

(1992) 07 KAR CK 0013

In the Karnataka High Court

Case No : S.T.R.P. No. 28 of 1989 connected with S.T.R.Ps. No's. 21, 23, 24, 36 and 37 of 1989

State of Karnataka

APPELLANT

Vs

Begees Foods (P.) Ltd. and another

RESPONDENT

Date of Decision : 01-07-1992

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 18, 18 A, 5, 8

Citation : (1993) 88 STC 451

Hon'ble Judges : R. Ramakrishna, J;K. Shivashankar Bhat, J

Bench : Division Bench

Judgement

K. Shivashankar Bhat, J.—It is unnecessary to narrate the facts as they are not in dispute. The question raised by the respective parties pertain to section 18 of the Karnataka Sales Tax Act, 1957 ("the Act" for short).

2. The assessees are all new industrial units and there is also no dispute that they are eligible to the benefits conferred by a notification issued u/s 8A of the Act. The notification is dated 15th October, 1981. The relevant para of the said notification reads thus :

"Notification, Bangalore, dated 15th October, 1981 S.O. 2297. - In supersession of Government Orders numbers : 1. CI 58 FMI 69, dated 30th June, 1969 2. CI 87 FMI 76, dated 8th August, 1975 3. FD 396 CSI 74, dated 11th August, 1975 4. CI 183 FMI 75, dated 17th November. 1975 5. CI 141 FMI 76, dated 12th January, 1977

3. In so far as they authorise the refund of sales tax on raw materials to new industries and all other Government Orders previously issued on the subject and in exercise of the powers conferred by section 8A of the Karnataka Sales Tax Act, 1957 (Karnataka Act No. 25 of 1957), the Government of Karnataka, having considered that it is necessary in the public interest so to do, hereby make a reduction of fifty per cent, with effect from 1st November, 1981, in the rate of

tax or taxes payable under the said Act, on the turnover of goods manufactured and sold by all new industrial units as defined hereafter, for a period of five years from the respective date of commencement of their commercial production, subject to the following restrictions and conditions, -

(i) the total quantum of sales tax concession available to a new industrial unit during each accounting year within the aforesaid period of five years by way of reduction in the rate of tax or taxes leviable on the finished products of such unit, under this notification as also under Notification No. FD 164 CSO 79 (II) dated 16th October, 1981, granting similar concessions under the Central Sales Tax Act, 1956, shall be restricted to ten per cent of its total investment in plant and machinery at the time of commencement of its commercial production; and

(ii) The unit would, however, be permitted to carry forward the unavailed portion of the concession, if any, from year to year within the said five year period, so however that the total concession in respect of Karnataka sales tax and Central sales tax available to the unit over the entire five year period does not exceed fifty per cent of its total investment in plant and machinery at the start of commercial production."

4. There is also no dispute that the assesseees collected the taxes from their customers at the full rate specified u/s 5 of the Act; further, they paid only 50 per cent of the tax so collected by virtue of the aforesaid notification. Since the benefit of the tax concession was not passed on to the customers by the assesseees the penalty proceedings were initiated u/s 18A of the Act. The explanation offered by the assesseees was that the benefit of the tax concession need not be passed on to the customers because the purpose of the notification was to grant incentive benefit to the industrial units of the assesseees, for which purpose a decision of the Division Bench of this Court in Arpee Electrical Pvt. Ltd. v. Finance Secretary (W.P. No. 15252 of 1983 dated 9th June, 1986) was relied. While interpreting the above notification the Bench observed as follows :

"It will be seen therefrom that the benefit of the concession afforded under the Notification dated October 16, 1981, has been extended to small-scale industries which have gone into commercial production between April 1, 1975 and March 31, 1981. It is not in dispute and indeed cannot be disputed that the petitioner has commenced production from January 18, 1979 and therefore is entitled to the benefits conferred under the said notification. We fail to understand how the Government could have insisted that the eligibility to obtain the concession could be only when the industrial unit could charge for and collect tax at half of the prescribed rate of tax. That is not the condition which has been imposed under the aforesaid notification. The incentive is meant for the industrial unit and we are sure that it is not for the benefit of the consumer. If the intention was to benefit the consumer, there were other and better ways by which the State Government could have extended the same. Nothing more need to be added in this context."

5. The explanation of the assesseees were not accepted by the several assessing authorities resulting in the levy of penalty on each of them. Before the appellate authority it was contended on behalf of the assesseees that there was no contravention of section 18 to attract section 18A, because the assesseees have not collected any tax in excess of the tax at the rate specified u/s 5 and if at all the collection of tax was at the rate in excess of the rate envisaged by the aforesaid notification and that there is a distinction between the tax specified u/s 5 and the tax envisaged by the notification issued u/s 8A. In each of the case the assesseees concerned made an offer that the amount collected in excess of the tax envisaged by the aforesaid notification would be refunded to the concerned customers and therefore the penalty provision u/s 18A was not to be attracted. However, the appeals were rejected by the various appellate authorities.

