

(1961) 04 KL CK 0003

In the High Court Of Kerala

Case No : O.P. No's. 88, 161 and 240 of 1956, 117 of 1957 and 50 and 156 of 1958

Harrisons and Crossfield Ltd., Quilon and Others

APPELLANT

Vs

Commissioner, Quilon Municipality and Others

RESPONDENT

Date of Decision : 12-04-1961

Acts Referred:

Constitution of India, 1950 — Article 276(2)
Taxation and Finance Rules — Rule 18, 18(2)

Citation : AIR 1962 Ker 185

Hon'ble Judges : M.A. Ansari, C.J;P. Govinda Menon, J

Bench : Division Bench

Advocate : P. Govindan Nair, K.V.R. Shenoi and P.M. Alexander, in O.P. No. 88 of 1956, G.B. Pai, P. Govindan Nair, K.V.R. Shenoi and P.K. Kurien, in O.P. No. 161 of 1956-E, P. Govindan Nair, K.V.R. Shenoi and P.K. Kurien, in O.P. No. 240 of 1956-E, G.B. Pai, P. Govindan Nair and K.V.R. Shenoi, in O.P. No. 117 of 1957, P. Govindan Nair, K.V.R. Shenoi and K. Sukumaran, in O.P. No. 50 of 1958, P. Govindan Nair, K.V.R. Shenoi, P.K. Kurien and K. Sukumaran, in O.P. No. 156 of 1958, for the Appellant; K. Velayudhan Nair in O.P. No. 88 of 1956, V. Rama Shenoi and V.M. Srinivasan, in O.P. No. 161 of 1956-E, T.K. Narayana Pillai and D. Narayana Potti for Respondents (Nos. 1 and 2) and Govt. Pleader for No. 3 in O.P. 240 of 1956-E, T.K. Narayana Pillai and D. Narayanan Potti, in O.P. No. 117 of 1957, T.K. Narayana Pillai and D. Narayanan Potti, in O.P. No. 50 of 1958, T.K. Narayana Pillai and D. Narayanan Potti, in O.P. No. 156 of 1958, for the Respondent

Final Decision : Allowed

Judgement

Ansari, C. J.

1. This batch of six petitions challenges the writ petitioners" being assessed to the professional tax under the Proviso to Rule 18(2) of the Taxa-tion and Finance Rules . These had been framed under the Travancore District Municipalities Act, No. XXIII of 1116, hereafter referred to as the Act, whose Section 91 authorises the profession tax being levied, if the Council by a resolution determine such a

tax being levied. The Section further enacts among other things that every company, which, after the date specified in the notification published u/s 79, transacts business within the Municipality governed by the Act, for not less than sixty days in "the aggregate in any half-year, should pay a half-yearly tax assessed in accordance with the Rules in Schedule II. Such schedule comprises among other things Rules 16 and 18, which alone are relevant for purposes of deciding these writ petitions. Rule 16 gives slabs of half-yearly income for purposes of assessment to the profession tax with the minimum half-yearly tax against each slab.

The first item the Rule states the half-yearly income to be more than Rs. 21,000/- and Its. 275/- to be the tax on it Then follow lesser slabs with proportionately decreasing quantum of the tax; and the proviso states that a company, whose half yearly income is more than Rs. 21,000/- shall, notwithstanding anything contained in the Rules, pay, jo addition to the maximum half-yearly tax of Rs. 275/- an additional half-yearly tax on such excess calculated at the rate of one rupee per one hundred rupees, or part thereof. The next Rule is Rule 18(1} and (2), which read as follows:

"18. (1) Where a company or person transacts business in any half year exclusively in the area of a single Municipality, the income of such Company or person from the transaction of such business shall, for the purpose of levying profession tax under this Act during the half-year, be deemed to be

(a) where Income Tax is assessed on such company or person under the Travancore Income Tax Act for the year, comprising the half-year, one-half of the amount at which the profits and gains of such business are computed u/s 8 of the Travancore Income Tax Act for the purpose of assessing the Income Tax; and

(b) where the amount of the said profits and gains is not ascertainable or where such company Or person is not assessed to Income Tax. Such percentage as Our Government may prescribe, of the turnover of the business transacted in the area of the Muicipality during the half-year or where this is also unascertainable, during the corresponding half-year of the previous year.

