
(1958) 10 AHC CK 0029
In the Allahabad High Court
Case No : Sales Tax Reference No. 254 of 1956

Sales Tax Commissioner	Vs	APPELLANT
Sada Sukh Vyopar Mandal		RESPONDENT

Date of Decision : 30-10-1958

Acts Referred:

Contract Act, 1872 — Section 72
Uttar Pradesh Sales Tax Act, 1948 — Section 11

Citation : (1959) 10 STC 57

Hon'ble Judges : R. Dayal, J; M.L. Chatuvedi, J

Bench : Division Bench

Advocate : The A.G, for the Appellant; K. C. Agarwala and J. Swarup, for the Respondent

Final Decision : Allowed

Judgement

The Judgment of the Court was delivered by

Dayal, J.—The Judge (Revisions) Sales Tax has made a reference to this Court on 1371 reference applications before him. His referring order is dated the 30th December, 1955. One common referring order was made, as the points of law raised in those applications were mostly common and could be covered by the few questions formulated by the Judge (Revisions). Out of these 1371 references, 1318 are on the applications u/s 11 of the U. P. Sales Tax Act made by the Commissioner, Sales Tax, Uttar Pradesh, and the remaining 53 are on the applications of different dealers. These applications for references were made in connection with a number of revisions which the various assesseees had filed before the Judge (Revisions) against the assessment of sales tax made by the various Sales Tax Officers and for the consequential relief with respect to the refund of the amount of sales tax which the various applicants had deposited in the Government treasury.

2. The above reference arises under the following circumstances. In the U. P. Sales Tax Act, U. P. Act No. XV of 1948, the word "sale" was defined in Clause (h)

of Section 2 and in the definition it was stated that it would include "forward contracts." The Sales Tax Department of the State Government accordingly started assessing sales tax on forward transactions as well. One of the assesseees, by name Budh Prakash, moved a writ petition in this Court challenging the vires of the definition of "sale" given in the Sales Tax Act in so far as it purported to include forward transactions within its ambit. The matter came up for consideration by a Division Bench of this Court, and the Division Bench upheld the contention of Budh Prakash on the ground that the word "sale" in the relevant entry in Schedule 7 of the Government of India Act did not include forward transactions and the U. P. Legislature had no jurisdiction to legislate with respect to them or to impose a tax on those transactions. The State Government took the matter to the Supreme Court of India and the Supreme Court upheld the decision of this Court. The decision of the Supreme Court is reported in Sales Tax Officer, The Sales Tax Officer, Pilibhit Vs. Budh Prakash Jai Prakash, . The learned Judges further held Explanation III to Section 2 (h), which inserted a deeming clause concerning the completion of sale on forward contracts as well as Section 3-B of the Act to be ultra vires. After the decision of the Division Bench of this Court, a number of revisions were filed by the assesseees before the Judge (Revisions) claiming refund of the amounts paid by them as sales tax on forward contracts. Some others waited till the law on the point was finally declared by the Supreme Court and then filed their revisions.

3. The Judge (Revisions) set aside the assessment of sales tax, as the assessment on forward contracts had been declared illegal by this Court whose order was confirmed by the Supreme Court, but held that the amount of tax deposited could be refunded only in those cases in which the dealers had not realised that amount from the customers and that the amount was not to be refunded in cases in which the dealers had actually realised those amounts from the customers. The Judge (Revisions) had not passed a final order but he remanded the cases to the Sales Tax Authorities for further findings and necessary assessments. The Commissioner, Sales Tax, was dissatisfied with this order so far as it held the deposited tax to be refundable in cases where the dealers had not realised it from the customers, and he filed 1318 applications for reference u/s 11 of the Sales Tax Act submitting that the following question be referred to this Court:

Whether a dealer who has paid to the State sales tax, whether realised or unrealised from the customers, on forward contracts of sale is entitled to a refund of the tax so paid by him on the ground of the tax having been declared ultra vires, even when the tax was voluntarily paid or realised without the assistance of any coercive process.

