

(1957) 02 OHC CK 0010

In the Orissa High Court

Case No : O.J.C. No's. 184 to 188 of 1955

Orient Paper Mills Ltd.

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 04-02-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 226, 286(1)
Orissa Sales Tax Act, 1947 — Section 12, 12(1), 12(7), 14, 22

Citation : AIR 1957 Ori 240 : (1957) 8 STC 749

Hon'ble Judges : Narasimham, C.J;Das, J

Bench : Division Bench

Advocate : P.C. Chatterji, A.C. Gupta and U.P. Mukherji, for the Appellant; A.G. and G.K. Misra, for (Nos. 2 to 4), for the Respondent

Judgement

Narasimham, C.J.—These are applications by Messrs, orient Paper Mills Ltd., against the orders of the Member (C. T.) Board of Revenue, in revision, rejecting their prayer for grant of refund u/s 14 of the Orissa Sales Tax Act, 1947 (Orissa Act XIV of 1947) (hereinafter referred to as the Act) in respect of sales tax realised from them for the quarters mentioned below:

OJC No. Quarter ending. Date of assessment including inter-State sales. Date of re-assessment u/s. 12 (7) (in respect of local sales only) Date of order on appeal against assessment noted in col. 3. Date of order on revision against appeal order noted in col. 5. Amount of re-fund claimed.

1 2 3 4 5 6 7

Rs. as. ps.

184/55 31-3-50 26-6-50 19-12-51 27-1-51 27-6-51 34,309 5 0

185/55 30-6-50 23-11-50 19-12-51 31-1-51 27-6-51 95,819 3 0

186/55 30-9-50 29-9-51 19-12-51 29-2-52 ... 135,250 0 0

187/55 31-12-50 29-9-51 19-12-51 29-2-52 ... 137,613 7 0

188/55 31-3-51 29- 9-51 19-12-61 29-2-52 ... 144,853 0 0

2. The petitioners paid the taxes in due course but when they came to know of the decision of the Supreme Court in the United Motors case reported in State of Bombay v. United Motors Ltd. AIR 1953 SC 252 (A) construing Article 286(1) of the Constitution they thought that they were not liable to pay sales tax in respect of the transactions covered by these applications inasmuch as they related to inter-State sales. Their claims for refund were mainly based on the decision of the Supreme Court which, according to them, made it absolutely clear that no sales tax was due from them in respect of those transactions. The subsequent reversal of that decision of the Supreme Court by a later decision of the same court in the Bengal Immunity case reported in Bengal Immunity Co. v. State of Bihar (S) AIR 1955 SC 661 (B) in respect of other matters did not, however, affect the former decision so far as the non-liability to pay sales tax in respect of these transactions was concerned.

3. The main ground on which the member (C. T.) Board of Revenue, by his order dated 12-2-1955 refused to grant refund was that the order of assessment of the sales tax became final; that the petitioners did not care to challenge it on appeal or revision and that it should not be reopened merely because of change in the law brought about by the decision of the Supreme Court in the United Motors case (A). Apparently, the sales tax authorities have taken the view that the principle of res judicata in some way or other would apply and if an assessee against whom an order of assessment of the sales tax is made allows the assessment to become final after exhausting the remedy by way of appeal or revision u/s 23 of the Act or interference by the High Court u/s 24, it will not be open to him to claim refund even though by a subsequent pronouncement of the Supreme Court such assessment may be held to be illegal and even though the application for refund is made within the period of limitation prescribed in Section 14 of the Act. The correctness of this view has been strenuously challenged and it will be the main question for decision in these applications.

4. I may now briefly refer to certain relevant provisions of the Act. Section 9B(1) impliedly authorises every registered dealer to realise amounts by way of tax on the sale of goods from purchasers. Sub-section (3) of that section is as follows:

"The amount realised by any person by way or tax on sale of any goods, shall, notwithstanding anything contained in any other provision of this Act, be deposited by him in a Government treasury within such period as may be prescribed, if the amount so realised exceeds the amount pay able as tax in respect of that sale or if no tax is payable in respect thereof,"

Assessment to sales tax is made u/s 12 of the Act on the basis of the returns submitted by the registered dealer and from the results of further enquiries made by the sales tax authorities. Section 23 gives a right of appeal, revision or review against the order of assessment and Section 24 empowers the High Court

to decide a question of law either on the statement of a case by the sales tax authorities or by calling for such a statement. Section 22 is as follows:

"Save as is provided in Section 24, no assessment made and no order passed under this Act or the rules made thereunder by the Collector or any person appointed u/s 3 to assist him shall be called into question in any court; and save as is provided in Section 23, no appeal or application for revision or review shall lie against any such assessment or order."

