

(1972) 10 SC CK 0047

In the Supreme Court Of India

Case No : Civil Appeals Nos. 2215 To 2217 Of 1969

State of Mysore and Others

APPELLANT

Vs

Mallick Hashim and Co.

RESPONDENT

Date of Decision : 30-10-1972

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 15, 5(4)
Mysore Sales Tax Act, 1957 — Section 5(4)

Citation : AIR 1972 SC 1449 : (1974) 3 SCC 251 : (1973) 31 STC 358

Hon'ble Judges : P. Jaganmohan Reddy, J;K. S. Hegde, J;H. R. Khanna, J

Bench : Full Bench

Advocate : C.K. Daphtary and I.N. Shroff, in C.A. No. 1927 of 1927, for the Appellant; V.C. Mahajan and R.N. Sachthey for respondent No. 1 and M.C. Setalvad, N.S. Das Bahl and P.C. Bhartari for respondent No. 1 in C.A. No. 19, for the Respondent

Final Decision : Dismissed

Judgement

A.R. Somnath Iyer, J.—These three matters raise the same question, and so could be disposed of by a common judgment. The petitioner in W. P. Nos. 417 and 418 of 1967 is a dealer in hides and skins. The petitioner in S. T. R. P. No. 43 of 1967 is a dealer in copra and coconuts. Their turnover during the relevant assessment years was subjected to sales tax under the Mysore Sales Tax Act, but the goods which were purchased by these two dealers and which were declared goods within the meaning of Section 5(4) were subsequently sold in the course of inter-State trade and commerce. So they claimed a refund of the tax which had been paid by them. That refund is what is claimable under the proviso to Section 5(4) of the Mysore Sales Tax Act, which reads:

5. (4) Notwithstanding anything contained in Sub-section (1) a tax under this Act shall be levied in respect of the sale or purchase of any of the declared goods mentioned in column (2) of the Fourth Schedule at the rate and only at the point specified in the corresponding entries of columns (4) and (3) of the said

Schedule on the dealer liable to tax under this Act on his taxable turnover of sales or purchases in each year relating to such goods :

Provided that where tax has been paid in respect of the sale or purchase of any of the declared goods under this sub-section and such goods are subsequently sold in the course of inter-State trade or commerce, the tax paid under this Act shall be refunded to such person in such manner and subject to such condition as may be prescribed.

2. In the exercise of the rule-making power created by Section 38 of the Act, Government made Rule 39-A which prescribed the manner in which and the conditions subject to which the refund directed by the proviso to Section 5(4) could be made. The relevant part of that rule reads:

39-A. Refund of tax in the case of certain types of sales of declared goods.-(1) The tax levied under Sub-section (4) of Section 5 in respect of the sale or purchase inside the State of any goods specified therein shall, if such goods are sold in the course of inter-State trade or commerce, be refunded in the manner and subject to the conditions prescribed in this rule to the dealer who has made the inter-State sale.

(We have omitted from Sub-rule (1) the concluding part of it which was struck down by this Court in *Munshi Abdul Rahiman & Bros. v. Commercial Tax Officer* [1967] 20 S.T.C. 89.

(2) Every such dealer who claims a refund under the rule, shall within the time allowed in Sub-rule (3), submit to the assessing authority a statement in Form 4-A.

(3) The statement referred to in Sub-rule (2) shall be submitted so as to reach the assessing authority not later than the date on which the return of turnover for the period in respect of the sale in the course of inter-State trade or commerce referred in Sub-rule (1) is due :

* * * 3. The petitioner in W. P. Nos. 417 and 418 of 1967 which is a firm called Mallick Hashim and Company did not present any application in form 4-A to which Rule 39-A(2) refers, and the petitioner in S. T. R. P. No. 43 of 1967, which is another firm did make an application in form 4-A, but did not make it within the time prescribed by Sub-rule (3). So the Commercial Tax Officer refused the refund sought by them. From that order the petitioner in S. T. R. P. No. 43 of 1967 preferred two unsuccessful appeals to the Deputy Commissioner and the Sales Tax Appellate Tribunal. The petitioners ask us to quash those orders by which the refund claimed by them was disallowed and ask for a mandamus to the Commercial Tax Officer that he should make the refund claimed by them.