4. Such dealers who had realised the tax from the customers also felt aggrieved and filed 53 applications for making references praying for eight questions of law to be referred to this Court. These eight questions are to be found in the paper book of Sales Tax Reference No. 467 of 1956. It is not necessary to reproduce

them here, as only two questions out of those eight are the real questions of law to be urged on behalf of those dealers. These two questions are :

Question No. (2).-- "Whether Section 8-A (4) of the Sales Tax Act gave any authority to the Sales Tax Authorities to refuse the refund of the sales tax wrongly levied and realised on forward transactions ?

Question No. (3).-- Whether in the circumstances of the case, Section 8-A(4) of the U. P. Sales Tax Act is at all applicable and is not ultra vires of the U. P. Legislature ?

5. The Judge (Revisions) formulated the following questions for the decision of this Court in his referring order :-

(1) Whether any taxes which have been deposited by any dealers on forward transactions (before or after the issue of the notices of demand) are refundable in all or any of the following cases :

(a) Where the taxes have been paid by the dealers from their own pockets without recovering the amounts from the customers ;

(b) Where the taxes have been debited in the account by the dealers against the customers (but the amounts have not been recovered);

(c) Where the taxes have actually been recovered by the dealers from the customers ?

(2) If the taxes are refundable in all or any of the cases mentioned in the first question, what is the period within which the refund can be claimed

6. When Sales Tax Reference No. 467 of 1956 came up for hearing on the 20th December, 1956, the learned Standing Counsel asked for an adjournment of the hearing till sometime after the decision by the Supreme Court in its Civil Appeal No. 87 of 1957 (Sales Tax Officer, Banaras and Ors. v. Kanhaiya Lal Makutnd Lal Saraf Since reported in [1958] 9 S.T.C. 747.) against the judgment of this Court in Special Appeal No. 18 of 1955. The following will indicate what took place in the court on that date prior to the adjournment of the hearing to a date subsequent to the decision of the aforesaid Supreme Court appeal:

The learned Standing Counsel on behalf of the State agrees that, in the event of the decision of this Court in Special Appeal No. 18 of 1955 being upheld by the Supreme Court, the first of the two questions referred to this Court in this reference must be answered in the affirmative and that the Second of the two questions must be answered by stating that there is no period of limitation provided for such a claim by the assessee under the U. P. Sales Tax Act. In view of this statement we think it proper to direct that the hearing of this reference shall stand over accordingly. Whether the State can raise any question u/s 8-A(4) of the Act and whether the respondent can contend that this sub-section is inapplicable are not questions which have been referred to this Court in this reference and they, therefore, remain open.

7. The Supreme Court decided its Civil Appeal No. 87 of 1957 [1958] 9 S.T.C. 747., on the 23rd September, 1958, and upheld the decision of this Court to the effect that the amount deposited as sales tax. in connection with the forward contracts was refundable in view of Section 72 of the Indian Contract Act, which covered cases of payments by mistake, be the mistake on a question of law or on a question of fact. It, however, further held, that the amount is not to be refunded in case some such circumstances existed which disentitled the assessee from claiming the refund. In view of this possible restriction on the right of a certain assessee to get the refund, the learned Advocate-General at the commencement of the hearing submitted that what had been agreed to by the learned Standing Counsel on the 20th December, 1956, need not be taken to be sufficient for giving the answers to the questions referred. He further submitted that the question of the applicability and effect of Section 8-A (4) of the Sales Tax Act arose in this reference and should be allowed to be urged and that the observations made by this Court in its order dated the 20th December, 1956, that that question had not been referred to the Court in this reference and the question was open need not be taken to be a final decisions of this Court on that point. Mr. Jagdish Swarup, learned counsel appearing for the assessee, agrees that the question u/s 8-A (4) is a question requiring determination in this reference. We accordingly allowed the learned Advocate-General to submit what he had to say both with respect to the circumstances which could disentitle the assessee from claiming the refund and with respect to the applicability and effect of Section 8-A(4) of the Sales Tax Act.

8. The questions formulated in the referring order require to be recast to bring out fully what was contemplated by the parties from the questions of law formulated by them for reference to this Court. We will reframe them as follows :

(1) Whether any sales tax which has been deposited by any dealer on forward transaction before or after the issue of notice of demand is refundable on the ground of the tax having been declared ultra vires, even when the tax was voluntarily paid or realised without the assistance of any coercive process in all or any of the following cases :

(a) where the taxes have been paid by the dealers from their own pockets without recovering the amounts from the customers,

(b) where the amounts of taxes have been debited in the account by the dealers against the customers but the amounts have not been recovered,

(c) in view of the provisions of Section 8-A (4) of the Sales Tax Act where the taxes have actually been recovered by the dealers from the customers.

