

(2014) 09 KAR CK 0010

In the Karnataka High Court

Case No : Writ Appeal No. 31357/2013 (T-KST)

Shantadurga Petro Chemicals

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 08-09-2014

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 18

Citation : (2014) ILR 4962

Hon'ble Judges : Ram Mohan Reddy, J;B. Manohar, J

Bench : Division Bench

Advocate : Pramod S. Yadawad and N.G. Rasalkar, Advocate for the Appellant;
C.S. Patil, Government Advocate, Advocate for the Respondent

Judgement

Ram Mohan Reddy, J.—Accepting the cause shown, the delay of 102 days in filing the appeal is condoned. I.A. I/14 is allowed.

2. Though this appeal is listed for preliminary hearing, with the consent of the Learned Counsel for the parties, is finally heard and disposed of by this order.

3. This intra Court appeal is filed by the unsuccessful petitioner calling in question the Order dated 1st August, 2013 of the Learned Single Judge dismissing W.P. No. 31756/2008.

4. Facts briefly stated are; appellant, a trader registered under the Karnataka Sales Tax Act, 1957 (for short "KST Act") purchased furnace oil for Rs. 17,08,235/- inclusive of 15% tax during the assessment year 2002-03 from M/s. Tata Power Company Limited, Kanabaragi, Belgaum, who remitted the amount collected as tax to the Commissioner of Commercial Taxes. The Deputy Commissioner of Commercial Taxes by assessment order dated 30.12.2004 forfeited to the Government Rs. 2,58,013/- representing 11% in excess of 4% tax collected by M/s. Tata Power Company Limited.

5. Appellant filed its return for the assessment year 2002-03 disclosing receipts with resale tax at 1.5% on re-sale of furnace oil and the deposit of the tax

component with the Commissioner. The Assessing Officer by Order dated 13.6.2006 accepted the said return.

6. Appellant on coming to know of the Order dated 30.12.2004 of forfeiture filed an application in Form 51 under Rule 20-B(1)(a) of the KST Rules, 1957, (for short "KST Rules") read with Section 18AA(4) of the KST Act for refund of excess tax collected from it and forfeited to the State under Section 18AA(3).

7. The Commissioner of Commercial Tax by Order dated 5th September, 2008 (Annexure-G) held that the appellant passed on the burden of the amount paid as excess tax to M/s. Tata Power Company Limited and refund would amount to unjust enrichment, in the light of the observations of the Apex Court in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, . That order when called in question in W.P. No. 31756/2008, the Learned Single Judge extracting paragraph-108 of the opinion in *Mafatlal Industries case*, accepted the reasoning of the Commissioner to dismiss the petition by the order impugned.

8. Learned Counsel for the appellant submits that the Commissioner recorded an inferential finding that the appellant passed on to its customers, the excess tax of 11% collected by M/s. Tata Power Company Limited and forfeited to the State in the absence of proved facts. According to the Learned Counsel, M/s. Tata Power Company Limited, on the sale of used furnace oil collected excess tax of 11% from the appellant in-contravention of Section 18 of the KST Act and having remitted the entire amount so collected to the Assessing Authority within the time prescribed and since forfeited to the State by Order dated 30.12.2004, the appellant is entitled to refund of Rs. 1,86,817/- representing 11% of Rs. 17,08,235/-. Learned Counsel hastens to add that appellant's return for the assessment year 2002-03 disclosing true and correct account of the trading business of purchase of furnace oil from M/s. Tata Power Company Limited by paying tax at 15% though liable to 4% and resale of the very same oil by collecting resale tax at 1.5% and remitting it, the Commissioner was not justified in recording a finding that the appellant having posted profits during the assessment year 2002-03 leads to the inference that the applicant had undoubtedly passed on the burden to its customer and so refund of the excess tax paid is unavailable.

9. Learned Government Pleader seeks to sustain the order of the Commissioner as well as that of the Learned Single Judge as being well merited, fully justified and not calling for interference. According to the Learned Government Pleader, appellant having not suffered any loss or any prejudice caused to him is disentitled to a refund of the excess tax, regard being had to the observation in *Mafatlal Industries case*. In addition, it is submitted that the Authority having noticed that used furnace oil purchased by the appellant when refined brought about a new product, the Assessing Authority was justified in observing that the new product attracted tax at 15%, hence, there was justification to decline refund of the excess tax paid.

