

(1991) 04 KAR CK 0045

In the Karnataka High Court

Case No : S.T.R.P. No"s. 11, 12, 13 and 14 of 1988

State of Karnataka

APPELLANT

Vs

V. Subramanian

RESPONDENT

Date of Decision : 04-04-1991

Acts Referred:

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

Citation : (1992) 84 STC 230

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

Bench : Division Bench

**Advocate : H.L. Dattu, High Court Government Pleader, for the Appellant;
Angadi for B.V. Katageri, for the Respondent**

Judgement

K. Shivashankar Bhat, J.—The State has come up with these revision petitions in S.T.R.P. Nos. 11 to 14 of 1988. The matter pertains to the interpretation of section 18-A of the Karnataka Sales Tax Act, 1957 (for short "the Act"). The assessee manufactures and sells copper sulphate. Under the Second Schedule to the Act, there are two entries which compete with each other to assess copper sulphate. Entry No. 79 refers to "chemicals of all kinds" while entry No. 117 refers to "insecticides and pesticides". The rate of tax on the sale of chemicals of all kinds is quite higher than the rate of tax applicable to the sale of insecticides and pesticides.

2. The assessee throughout has been contending that the copper sulphate sold by the assessee falls within entry No. 117 while the Revenue has been contending that the subject was covered by entry No. 79. In the year 1963 there was a circular issued by the Commissioner under the Act stating that the copper sulphate was covered by entry No. 79. The assessee protested and has been agitating with the Government insisting that the copper sulphate should be taxed only under entry No. 117.

3. However, in the meanwhile the assessee continued to collect tax at the rate applicable to entry No. 79, and in all its monthly returns the said collection was

shown and appropriate payments were made to the State Government. There is no dispute that the assessee has paid the tax under entry No. 79. Since the assessee could not persuade the State Government to bring the subject-matter under entry No. 117, the assessee filed writ petitions in the year 1976 seeking the quashing of the circular issued by the Commissioner. The said writ petitions (W.P. Nos. 3163 and 3322 of 1976) were disposed of on September 29, 1983. This Court quashed the aforesaid circular issued by the Commissioner to the extent that the said circular included copper sulphate as a heavy chemical. It was declared that copper sulphate was a subject falling within entry No. 117 as "insecticides". The authorities under the Act were required to regulate the levy and collection of sales tax on this basis. Thereafter the Revenue assessed the assessee under entry No. 117. The balance of amount with the State had to be refunded to the assessee. At this stage, the assessing authority thought that the assessee should have made provisions for refunding the excess collection of tax to its customers, and assessee having collected the tax at a higher rate treating the goods as falling under entry No. 79, section 18 of the Act stood contravened. Consequently, proceedings were initiated u/s 18-A on the ground that the assessee contravened the provisions of section 18.

4. The assessee contended that the collection of the tax under entry No. 79 was by abundant caution, since there was a circular issued by the Commissioner under the Act which was binding on all the authorities and the collection was not by way of any misuse or contravention of the provisions of the Act. The assessing authority insisted that the assessee should undertake to refund the excess collections to the customers from whom the excess tax has been collected.

5. The assessee went up in appeal to the Deputy Commissioner who also dismissed the appeal on the ground that the assessee had not effected any refund of the tax collected from the various customers from whom excess amounts had been collected and that the assessee was not prepared to file an undertaking that the amount of tax collected would be refunded to the customers concerned. The assessee approached the Appellate Tribunal. The Appellate Tribunal accepted the appeals filed by the assessee. The Appellate Tribunal opined that in view of the stand taken by the Revenue that tax is payable at 8 per cent, the assessee could not have taken the risk of collecting the tax at a lower rate and accordingly collection of tax at the higher rate was by way of abundant caution. Consequently, the levy of penalty was not justified.