(2) If the taxes are refundable in all or any of the cases mentioned in the first question, what is the period within which the refund can be claimed ?

9. We may add a further question in view of question No. (3) in the application for reference by the dealers. This question is-

(3) Whether in the circumstances of the case, Section 8-A (4) of the U. P. Sales Tax Act is at all applicable and is not ultra vires of the U.P. Legislature ?

10. Question No. (2) formulated in the referring order does not really arise out of the questions which the Commissioner of Sales Tax or the dealers desired to be referred. It is, therefore, not to be answered. We may however note that both the learned Advocate-General and Mr. Jagdish Swarup, learned counsel for the opposite parties, agree that there is no period of limitation provided for a claim for the refund by the assessee under the U. P. Sales Tax Act.

11. The learned Advocate-General has submitted the following circumstances in support of the contention that the assessee, who had the right to refund of the sales tax deposited, became disentitled to get it :

(1) The sales tax is a sort of direct tax which the dealer collects from the customers as an agent of the State.

(2) It is not equitable to refund the deposited tax as it is not possible for the dealer to refund it to the actual customer, and any refund, in such circumstances, would amount to making a gift of this sum to the dealer who also had no right to collect it from the customer when the Government had no right to collect it from him.

(3) In a case where the dealer had actually realised the amount from the customer, he had suffered no loss and, therefore, he should not get the refund when the principle behind the provision of law u/s 72 of the Indian Contract Act is that the person, who had paid money by mistake, should not suffer on that account.

12. Besides these three circumstances, the other point which the learned Advocate-General has urged is that the dealer is bound to deposit this amount, which he claims as refund, in the Government treasury, in view of the provisions of Section 8-A (4) of the Sales Tax Act, as this amount of tax had been realised by him as a tax on sale of goods, when no tax was payable in respect of that sale. It may be mentioned that the learned Advocate-General does not dispute that the amount deposited by the dealers, who have not realised it from the customers, is to be refunded. He has alleged no circumstances which would justify the non-refunding of the amount to such dealers. The referring order indicates that out of 1318 cases sought to be referred by the Commissioner of Sales Tax, 1040 are the cases in which, according to the State, the amounts were actually paid by the dealers themselves from their own pockets.

13. We are of opinion that none of the circumstances urged disentitles the assessee from getting the refund to which he is entitled u/s 72 of the Contract Act, as held by the Supreme Court in its Civil Appeal No. 87 of 1957 Since reported as Sales Tax Officer, Banaras, and Ors. v. Kanhaiya Lal Makund Lal Saraf [1958] 9 S.T.C. 747, in cases in which the assessee had realised that amount from his customer. In this connection we may refer to some of the observations

made in the Supreme Court judgment. After quoting at length from the observations of the Privy Council in *Sri Sri Shiba Prasad Singh v. Maharaja Srish Chandra Nandi* (1949) 76 I.A. 244, Mr. Justice Bhagwati, who delivered the judgment of the Court, said,

We are of opinion that this interpretation put by their Lordships of the Privy Council on Section 72 is correct.

14. We may now quote a portion of the quotation from the Privy Council in this judgment as follows:

But there appears to their Lordships to be no good reason for so limiting the scope of the Act. Once it is established that the payment in question was not due, it appears to their Lordships to be irrelevant to consider whether or not there was a contract between the parties under which some other sum was due. Their Lordships do not find it necessary to examine in detail the Indian authorities for the wider interpretation of "mistake" in Section 72. They would only refer to the latest of these authorities, *Pannalal v. Produce Exchange Corporation Ltd.* (1946) AIR 1946 Cal. 245, in which acarefully reasoned judgment was given by Sen, J. Their Lordships agree with this judgment. It may be well to add that their Lordships' judgment does not imply that every sum paid under mistake is recoverable, no matter what the circumstances may be. There may in a particular case be circumstances which disentitle a plaintiff by estoppel or otherwise.