The learned counsel for the sales tax authorities has relied very much on this section and urged that by virtue of this section finality is given to an assessment made under the Act and it is not open to this court to order refund on the ground that the assessment was illegal merely because the case law underwent a change in the Supreme Court in the United Motors case. The obvious answer to this question is that the powers of this court under Article 226 which are derived from the Constitution cannot be in any way circumscribed by an act of a Legislature in India and consequently merely because some sort of finality is given to an order under any statute the jurisdiction of this court under Article 226 cannot be curtailed.

5. The refund section is as follows:

"Section 14. The Collector shall, in the prescribed manner, refund to a dealer applying in this behalf any amount of tax paid by such dealer in excess of the amount due from him under this Act, either by cash payment or at the option of the dealer, by deduction of such excess from the amount of tax due in respect of any other period:

Provided that no claim to refund of any tax paid under this Act shall be allowed unless it is made within twenty-four months from the date on which the order of assessment was passed or within twelve months of the final order passed on appeal, revision, review or reference in respect of the order of assessment, whichever period is later."

Under this section, therefore, in considering an application for refund there are only two matters to be decided: (1) Was any tax paid by the applicant in excess of the "amount due" from him under the Act? (2) Is his claim for refund within the period of limitation laid down by the proviso to Section 14? That section, in terms, does not say that no claim for refund shall be made if the assessment becomes final u/s 22 of the Act nor does it say that it is subject to the provisions of Section 22.

6. It will be helpful if the corresponding provision of the Indian Income Tax Act be compared. Section 48 of that is as follows:

"48 (1) If any individual, Hindu undivided family, company, local authority, firm or other association of persons, or any partner of a firm or member of an association individually satisfies the Income Tax officer or other authority appointed by the Central Government in this behalf that the amount of tax paid

by him or on his behalf or treated as paid on his behalf for any year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of any such excess.

(2) The Appellate Assistant Commissioner or the Appellate Tribunal in the exercise of their appellate powers if satisfied to the like effect shall cause a refund to be made by the Income Tax officer of any amount found to have been wrongly paid or paid in excess.

(3) Where income of one person is included under any provision of this Act in the total income of any other person such other person only shall be entitled to a refund under this section in respect of such income.

(4) Nothing in this section shall operate to validate any objection or appeal which is other-wise invalid or to authorise the revision of any assessment or other matter which has become final and conclusive, or the review by any officer of a decision of his own which is subject to appeal or revision, or where any relief is specifically provided elsewhere in this Act, to entitle any person to any relief other or greater than that relief or to entitle any person to claim a refund of tax payable before the commencement of the Indian Income Tax (Amendment) Act, 1939 which he would not be entitled to claim but for the passing of that Act."

Sub-section (4) of that section expressly bars the consideration of any application for refund if that involves the revision of any assessment which has become final or conclusive. The Privy Council decision reported in *Commr. of Income Tax West Punjab North West Frontier and Delhi Provinces, Lahore v. Tribune Trust Lahore* AIR 1948 PC 102 (C) is based on the language of Sub-section (4) of Section 48 of the Income Tax Act (old Section 48A). Such a provision is significantly wanting in Section 14 of the Act. Mr. Gupta on behalf of the petitioner, therefore, contended that so long as the applications are within the period of limitation provided by Section 14, if tax is not legally due either in consequence of the change in the case law on the subject or even the change in the law brought about by retrospective legislation the petitioners would be entitled to the refund asked for.

