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**(2002) 12 KL CK 0069**

**In the High Court Of Kerala**

**Case No : O.P. No's. 28475, 30151 etc. of 2002**

Desai Brothers Papers (P) Ltd.

APPELLANT

Vs

State of Kerala

RESPONDENT

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**Date of Decision : 24-12-2002**

**Acts Referred:**

**Citation : (2003) 2 KLT 837**

**Hon'ble Judges : C.N. Ramachandran Nair, J**

**Bench : Single Bench**

**Advocate : Mohan Parasaran and K. Latha, for the Appellant; Sojan James, Government Pleader, for the Respondent**

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## **Judgement**

C.N. Ramachandran Nair, J.—The petitioners in these original petitions are registered dealers under the Kerala General Sales Tax Act engaged in the sale of paper. The dispute is against the demand of sales tax at the rate of 8 per cent as against 4 per cent paid by the petitioners for the period commencing from January 2002 to August 2002. Paper is an item taxable under Entry 106 of the First Schedule to the Kerala General Sales Tax Act at the point of first sale in the State. The rate of tax applicable until December 31, 2001 was 4 per cent. However, the rate of tax on paper was increased from 4 per cent to 8 per cent with effect from January 1, 2002 by the Kerala General Sales Tax (Amendment) Ordinance, 2001 (Ordinance No. 37 of 2001 published in Kerala Gazette dated December 31, 2001). This Ordinance was followed by the Kerala General Sales Tax (Second Amendment) Ordinance, 2002. Thereafter the Ordinance was superseded by the Kerala General Sales Tax (Amendment) Act, 2002 by which, among other matters, the rate of tax on paper increased by the above referred Ordinance was retained. The petitioner's case is that the petitioners were not aware of the increase in the rate of tax from 4 per cent to 8 per cent by the Ordinances and therefore, they have not remitted tax at the higher rate from January 1, 2002 onwards. According to them, the assessing officers were also not aware of the Ordinances and they did not demand tax by making provisional

assessment or provisional demand based on monthly returns filed by the petitioners. Since the petitioners were not aware of the amendment, they have not collected the tax at 8 per cent from January, 2002 onwards and therefore they should not be compelled to pay tax demanded by the assessing officer at higher rate is their contention. As the issue raised in all the Original Petitions are one and the same, all the Original Petitions were consolidated and heard together and hence disposed of by this common judgment.

2. I heard Sri. Mohan Parasaran, and other learned counsel appearing for the petitioners and the learned Government Pleader, Sri Sojan James, appearing for the respondents. The first contention raised by the petitioners is against Clause (c) of Section 3 of the Kerala General Sales Tax (Amendment) Act, 2002, by which the rate of tax increased from 4 per cent to 8 per cent on paper was given retrospective effect from December 31, 2001 onwards. According to the petitioners, the demand of tax now made by the assessing officers by virtue of Section 2 of the Amendment Act which provides for retrospective levy is confiscatory because they have not collected the tax at higher rate being unaware of the amendment. The second point raised is that both the petitioners and the assessing officer were unaware of the Ordinance as there was no publication and therefore, the demand of tax under the Ordinance is also not sustainable. Relying on Article 213(2)(a) of the Constitution, the petitioners have contended that Ordinance No. 37 of 2001 has ceased to be in force from the expiry of six weeks from the reassembly of the Legislature because the Ordinance was not laid before the House. The learned Government Pleader contended that the Ordinance does not get invalidated by itself but ceases to operate from the expiry of six weeks from the date of reassembly of the House. Therefore, according to him, Ordinance No. 37 of 2001 was in force from January 1, 2002 onwards and since the said Ordinance ceased to be effective, the Government issued the Kerala General Sales Tax (Second Amendment) Ordinance, 2002, ie., Ordinance No. 4 of 2002 which came into force retrospectively from December 31, 2001. The above Ordinance remained valid as long as and until the Kerala General Sales Tax (Amendment) Act, 2002 came into force. According to him, it was unnecessary to have given retrospective effect for Clause 1(c) of the Amendment Act because of the operation of the Ordinance. Therefore, he contended that validity of retrospectivity of the statute under challenge need not be looked into by this Court because the notice of demand for differential rate of tax and penalty for violation as the case may be issued in the case of the petitioners can be sustained by reliance on the Ordinances that were in force.