4. It is undisputed that the declared goods which were purchased by the petitioners were subsequently sold by them in the course of inter- State trade or commerce. So they became entitled to the refund of the tax paid by them on their purchases inside the State under the proviso to Section 5(4) of the Mysore

Sales Tax Act, whose provisions are similar to the provisions of Section 15(b) of the Central Sales Tax Act. That the goods purchased by the petitioners and subsequently sold by them are declared goods within the meaning of Section 5(4) of the Mysore Sales Tax Act is also not controverted. So the only question which arises for decision is whether the Commercial Tax Officer could have refused the refund on the ground that no application was presented by the petitioners before us within the time allowed by Rule 39-A(3).

5. Mr. Srinivasan appearing for the petitioners asks us to say that that part of Rule 39-A which prescribes the form and the period of limitation within which the claim should be made is not authorised by the proviso to Section 5(4) of the Mysore Sales Tax Act. We are of the opinion that he is right in making the submission that that part of Rule 39-A, which prescribes the period of limitation, was beyond the competence of Government.

6. The proviso to Section 5(4) consists of two parts. The first part creates an absolute claim to a refund which cannot be refused. The second authorises the prescription of the manner and the condition subject to which that refund could be made. There is nothing in the proviso which could be regarded as the source of power in the exercise of which Government could either u/s 38 or otherwise make a rule prescribing a period of limitation. The words "shall be refunded" occurring in the proviso indicate that there shall not be a refusal of the refund which the proviso directs, in a case where there is a subsequent sale of declared goods in the course of inter-State trade or commerce. The manner in which that refund could be made should be prescribed by a rule as the proviso expressly authorises. Similarly, the conditions subject to which that refund shall be made could also be imposed by a rule. But no conditions could be imposed which destroy the right to a refund which is otherwise absolute. The conditions authorised are conditions which regulate the refund and not conditions which result in the extinguishment of the right to a refund which the Legislature has created under the proviso.

7. It is of significance to observe that the conditions authorised by the proviso are not conditions subject to which a claim to a refund could be made, but conditions subject to which a refund shall be made. While the proviso authorises the procedure to be adopted by the Commercial Tax Officer in the disposal of a claim for refund, it does not authorise the imposition of fetters on the exercise of the right to a refund to which a dealer who has subsequently made an inter-State sale has become absolutely entitled. If the proviso says that the tax paid in that situation shall be refunded, it is not within the competence of Government to make a rule that that tax shall not be refunded unless an application is made within the period of limitation prescribed by them.

8. In *Thirumurthi Chettiar v. State of Madras* [1968] 21 S.T.C. 489, the High Court of Madras expressed the opinion that there was nothing in the proviso to Section 4 of the Madras General Sales Tax Act, the provisions of which correspond to the proviso to Section 5(4) of the Mysore Sales Tax Act, which

could bestow power on Government to make a rule prescribing a period of limitation for a claim to a refund which could be made under the proviso. We respectfully concur in the view expressed in that case. So the claim to a refund could not have been refused by the Commercial Tax Officer on the ground that it was not made within the period of limitation prescribed by Rule 39-A(3).

9. The next question is whether in the case of the petitioners in the two writ petitions before us the refund could have been refused on the ground that they did not make an application in form 4-A of which Rule 39-A(2) speaks. Although the petitioner in S. T. R. P. No. 43 of 1967 did make an application in form 4-A, the petitioner in the other two writ petitions did not. What he did was to merely make an application in the usual way for a refund. But we do not think that the omission on his part to make an application in the prescribed form disentitled him to the refund claimed by him.

10. It will be seen that the particulars to be specified in form 4-A are those which at the stage when that application has to be made are fully known to the Commercial Tax Officer or could be otherwise gathered. Column 1 asks the applicant to mention the serial number and it is difficult to understand what that column means. Column 2 requires him to specify the name, address and the registration number of the dealer who paid the tax u/s 5(4) of the Act and those particulars relate to the applicant. Against column 3 the description of the goods has to be given. Column 4 asks him to specify the period of the return relating to the assessment u/s 5(4). Against column 5 the amount of the tax paid u/s 5(4) has to be specified. Column 6 asks for unnecessary information with respect to antecedent transactions and column 7, the date on which the inter-State sale was effected by the applicant. Against column 8 there should be a specification of the amount of the Central sales tax paid by the applicant, and the information required against that column has no relevance by reason of the decision of this Court in [1967] 20 S.T.C. 89 *Munshi Abdul Rahiman & Bros. v. Commercial Tax Officer*, the elucidation made in which was that the payment of the tax under the Central Sales Tax Act is not a condition precedent to a claim to a refund. Against column 9 the applicant has to state the amount of the tax of which he seeks refund. There is a declaration at the end of the form which has to be signed by the applicant.

