

(1978) 02 CAL CK 0035

In the Calcutta High Court

Case No : Appeal from Original Order No's. 51-53 of 1975

State of West Bengal and Others

APPELLANT

Vs

Satyesh Ch. Lahiry and Others

RESPONDENT

Date of Decision : 09-02-1978

Acts Referred:

Citation : (1979) 44 STC 246

Hon'ble Judges : B.C. Chakrabarti, J;Anil K. Sen, J

Bench : Division Bench

Advocate : Samarendra Nath Butt, for the Appellant;Gopal Chandra Chakraborty and Narayan Bhattacharjee, for the Respondent

Final Decision : Dismissed

Judgement

Anil K. Sen, J.—The State of West Bengal and the commercial tax authorities have preferred these three appeals under Clause 15 of the Letters Patent, being aggrieved by a common judgment and order dated 19th June, 1974, passed by a learned single Judge of this Court disposing of three writ petitions. The facts are not in dispute and may be set out shortly.

2. The respondents, who are common in all these three appeals, are a firm of building contractors. They, having been assessed to sales tax on certain transactions, were made to pay sales tax with the commercial tax authorities. These were the assessments for the periods: (1) three quarters ending 30th September, 1950, (2) four quarters ending 30th September, 1951, and (3) four quarters ending 30th September, 1954. Such assessments were set aside by the Board of Revenue by an order dated 12th December, 1961, and the Board of Revenue directed reassessment on an adjudication as to whether and how far the respondents would be liable for such sales tax in the light of a Supreme Court decision that indivisible structural contracts do not constitute sale. As a result of the assessment thus directed by the Board of Revenue, the Commercial Tax Officer made the reassessment. In making the reassessment, the Commercial Tax Officer found as follows:

Copies of contract orders and bills of sales in support of the statement were produced. Those were test checked. No further instance of sale of materials other than those noted above were detected. The dealer's claim is held to have been the proceeds on indivisible structural contracts except Rs. 3,067-4-6.

The gross turnover is, therefore, determined at Rs. 3,067-4-6 and the balance Rs. 9,22,024-15-0 is accepted to be the proceeds of indivisible structural contracts not amounting to "sales".

3. It is not in dispute that, on such reassessment, three sums, being Rs. 10,037.62, Rs. 21,908.03 and Rs. 26,589.91, were determined to be the excess amount of taxes earlier paid by the respondents for the aforesaid three periods. Accordingly, a notice in form VII was issued u/s 11(3) of the Bengal Finance (Sales Tax) Act, 1941, showing such excess payment of the tax. Such reassessment was made on 8th December, 1965, and on 11th December, 1965, the respondents filed three applications under Rule 59 read with Section 12 of the said Act. The appellants, however, failed to discharge their statutory duties in disposing of these applications in terms of Rules 61 and 62 of the Rules or grant the refund under Rule 63 thereof. Thereupon, the respondents moved this Court with three writ petitions out of which the present appeals arise for issue of an appropriate writ directing the appellants to refund the excess amounts paid by them by way of sales tax. These applications succeeded and the learned single Judge, having directed such refund, the appellants have preferred the present appeals.

4. The aforesaid facts are not in dispute and the only question, which has now been agitated before us, is as to whether, in view of the fact that two years after the aforesaid reassessment, when the Assistant Commissioner of Commercial Taxes initiated suo motu proceedings for revision u/s 20(3) of the said Act and issued show cause notices on 18th December, 1967, the appellants could hold back the money which was repayable to the respondents until the disposal of the said proceeding. Before the learned single Judge, the appellants raised the same defence and contended that, until the disposal of the said suo motu revision proceeding, the present respondents cannot enforce refund of the amounts claimed by them. But the learned single Judge, in view of an earlier single Bench decision of this Court in the case of *Shivram Ban v. Commercial Tax Officer* [1969] 23 S.T.C. 98, overruled the said plea.