3. The first question to be considered is whether demands under Ordinance No. 37 of 2001 as well as Ordinance No. 4 of 2002 are sustainable and how does Article 213(2)(a) apply as far as the first Ordinance is concerned. The petitioners have a case that there is no proper publication of the Ordinance, However, I do not think, this objection can be sustained because the petitioners themselves have produced Ext. P1 which is a gazette publication of the Ordinance on

December 31, 2001. The petitioners have no case that Ext. P1 gazette was not published by the Government. The next question is what is the effect of this Ordinance on account of nonpresentation of the same before the Legislature on reassembly of the Legislature. Article 213(2)(a) of the Constitution is as follows:

"213. Power of Governor to promulgate Ordinances during recess of Legislature.-

(1) ...

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance-

(a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council".

From the above it is clear that since the Ordinance issued is not placed before the Legislature on reassembly, the same ceases to be in force after six weeks from reassembly of the Legislature. Therefore, Article 213(2)(a) itself does not invalidate the Ordinance as such. The Ordinance only ceases to be effective after the period specified. In the other words, until expiry of six weeks from reassembly of the House of the Ordinance has the force of law by virtue of Article 213(2). Therefore, by virtue of the amendment to the Kerala General Sales Tax Act by Ordinance No. 37 of 2001 from January 1, 2002 onwards, the rate of tax on paper stood increased from 4% to 8%. However, since the ordinance was not laid before the House on reassembly and consequently would cease to be in force on expiry of the period provided in Article 213(2)(a), the Government issued Kerala General Sales Tax (Second Amendment) Ordinance, 2002 as Ordinance No. 4 of 2002 and the same was published in the gazette dated April 11, 2002 before the period of expiry of the first Ordinance, which is produced by the petitioners in O.P. No. 30151 of 2002 as Ext. P13. In order to get over the consequence of the elapse of Ordinance No. 37 of 2001, this Ordinance vide Section 1(2) was given retrospective effect from December 31, 2001. It is to be noted that under Clause 3(c) of this Ordinance also, the rate of sales tax on paper provided under the Kerala General Sales Tax Act was increased from 4 per cent to 8 per cent. Since Ordinance No. 37 of 2001 has ceased to be in force, by virtue of operation of Article 213(2)(a), Ordinance No. 4 of 2002 was given retrospective effect from December 31, 2001. In other words, by virtue of these two Ordinances, Entry 106 of the First Schedule to the Kerala General Sales Tax Act stood amended from January 1, 2002 whereby the rate of tax applicable to paper was 8 per cent. When the Amendment Act came into force, it superseded only Ordinance No. 4 of 2002 because Ordinance No. 37 of 2001 had ceased to

