

(1982) 06 KAR CK 0014
In the Karnataka High Court
Case No : Civil Petition No. 129 of 1981

Mysore Breweries Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 10-06-1982

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 256 (2), 260, 80 J

Citation : (1987) 64 CTR 288 : (1987) 166 ITR 723 : (1986) 29 TAXMAN 1

Hon'ble Judges : M.M. Venkatachaliah, J; M. Rama Jois, J

Bench : Division Bench

Advocate : G. Sarangan, for the Appellant; K. Srinivasan, for the Respondent

Judgement

M.M. Venkatachaliah, J.—In this petition by the assessee, Mysore Breweries Limited, u/s 256(2) of the Income Tax Act, 1961, ("Act" for short), the assessee contents that a question of law does arise out of the appellate order of the Income Tax Appellate Tribunal, Bangalore Bench, Bangalore, in ITA No. 320/Bom/1978-79 on its file and that accordingly the Tribunal be directed to state a case and refer the following question, said to be one of law, for the opinion of this court :

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in the holding that secured and unsecured loans have to be deducted from the assets in the computation of capital base for the purpose of reckoning the relief due u/s 80J of the Income Tax Act, 1961, for 1975-76 assessment?"

2. The proceedings relate to the assessment year 1975-76. The point for consideration is whether for purposes of computation of the capital bases u/s 80J of the Act, borrowed capital, both secured and unsecured, requires to be deducted from the value of the assets. That the assessee was entitled to the benefit of section 80J of the Act was not in dispute; but its quantification was.

3. It is common ground that if effect is given to the provisions of rule 19A (2) (iii) of the Income Tax Rules, 1962 ("Rules" for short), the view taken by the authorities under the Act "that the borrowed capital should be deducted in computing the capital base for purposes of relief u/s 80J" would be right. But the assessee contended before the authorities that the said rule 19A (2) (iii) was itself ultra vires the provisions of the parent Act and that, therefore, its provisions should not quite the matter and that the computation be done untrammelled by the provisions of the said rule 19A (2) (iii). The Tribunal declined to entertain this argument. It held that being an authorities constituted under the Act, it could not go into and pronounce on the validity of the very provisions of the Act of or the Rules made thereunder.

4. Though the question as formulated does not make any specific reference to rule 19A (2) (iii) and its effect, in substance, however, the question involved is whether the said rule 19A (2) (iii) is a valid provision. The proposition acquires a further dimension by virtue of the circumstance that pending disposal of these matters before the authorities below, section 80J was itself amended by the Finance (No. 2) Act of 1980 introducing several sub-sections within section 80J. The effect of this amendment is to incorporate the rules of computation contained, inter alia, in rule 19A (2) (iii) in the main section 80J itself. By the amendment of section 80J, the question whether rule 19A(2)(iii) is ultra vires section 80J is rendered merely academic, as in view of the retrospective amendment to the main section 80J, the conclusion of the Tribunal becomes supportable on the language of the amended section, quite independently of any recourse to the impugned rule.

5. However, Sri Sarangan, learned counsel for the assessee, stated that a similar question arose in C. P. No. 107 of 1980 and that on March 2, 1982, a Division Bench of this court has called for a reference on an identical question. We have perused the order dated March 2, 1981, in C. P. No. 107 of 1980. It reads :

"In this petition under sub-section (2) of section 256 of the Income Tax Act, 1961, the Revenue has sought for a reference to this court of questions Nos. 2 and 3 set out in para 4 of the petition which the Income Tax Appellate Tribunal, Bangalore Bench (hereinafter referred to as "the Tribunal") had declined to refer.

2. Question No. 3 is a part of question No. 1 which has already been referred to this court by the Tribunal. Hence, it is not necessary to direct the Tribunal to refer to this court question No. 3.

3. However, question No. 2, which is as follows, merits reference :

"2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is competent to entertain and decide the question with regard to the vires of rule 19A of the Income Tax Rules?"