15. Mr. Justice Bhagwati further said later on :

On a true interpretation of Section 72 of the Indian Contract Act the only two circumstances there indicated as entitling the party to recover the money back are that the moneys must have been paid by mistake or under coercion. If mistake either of law or of fact is established, he is entitled to recover the moneys and the party receiving the same is bound to repay or return them irrespective of any consideration whether the moneys had been paid voluntarily, subject however to questions of estoppel, waiver, limitation or the like. If once that circumstance is established the party is entitled to the relief claimed.

16. He further said later on:

Re. (ii): Whether the principle of estoppel applies or there are circumstances attendant upon the transaction which disentitle the respondent to recover back the moneys, depends upon the facts and circumstances of each case. No question of estoppel can ever arise where both the parties, as in the present case, are labouring under the mistake of law and one party is not more to blame than the other.... The other circumstances would be such as would entitle a court of equity to refuse the relief claimed by the plaintiff because on the facts and circumstances of the case it would be inequitable for the court to award the relief to the plaintiff. These are, however, equitable considerations and could scarcely be imported when there is a clear and unambiguous provision of law which

entitles the plaintiff to the relief claimed by him.... No such equitable considerations can be imported when the terms of Section 72 of the Indian Contract Act are clear and unambiguous.

17. We take this judgment of the Supreme Court to hold that a person, who has paid money to another by mistake, be it of fact or law, is entitled to get back the money and his title to get back the money may, however, be lost to him on account of certain circumstances like estoppel, waiver, limitation or the like. No equitable consideration can take away the title to the refund of the money. The terms of Section 72 of the Contract Act are plain enough for disregarding any suggested obstacle to the payers having no right to the refund. His right exists. He may not be able to enforce it on account of certain conduct of his like that of estoppel, waiver or having taken no action to enforce his right and the period of enforcing the right having elapsed.

18. The considerations urged in this case are not of this kind. The assessee made no representation to the State and the State, in no way, acted to its detriment as a result of any representation. He made no such promise which made the State alter its position. There is no limitation for his claiming the refund under the Sales Tax Act.

19. It is not correct to say that the assessee collected the tax from the customer as an agent of the State. The Sales Tax Act in a way ignores the customer altogether. Section 3 of the Act makes a dealer liable to the payment of the tax on the basis of his turnover of the previous year. There is no provision in the Act, which says that the customer will have to pay a sales tax at such and such rate. There is not even a provision to the effect that the dealer shall charge this amount from the customer. Section 8-A (2) of the Act prohibits an unregistered dealer from realising any tax as such on sale of goods from the purchaser. A registered dealer is not so prohibited, but he too is not bound to realise the tax from his purchaser. In case, however, he does realise the tax from his purchaser, Sub-section (3) of Section 8-A requires him to act in a certain manner. He is required to issue a signed cash memo showing separately the price for which the goods are sold and the amount realised as tax from the purchaser. He is required to keep a counterfoil and to maintain a true and correct account of all moneys realised by him as tax in the prescribed manner. We do not agree with the contention of the Commissioner of Sales Tax that the dealer collects this amount from the customer under the authority given to them under Sub-section (3) of Section 8-A. This sub-section gives no authority to realise it. The authority, if any, is a general authority of a dealer to charge what he likes from his customer. It is only when he realises the tax as a tax from his purchaser that he has to comply with the requirements of Sub-section (3).

20. The other question, that it would be inequitable to make a gift of this money to the assessee when it is not possible for him to refund it to the customer, is not material. We have already quoted from the judgment of the Supreme Court that any equitable consideration has no place in determining the rights of the

assessee to get back his tax and no such consideration can certainly take away the right which the assessee otherwise possesses. Further, it may be said that it is not possible to say as a fact that the assessee will not be able to refund the realised tax to the customers. The taxes have been realised on forward transactions and it is likely that a record has been maintained of these transactions. It cannot be denied that the customer has a right to a refund of the money from the assessee, and the question whether his claim now would be barred by time is, to say the least, highly controversial.