be in force by virtue of operation of Article 213(2)(a). By virtue of the operation of the Ordinances the relevant entry in the Kerala General Sales Tax Act stood amended and therefore it cannot be said that the notices issued pursuant to the amendment are by virtue of retrospective amendment by the Amendment Act. Though, the petitioners contend that there is no "publication" of the Ordinances, I do not think, the same is correct because every publication by the Government is through gazette and gazette copies are produced by the petitioners themselves. The petitioners have no case that the Ordinances were not published in the gazette. Of course, publication of the gazette in the usual course is by sending it to Government offices and by making it available to those who subscribe it. The Supreme Court in *Collector of Central Excise v. New Tobacco Co.* (1998) 109 STC 376; (2001) 9 KTL 201, held that mere printing of gazette is not publication. However, in this case the petitioners have no case that the gazette copy of Ordinance-produced by them was not published by the Government. The gazette notifying Ordinance No. 37 of 2001 was in fact published. The petitioners contend that like them the departmental officers were also unaware of the increase in tax by the Ordinance published in gazette and therefore, they contend that the demand of tax cannot be pressed against them. I do not think, ignorance of the departmental officers or the lack of specific communication at least to the officers who are the enforcing agencies about the increase of rate of tax will offer a defence to the petitioners against the demand of tax. It is not mandatory for the departmental officers to scrutinise every monthly return filed and to demand tax then and there either by making provisional assessments or by making provisional demands. The lapse on the part of the department is of course only a reflection as to how indifferent or inefficient the department is. However, I do not think the petitioners can claim immunity from payment of tax on the laches of the departmental officers. So long as there is time-limit to demand tax under the statute and demand is raised within such time, the petitioners are bound to pay the tax. Probably it offers a good defence against the demand of penalty or penal interest for the period until the officers raise the demand. The validity of Section 2(1) of the Amendment Act which provides for retrospective operation of the Act has to be upheld because the Amendment Act only retained the amendments to the Kerala General Sales Tax Act introduced prospectively by Ordinance No. 37 of 2001. As already stated impugned notices clearly establish that notices were issued under Ordinance No. 37 of 2001 and therefore the challenge against retrospective effect of the Act does not stand. The retrospectivity given to Ordinance No. 4 of 2002 also cannot be invalidated for the reason that Ordinance No. 37 of 2001 ceased to be in force and it is only to revive the provisions of this Ordinance, the later Ordinance was issued. The Supreme Court in the case of *Dr D.C. Wadhwa and Others Vs. State of Bihar and Others*, held that repromulgation of an Ordinance without getting it replaced by an Act of the Legislature is unconstitutional. However, in this particular case, the repromulgated Ordinance was only a stop-gap arrangement to get over the elapse of Ordinance No. 37 of 2001 and the repromulgated Ordinance did not stay on but was replaced by statute with retrospective effect.

Therefore, I do not think it possible to go into the constitutionality of Ordinance No. 4 of 2002 which does not survive after the passing of the Sales Tax (Amendment) Act which replaced the Ordinance. Moreover the question raised by the petitioners is the validity of the retrospective amendment to the Kerala General Sales Tax (Amendment) Act.

4. The petitioners relied on a large number of decisions of the Supreme Court and of this Court in support of their contentions. The decisions relied on are mainly on the question of retrospective amendment. The decision by this Court cited by the petitioners is that of *Hotel Elite v. State of Kerala* (1998) 69 STC 119. That was a case where a retrospective amendment introducing turnover tax was not enforced by virtue of the concession made by the Advocate General on behalf of the State before the Court and the Court accepted the same. This position cannot be canvassed as a proposition against validity of retrospective amendment. On the other hand, the Government Pleader cited the decision of this Court in *State of Kerala v. Mega Traders* (1997) 107 STC 1 wherein this Court has upheld a retrospective amendment on the levy of tax on agarbathis retrospectively. While upholding the retrospective amendment, this Court held that there was an earlier clarification issued by the Government on the very same lines as the levy and therefore it cannot be said that retrospective legislation was arbitrary or unreasonable as the dealers had notice of the earlier clarification issued by the Government. Similar is the position in this case also because the rate of tax was for the first time increased from 4 per cent to 8 per cent by Ordinance No. 37 of 2001 published on December 31, 2001 with prospective effect from January 1, 2002. When this Ordinance was to lapse on account of the expiry of the time provided under Article 213(2)(a) of the Constitution of India, Ordinance No. 4 of 2002 was published to retain the amendment. When the latter Ordinance was replaced by the Sales Tax (Amendment) Act, the increase in rate of tax made prospective by Ordinance No. 37 of 2001 was only retained. Therefore there is nothing unreasonable, or arbitrary in introducing the Amendment Act with retrospective effect from January 1, 2002 which is only retention of the prospective amendment made by the first Ordinance 37 of 2001. The petitioners' inability to collect tax in accordance with Section 22 of the Kerala General Sales Tax Act, 1963 is not on account of retrospective levy of tax, but on account of lack of information about the amendment. It has been held by the Supreme Court in *Premier Enterprises, Secunderabad Vs. Commercial Tax Officer and Another*, that inability to realise tax by the dealers from the buyers is not a ground to hold that such levy is unreasonable. Section 22 of the KGST Act gives a right to registered dealer to collect tax which is optional for the dealer and it is for him to collect the tax or not. The liability to pay tax does not depend upon collection at all. Section 22 of the Kerala General Sales Tax Act, 1963 confers a privilege on the registered dealer to collect tax, and at the same time, simultaneously prohibits the dealer from collecting any tax in excess of what is payable under the statute. However, the failure of the dealer to collect tax does not affect the validity of the