10. Having heard the Learned Counsel, perused the pleadings and examined the orders impugned, the question for decision making is:

"Whether in the facts and circumstances, more appropriately, the collection of 11% tax in excess of 4% on sale of used furnace oil by M/s. Tata Power Company Limited, from the appellant during the assessment year 2002-03, and remitting it to the Commissioner under Section 18AA of the KST Act, since forfeited to the State by order dated 30.12.2004 of the Deputy Commissioner of Commercial Taxes, and the resale of the used oil by collecting resale tax at 1.5% by the appellant from its customers, the Commissioner of Commercial Tax, was not justified in rejecting the appellant's claim for excess tax refund of Rs. 1,86,817/- representing 11% of Rs. 17,08,235/- the value of used furnace oil purchased, on the premise of unjust enrichment by inferring that the "burden" was passed on to the customers of the appellant, in view of return posting profits for the assessment year 2002-03?"

11. (i) Sub-Section (1) of Section 18AA of the KST Act states that where any amount is collected by way of tax or purporting to be by way of tax from any person by any dealer in contravention of Section 18, whether knowingly or not, such dealer shall pay the entire amount so collected, to the assessing authority within twenty days after the close of the month in which such amount was collected, notwithstanding that the dealer is not liable to pay such amount as tax or that only a part of it is due from him as tax under the Act.

(ii) Sub-Section (3) provides that notwithstanding anything contained in the Act, or in any other law for the time being in force, any amount paid or payable by any dealer under sub-section (1) shall, to the extent it is not due as tax be forfeited to the State Government and be recovered from him and such payment or recovery shall discharge him of the liability to refund the amount to the person from whom it was collected.

12. Indisputably, appellant paid Rs. 1,86,817/- representing 11% tax in excess of 4% on Rs. 17,08,235/- being the value of used furnace oil purchased from M/s. Tata Power Company Limited during the assessment year 2002-03, which when remitted to the Assessing Authority and accounted in its return, the Assessing Officer by Order dated 30.12.2004 forfeited to the Government Rs. 2,58,013/- as excess tax collected in compliance with sub-Section (1) and (3) of Section 18AA of the KST Act.

13. Sub-Section 4 of Section 18AA of the KST Act reads thus:

"Where any amount is paid or recovered by or from any dealer under sub-section (1) or (3), a refund of such amount or any part thereof can be claimed from Government by the person from whom, it was realised by way of tax provided an application in writing in the prescribed form is made to the Commissioner, within two years from the date of the order of forfeiture. On receipt of any such application, the Commissioner shall hold such inquiry as he deems fit and if the Commissioner is satisfied that the claim is valid and admissible and that the

amount so claimed as refund is actually paid or recovered, he shall refund the amount or any part thereof, which is found due to the person concerned."

14. The prescription is in Rule 20B of the KST Rules, specifying Form No. 51 as relevant.

15. Appellant on coming to know of the Order dated 30.12.2004 forfeiting to the State the excess tax collected, filed application in Form No. 51 under Rule 20B of the Rules seeking refund of Rs. 1,86,817/- representing 11% of the total value of used furnace oil purchased and collected by M/s. Tata Power Company Ltd. Appellant thus complied with Section 18AA(4) of the KST Act, entitling the repayment, subject to the enquiry to be held by the Commissioner.

16. The Commissioner of Commercial Taxes, having regard to M/s. Tata Power Company Ltd., collecting tax at 11% in excess of 4% from the appellant on the sale of used furnace oil which the appellant resold to its customers at a price including resale tax at 1.5% framed the following question for decision making:

"With the above facts before us, the only issue that has to be resolved is: who has borne the tax burden - the applicant or its customers or purchasers. The Assistant Commissioner of Commercial Taxes, 6th Circle, Belgaum, along with his letter of 18.3.2005 has furnished the photo copy of the profit and loss account of the firm for the period from 1.4.2002 to 31.3.2003 and also photo copies of the sale invoices. Along with the application in Form-51 dated 10.01.2005 the applicant has furnished sale bill/invoices number-wise purchase details and also the photo copies of the sale invoices issued by the Tata Power Co. Ltd. I have carefully studied all the relevant documents found in the related filed."

17. On analysing the trading account of the appellant for the period from 1.4.2002 to 31.3.2003 the Commissioner observed that the appellant carried on one activity of purchase of lubricant and used furnace oil and resale of the same to its customers not incurring loss was liable to remit resale tax at 1.5%. Indeed the Commissioner made an observation that, had the applicant manufactured a new product out of the used lubricant oil or furnace oil, then the rate of tax on the oil sold by the applicant in the relevant year would have been 15%, while the appellant obviously did not manufacture oil, but processed the used oil and resold it to its customers as a second and subsequent sale, attracting 1.5% resale tax collected by the applicant.