5. Mr. Dutt, appearing in support of these appeals, has contended that the learned Judge in the trial court was not right in his conclusion that, even pending the disposal of the suo motu proceeding for revision, the respondents could enforce refund of the amounts as aforesaid. According to Mr. Dutt, the assessment does not reach a stage of finality as and when a suo motu proceeding for revision is initiated and, until such finality is reached, the liability for refund u/s 12 does not arise. We are, however, unable to accept this contention of Mr. Dutt. Section 12 in clear terms lays down that the Commissioner shall refund to the dealer any amount paid by him in excess of the

amount due from him. The amount due, in our view, necessarily means the liability determined and does not mean any amount which ultimately may be found to be due. The section nowhere provides that even when an assessment (sic) being revised or set aside, any amount which is determined to have been paid in excess, that amount will not be refundable only because a further appeal or revision has been preferred or is pending. Such a view, in our opinion, is not consistent with the scheme of Section 12 and the Rules framed under the Act. The proviso to Section 12 enables the dealer to apply for the refund either within 12 months from the assessment or within six months of the final order. The section, therefore, contemplates that refund can be enforced even prior to the final order provided the other conditions are fulfilled and the amount is determined to be one paid in excess of the dues assessed. Option lies with the dealer and not with the commercial tax authorities as to when he would enforce the refund. The Rules again provide that the refund orders are to be issued if it comes within Rule 62 within 60 days from the date of the application. Such is the provision in the rule, while Section 20(3) permits a suo motu proceeding for revision to be initiated at any time within four years. Therefore, it could not have been the intention of the legislature that, unless the assessment attains finality on exhaustion of all proceedings in relation thereto, the dealer is not entitled to refund. The only test laid down by the statute is that the Commissioner is to see whether the dealer has paid any amount towards tax or penalty in excess of the amount due from him on those amounts or not and, if it is so found, the amount has to be refunded, either conditions of Section 12 being fulfilled. The liability imposed upon the Commissioner by the language of the statute is mandatory apart from the fact that it is a provision for refund of excess amount realised towards a tax liability. As both these conditions were fulfilled in the present case, the learned Judge in the trial court, in our view, held that a mere pendency of a proceeding or proceedings u/s 20(3) could not have been pleaded as a justification for not discharging the statutory obligations.

6. There is another aspect, which is required to be considered. As we have indicated hereinbefore, the reassessment having been made on 8th December, 1965, notices under form VII were issued by the Commercial Tax Officer showing the aforesaid amounts as excess payments. The respondents had a right on issue of such notices to claim refund and apply for such refund, which they did in terms of Rule 59. Rule 60 provides that, on receipt of such an application, the assessing authority, if he is satisfied that the refund is due, shall, except as provided in Rule 61 or Rule 62, record an order sanctioning the refund and communicate the order to the applicant. Rule 61 provides that, if the assessing authority is the Commercial Tax Officer and if the amount to be refunded exceeds Rs. 1,000, he should forward the application together with his own opinion thereon to the Assistant Commissioner for orders. Rule 62 then provides that within 30 days from the date of submission of the application under Rule 61, the Assistant Commissioner shall record his order in writing and shall communicate it to the Commercial Tax Officer for necessary action. Rule 63 provides for issue of

refund payment order, when so desired by the dealer, on issue of an order made under Rule 60 or Rule 62. Such being the position in law, when the application for refund was made on 11th December, 1965, and when there was no other proceeding pending, the Commercial Tax Officer and the Assistant Commissioner had their legal obligations under Rules 60, 61 and 62 to be discharged by them. Admittedly, they failed to do it and made no orders on the application so filed, which was kept pending for over two years and then the Assistant Commissioner initiated suo motu proceedings u/s 20(3) of the Act for revision. Thus, it appears that, having initiated such a proceeding for revision, they are trying to take advantage of their own default earlier made, because had not they failed to discharge their obligation earlier, the money would have been refunded to the respondents long long ago. This, we hold, the appellants were never entitled to. In this view, we cannot but uphold the order as passed by the learned single Judge.

7. In the result, the appeals fail and they are dismissed without any order as to costs in any of them.

8. Since, pending the appeals, in terms of the order of the appellate court, the appellants had deposited a sum of Rs. 59,000 with the Registrar, Appellate Side of this Court, in discharge of their obligations to be enforced by the writ issued by the trial court, we would now allow the respondents to withdraw out of the aforesaid sum the amount of excess of taxes refundable to them, such amount being in total a sum of Rs. 58,535.56 (Rupees fifty-eight thousand five hundred and thirty-five and paise fifty-six) together with the interest which has accrued thereon on the investments made by the Registrar, Appellate Side of this Court. These amounts, the respondents would get in discharge of the appellants' liability for refund as it arose on the reassessments dated 21st October, 1965, 6th November, 1965, and 8th December, 1965. The balance amount, if any, would be paid back to the appellants by the Registrar, Appellate Side of this Court. A consolidated order may be drawn up accordingly.

Chakrabarti, J.

I agree.