4. We direct the Tribunal to refer to this court the above question together with the statement of the case."

6. Sri Sarangan contends that the proposition that the authorities under the Act and the Tribunal being creatures of the statute are not supposed to go into and pronounce on the constitutional validity or vires of a provision of the Act or a rule or order or notification made thereunder is not a sound one and that the correct view to take would be that the authorities under the Act and the Tribunal cannot pronounce on the constitutional validity or vires of merely those provisions under which they are appointed or constituted or from which their powers and functions are derived and that they are not debarred from examining the validity or vires of the other provisions of the Act or the rules and notifications issued thereunder which do not touch upon their constitution or powers. Sri Sarangan, apart from relying upon a statement contained at pages 1155 and 1156 in the "Law and Practice of Income Tax" (Kanga and Palkhivala), seventh edn...., Vol. 1 also sought to rely upon the decision of the Supreme Court in Navinchandra Mafatlal Vs. The Commissioner of Income Tax, Bombay City, and of the Privy Council in (1948) 16 ITR 240 (Privy Council)

7. Sri Sarangan contends that, in any view of the matter, the authorities under the Act as also the High Court in reference proceedings have jurisdiction to decide the question of vires of the rules made under the Act. In regard to this later proposition, he relied upon a pronouncement of the Jammu & Kashmir High Court in Commissioner of Income Tax Vs. Shri Krishen Chand Charitable Trust,

8. As stated earlier, in view of the retrospective amendment of section 80J, this question has become purely academic in this case. The order in C. P. No. 107 of 1980 proceeds on the premise that upon a decision of the question therein formulated, the matter admits of being disposed of. It appears to us that in view of the amended provisions of section 80J, the question whether rule 19A (2) (iii) was ultra vires or not would be immaterial. In view of this, the larger question whether the High Court itself; in the reference jurisdiction u/s 256 and 260 of the Act can go into the question of the constitutional validity or vires of statutory provision becomes unnecessary in this case. However, as the matter was debated at some length before us by learned counsel and reliance was sought to be placed on some authorities, we propose, out of deference to the strenuous arguments of counsel, to advert to this argument. In our opinion, the proposition is no longer res integra, being fully covered by the authoritative pronouncements of the Supreme Court.

9. It is no doubt true that in Navinchandra Mafatlal Vs. The Commissioner of Income Tax, Bombay City, , the question of law which came up for consideration before the High Court of Bombay upon a reference u/s 66 (1) of the 1922 Act was whether the imposition of a tax under the head "Capital gains" by the Central Legislature was constitutionally valid. Section 12B of the 1922 Act which authorised the imposition of tax on capital gains was inserted by the Indian Income Tax and Excess Profits Tax (Amendment) Act (XXII of 1947) which was a Central Act. The matter was examined on merits and it was held that the impugned provisions were intra vires the powers of the Central Legislature acting

under entry 54 in List I of the Seventh Schedule to the Government of India Act, 1935. In appeal, the Supreme Court affirmed this view.

10. Again, in (1948) 16 ITR 240 (Privy Council) , the Privy Council was dealing with an appeal by special leave from the Federal Court, which had, in turn, dismissed the assessee's appeal from a judgment of the Bombay High Court, answering in favour of the Revenue, certain questions of law coming up on a reference under the 1922 Act. The question related to the validity of certain provisions of the Indian Income Tax Act, 1922, by virtue of which some income arising outside British India became includible in the income liable to tax under Act. The Privy Council did deal with and examine that question on merits. Relying upon these two pronouncements, Sri Sarangan contends that the proposition that courts, in matters arising out of references under the Income Tax Act, could go into and pronounce on the constitutional validity of provisions of the Act or Rules is not an unfamiliar one and that the proposition that the Tribunal in appeal or the High Court in the reference jurisdiction cannot pronounce on the vires of the statutory provisions must be held to be a proposition too broadly stated.

11. Sri Sarangan further commended for acceptance as a correct statement of law, a passage occurring in pages 1155 and 1156 in Kanga and Palkhivala's treatise.

12. It appears to us that the question whether in exercise of the reference jurisdiction under the Income Tax Act, the High Court can go into and pronounce on the constitutional validity of the statutory provisions was not, in that form, posed in the two cases referred to by Sri Sarangan and, if we may say so with respect, there was no occasion for the Supreme Court and the Privy Council to consider and pronounce on that aspect of the question as that aspect had not been so projected. These two decisions cannot, therefore, be taken as authoritative pronouncements on the proposition that such a power exists, i.e., the jurisdiction of the statutory authorities to declare a statutory provision, or rule or rule or order as unconstitutional or ultra vires and of the High Court in the reference jurisdiction. We are of the opinion that since that aspect of the question did not directly and specifically arise for consideration, these cases cannot be of any assistance to Sri Sarangan in support of his broad proposition.