7. I am Inclined to accept Mr. Gupta's argument. When the Supreme Court construed Article 286(1) of the Constitution in the *United Motors* case, their interpretation became the law not only from the date of the decision but it should be deemed to be the correct interpretation from the date of the Constitution Itself. The consequential effects flowing from the law so laid down should necessarily follow subject of course to the law of limitation or special rule such as *res judicata* in civil cases or *autrefois acquit* or *convict* in criminal cases provided in the special statutes Section 22 of the Act cannot operate as a bar inasmuch as the Income Tax authority before whom the application for refund is made is not a court nor is that authority asked to review or revise the previous assessment order. The right of a dealer to apply for refund is found within the four corners of Section 14 of the Act and the only restriction on the exercise of that right is the

law of limitation laid down in the proviso to that section. Hence, once it is conceded that the transactions in question are inter-State transactions which are not liable to sales tax, it is obvious that the sales tax paid which is not legally due from the purchasers must be refunded to them unless the applications for refund are time-barred. The mere fact that the assessment order was not challenged by way of appeal or revision under the other provisions of the Act seems immaterial.

8. This view is supported by a Bombay case reported in *Purshottamdas Dwarkadas v. State of Bombay* 1956-7 STC 375(D). There also the facts were very similar to the present case and the refund application was based on the decision of the Supreme Court regarding inter-State trade and the refund section of the Bombay Sales Tax Act (Section 13) is almost identical with Section 14 of the Act. There is an Allahabad decision in *State of Uttar Pradesh v. Kanhaiya Lal* 1956-7 STC 679: (S) AIR 1956 All 383 (E) which is also helpful. There the assessee paid sales tax on forward contracts. But the Supreme Court subsequently held that the provisions of the U.P. Act imposing sales tax on forward contracts were ultra vires the State Legislature. The assessee then applied for refund of the tax paid. His prayer was allowed and the decision was based on Section 72 of the Indian Contract Act and their Lordships held that payment made even under mistake of law may have to be refunded and Section 21 of the Contract Act would not operate as a bar. In the present case also the petitioners can contend with equal force that the payments were all made under a view of law regarding Article 286(1) of the Constitution which has been held to be incorrect by the Supreme Court in the *United Motors Case* (A).

9. The counsel for the opposite party, however, relied on Section 9B (3) of the Act and urged that where a registered dealer collects any amount by way of tax even though no tax is payable in respect thereof, he is bound to deposit the same in the treasury and that consequently he was not entitled to refund. According to him, the various constituents who actually paid the tax may be entitled to claim refund from the Government. But the petitioners are registered dealers and they merely acted as middlemen in collecting the sales tax from the constituents and have no other option but to deposit the tax in the treasury. In my opinion, such an argument does not follow from a construction of Section 9B(3) with Section 14 of the Act. Section 9B(3) seems to be in the nature of a procedural provision which requires every registered dealer to deposit in the treasury any amount collected by him by way of tax, whether any tax is legally payable or not. The word used is "deposit" which conveys the idea that no right as between the depositor and the Government is finally decided. The money merely remains with the Government until the rights of the parties are decided by appropriate provisions either in the Sales Tax Act or of any other relevant law. Section 14, however, is not expressly made subject to the other provisions of the Act. It gives the registered dealer an unfettered right to claim refund if the amount of tax paid by him is in excess of the amount due while drafting Section 14 the Legislature was fully aware that the dealer was not paying tax from his

own pocket but was merely acting as the collecting agent and realising the tax from the purchasers and then depositing it in the treasury. Hence, when that section does not say that where the tax has been actually paid by the constituents and not by the registered dealer the latter is not entitled to claim refund nor does it contain any reference to Section 9B (3), it will not be proper on principles of statutory construction to hold that Section 14 is subject to Section 9B(3) so as to disentitle the petitioners to claim refund in this case.

10. Mr. Gupta, however, relied on a Madras decision reported in *Tata Iron and Steel Co., Ltd. v. State of Madras*, 1954-5 STC 382(F) where while construing Section 8B of the Madras Sales Tax Act, 1939 (similar to Section 9B of the Orissa Sales Tax Act) it was held that the dealer was entitled to refund where tax, due has not been collected from his constituents. This Madras decision was followed if a later Mysore decision reported in *Minerva Mills Ltd. v. State of Mysore* 1956-7 STC 148: (AIR) 1955 Mys 148) (G) and in a Hyderabad case reported in *Gangabishen Mohanlal v. Sales Tax Officer* 1956-7 STC 460 (H).

