

(1993) 04 KL CK 0020

In the High Court Of Kerala

Case No : O.P. No's. 7815, 8836 and 10671 of 1989, 1691, 5324, 5325 and 5579 of 1990, 1365, 6373, 9941 and 10951 of 1991, 1502, 3087, 14857 and 17145 of 1992 and 763, 1681 and 2020 of 1993

Nagalingam Nadar Sons

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 07-04-1993

Acts Referred:

Central Sales Tax Act, 1956 — Section 8(5)

Kerala General Sales Tax Act, 1963 — Section 10, 10(1), 10(3), 8A(1), 8A(3)

Citation : (1993) 04 KL CK 0020

Hon'ble Judges : T.L. Viswanatha Iyer, J

Bench : Single Bench

Advocate : Jose Joseph, in O.P. No. 7815 of 89, S.K. Devi, in O.P. Nos. 8836 of 89 and 1365 of 91, T. Karunakaran Nambiar and S. Sankaran, in O.P. No. 10671 of 89, N. Muraleedharan Nair, in O.P. Nos. 1691 of 90 and 14857 of 92, K.P. Dandapani, in O.P. Nos. 5324 of 90 and 5325 of 90, G. Sivarajan, in O.P. No. 5579 of 90, K.K. Vijayaraghavan, in O.P. Nos. 6373 of 91, 9941 of 91, 1502 of 92, 17145 of 92 and 763 of 93 and K.C. Balagangadharan and Baby George, V., in O.P. Nos. 10951 of 91, 3087 of 92, 1681 of 93 and 2020 of 93, for the Appellant; S. Vijayan Nair, Government Pleader, for the Respondent

Judgement

T.L. Viswanatha Iyer, J.—These Original Petitions are filed by oil millers who feel aggrieved by a part of the notification S.R.O. No. 781 of 1989 issued by the Government on 18th May 1989 u/s 10 of the Kerala General Sales Tax Act, 1963. The notification has been given. retrospective effect from July 1, 1987. The notification has ceased to be in effect on March 31, 1992. To understand the grievance of the Petitioners, it is necessary to state the history of the reduction, in the rate of purchase/sales tax relating to coconut, copra, coconut oil and coconut oil cake over the years. The statute concerned is the Kerala General Sales Tax Act, 1963 (hereinafter referred to as the Act).

2. Petitioners are all oil millers who purchase coconut and copra, for crushing in their oil mills, and sell the resultant oil and oil cake produced out of such coconut

or copra either within the State or in the course of inter-state trade. Coconut and copra constitute Entry No. 5 in the second schedule to the Act, liable to tax at 4 percent at the point of last purchase. Similarly coconut oil and oil cake were Entries 60 and 29 respectively in the first schedule to the Act upto 1st July 1987 when they were liable to tax at 4 percent upto 16th September 1980 and thereafter at 5 percent on the first sale within the State. The first schedule was recast with effect from 1st July 1987 by which coconut oil and oil cake became Entries 50 and 51 therein with the rate of tax and point of levy remaining the same at 5 percent and the first sale within the State. There was an Explanation to these entries which stated that where tax had been levied in respect of copra or coconut, the tax leviable on the coconut oil and oil cake produced out of such coconut or copra shall be reduced by the amount of tax levied on such coconut or copra. In other words, the position was that the oil miller selling coconut oil and oil cake got a reduction, from the tax payable by him on such sales, of the amount of tax paid by him on the purchase of the coconut or copra out of which the coconut oil and oil cake were produced. This was the position under the Act after 1st July 1987.

3. Purchase of coconut and copra, and the sales of coconut oil and oil cake, had been the subject of reductions in the rate of tax payable, under three notifications S.R.O. Nos. 137/69, 854/74 and 388/79. By S.R.O. No. 137/69 which came into force and had effect from April 1, 1969. Government reduce the rate of tax payable under the Act, by an oil miller, in respect of his purchases of coconut or copra, which were used by him for production of coconut oil and cake in his mill within the State for sale, to 2 percent. This notification dealt with purchases of coconut and copra. The subsequent two notifications related to sales of coconut oil and oil cake. By S.R.O. No. 854/74, Government reduced the rate of tax, payable under the Act, by an oil miller in the State, on the sale of coconut oil and oil cake produced in his mill, to a dealer, for sale by such dealer, in the course of inter-state trade or commerce, including transfer to any other place of business or to an agent or principal situate out of the State, from 5 percent to 1 percent, subject to the condition that the oil miller produced before the assessing authority, a declaration from the purchasing dealer testifying that he had actually sold the goods, in the course of inter-state trade or commerce or transferred them in the manner referred to above. This notification is dated 21st November 1974.