13. On the contrary, there is high and binding authority of subsequent pronouncements of the Supreme Court in cases which have directly considered this question.

14. The principles that guide a proposition such as this are that, first, the Tribunal is a creature of the statute and the Tribunal can only decide a dispute between the assessee and the Commissioner in accordance with the in terms of the provisions of the Act and the question of the constitutionality and vires of the provisions are foreign to the scope of its jurisdiction; secondly, the jurisdiction of the High Court u/s 256 of the Act is a special advisory jurisdiction, and, unlike the jurisdiction under article 226, strictly limited by the provisions of the statute

to decide question of law arising out of the order of the Tribunal and the, thirdly, as the Tribunal itself has no jurisdiction to decide the question of ultra vires of a statutory provision, such a question cannot be said to arise out of the Tribunal's order. This is the principle which requires the High Court, in a reference, not to embark upon an enquiry as to the constitutionality and vires of a provision.

15. In *K.S. Venkataraman and Co. Vs. State of Madras*, , the Supreme Court observed (at page 130 of ITR) :

"It has been held by this court that the jurisdiction conferred upon the High Court by section 66 of the Income Tax Act is a special advisory jurisdiction and its scope is strictly limited by the section conferring the jurisdiction. It can only decide questions of law that arise out of the order of the Tribunal and are referred to it. Can it be said that a question whether a provision of the Act is ultra vires the Legislature arises out of the Tribunal's order ? As the Tribunal is a creature of the statute, it can only decide the dispute between the assessee and the Commissioner in terms of the provisions of the Act. The question of ultra vires is foreign to the scope of its jurisdiction. If an assessee raises such a question, the Tribunal can only reject it on the ground that it has no jurisdiction to entertain the said objection or decide on it. As no such question can be raised or can arise on the Tribunal's order, the High Court cannot possibly give any decision on the question of the ultra vires of a provision."

16. The limit on the jurisdiction of the Tribunal and consequently that of the High Court in a reference, to go into the question of the vires of a provision of law, is not confined to the provision of the Act alone but extends to statutory rules and notifications issued under the Act.

17. In *Kanpur Vanaspati Stores v. CST* [1973] 32 STC 655, the Supreme Court held (at page 660);

"Further, it is now well settled by the decision of this court that no one can challenge the validity of provision of an Act or rule made thereunder or even a notification issued either under the Act or under the Rules made, before the authorities constituted under the Act. It is true, as contended by Mr. Gupte, that these decisions were rendered long after 1962, but the fact remains that the decisions in question merely interpret what the law is."

18. In *Dhulabhai v. State of Madhya Pradesh* [1968] 22 STC 416, the Supreme Court observed (at pages 434 and 426) :

"Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals."

"... In *Circo's Coffee Co. v. State of Mysore* [1967] 19 STC 66 (SC), it was contended that section 40(2) of the Mysore Sales Act, 1957, was ultra vires and beyond the competence of the State Legislature. This court observed :

"It is true that a question as to the vires of section 40(2) of the Sales Tax Act, 1957, was raised, but it is now settled by decisions of this court that the question as to the vires of a statute which a taxing officer has to administer cannot be raised before him."

"The same was again reiterated in C.T. Senthilnathan Chettiar Vs. State of Madras, (C. A. No. 1045 of 1966, dated July 20, 1967) in the following words (at page 105) :

".... this court has held in K.S. Venkataraman and Co. Vs. State of Madras, , that the authorities under a taxing statute are not concerned with the validity of the taxing provisions and the question of ultra vires is foreign to the scope of their jurisdiction".

19. In Dhrangadhra Chemical Works Ltd. Vs. Commissioner of Income Tax, Bombay City-II, , a Bench of the Bombay High Court, referring to the pronouncements of the Supreme Court on the matter, observed (at pages 497 and 498) :

"It is well-settled if regard be had to the decisions of the Supreme Court that that jurisdiction that is possessed by this court in exercise of its advisory jurisdiction under a taxing statute is not the same as the one that is conferred upon it under article 226 of the Constitution of India.... The question of ultra vires is foreign to the scope of its jurisdiction. If an assessee raises such a question, the Tribunal can only reject it on the ground that it has no jurisdiction to entertain the said objection or decide on it. As no such question can be raised or can arise from the Tribunal's order, the High Court cannot possibly give any decision on the question of the vires of a provision."