legislation. The petitioners' contention that a retrospective levy of indirect tax which the dealer is entitled to pass on to the customers is arbitrary and confiscatory in nature as recognised by the Supreme Court. The Supreme Court has in fact made such observations in *Shri Krishna Enterprises v. State of Andhra Pradesh* (1990) 76 STC 67 wherein the Supreme Court turned down the review petition by the State to sustain demand of tax based on a retrospective amendment. The Supreme Court has held as follows:

"The incidence of sales tax is ordinarily passed on to the customer and in the event of accepting the retrospective amendment a liability would be created without affording any opportunity to the hoteliers to pass on the incidence of the tax".

However, this position canvassed by the petitioners does not apply here because in effect the increase in tax was not retrospective. In this case, as already noticed, the increase in rate of tax though retrospectively brought under the Kerala General Sales Tax (Amendment) Act, 2002, it is only a regularisation of an amendment introduced prospectively under Ordinance No. 37 of 2001 and retained by Ordinance No. 4 of 2002. Even if the impugned Amendment Act was not retrospective, the rate of tax on paper stood increased under entry 106 of the First Schedule to the Kerala General Sales Tax Act from 4 per cent to 8 per cent by virtue of the two Ordinances stated above until the Kerala General Sales Tax (Amendment) Act, 2002 replaced the Ordinances. It is a well-settled position by the decision of the Supreme Court in *Premier Enterprises, Secunderabad Vs. Commercial Tax Officer and Another*, that the Legislature has the competence to make retrospective levy of tax, provided the same is not oppressive or unreasonable. The Ordinance amending the statute shall have the same force of an Act of the Legislature by virtue of the declaration contained in Article 213(2) of the Constitution of India. As already stated, the amendment to entry 106 of the First Schedule to the Kerala General Sales Tax Act increasing the rate of tax on paper from 4 per cent to 8 per cent was made by Ordinance No. 37 of 2001. This Ordinance Was published on December 31, 2001 and was prospective, ie., from January 1, 2002. Therefore it is this amendment that is retained by Ordinance No. 4 of 2002 which in turn was substituted by Act of the Legislature later retrospectively from January 1, 2002. Therefore the amendment did not have retrospective effect and it was only a case of omission on the part of the petitioners to collect higher rate of tax, which according to them is on account of their ignorance of the amendment. The Supreme Court decision relied on by the Government Pleader in *Kanthi Enterprises and Others Vs. State of Karnataka and Others*, squarely applies to this case. That was a case where the retrospective amendment was upheld by the Supreme Court on the ground that prior to the amendment there was a clarification issued by the Commissioner of Commercial Taxes on the same lines as the amended provisions. But the amendment was made necessary because the clarification was held to be unconstitutional by the declaratory judgment of the High Court. Further the Court held that the appellants could not collect tax on account of erroneous interpretation of the

provisions by the High Court is not a ground to relieve them from the burden of tax legally payable by them. The cases at hand are similar because the inability to collect tax is on account of ignorance of law. Moreover, I do not think ignorance of law can invalidate a notice demanding tax and interest based on valid statutory provisions. I do not think the several other decisions cited by the petitioners should be gone into because in no such case the Court had occasion to consider the sufferings of a party on account of want of information of law on the subject. Ignorance of law is not a ground to invalidate an order validly issued. I do not think the original petitions are to be entertained. Therefore, they are liable to be dismissed and I do so.

However, in view of the contentions raised, and the failure on the part of the department to enforce the amendment in time by demanding different tax based on monthly returns, the petitioners are granted six weeks" time to file revised returns and pay difference in tax, and if they fail to do so, it is open to the department to take penal action in accordance with the provisions of the Act and Rules.

Order on CMP No. 55025 of 2002 in O.P. No. 28475 of 2002 dismissed.