6. Mr. Dattu, the learned counsel for the Revenue, contended that the conduct of the assessee in not even agreeing to refund the excess collections to its customers itself is an indication that the assessee collected the tax at a higher rate in contravention of section 18; if actually the assessee has collected the tax at a higher rate by abundant caution, there was nothing in the way of the assessee agreeing to refund the said excess to the customers and therefore, it is a clear case of contravention of section 18.

7. Section 18-A read with section 18 are enacted to prevent the dealers from

misusing the provisions of the Act and collecting amounts by way of tax which are not lawfully leviable. The purpose certainly is to deter the dealers from enriching themselves by purporting to act under the Act. Section 18-A is a penal provision. It can be applied only when guilty mind is established. The question is whether the assessee sought to misuse the provisions of the Act and collected any tax which was not lawfully leviable and whether the assessee collected a higher amount by way of tax than the one lawfully leviable with full knowledge that such a collection was illegal. If there was any doubt about the rate applicable or the leviability of the tax in respect of a particular item, then such an intention on the part of the assessee to enrich himself by collecting a non-refundable tax, cannot be inferred. In the instant case, the assessee was, no doubt throughout agitating that the tax should be at the most leviable under entry No. 117. But that by itself is not a ground to hold that the assessee collected the tax from the assessee's customers by applying entry No. 79 solely on the ground of enriching itself. The idea certainly was to collect amount by abundant caution, so that, in case ultimately the assessee's contention fails, the assessee should not fall short of funds to make the payments or suffer any loss. Mr. Dattu's contention that the assessee should have agreed to refund the amount to the customers, no doubt is a salutary proposition, but that by itself cannot be a ground to impose penalty u/s 18. The State if so desires could have sought a further provision in the Act compelling the dealers to refund the excess collection of amount to the customers as and when the court declares the correct rate of tax, imposable under the Act failing which an appropriate penalty provision may be enacted. It is also possible for the State to provide the vesting of such funds in the State Government as a trustee for the benefit of the concerned customer who may receive refund directly from the State Government when the law is declared in an appropriate case about taxability of a turnover of a particular goods. The instant case is almost similar to the facts involved in The State of Tamil Nadu Vs. Sasman and Company, The assessee in the said case also had to collect a higher rate of tax pending the question raised by the assessee being finally resolved and ultimately the assessee succeeded about the rate of tax applicable before the Appellate Tribunal. When the excess tax had to be refunded to the assessee, the Revenue proceeded to impose penalty on the assessee for collecting the higher tax which was held to be totally unjustified by the Madras High Court. The relevant observations are found at page 163, which is as under :

"Thus, on the facts and the circumstances of this case, the penalty is sought to be levied on the assessee for approaching the Tribunal and getting a decision that the turnover relating to the sales of cloth bags is taxable only at 2 per cent. The department having right through proceeded on the basis that the rate of tax on the sale of cloth bags is only at 4 per cent and having resisted the assessee's claim that it is taxable only at 2 per cent and having driven the assessee to go before the Tribunal to get a decision and the Tribunal having given a decision in favour of the assessee though for the earlier years, it cannot now turn round and

say that the assessee has wrongly collected the tax at 4 per cent instead of 2 per cent. There appears to be a mutual mistake as to the rate of tax payable on the sale of cloth bags. Even the department has been proceeding on the basis, till the Tribunal has rendered its decision on 24th November 1976, that the sale is taxable only at 4 per cent. When the assessing authority himself was of the view that the turnover relating to cloth bags is taxable at 4 per cent, the assessee cannot be said to have intentionally violated the provisions of the Act. On the special circumstances of this case, we are inclined to agree with the Tribunal that the penalty provisions will not stand attracted in this case."

Mr. Dattu having realised our approach to the problem before us, submitted that liberty should be preserved to the State to refuse the refund of the tax collected already on the ground of unjust enrichment on the part of the assessee. This is not a matter before us. We are only concerned with the proceeding u/s 18-A of the Act. Therefore, we do not express any opinion on the submission made by Mr. Dattu.

Consequently, these petitions are dismissed. No costs.

8. Petitions dismissed.