11. There is also a Travancore Cochin decision reported in *K.J. Mathew v. Sales Tax Officer, Alwade* 1954-5 STC 58 (I) to the contrary and this was dissented from in the later decisions mentioned above. See also *Brilliant Traders Ltd. v. Sales Tax Officer*, 1957-8 STC 42 (Kerala) (J). Mr. Misra, however, distinguished all these decisions by pointing out that the corresponding provisions either of the Madras Sales Tax Act or of the Mysore Sales Tax Act or of the Hyderabad Sales Tax Act were somewhat different from Sub-section (3) of Section 9B of the Act inasmuch as there the words "if no tax is payable in respect thereof" are not found. In the Orissa Act, however, it is expressly made clear that even if no tax is payable if a registered dealer collects from any person any amount by way of sales tax he must deposit it in the treasury. Hence the aforesaid decisions may not be applicable to the present case. But I have already shown that on the main principles of statutory construction the right to refund u/s 14 cannot be taken away by the mere right of the Government to receive the amount in deposit conferred by Section 9B(3). I may further point out that though Section 9B was amended by the Orissa Sales Tax (Amendment) Act. 1954 (Orissa Act I of 1955) by substituting the words "any amount by way of tax" for the words "any tax", no amendment was made to Section 14. The amendment was obviously made with a view to make it absolutely clear that so far as deposit in the treasury is concerned it is immaterial as to whether the money collected from the constituents by a registered dealer was legally due as sales tax or not. But Section 14 was significantly left untouched.

12. The next question for consideration is whether the claims for refund in these five applications are within the period of limitation prescribed in the proviso to Section 14 of the Act. So far as Order J. C. 186/55, 187/55 and 188/55 are concerned. It is conceded by the counsel for the opposite party that the applications were made within the period of twenty-four months from the date of assessment as required by the proviso. The petitioner's claim in those

applications must therefore succeed.

13. As regards the claims in O. J. C. 184/55 and 185/55. It was urged that the applications for refund were made beyond the period of limitation and as such the claims were time-barred. The dates of assessment in these two cases are 26-6-50 and 23-11-50 respectively. The claim for refund before the sales tax authority was made on 26-9-53 long after the expiry of the period of limitation of twenty-four months prescribed in Section 14. On behalf of the petitioners it was, however, contended that in these two cases there was re-assessment u/s 12(7) of the Act on 19-12-51 and if that date be taken as the starting point for limitation the applications would be within time. An affidavit has been filed by the Sales tax authorities to the effect that re-assessment u/s 12(7) of the Act dealt exclusively with local sales which have nothing to do with inter-State sales which were dealt with by the first assessment made on 26-6-50 u/s 12(1) and that date should be the starting point for the purpose of limitation. In my opinion, re-assessment u/s 12(7) of the Act stands on a different footing from the original assessment u/s 12(1) and for the purpose of limitation u/s 14, these two dates must be considered separately. If the tax is found to be not due there will be two separate dates for the purpose of limitation, one commencing from the date of assessment u/s 12(1) & another from date of re-assessment u/s 12(7). If the amount re-assessed alone is found to be not due whereas the amount assessed is found to be due the date of re-assessment will be the starting point for limitation; whereas if the amount originally assessed be held to be not due the date of assessment should be the starting point. It is immaterial as to whether the assessment and reassessment refer to the same period. The affidavit filed by the opposite party to the effect that the re-assessment u/s 12(7) was in respect of local sales only has not been challenged by any counter-affidavit. The liability to pay sales tax in respect of local sales is beyond question and is not affected by the decision of the Supreme Court mentioned above. Hence, there will be no right of refund for the tax paid in respect of such sales though the original assessment must be held to be invalid as it relates to inter-State sales which are covered by the Supreme Court decision.

14. Before the Income Tax authorities a technical objection was taken on the ground that the applications for refund were not filed before the appropriate authority, namely, the Collector of agricultural Income Tax. This point was not seriously pressed before me & hence it is unnecessary to discuss it at length. It is sufficient to say that by virtue of the delegations made under the Act the Sales Tax Officer at Sambalpur is authorised to receive the applications for refund even though he may not have the jurisdiction to pass orders on those applications as the amount of refund exceeds his pecuniary jurisdiction.

15. I would, therefore, reject the claim for refund in O. J. C. Nos. 184 and 185 of 1955 as time-barred. I would allow the claim for refund in O. J. C. Nos. 186/55, 187/55 and 188 of 1955. Both parties will bear their own costs of these applications.

Das, J.

16. I agree.