6. The assesseees were successful before the Karnataka Appellate Tribunal. The Appellate Tribunal relied on the decision of this Court in Arpee Electrical Pvt. Ltd.'s case and held that the benefit of the notification was not extended to the customers and the benefit of the tax concession could be availed of by the industrial unit concerned by retaining the difference between the normal rate of tax and the concessional rate of tax after collecting the full rate from the customers.

7. The learned Government Advocate very seriously contended before us that this is a case of an attempt to enrich themselves by the concerned assesseees by projecting as if the tax leviable is the one prescribed u/s 5 and that their conduct does not entitle any of the assesseees for any liberal consideration. According to the learned counsel, the purpose of the notification is to enable the concerned industrial unit to compete with the other old establishments, which requires the charging of a lower price, which in turn could be achieved by charging a lower rate of tax. The purpose of the notification is not to grant a direct incentive to a new industrial unit by permitting the industrial unit to retain an amount which should belong to the State Government by way of tax. The learned counsel brought to our notice the decision of the Supreme Court in Amrit Banaspati Co. Ltd. and another Vs. State of Punjab and another, Though the facts of the said decision pertain to the application of doctrine of promissory estoppel, the Supreme Court had an occasion to refer to the purpose for which tax concessions are given to the dealers and entrepreneurs. At page 505 of STC (page 1082 of AIR) the Supreme Court observed :

"Exemption From tax to encourage industrialisation should not be confused with refund of tax. They are two different legal and distinct concepts. An exemption is a concession allowed to a class or individual from general burden for valid and justifiable reason. For instance tax holiday or concession to new or expanding industries is well-known to be one of the methods to grant incentive to encourage industrialisation. Avowed objective is to enable the industry to stand up and compete in the market. Sales tax is an indirect tax which is ultimately passed on to the consumer. If an industry is exempt from tax the ultimate

beneficiary is the consumer. The industry is allowed to overcome its teething period by selling its products at comparatively cheaper rate as compared to others. Therefore, both the manufacturer and consumer gain, one by concession of non-levy and other by non-payment. Such provisions in an Act or notification or orders issued by the Government are neither illegal nor against public policy."

8. Thereafter there is an observation that no law can be made to refund tax to a manufacturer realised under a statute. But that was in the context of the doctrine of promissory estoppel invoked by the individual manufacturer. The observation of the Supreme Court referred above clearly brings out the purpose behind a tax concession granted to a newly established industrial unit. By the tax concession both the manufacturer and the consumer gain, one by concession of non-levy and the other by non-payment of tax. The object of the concession is to confer a benefit not only on the manufacturer but also on the consumer. The manufacturer is able to compete with the other established units because he could charge a lower rate of tax and to that extent the price charged by him to the goods manufactured by him will be lower when compared to the price that will be charged by the established industrial units.

9. The learned counsel for the assesseees, however, contended that the decision of this Court in Arpee Electrical Private Ltd. has become final and was being acted upon all these years and the assesseees cannot be found fault with, for following the aforesaid decision and taking advantage of the observation made therein.

10. Before proceeding further we have to express our view that the observation made in Arpee Electrical Private Ltd. by a Division Bench of this Court seems to be not in accordance with the principles enunciated by the Supreme Court which we have quoted above. However, only because of that we don't think the assesseees should fail in their plea for the relief against the levy of penalty. We are also not expressing our view as to whether section 18 is attracted or not and whether section 18 is confined only with the rate of tax collected in excess of the rate specified u/s 5. These cases can be disposed of on an interpretation of section 18A and in the light of the observation made by this Court in Southern Founders Vs. State of Karnataka and another,

11. Section 18 bars the collection of tax by the dealers in excess of the tax at the rate levied u/s 5 of the Act. In such a situation the person who contravenes the bar imposed by section 18 is liable to be penalised u/s 18A. In Southern Founders Vs. State of Karnataka and another, after referring to the decision of the Supreme Court in R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, and a few other decisions it was held that a dealer cannot be held to have collected the tax illegally if he makes a serious attempt to refund the excess collected by him to the customers. In such a situation the conduct of the dealer in attempting to refund or to make a provision for refund to the customers of the excess collection would certainly be a very relevant factor while considering the question of imposing the penalty.

12. Section 18A being a penal provision it is attracted only when the conduct of the person charged with the contravention actually requires to be dealt with by penalising him; the bona fides and the conduct of the assessee are certainly very relevant factors. This aspect also has been referred in the aforesaid decision rendered in Southern Founders Vs. State of Karnataka and another, The two factors will have to be considered at this stage : (i) In all these cases, the assessees were led to believe that they were entitled to retain the excess tax collected by them because the notification was meant to be exclusively for their benefit and not for the benefit of the consumers; and (ii) all the assessees have undertaken to make a serious attempt to refund the excess collection to their respective customers and thereby have exhibited a conduct not to retain the amount collected and therefore there is no "collection" of the tax in contravention of section 18 read with section 18A of the Act.

13. In view of the above, we are of the view, that the conclusion reached by the Appellate Tribunal will have to be upheld. All the revision petitions are consequently dismissed.

14. Petitions dismissed.