11. It will thus be seen that although it would be convenient for a dealer who makes an application for a refund to specify the information to which the form refers so that the Commercial Tax Officer may expeditiously dispose of the application on the basis of the form which is self-contained, it is clear that the requirement that the application should be made only in that form is merely directory and not mandatory.

12. That being so, the omission to make an application in the form prescribed cannot lead to the nullification of the absolute right to a refund expressly created by the proviso to Section 5(4) of the Act. If the Commercial Tax Officer requires any information which is not already known to him and which has relevance to

the claim for a refund, he could always call upon the dealer to furnish that information, but he could not, in our opinion, refuse the refund on the ground that information has not already been furnished or that it is not furnished in a particular form.

13. It is, we think, plain that the requirement that the application should be made in a particular form is really one of form and is therefore not imperative. It is not contended in the cases before us that any information which was necessary to enable the Commercial Tax Officer to make the refund to which the dealers were admittedly otherwise entitled, was not furnished by them. The only ground on which the refund was refused by the Commercial Tax Officer was that the applications were not made within time, and that they were not made in a particular form.

14. Any other view would result in the defeat of the right to ask for an adjustment of the amount, of which a refund could be claimed under the proviso against the tax payable by him u/s 5(4) which is recognised by the decision of this Court in *Bhandari Rajmal Kusalraj v. State of Mysore* (1967) 11 L R 877, would stand defeated (sic). Such adjustment could not be claimed on the view taken by the Commercial Tax Officer unless the dealer made the application within the prescribed period of limitation and in form 4-A.

15. That being so, we quash the orders of the Commercial Tax Officer in the two writ petitions and the order which was made against the petitioner in *S. T. R. P. No. 43 of 1967* and direct the Commercial Tax Officer to make the refund prayed for by the petitioners. But we make no direction in regard to costs.

Appeals were preferred to the Supreme Court against this decision of the High Court.

K.S. Hegde, J.

16. These are appeals by special leave. The first two appeals, namely, Civil Appeals Nos. 2215 and 2216 of 1969 arise from the decision of the Mysore High Court, in two writ petitions filed by a dealer in hides and skins whereas the third appeal, namely, Civil Appeal No. 2217 of 1969, arises from the judgment of the same court in a sales tax revision petition. In all these petitions the only question that arises for decision is whether Rule 39-A of the Rules framed under the Mysore Sales Tax Act, 1957, is ultra vires the rule-making power.

17. Section 15 of the Central Sales Tax Act, 1956, provides thus:

Every sales tax law of a State shall, in so far as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions, namely :

(a) the tax payable under that law in respect of any sale or purchase of such goods inside the State shall not exceed three per cent of the sale or purchase price thereof, and such tax shall not be levied at more than one stage;

(b) where a tax has been levied under that law in respect of the sale or purchase inside the State of any declared goods and such goods are sold in the course of inter-State trade or commerce, the tax so levied shall be refunded to such person in such manner and subject to such conditions as may be provided in any law in force in that State.

18. Section 5(4) of the Mysore Sales Tax Act, 1957, provides:

Notwithstanding anything contained in Sub-section (1) a tax under this Act shall be levied in respect of the sale or purchase of any of the declared goods mentioned in column (2) of the Fourth Schedule at the rate and only at the point specified in the corresponding entries of columns (4) and (3) of the said Schedule on the dealer liable to tax under this Act on his taxable turnover of sales or purchases in each year relating to such goods :

Provided that where tax has been paid in respect of the sale or purchase of any of the declared goods under this sub-section and such goods are subsequently sold in the course of inter-State trade or commerce, the tax paid under this Act shall be refunded to such person in such manner and subject to such conditions as may be prescribed.