(2) Where a company or person transacts business partly in the area of a Municipality and partly outside such area, the income of such company or person from the transaction of business in the area of the Municipality shall, for the purpose of levying profession tax under this Act, be deemed to be the percentage prescribed under Clause (b) of Sub-rule {1) of the turnover of the business transacted in such area during the half-year or the corresponding half-year of the previous year, as the case may be". Rule 18(2) originally contained no proviso, but the authorities vested u/s 6325 of the Act with the power of framing Rules, added a proviso to Rule 18 (2) by notification of August 28, 1947. This proviso ran as follows:

"Provided that in the case of a company or Person assessable to Income Tax, the total profits earned by the company or person as disclosed by the Income Tax

assessment for the whole State for the year comprising the half-year for which the profession tax is to be levied, shall be divided in the proportion of the turnover of the business of the company or person in the Municipality and outside, for purposes of assessment to profession tax".

2. The reference to the Travancore Income Tax Act in Rule 18(1)(a), which evidently extended to the proviso to Rule 18(2) as well, was likely to cause difficulties after the Finance Act had extended the Indian Income Tax Act to Part B States and repealed the State enactment. As was expected, after the aforesaid repealment, an objection to being assessed under the proviso was raised in D. P. No. 34 of 1955, wherein the petitioner is the same that has filed O. P. No. 240 of 1956 before us, and therein also the assessments made on the company were for the same period as in the petition before us, though under the proviso to Rule 18(2) as it then, stood. The petition was allowed by a Division Bench, which held that the proviso to Rule 18(2) had really provided for the adoption of certain figures representing the total profits as disclosed by an Income Tax assessment for a particular year, in which the emphasis was upon the assessable area, which, on becoming impossible of ascertainment, made the entire proviso absolute. *Wide Harrisons and Crossfield, Ltd. v. Commissioner Quilon Municipality* ILR 1955 T.C 1003 : AIR 1956 T.C 174.)

The authorities then thought it advisable to Substitute new words in Rule 18(1) (a) and the proviso with retrospective operation; and this was done by notification of February 15, 1956. The aforesaid notification provided for the following amendments:

"(1) In Clause (a) of Sub-rule (1) of Rule 18 --

(a) for the words "Travancore Income Tax Act" wherever they occur the words and figures "Indian Income Tax Act, 1922" shall be substituted;

(b) for the word and figure "Section 8" the word and figure "Section 10" shall be substituted.

(2) In the proviso to Sub-rule (2) of Rule 18 for the words "whole State" the words "whole of the Indian Union" shall be substituted.

These amendments shall be deemed to have come into effect from 1-4-1950".

3. The effort to make the amendments operate retrospectively was soon after attacked, and a party, assessed to pay the tax, challenged the vires of the amendments on the ground that the power to frame rules could not be exercised retrospectively. The objection was upheld by a learned Judge of the High Court in the *Highland Produce Co., Ltd- v. Commr. Alleppey Municipal Council*, O. P. Nos. 196 to 202 of 1955, D/- 26-10-1956 (T-C.) where he found that the delegated authority under the relevant provisions of the Act could not frame rules with retrospective operations and, therefore, the amendments to Rule 18 (1) (a) were ultra vires. The Kerala Legislature then thought it expedient to enact the Profession Tax (Validation and Reassessment) Act, XIV of 1958, whose Section

62 is necessary for purposes of deciding these writ petitions, and reads as follows:

"Validation of the levy or collection of profession tax under the Travancore District Municipalities Act, 1116: Notwithstanding any judgment, decree or order of any Court, the amendments to the Taxation and Finance Rules contained in Schedule II to the Travancore District Municipalities Act, 1116 (XXIII of 1116), made by notification No. L.S. 11-13975/55/DD dated 15-2-1956, of the Government of the former State of Travancore-Cochin, shall be deemed to have come into force with effect from the first day of April, 1950, and the validity of the levy or collection of profession tax made under the said Act and Rules shall not be called in question on the ground that the amendments made by the notification afore said cannot have any retrospective operation, and any profession tax so levied but not collected may be collected as if the said amendment had been validly made with effect from the first day of April, 1950".

4. We are now in a position to formulate the legal issue, which is common to all the petitions now before us. Very shortly put, it is whether the permission under the Constitution to continue levy of the profession tax on incomes, includes the authority to enact fresh rules, that empower profession tax being charged beyond the limits imposed by Article 276 (2)? It is obvious that should the decision on the issue be in the negative, neither the notification of 15-2-1956, nor Act XIV of 1958 would be within the competence of the enacting authority, and the writ petitions would succeed, in this connection it may be mentioned that five of the writ petitions before us were filed before Act XIV of 1958 was passed, and, therefore, they had then objected only to the assessments on the basis of the notification of 15-2-1956, being ultra vires; but after Act XIV of 1958 had been enacted, amendment petitions have been filed in five petitions challenging the constitutionality of the aforesaid Act as well: Thus they together raise the aforesaid common issue, and there is, however, no prayer to amend the sixth petition; but that would not adversely affect the petitioner's right, should Act XIV of 1958 be found to be beyond the legislative competence of the enacting authority and, therefore, constitutionally void.