4. The next notification S.R.O. No. 388/79 dealt with the sales of coconut oil to soap manufacturers in the State, for use in the manufacture of soap within the State, and reduced the rate of tax from 5 percent to 1 percent. This notification came into force from 1st April 1979.

5. The position as under these notifications, which were all in force on 1st July 1987, when the first schedule to the Act was recast as mentioned earlier, was that tax was payable at 2 percent on the purchases of coconut and copra by oil millers like the Petitioners, for production of coconut oil and oil cake for sale. The

sales of coconut oil and oil cake by such oil millers, to Anr. dealer for effecting inter-state sale, or for transfer on consignment basis, or for the manufacture of soap, were taxable at 1 percent. The effect of these notifications, in conjunction with the Explanation to Entries 50 and 51 of the first schedule after 1st July 1987, was virtually to exempt the sales of coconut oil and oil cake by an oil miller in the circumstances mentioned above, from payment of any tax, inasmuch as they got a reduction, from the tax payable on such sales, of the amount of tax which they had paid on the purchases of coconut and copra at 2 percent of the purchase value.

6. These three notifications were consolidated by the Government, apparently in the light of the Explanation to Entries 50 and 51 by S.R.O. No. 781 of 1989 dated May 18, 1989, referred to earlier. This notification supersedes the three notifications S.R.O. Nos. 137/69, 854/74 and 388/79. The notification then makes a reduction in the rate of tax payable for coconut, copra; coconut oil and oil cake in the manner mentioned below. The tax payable by an oil miller on the purchase of coconut and copra, used by him for production of coconut oil and oil cake, in his mill within the State, for sale, was reduced to 2 percent, where tax was levied on the coconut oil and oil cake produced out of such coconut or copra, either under the Act, or under the Central Sales Tax Act, 1956; and to 3 percent, in cases where tax was not levied on the coconut oil and oil cake concerned under either of these enactments. The tax payable by an oil miller in the State on the sale of coconut oil and oil cake produced in his mill in the State, to any dealer, for sale by such dealer in the course of inter-state trade or commerce, including transfer to any other place of business or to an agent or a principal situate outside the State, or to a manufacturer of soap within the State, when tax is levied under the Act on the coconut or copra, out of which the coconut oil and oil cake are produced, was reduced from 5 percent to 1 percent. However, this reduction was subject to the condition that the Explanation to the entries "coconut oil" and "coconut oil cake" in the first schedule to the Act shall not apply to such sales, and the oil miller should produce before the assessing authority a declaration from the purchasing dealer in the form appended, declaring that he had dealt with the coconut oil and oil cake in the manner mentioned above. This notification, though issued on May 18, 1989, was made retrospective with effect from July 1, 1987.

7. The effect of this notification was that on and after July 1, 1987, sales of coconut oil and oil cake by an oil miller, to Anr. dealer for sale in the course of inter-state trade or commerce, or for consignment transfer outside the State, or to a soap manufacturer, could get the benefit of reduced rate of tax at 1 percent only by foregoing the rebate granted by the Explanation to Entries 50 and 51 to the first schedule. To put it differently the oil miller had to pay tax at 1 percent on the sales of his coconut oil and oil cake as also tax at 2 percent on his purchases of coconut and copra. In other words, the position which prevailed under the three notifications, by which the rate of tax on these sales stood reduced to 1 percent with the added benefit of the statutory rebate of the tax

paid on the purchase of copra and coconut, ceased retrospectively with effect from July 1, 1987, and the oil millers became bound to pay tax at 1 per cent on the sales of the coconut oil and oil cake, apart from the payment of tax which they had to make on the purchase of coconut and copra. Thus the virtual non-liability which existed till then on the sales of coconut oil and oil cake by an oil miller stood withdrawn with retrospective effect by S.R.O. No. 781 of 1989.

8. The Petitioners do not challenge the exemption granted to them by the operative parts of the aforesaid notification for the reason that it substantially incorporates the benefit given to them under the earlier notifications. What they are aggrieved by is the condition that the Explanation to Entries 50 and 51 shall not apply to such sales; and that forms the subject matter of the challenge in these petitions. Petitioners contend that the imposition of this condition retrospectively withdraws the exemption which they were enjoying till May 18, 1989 by the combined operation of the three notifications and the Explanation. This is incompetent and not permitted by Section 10 of the Act, They also submit that they have not collected any tax on their sales of coconut oil and oil cake, acting on the combined effect of the earlier notifications and the Explanation and therefore they are entitled to be relieved of the levy imposed by S.R.O. No. 781/89, under the doctrine of promissory estoppel.

