., The facts of the case are as follows :-

15. In 1913 the appellant built a knitting factory in Salem which was sold later. Under the provisions of the Cotton Duties Act (II of 1896), it was obligatory on the appellant to submit a return every month. The appellant did not do so, and, when in 1922 or thereabouts the tax was sought to be recovered, he paid the same under protest and filed a suit for the recovery of the amount so paid principally on two grounds :- (1) that no duty can be assessed or collected in the absence of a return made by him and (2) that the Act did not provide for the collection of the arrears. Both these contentions were rejected by the trial Court and, in appeal, the learned Judges took the same view. Curgenvin, J., observed thus :-

It may be that collection and assessment of the duty was fixed upon a monthly basis in the interests of the assessee as well as of the revenue, but if the return which was to form the initial steps in such a procedure is withheld, it would be unreasonable to insist that it is still incumbent upon the revenue department either to assess the duty month by month or to forego their revenue altogether. Where there is a liability and no express provision limiting its realization, it is to be inferred that it may be realized at any time after it arises.

16. There is, therefore, absolutely no merit in this petition. The petitioner has sought unavailingly to impeach the vires of Act V of 1958, and when he failed, he has filed this petition wholly on unsubstantial grounds. The petition fails and is dismissed with costs. Advocate's fee Rs. 200.