5. Before adjudicating the aforesaid complaint, it is but necessary to shortly narrate the averments in each of the aforesaid petitions, taking them according to their assessment years and remembering that only one company is the petitioner in five such petitions. Messrs. Harrisons and Crossfield, Ltd., that is, the petitioner in O. P. No. 240 of 1956, carried general trading business at Quilon and several other cities in the erstwhile Travancore-Cochin State as well as at Calcutta in West Bengal, and was once assessed to the profession tax under the proviso to Rule 118(2) as it stood before the notification. The assessment had been for the two half-years comprised in 1125 (M.E.), the first 7 1/2 months of 1126, and the two half-years in 1951-52, 1952-53, and in 1953-54. The petitioner's appeal against the orders was dismissed, and the aforesaid assessments were then challenged by D. P. No. 34 of 1955 in the High Court.

The petitioner did not deny the liability to pay to the Quilon Municipality the profession tax under Rule 18(2) read with Rule 18 (1) (b), i.e., two per cent of the petitioner's turnover within the Quilon Municipality; but the taxing authorities had proceeded to charge under the proviso to Rule 18(2) as it then stood. The writ petition was allowed by the High Court on August 9, 1955, and it was held that Rule 18(2) without the proviso, would be the relevant provision. As the petitioner had already paid the tax, requests for refund were made, and also lawyer's notice demanding the return of the amount so paid, was issued on March 5, 1956, Along with the reply to the notice the petitioner received a communication dated April 5, 1956, calling for information for what was stated to be for re-assessment on the basis of the new proviso to Rule 18(2); and a statement is alleged to have been furnished on May 10, 1956, but the Municipality had on May 5, 1956 passed a resolution about the petitioner being reassessed. On July 27, 1956, the writ petition was filed challenging the notification of February 15, 1956 to be ultra vires on which the aforesaid reassessment had been based.

It would be recalled that the Kerala State Legislature had passed Act XIV of 1958 only after the decision of a learned Judge of this High Court in O. P. No. 198 to 202 of 1955, D/-26-10-1956 (TC) that held the notification to be ultra vires due to the absence of power in the delegated authority to make rules with retrospective operation and was given on October 26, 1950. That would have been relevant and decisive of this writ petition as well; but the petition was not heard till Act XIV of 1958 had been enacted in March 1958. Thereafter the petitioner filed C.M.P. 950 of 1959, whereby the constitutionality of the aforesaid enactment has been sought to be raised by way of amendment to the grounds taken in the writ petition against the assessments.

6. The same petitioner has by O.P. No. 50 of 1958 challenged the assessment to the profession tax for both the halves of 1954-55. Hardly any statement of facts in connection with this petition is necessary except that it was filed on January 6, 1958, which was before Act XIV of 1958 had been enacted; and, consequently, after the aforesaid enactment, the petitioner by C. M. P- No. 954 of 1959 sought to amend the writ petition by adding the challenge to the constitutionality of the enactment as one of the grounds of the writ petition.

7. The same company has on March 29, 1956 filed O. P. No. 88 of 1956; whereby the levy of the profession tax on the petitioner under the proviso to Rule 18(2) in respect of the first and second half-years of 1955-56 been challenged. The tax demand amounts to Rs. 10,130/- and it is challenged on the ground, that was upheld by the Travancore-Cochin High Court in OP Nos. 196 to 202 of 1955 D/-26-10-1956 (T C) which was later given on October 26, 1956. Because of the subsequent legislation, i.e., Act XIV of 1958 the original ground taken in the aforesaid writ petition had become infructuous; and, by CMP No. 953/59, a fresh ground for vacating the assessment order, which is similar to those taken in the other two petitions, has been added

8. O. P. No. 117 of 1957 is the fourth writ petition by the company and was filed on March 19, 1957. Thereby the petitioner challenges the company being, under the proviso to Rule 18(2), assessed by the Quilon Municipality to the profession tax for the first and second half-years of 1956-57. Evidently the assessment was after the pronouncement of this Court in OP Nos. 196 to 202 of 1955 P/- 26-10-1956 (TO and consequently what was therein decided was taken as the main ground for allowing the writ petition. It would be recalled that the Court had found the notification of February 1956 to be beyond the rule-framing power, due to its operation being retrospective; and that position was sought to be redressed by Act No. XIV of 1958. This has resulted in C. M. P. No. 951 of 1959 being filed in this petition as well for the purpose of adding a ground in order to challenge the constitutionality of that Act.