9. There was also a subsidiary contention raised by Smt. S.K. Devi that the operation of the earlier notifications together with the Explanation should be continued, even after May 18, 1989 and cannot be, whittled down in any manner. I find no substance in this plea meriting any elaborate consideration. I reject it.

10. The real point for consideration is about the retrospective operation given to S.R.O. No. 781/89. From what I have pointed out earlier, there can be no serious dispute that the effect of this notification is to make the oil millers retrospectively liable for payment of tax at 1 percent on their sales of oil and oil cake, without their getting the benefit of the reduction which they were enjoying from July 1, 1987 to May 18, 1989 under the Explanation to Entries 50 and 51 in the first schedule, In that sense, there is virtually a retrospective levy of tax on the oil millers during this period.

11. The question is whether this is justified on the terms of Section 10. I may here refer to a contention raised by the learned Government Pleader appearing for the Respondents that the three notifications S.R.O. Nos. 137/69, 854/74 and 388/79 were inconsistent with the Explanation to Entries 50 and 51, and therefore they became ipso facto void and inoperative on July 1, 1987 when the first schedule was recast and the Explanation made its appearance. According to him, Government's intention was always to collect 3 percent tax in the aggregate, namely 2 percent on the purchase of the copra and coconut, and 1 percent on the sales of the coconut oil and oil cake produced from such coconut and copra, and that it was never their intention to give any exemption to sales of coconut oil and oil cake. Read in this background, the notifications ceased to be effective on July 1, 1987.

12. I am unable to accept this contention. The Act provides the rate of tax, as also the point of levy of tax on various goods. But power is vested in the Government u/s 10 to exempt goods or persons from payment of tax or to reduce the rate of tax in public interest. Reductions in the rate of tax or total exemptions could therefore stand side by side with the prescriptions in the Act, and no question of inconsistency arises in the exercise of the power u/s 10 by Government. In fact, the very purpose of Section 10 is to deviate from what is provided in the Act and to grant exemptions or reductions, from what is provided in the Act. There was therefore nothing incongruous in the continued operation of the three notifications after July 1, 1987. It is true that the combined effect of the notifications and the Explanation was to totally exempt sales of oil and oil cake from the levy of tax, in the form of a rebate under the Explanation. It may also be true that Government did not have the Intention to give up the tax on the sales of coconut oil and oil cake and that they came to grips, with the real situation after July 1, 1987 only afterwards when they issued S.R.O. No. 781/89 on May 18, 1989. But that is no reason to hold that the three notifications issued u/s 10 could not stand in the light of the subsequent amendment to the law. In fact all such exemptions or reductions are really inconsistent with the provisions of the Act, but they are issued in public interest by virtue of a power conferred by the legislature itself. The anomalous result mentioned by the Government Pleader does not therefore appeal to me as a ground for holding that the notifications ceased to be effective on July 1, 1987, In fact Government itself did not understand it that way as evident from the express supersession of these notifications in S.R.O. No. 781/89.

13. I have noted earlier that the notification S.R.O. No. 781/89 has the effect of withdrawing an exemption which was available to the oil millers upto May 18, 1989 in the guise of imposing a condition for the purpose of availing the reduction in the rate of tax on the sales of coconut oil and oil cake. Since the power to issue the notification is traced to Section 10, I shall read Sub-sections (1) and (3) thereof, which are relevant:

(1) The Government may, if they consider it necessary in the public interest, by notification in the Gazette, make an exemption or reduction in rate, either prospectively or retrospectively in respect of any tax payable under this Act.

(i) on the sale or purchase of any specified goods or class of goods, at all points or at a specified point or points in the series of sales or purchases by successive dealers, or

(ii) by any specified class of persons in regard to the whole or any part of their turnover.

* * * *

(3) The Government may by notification in the Gazette, cancel or vary any notification issued under Sub-section (1).