19. Apparently in exercise of the powers conferred by Section 5(4) of the Mysore Sales Tax Act, 1957, the Government of Mysore framed Rule 39-A. That rule reads :

Refund of tax in the case of certain types of sales of declared goods.-

(1) The tax levied under Sub-section (4) of Section 5 in respect of the sale or purchase inside the State of any goods specified therein shall, if such goods are sold in the course of inter-State trade or commerce, be refunded in the manner and subject to the conditions prescribed in this rule to the dealer who has made the inter-State sale and has paid tax under the Central Sales Tax Act, 1956 (Central Act 74 of 1956), in respect of such sales.

(2) Every such dealer who claims a refund under the rule, shall within the time allowed in Sub-rule (3), submit to the assessing authority a statement in Form 4-A.

(3) The statement referred to in Sub-rule (2) shall be submitted so as to reach the assessing authority not later than the date on which the return of turnover for the period in respect of the sale in the course of inter-State trade or commerce referred to in Sub-rule (1) is due :

Provided that in respect of any period prior to the publication of this rule, the statement referred to in Sub-rule (2) shall be submitted to the assessing authority within a period of three months from the date of publication of this rule in the official Gazette, if the due date for the submission of the return of turnover for the said period has already elapsed.

(4) The burden of proving the claim preferred shall be on the dealer.

(5) On receipt of the statement in Form 4-A, the assessing authority shall, if it is satisfied after such scrutiny of the accounts and after such enquiry as it considers necessary that the claim is admissible, pass an order refunding the tax.

(6) If the statement submitted appears to the assessing authority to be incorrect, incomplete or otherwise not in order, it shall, after making such enquiry as it considers necessary and after giving the dealer an opportunity of being heard, pass such orders thereon as it thinks fit.

20. As mentioned earlier the petitioner in the two writ petitions are dealers in hides and skins whereas the petitioner in the sales tax revision petition before the High Court is a dealer in copra and coconuts. It is not disputed that hides and skins as well as copra and coconuts are declared goods u/s 14 of the Central Sales Tax Act, 1956. It is also not disputed that at the time of purchase of those goods the dealers in question had paid the purchase tax. Further it is admitted that these goods were sold in the course of inter-State sale transactions. It is not denied that the petitioners had a right to apply for refund of the taxes paid by them but the objections raised by the State is those refund applications were not filed within the period mentioned in Rule 39-A(2) and (3) and further in two cases it is contended that the applications were not made in the prescribed form. The High Court has taken the view that Rule 39-A is ultra vires the rule-making power. It has opined that the rules made u/s 5(4) of the Mysore Sales Tax Act, 1957, are those which must relate to the manner and conditions under which refund has to be made and such a rule cannot in substance deprive the dealer of the right to get refund to which he is entitled to u/s 15 of the Central Sales Tax Act, 1956, as well as Section 5(4) of the Mysore Sales Tax Act, 1957. We have not thought it necessary to go into that question as, in our opinion, Sub-rules (2) and (3) of Rule 39-A are wholly unreasonable rules and consequently these cannot be sustained. Sub-rule (3) of Rule 39-A provides that before a person is entitled to refund u/s 15 of the Central Sales Tax Act, 1956, as well as u/s 5(4) of the Mysore Sales Tax Act, 1957, he must have made the refund application within the time before which he should have submitted his sales tax return. In many States the dealers have to submit quarterly returns. Under Rule 18 framed under the Mysore Sales Tax Act, 1957, we are informed that a dealer will have to submit his annual return within 30 days of the end of the financial year. That means even if a sale in the course of inter-State trade has been made on the 31st March of a year, the refund application will have to be made within 30 days from that date. The position will be worse still if the dealer is required to submit quarterly returns. The learned counsel for the State was not in a position to tell us whether in the Mysore State the dealers have to file quarterly returns. In our opinion the impugned rule is merely an attempt to deny the dealers the refund to which they are entitled under the law or at any rate to make the enforcement of that right unduly difficult.

21. In our judgment this is not a fit case where we should interfere in exercise of our powers under Article 136 of the Constitution. These appeals are accordingly

dismissed. The respondents are not represented before us. Hence there will be no order as to costs.