9. O., P. 156 of 1958 is the last of the five writ petitions by the company challenging its being assessed to the profession tax. The assessment is by the same Municipality for the half-years of 1957-58 on the estimated half-years income of Rs. 3,00,000/-. The petition was filed on March 15, 1958, and the ground against the legality of the assessment taken is evidently the decision by the High Court holding the notification of February 15, 1956, to be ultra vires due to its being given retrospective operation. Obviously that ground would not be available after Act No. XIV of 1958 had come into operation, and that legislation was published in the Gazette on March 11, 1956. The writ petition, though filed after the enactment had become operative, had taken no ground against the constitutionality of the legislation, and C. M. P. 827 of 1959 has been filed raising the ground. We do not think any useful purpose would be served in deciding whether the writ petitioner should, in such circumstances, be given an opportunity to amend this writ petition, because, if his objection in the other petitions against the constitutionality of the enactment be sustained the assessment challenged by O. P. 156 of 1958 would be vitiated as well, and this writ petition would also be governed by the pronouncement of the aforesaid objections raised in the earlier four writ petitions. These are the necessary facts in the five writ petitions, that challenge the company's being assessed to the profession tax under the proviso to Rule 18(2), beginning from 1125 (M-K.) to the first half of 1958.

10. Messrs. Brooke Bond (India) Ltd., Alleppy, has filed O. P. No. 16.1 of 1956 on May 23, 1956, and thereby seeks to vacate the assessment on the petitioner of the profession tax for the two half-years of 1952-53. The aforesaid assessment has been made under the proviso to Sub-rule (2) of Rule 18 as it then stood, and the petition seeks to challenge the tax on the ground that was upheld in ILR 1955 TC 1003: AIR 1956 TC. 174). The ground is still the basis on which the petition rests; for, there is no application to amend the grounds initially taken. The learned advocate for the respondent in the circumstances, has urged that the proviso to Rule 18(2) as it then stood had not become ineffective due to the repealment of the Travancore Income Tax Act and the extension of the Indian Income Tax Act to Part B States. He has argued that the aforesaid repealment in

substance amounts to re-enacting similar legal Tax Act in the proviso should be deemed to be the reference to the Indian Income Tax Act under the General Clauses Act

He has urged that the assessment on the petitioner is valid notwithstanding the decision in The two questions, therefore, inviting adjudication in these writ petitions are:

(1) Whether the subsequent notifications amending the proviso to Rule 18(2) as well as Act XIV of 1958, are constitutionally valid? and

(2) Whether the Quilon Municipality, because of the principle underlying the provisions of the General Clauses Act already referred to, would be authorised to levy the profession tax on the basis of the Indian Income Tax Act, being deemed to have been substituted where the Travancore Income Tax Act had been mentioned in Rule 18(1)?

11. It is obvious that the decision on the constitutional issue cannot be deferred in any of these writ (petitions; for, unless by the Constitution the States be found to be authorised to levy the profession tax according to rules different to those existing earlier, any levy under an amendment to the existing Acts, even through judicial interpretation, would not be permissible. In other words, it is necessary to determine whether any assessment, not according to the Act as it then stood, would be constitutionally valid. We, therefore, feel that the decision on the constitutional issue should be taken first and, any pronouncement on the second is unnecessary. For this purpose, we would recapitulate certain relevant constitutional provisions. It is clear that the States are, under Article 246 read with Entry 60 of List II of the Seventh Schedule authorised to levy tax on profession for purposes of Municipal administration. It is equally beyond dispute that the Centre can under Entry 82 of List I of the Seventh Schedule, levy Income Tax; and to avoid any clash of such powers, the framers of the Constitution have provided in Article 276 as follows:--

"276. (1) Notwithstanding anything in Article 246, no law of the Legislature of a State relating to taxes for the benefit of the State or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income

(2) The total amount payable in respect of any one person to the State or to any one municipality, district board, local board, or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two hundred and fifty rupees per annum:

Provided that if in the financial year immediately preceding the commencement of this Constitution there was in force in the case of any State or any such municipality, board or authority a tax on professions, trades, callings or employments the rate, or the maximum rate, of which exceeded two hundred

and fifty rupees per annum, such tax may continue to be levied until provision to the contrary is made by parliament by law, and any law so made by Parliament may be made either generally or in relation to any specified States, municipalities, boards or authorities