Power is thus given under Sub-section (1) to make an exemption or reduction in rate either prospectively or retrospectively in respect of any tax payable under the Act. Sub-section (3) enables Government to cancel or vary any such notification issued under Sub-Section (1). Significantly, Sub-section (3) is silent about retrospectivity for any notification issued under it. Thus while Sub-section (1) authorises the grant of an exemption or reduction in rate with retrospective effect in respect of any tax payable under the Act, Sub-section (3) does not provide for any cancellation or variation retrospectively. In issuing notifications u/s 10, Government is exercising only delegated powers. While the legislature has plenary powers to legislate prospectively and retrospectively, a delegated authority like the Government acting under the powers conferred on it by the enactment concerned, can exercise only, those powers which are specifically conferred. Therefore, if it is intended to confer on Government a power to cancel/withdraw/vary an exemption or reduction in rate of tax, with retrospective effect, such a power has to be specifically conferred, and in the absence of any such specific conferment of power in Sub-section (3) of Section 10, Government cannot issue notifications thereunder affecting a vested right or imposing an obligation to act retrospectively. I have already mentioned that this provision is significantly silent on such a power. Equally, Government has also no power to levy a tax with retrospective effect. The retrospective cancellation/withdrawal of an exemption or a reduction in rate tantamounts to levy of a tax, or tax at a higher rate from a date in the past, for which Government has no power under Sub-section (3). It has therefore to be held that Government had no power to impose the condition about the non-applicability of the Explanation for the purpose of availing the reduction in rate of tax on the sales of coconut oil and oil cake for the period from July 1, 1987 to May 17, 1989 and that the condition will take effect only on and after May 18, 1989. I shall briefly refer to a few decided cases on the point.

14. In *Sales Tax Officer v. Timber and Fuel Corporation* (1973) 31 S.T.C. 585 the Supreme Court was dealing with a case where the Madhya Pradesh Government had, by a notification issued on June 1, 1963 retrospectively exempted the Forest Department from the levy of tax on timber which was taxable at the first sale within the State, during the period April 1, 1959 to November 2, 1962. The consequence was that the Assessee, purchasers of the timber from the Forest Department during this period, who were hitherto not liable as second sellers, became liable for payment of tax on their sales with retrospective effect. This was challenged. The Supreme Court held that Government had no power to levy tax either prospectively or retrospectively but only to exempt a person from payment of tax. That power cannot be used directly or indirectly to retrospectively levy tax on someone else. When the taxable event took place, the Assessee was not liable to be taxed on the sales effected by them. Their liability had to be determined as on those days. The fact that the Forest Department was retrospectively exempted from paying tax could not make them liable to pay tax which they were otherwise not liable to pay. The Assessee was

therefore held not liable to pay tax on their sales, in the past, despite the exemption granted to the Forest Department. In *Yemmiganur Spinning Mills Ltd, v. State of Andhra Pradesh* (1976) 37 S.T.C. 314 Chinnappa Reddy and Jeevan Reddy, JJ. as they then were, of the Andhra Pradesh High Court were dealing with a notification of the Government of Andhra Pradesh dated May 18, 1971, published in the gazette dated July 1, 1971 by which the exemption granted to the sales of hank yarn by a notification dated 9th February 1971 was withdrawn with effect from April 19, 1971. The question was whether this notification was enforceable during the period upto July 1, 1971, when alone it was published in the Gazette. The general proposition that a delegate cannot make a rule or issue a notification with retrospective effect unless empowered expressly or by necessary implication was reiterated, and it was held that Section 9 of the Andhra Pradesh General Sales Tax Act, 1957 which enabled the Government to grant exemption from tax by notification, did not enable it to rescind with retrospective effect an earlier notification granting exemption from tax. Any such notification will come into force only from the date of its publication in the gazette. The impugned notification could therefore operate only from July 1, 1971 and not from April 19, 1971, as notified. Reliance was placed for this on the earlier decisions of the Supreme Court in *Income Tax Officer, Alleppey Vs. M.C. Poonnoose and Others*, *Fuel and Timber Corporation case* (1973) 31 S.T.C. 585.

15. I may refer here itself to one further decision of the Andhra Pradesh High Court in *Prakash Enterprises v. Commercial Tax Officer* (1988) 70 S.T.C. 245, in which the withdrawal of an exemption granted on sales of tyres and tubes of cycles with retrospective effect was under challenge. The High Court followed the dictum in *Yemmiganur Spinning Mills Ltd. (1976) 37 S.T.C 314* and quashed the retrospective operation of the notification withdrawing the exemption.

16. The Madhya Pradesh High Court had occasion to deal with an analogous situation, as in this case in *Vijay Dal Mill v. State of Madhya Pradesh* (1982) 51 S.T.C. 242 where the question related to the retrospective withdrawal of a reduction in the rate of tax. The Madhya Pradesh government had issued a notification on April 1, 1966 u/s 8(5) of the Central Sales Tax Act, 1956 reducing the rate of tax payable on inter state sales of pulses to 2 percent. A notification was subsequently issued on July 6, 1979 withdrawing the reduction in the rate of tax with effect from May 21, 1975. The retrospective withdrawal was challenged. The court stated that Section 8(5) of the Central Act did not authorise the State Government to withdraw an exemption or concession retrospectively so as to increase the rate of tax retrospectively. The retrospective enhancement of the rate, and the withdrawal of the concession to dealers, was therefore unauthorised. The notification of 1979 in so far as it operated retrospectively was struck down accordingly.

