
(2010) 02 KAR CK 0025
In the Karnataka High Court
Case No : S.T.R.P. No. 21 of 2006

State of Karnataka

APPELLANT

Vs

Anjana Zarda Agencies

RESPONDENT

Date of Decision : 25-02-2010

Acts Referred:

Citation : (2011) 39 VST 525

Hon'ble Judges : K.L. Manjunath, J;B.V. Nagarathna, J

Bench : Division Bench

Advocate : T.K. Vedamurthy, High Court Government Pleader, for the Appellant;
B.P. Gandhi, for the Respondent

Final Decision : Allowed

Judgement

B.V. Nagarathna, J.—State has preferred this revision challenging the order dated May 31, 2005 passed in S.T.A. Nos. 1601, 1602, 1603 and 1604 of 2004 by the Karnataka Appellate Tribunal in Bangalore. The facts of the case are that the respondent who is a registered dealer under the provisions of the KST Act and is engaged in the sale of gutka, pan masala, jarda and other similar products had filed its returns and the assessments were completed for the years 1994-95 up to 1997-98. Pursuant to a decision of the apex court in the case of Kothari Products Ltd. Vs. Govt. of A.P., it was held that the State Government had no authority to impose sales tax on the sale of gutka. Thereafter, the assessing officer rectified the assessment orders u/s 25A of the Act and granted exemption from levy of tax on the sales turnover of gutka. However, the assessing authority had passed an order u/s 18AA of the Act forfeiting the tax paid by the respondent on the said product for the relevant period. The respondent being aggrieved by the said order passed u/s 18AA of the Act filed an appeal before the appellate authority which was dismissed confirming the order passed by the assessing authority. The said matter was carried in appeal before the Tribunal, which, by its order dated May 31, 2005 has allowed the appeals and thereby set aside the order passed by the assessing authority which was confirmed by the

appellate authority. Being aggrieved by the said order, the State has preferred this appeal raising the following questions of law:

1. In the facts and circumstances of the case, whether the Appellate Tribunal was right in holding that the authorities were not justified in forfeiting the tax amount u/s 18AA of the KST Act in the absence of the dealer not establishing the passing of the burden of tax to the customers?

2. Whether, in the facts and circumstances of the case, the sale price includes the tax element warranting the forfeiture of tax collected?

3. Whether, in the facts and circumstances of the case, the Appellate Tribunal was justified in not following the law declared by the apex court in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*,

2. We have heard the learned Government Pleader for the State and the learned counsel for the respondent-assessee.

3. It is submitted on behalf of the State that the assessment for the years 1994-95 to 1997-98 had attained finality and it was thereafter that the apex court had ruled in the matter of *Kothari Products Ltd. Vs. Govt. of A.P.*, That the State did not have power to levy tax on the said products. Therefore, in the matter of considering the exemption from levying of sales tax, the assessing authority is justified in passing an order u/s 18AA of the Act forfeiting the amount of tax because the said decision was rendered after the assessments had attained finality which order was rightly affirmed by the first appellate authority and the Tribunal was not justified in setting aside the said order which was resulted in loss of revenue to the State. He therefore submits that the Tribunal's order has to be set aside and the order of the assessing authority confirmed by the appellate authority has to be affirmed in this appeal.

4. Per contra, the learned counsel appearing for the respondent-assessee submits that the decision rendered by the apex court in *Kothari Products Ltd. Vs. Govt. of A.P.*, meant that the State has no authority whatsoever to levy tax on gutka and in fact even prior to the relevant assessment years in question tax was not levied or collected for the said product and for the relevant year also no tax was leviable and accordingly did not collect any tax. However, on compulsion, on account of the action by the intelligence wing of the Department the respondent-assessee out of its profits had deposited the amount towards sales tax on gutka and pursuant to the decision of the Supreme Court it was entitled for refund of the said amount. Hence the assessing authority and the appellate authority were not justified in passing an order u/s 18AA of the Act and the Tribunal was right in setting aside the said order and giving benefit to the respondent.

5. Having heard the counsel for the parties and on perusal of the material on record as well as the additional material filed by the counsel for the respondent, it is seen that for the assessment year 1993-94 no sales tax on gutka was not collected by the respondent. As far as the relevant assessment years are

concerned, viz., 1994-95 to 1997-98 also on perusal of the order of assessment it is noted that sales tax on gutka has not been collected by the assessee. However, when the position was such, the assessee nevertheless deposited amount of sales tax proportionate to the sales pursuant to the action initiated by the intelligence wing of the Department out of its profits. Pursuant to the decision of the Supreme Court in Kothari Products Ltd. Vs. Govt. of A.P., it became clear that the State was not at all entitled to levy sales tax on gutka and accordingly assessing authority was duty-bound to return the amount which was collected by way of sales tax from the assessee. It is under those circumstances that an application was made by the assessee which was allowed. But the assessing authority passed an order u/s 18AA of the Act forfeiting the amount paid as tax by the respondent. While passing the Order u/s 18AA of the Act, the Deputy Commissioner of Commercial Taxes has stated that:

It is seen from the assessment records and the verification report that the assessee-concern has not collected sales tax separately in the sale bills issued, but at the same time it cannot be ruled out that the value of gutka shown in the sale bills is inclusive of admissible tax element resulting in indirect unjust enrichment. Therefore if this amount is not taken to Government u/s 18AA of the KST Act, it would definitely amounts to unjust/undue enrichment as the purchaser/consumer has paid tax and the Government is not levying such tax.

6. Before an order of forfeiture can be made u/s 18AA of the Act, it is necessary to have material to show that there has been unjust enrichment or circumstances which are relevant for making an order of forfeiture should be clear and such material has to be on record before the concerned authority. In the face of the aforesaid opinion expressed by the Deputy Commissioner of Commercial Taxes, wherein the said authority is not sure as to whether sales tax was collected at all by the assessee and as to whether sale bills were inclusive of admissible tax, he could not have concluded that the assessee had an unjust enrichment and therefore order for forfeiture. In our view, the same cannot be held to be just and proper as the said order is based on mere surmises and conjectures.

7. When such was the basis for the order passed by the Deputy Commissioner of Commercial Taxes, it is not known as to under what basis the Tribunal came to the conclusion that there has to be refund of tax paid by the respondent for all the four years. There was no material even before the Tribunal with regard to the question as to whether there had been any collection of tax by the assessee or as to whether it was entitled to any refund. Under the circumstances, we think it is just and proper to remand the entire matter to the assessing officer reserving liberty to the respondent to furnish all relevant materials before the assessing officer so that on consideration of the same, appropriate order can be passed u/s 18AA of the Act in accordance with law. Therefore, without answering the questions of law raised in this revision petition, matter is remanded to the assessing officer and the petition is allowed accordingly.