It is obvious that the States' powers to levy the tax have been clarified and they have been authorised within certain limitations to tax income. That limitation on the powers to levy the profession tax, has been placed by Article 276(2), which unequivocally provides that the total amount payable in respect of any one person to the State or to any one municipality, district board, local board or other local authority in the State by way of taxes on professions shall not exceed Rs. 250/- per annum. It follows that the States have after the Constitution no legislative competence to pass law authorising levy or collection of tax on professions beyond the aforesaid limit of Rs. 250/- per annum; and relying and the limitation, the writ petitioners' learned advocate has urged that the proviso to Article 276(2) only permits enjoyment of the earlier accrued right to collect the tax exceeding the limit under any enactment, which has been operative in the financial year immediately preceding the commencement of the Constitution. He has urged that under the proviso the States do not get any legislative authority to enact a new law in contravention of the limitation placed upon the enacting power under Article 276 (2).

The arguments by the learned advocates for the Quilon and Alleppey Municipalities, those being the two municipalities that have levied the profession tax in the cases before us, are that a distinction should be drawn between the bases, on which the taxation is levied and the rules that quantify the liability, and (that the limitation under Article 276(2) prohibits changing the basis of the profession tax and not the machinery parts of any legislation, which only quantify the liability. Much argument has been built on the use of the words "such tax" in the proviso to Article 276(2), and a learned advocate has argued that the absence of the same words in the subsequent part of the proviso indicates permission to read just the rules concerning the machinery in order to enjoy the right preserved by the proviso. To support this argument, reliance is placed on *The Municipality of Chopda Vs. Motilal Manekchand and Another*, and *District Board v. District Board Vs. The Upper India Sugar Mills Ltd.*, .

Another learned advocate has urged that the proviso authorises the earlier rates of the professional tax being continued and the operation of the limitation being thus excluded the States with powers to enact fresh legislation under Article 249 read with Entry 60 of List II of the Seventh Schedule can frame new rules concerning the earlier preserved rates. With respect, we feel that any distinction between rules dealing with basis of and those with the collections of taxes, is of no importance when the question of competence to legislate is raised, as both are rules and must, in order to operate, be by a competent authority. Therefore, the States without the authority to enact cannot frame valid rules even to adjust the machinery for collecting the tax on profession and any limitation on the

legislative power would adversely affect such rules as well.

It follows that the question in the cases is whether the Constitution having imposed, on the power to enact, the limit of Rs. 250/- has later qualified the limitation? We feel that there are difficulties in accepting the aforesaid limitation to have been again relaxed, for, the prohibition concerning the future enactments, under Article 276 (2) is in absolute form, and had the intention been to qualify the limitation, the words of such modification would have been incorporated in the limitation itself. It is equally clear that having so embanked the power for future legislation, the embankment would not control the rights, that had accrued under the laws existing before the inauguration of the Constitution and the enjoyments of the aforesaid rights would be preserved. Such preservation to the States is not inconsistent with the limitation, and the proviso to Article 276 (2) so states.

12. It has next to be determined whether the rights being so continued, further carries with it the power to amend, or fill the gaps in the existing enactments, and whether such powers have been conferred by the proviso. We are convinced, that they have not been reserved to the States; for, had the intention been to confer them with such powers, the authority to vary the existing laws would, not be expressly vested in the Parliament, and there can be no two Legislature with varying enacting authorities over the same rules. The inevitable consequence of our interpretation is that though the several municipalities in the Travancore area of this State enjoy the benefits of the enactment authorising levy of larger profession tax, which was operative in the last financial year prior to the inauguration of the Constitution, there is after January 26, 1950 no enacting power in the State Legislature either to amend the machinery parts of such legislation, or to fill gaps therein so as to continue the levy under new rules beyond the constitutional limitation. In that view Act XIV of 1958 is beyond the competence of the State Legislature as it seeks to fill gaps brought about by the repealment of the Travancore Income Tax Act, and the position is not different so far as the notification of 15-2-1956 is concerned, as the delegated authority under the Act is as well bound by the constitutional limitation.

13. It follows that the assessment of the Writ petitioners to the tax on profession according to the proviso to Rule. 18 (2) for the period subsequent to the repealment of the Travancore Income Tax Act, are illegal due to their not being according to law. We, therefore, vacate the assessment orders; and these writ petitions being allowed would be without prejudice to the rights of the Municipality to "assess the petitioners afresh to the tax on profession, having regard to the legal provisions of Rule 18. Accordingly the writ petitions are allowed with costs, and the assessments are vacated. This judgment will govern all the six writ petitions, and the counsel's fee we fix at Rs. 200/- in each petition.