20. In B. Shankara Rao Badami and Others Vs. The State of Mysore and Another, , the Supreme Court observed that the constitutional validity of the Mysore (Personal and Miscellaneous) Inams Abolition Act could not be challenged in the statutory appeals.

21. In view of the clear and authoritative pronouncements of the Supreme Court on the point, we are unable to accept the contention of Sri Sarangan that the Tribunal can go into the question of vires of the statutory provisions, and accordingly it follows that this court cannot also go into that question.

22. We may now advert to the passage in Kanga and Palkhivala's treatise 7th edition (pages 1155, 1156). The learned authors, after referring, inter alia, to the propositions emerging from the decision of the Supreme Court in K.S. Venkataraman and Co. Vs. State of Madras, and in C.T. Senthilnathan Chettiar Vs. State of Madras, observed :

"It is submitted that the above propositions require reconsideration. The correct principle is that a creature of a statute cannot go into the question of the validity or vires of the statutory provisions which gave it birth and jurisdiction, because the jurisdiction of a statutory authority to entertain any question presupposes

the legal existence of that authority and any exercise of the power to decide an issue presupposes the valid conferment of that power. Accordingly, the Income Tax authorities and the Tribunal cannot decide upon the validity or vires of those section under which they are appointed or constituted, or of the sections from which their powers and functions are derived. But they are not debarred from considering the validity or vires of the other provisions of this Act."

23. The above passage reflects the opinion of the learned authors as to the need for a reconsideration of the present state of the law. The need and occasion for a suggestion for reconsideration would itself presuppose that the extant position is the contrary. Sri Sarangan cannot rely upon this as a statement of the law.

24. There is yet another passage on page 1156 to the effect that in all events, the vires of the rules could be gone into. The statement is, in turn, based on the authority of the Jammu & Kashmir High Court in Commissioner of Income Tax Vs. Shri Krishen Chand Charitable Trust, relied upon by Sri Sarangan. This decision did, of course, declare the provisions of certain rules ultra vires. The decision does not take note of the pronouncements of the Supreme Court in cases of K.S. Venkataraman and Co. Vs. State of Madras, , Kanpur Vanaspati [1973] 32 STC 655 and C.T. Senthilnathan Chettiar Vs. State of Madras, , to which we have referred. Indeed, the question whether the authorities constituted under the Act could go into the vires of the statutory provisions was not, as such considered and pronounced upon.

25. Indeed, the position is absolutely clear from the pronouncements of the highest court of the land. In view of this clear mandate, it is impermissible for us to countenance a dilemma, either real or contrived. The words of Krishan Iyer J. are worth recalling : See Ganga Sugar Corporation Ltd. and Others Vs. State of Uttar Pradesh and Others,

"Enlightened litigative policy in the country must accept as final the pronouncements of this court by a Constitution Bench unless the subject be of such fundamental importance to national life or the reasoning is so plainly erroneous in the light of later thought that it is wiser to be ultimately right rather than to be consistently wrong. Stare decisis is not a ritual of convenience but a rule with limited exceptions. Pronouncements by Constitution Benches should not be treated so cavalierly as to be revised frequently. We cannot devalue the decisions of this court to brief ephemerality which recalls the opinion expressed by Roberts J. of the U. S. Supreme Court in Smith v. Allwright [1944] 321 US 649, "that adjudications of the court were rapidly gravitating into the same class as a restricted railroad ticket, good for this day and train only.""

26. The effect of the retrospective amendment of section 80J has to be taken into account in disposing of the reference. In view of this amendment, the relevance of rule 19A (2) (iii) hardly survives and as observed by the Supreme Court in Commissioner of Income Tax, West Bengal, Calcutta Vs. Smt. Anusuya Devi, , when a question becomes academic and is unnecessary, this court is not

bound either to call for a statement of the case or to answer such a question.

27. For the foregoing reasons, we decline to call for a statement of the case. The petition is dismissed.

28. Sri K. Srinivasan, learned counsel for the Revenue, is permitted to file his memo of appearance within two weeks from today.