17. A similar situation arose again in *Dhannilal Labhohand v. Sales Tax Officer* (1988) 69 S.T.C. 117, where the decision in *Vijay Dal Mill* (1982) 51 S.T.C. 242 was followed and the retrospectivity to the withdrawal of the exemption was

nullified.

18. The decision in *Ananda Soap Factory v. State of Karnataka* (1978) 42 S.T.C 356 is apposite, as the Karnataka High Court specifically dealt with Section 8A(3) of the Karnataka Act which corresponds to Section 10(3) of the Kerala Act. The decision concerned the retrospective withdrawal of a concession given to certain assessees. The headnote accurately summarises the decision of the court speaking through E.S. Venkataramiah, J. (as he then was) and I shall therefore extract it:

When once a notification is issued by the State Government in accordance with the provisions of Section 8A(1) of the Karnataka Sales Tax Act, 1957, the notification would have statutory force and the validity of the exemption granted thereunder has to be construed as exemption granted by the statute itself. The State Government has also the power u/s 8A(3) of the Act to cancel or vary a notification issued u/s 8A(1) and it can be exercised prospectively. But it is not open to the State Government, in the absence of express power granted by the legislature, to act retrospectively to issue a notification either taking away vested rights or imposing obligations with retrospective effect.

One of the decisions relied on by the Court was that in *India Sugars and Refineries Ltd. v. State of Mysore* AIR 1960 Mys 326, which had been approved by the Supreme Court, in *Income Tax Officer, Alleppey Vs. M.C. Ponnose and Others*, .

19. To complete the cases cited by counsel, I may refer also to the decision of the Orissa High Court in *Kaliram Ramkumar v. Sales Tax Officer* (1989) 75 S.T.C. 388 where again a similar view was taken.

20. I may incidentally refer to the decision of the Supreme Court in *Bakul Cashew Co. v. Sales Tax Officer* (1986) 62 S.T.C. 122, that even an exemption from payment of tax could not be granted retrospectively by Government in the absence of express conferment of power in that behalf. It should therefore be all the more so, to take away a concession or exemption validly granted earlier.

21. I shall close the discussion with a reference to the recent decision of the Supreme Court in *State of Madhya Pradesh v. G.S. Dall and Flour Mills* (1991) 80 S.T.C. 138 where the Supreme Court observed while dealing with a notification issued by the Madhya Pradesh High Court in 1987, rescinding 1981 notification of exemption that while a notification granting exemption could be either prospective or retrospective, only prospective operation could be given to a notification rescinding an exemption granted earlier. Such a notification cannot take away an exemption conferred by an earlier notification. This dictum of the Supreme Court squarely applies to the facts of this case.

22. The position that emerges therefore is that a delegated authority like the Government could frame a rule or issue a notification only prospectively unless a power to frame a rule or issue a notification retrospectively is conferred on it

either expressly or by necessary implication. Therefore, while Section 10(1) of the Act enables the Government to grant an exemption or reduce the rate of tax payable, prospectively or retrospectively, a cancellation or variation of such a notification issued under Sub-section (3) could have only prospective effect. Government cannot also issue any notification which will have the effect of imposing a tax or enhancing the tax payable for a period prior to the issue of the notification. I have already held that the effect of S.R.O. No. 781/89 is to offset the nonliability from sales tax available to the oil millers upto May 18, 1989 by withdrawing the rebate of the tax paid on the purchase of coconut and copra. Therefore, that part of the notification S.R.O. No. 781/89 which subjects the reduction of tax on the sales of coconut oil and oil cake by oil millers in the circumstances specified in Clause (ii) thereof, to the condition that the Explanation to Entries 50 and 51 shall not apply to such sales, is inoperative upto May 18, 1989. I hold so. The assessments, if any, made on the Petitioners covering the period July 1, 1987 upto and inclusive of May 17, 1989 will have to be modified in the light of this decision. In this view which I have taken, I find it unnecessary to consider the question of promissory estoppel which the Petitioners have raised, though I find considerable force in their said submission as well.

The Original Petitions are therefore, allowed to the extent of declaring that the Sub-clause, "the Explanation to the Entries coconut oil and coconut oil cake in the First Schedule to the Act, shall not apply to such sales" occurring in Clause (ii) of the notification S.R.O. No. 781/89, shall operate only prospectively from May 18, 1989, and that it will have no effect from July 1, 1987 till that date. The assessments, if any, made on the Petitioners for the years 1987-88 and 1988-89 shall be modified accordingly within a period of four months from today.

There will be no order as to costs.