18. The Commissioner's findings reads thus:

"The above facts bring out very clearly that the purchase cost of the used oil by the applicant included the sales tax paid by its to Tata Power Co. Ltd. had the applicant not included sales tax paid to the Tata Power Co. Ltd. in the selling price of the purified oil, then the applicant would have incurred loss. The very fact that the applicant made profit in that year as revealed in the trading account and also that it had not separately shown the tax amount while calculating the selling price, clearly goes to show that the tax amount paid by it to Tata Power

Co. Ltd., while purchasing the used oil was part of the selling price. In other words, the applicant had passed on the burden of the amount that he had paid as tax to the Tata Power Co. Ltd., to its customers."

19. Appellant submitted its return for the assessment year 2002-03 disclosing the statement of account over resale of the oil purchased from M/s. Tata Power Company Ltd., collection of resale tax at the rate of 1.5% and its remittance, which was accepted by the Assessing Authority. The fixing of selling price while trading in reselling furnace oil, is the prerogative of the appellant, which necessarily need not include the excess tax paid on purchase unless such a structuring is evident from the books of account maintained by the appellant. There being no dispute that the rate of resale tax was 1.5%, which the Commissioner observed that the appellant was justified in collecting the resale tax at 1.5%, nevertheless, the Commissioner applied the doctrine of unjust enrichment as observed by the Apex Court in *Mafatlal's* case, to deny the refund.

20. It is elsewhere stated that essential may be inferred if facts proved justified the inference. On the one hand, the Authority must not surmise and conjecture but on the other hand, may draw inference from proved facts so long as it is a legitimate inference. Regard being had to the aforesaid principle, the Commissioner, having noticed that the appellant did not manufacture a new oil from out of the used lubricant and furnace oil purchased from Tata Power Co. Ltd. during the assessment year 2002-03, in the absence of relevant material constituting substantial legal evidence of the fact that the sale price of the furnace oil, resold by the appellant was the same as the purchase price and the profit was none other than the excess tax paid, and that if the excess tax amount was not included in the resale price, appellant would have posted losses, there was no justification for the Commissioner to draw an inference that the applicant had passed on the "burden" to its customers. Such an inferential finding, in the circumstances is perverse and illegal.

21. In *Mafatlal Industries Ltd.*, case, the Apex Court observed that the doctrine of unjust enrichment is just and salutary, hence, no person can seek to collect the tax or duty from both ends, in other words, cannot collect duty from the purchaser at one end and also collect the same from the State on the ground that it has been collected from him contrary to law; the power of the Court is not meant for unjustly enriching a person; the doctrine is, however, inapplicable to State; the State represents the Country: and that no one can speak of the people being unjustly enriched. The Apex Court further observed that the tax collected without the authority of law shall not be refunded unless the claimant alleges and establishes that he has himself borne the burden thereof and that he has not passed on the burden to a third party and also that where the claimant has suffered not real loss or prejudice, having passed on the burden of the tax or duty to another person, it would be unjust to allow or decree his claims since it is bound to prejudicially affect the public exchequer.

22. The doctrine of unjust enrichment, in our considered view, has no application

to the facts and circumstances of the case, in view of the finding of the Commissioner in the order impugned, that the appellant collected 1.5% resale tax from its customers on resale of the furnace oil and therefore appellant did not pass on the burden of 11% excess tax collected by M/s. Tata Power Company Ltd., on the sale of oil, hence appellant, was entitled to refund of the excess tax paid and forfeited to the State.

23. The bill of cost disclosing resale tax at 1.5% collected from the customers of the appellant on the resale of the furnace oil when found to be true and correct, the appellant pleaded and established the claim for refund of the excess tax paid. In our considered view, Rs. 1,86,817/- representing 11% of the excess tax paid by the appellant, being an investment made by the appellant from out of its capital, if not refunded, would occasion serious prejudice.

24. In the circumstances, the conclusion of the Commissioner that the appellant "undoubtedly passed on the tax burden on to its customers and so, refund of the tax amount on the plea that it had paid the said amount to Tata Power Co. Ltd., would lead to unjust enrichment of the applicant" is perverse and unsustainable.

25. The order impugned without dwelling into the crux of the matter but skirting upon the surface of the lis and accepting as just and legal the conclusion arrived at by the Commissioner, is unacceptable.

In the result, this appeal is allowed.

The Order dated 1st August, 2013 in W.P. No. 31756/2008 is set-aside. The Order dated 5.9.2008 (Annexure-G) of the 2nd respondent/Commissioner of Commercial Taxes is quashed. The appellant's application in Form No. 51 under Rule 22B of the Rules read with Section 18AA(4) of the KST Act is allowed. A writ of mandamus shall ensue to the 2nd respondent to forthwith refund of Rs. 1,86,817/- to the appellant.