21. The third circumstance, i.e., the fact that the assessee had realised tax from the customer and has not suffered any loss, is not any reason to disentitle the dealer-assessee from getting the refund to which he is entitled. If we agree with this contention, it would mean that the right given to a person u/s 72 of the Contract Act is not a plain right to a refund of the money in case it is paid by mistake but is a right to get back the money only when he has not suffered any loss on account of that payment. This would mean adding something to Section 72 of the Contract Act and will, in every case, lead to a consideration of the original source from which the person paying tax got the money. Further, this is a circumstance which goes to the right of a person to the refund of money he had paid under a mistake and is not a circumstance which should disentitle him, if he is entitled, to a refund. It is significant to mention in this connection that the person who gets the money, which he is not entitled to get, has no right to it and cannot retain it unless the person who originally paid it under a mistake had lost his right to get it back. As we have already stated above, the legal liability to pay the tax is of the dealer and he is bound to pay the tax even though he may not have recovered it from the customer. The dealer-assessee thus pays his own money to the State Government as tax and he would thus suffer a loss if the money is not refunded to him, even though he may have wrongly realised it from the customer.

22. Lastly, we have to consider the effect of the provisions of Section 8-A(4) of the Act, assuming it to be a valid enactment. Section 8-A is-

8-A. (1) Any dealer (hereinafter called "registered dealer" may get himself registered under this section and, for that purpose, shall submit an application to the assessing authority in such manner, within such period and accompanied by such annual fee not exceeding rupees ten as may be prescribed.

(2) No person who is not a registered dealer shall realise any tax as such on sale of goods from the purchasers.

(3) Notwithstanding anything contained in Section 12, any registered dealer who realizes tax as such on sale of any goods from the purchaser, shall issue a cash memo, signed by the dealer or his servant, manager or agent, to the purchaser showing separately the price for which the goods are sold and the amount realized as tax from the purchaser and shall keep a counterfoil duly signed and shall further maintain a true and correct account of all moneys realized by him as

tax in the prescribed manner.

(4) Without prejudice to the provisions of Clause (f) of Section 14, the amount realized by any person as 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 realized exceeds the amount payable as tax in respect of that sale or if no tax is payable in respect thereof.

23. The contention of the learned Advocate-General is that the assessee realised the tax from the customers in connection with the forward transaction treating such transaction as a sale and that now that it had been held that a forward transaction does not amount to a sale and that no tax could be assessed on its basis, the dealer had to pay the amount of such tax realised in the Treasury. We are of opinion that what Sub-section (4) contemplates to be deposited is the amount which a person collects as tax on a transaction which is in reality a sale transaction and, not what he collects as a tax on a transaction treating it to be a sale transaction. The expression "as tax on sale of any goods" simply means that the amount realised should be realised as a tax. This is clear from the later expressions in the sub-section which deal with the circumstances in which such realisations are to be deposited in the Treasury. They are to be deposited when the amount realised is in excess of the amount payable as tax in respect of that sale or if no tax is payable in respect thereof, i.e., in respect of that sale. If the transaction in connection with which the amount had been realised does not amount to a sale the later contingencies which require its deposit will not materialise and it must follow that the reference to realisation as tax on sale of any goods must be to realisation as tax in respect of a sale of goods and not in respect of any transaction taken to be a sale even when it is not a transaction of sale. When the Supreme Court has held that it was ultra vires of the U.P. Legislature to enact that the expression "sale" includes forward transaction, it must follow that that ultra vires provision never existed in the Act and that therefore a forward transaction never amounted to a sale. In this view of the matter, the amount realised by a dealer-assessee as tax from a customer in connection with a forward contract cannot be said to be an amount realised as tax on sale of any goods and therefore such an amount is not covered by the provisions of Sub-section (4) of Section 8-A of the Act.

24. In view of our opinion about the applicability of Sub-section (4) of section 8-A of the Act, we need not express any opinion on the question with respect to the competence of the U. P. Legislature to enact this sub-section.

25. We therefore answer the re-formulated question No. 1 (a), (b) and (c) in the affirmative to the effect that the tax deposited by a dealer on forward transaction is refundable. We give no answer to question No. 2 in view of what we have said above. Our answer to the first part of question No. 3 is that Section 8-A (4) of the U.P. Sales Tax Act is not applicable in the circumstances of the case. We order the Commissioner, Sales Tax, U.P., to pay the costs of the assessee which

we assess at Rs. 500.