

(2005) 11 KAR CK 0014
In the Karnataka High Court
Case No : Writ Petition No. 21158 of 2002

Suresh Colour Labs

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 10-11-2005

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 12, 17 (6), 25 A, 5 B
Karnataka Sales Tax Rules, 1957 — Rule 20

Citation : (2008) 11 VST 621

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : T.N. Keshavamurthy, for the Appellant; T.K. Vedamurthy, High Court Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

D.V. Shylendra Kumar, J.—Writ petition is by a dealer registered under the provisions of the Karnataka Sales Tax Act, 1957 (for short, "the Act"), involved in the activity of processing and supply of photographs, photo print and photo negatives along with allied activities including sale of films, etc.

2. Subject-matter of the writ petition is the tax liability relating to the activity of processing and supply of photographs, photo negatives which activity described as works contract had become taxable u/s 5B of the Act read with entry 25 of the Sixth Schedule to the Act on and after introduction of this entry and the Schedule from the year 1986.

3. The levy of tax in respect of the activity of photography has been subject-matter of chronic litigation between the photographers, photo labs and the Revenue and the first of such litigation was in the case of The Assistant Sales Tax Officer and Others Vs. B.C. Came, Proprietor Came Photo Studio, . Thereafter, there has been a flurry of litigation, an unending tussle between the Revenue and the tax-payer. The decision referred to above, also paved the way of ushering in amendment to the definition of the phrase "tax on the sale or

purchase of goods" as it occurs in Article 366(29A) of the Constitution of India, enlarging the scope of such levy for the purpose of entry 54 in List II of the Seventh Schedule of the Constitution. That is how Section 5B was introduced in the Karnataka Sales Tax Act and over a period of time, new types of contracts or activities were also sought to be brought in within the net of tax and one such entry was introduction of entry 25 relating to processing and supply of photographs, photo prints and photo negatives.

4. Undoubtedly, the petitioner is a person carrying on such activities and the levy of tax in terms of this provision is attracted and for the assessment years 1989-90, 1990-91 and 1991-92, tax had been assessed and levied in respect of assessment year 1989-90 in terms of the assessment order dated October 6, 1995 a sum of Rs. 95,026, in respect of assessment year 1990-91 in terms of the assessment order dated September 21, 1992 a sum of Rs. 2,05,222 and in respect of assessment year 1991-92 in terms of the assessment order dated June 14, 1994 a sum of Rs. 1,67,541, as tax liability of the assessee. It is claimed that the petitioner had paid such taxes on having opted for payment of tax by way of composition in terms of Section 17(6) of the Act.

5. The petitioner was quite content in paying tax and kept quiet, but became active, inasmuch as, in the case of other similarly placed persons, the levy was held to be bad in terms of the judgment of this court in the case of Keshoram Surindranath, Photo-Mag (P) Ltd. v. Assistant Commissioner of Commercial Taxes (LR), City Division, Bangalore reported in [2001] 121 STC 175 SC. The attempt on the part of the State to get over this judgment by seeking special leave before the Supreme Court having failed, the Legislature resorted to the ushering in of the amendment to the provision taking cue from certain observations made by the Supreme Court in the case of M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, . The State Legislature reintroduced the entry by amending Act No. 3 of 2004.

6. The assessee became active yet again, questioned the amended provisions and this court by the judgment rendered in a batch of writ petitions, namely, Writ Petition No. 8602 of 2004 and connected matters, in the case of Pro Lab A Partnership Concern and Others Vs. The State of Karnataka and Others, , yet again invalidated the amending Act, being of the view that it is nothing but a reintroduction of the very entry which had been found fault with earlier.

7. It is in the light of such development of law and after this court had declared the entry 25 as it had been introduced initially, that the petitioner got wise and had made an attempt to get back the amount that he had paid under the assessment orders by filing an application u/s 25A of the Act before the assessing authority as one for rectification of the assessment orders and for consequential refund.

8. The assessing authority being of the view that it cannot entertain the application as it was filed beyond the period of five years and having issued an

endorsement in terms of annexures C, C1 and C2, the petitioner had appealed to the Joint Commissioner without success. It is thereafter, the present writ petition is filed.

9. Writ petitioner has sought for, inter alia, quashing the endorsement issued by the assessing authority rejecting the refund application as also the appellate order of the Joint Commissioner and also for a writ of certiorari to quash the original assessment orders themselves and the consequential relief for refund by issue of a writ of mandamus in this regard.

10. Writ petition had been admitted and the respondents have entered appearance through Sri Veda Murthy, learned Government Pleader. Statement of objections has also been filed.

11. I have heard Sri Keshava Murthy, learned Counsel for the petitioner and also Sri Veda Murthy, learned Government Pleader, appearing for the respondents.

12. Submission of Sri Keshava Murthy, learned Counsel for the petitioner is that though the petitioner had paid the taxes in terms of the assessment order and had not carried the matter by way of appeal, in as much as, the very provision, levying the tax, namely, the entry 25 which is part of Section 5B under which the tax is levied on the activity of the petitioner, has been held to be invalid in terms of the judgment of this court rendered in the year 1999, the petitioner is definitely entitled for claiming refund of the amount that he had paid under mistake of law that the provision is a valid provision under which he was liable to pay; that now that the provision has been held to be invalid, levy and collection becomes unauthorised in law and therefore the assessment orders are also required to be quashed and consequential relief of refund allowed in favour of the petitioner by issue of a writ of mandamus.

13. In support of his submission Sri Keshava Murthy has placed reliance on the decision of the Supreme Court in the case of *Salonah Tea Co. Ltd. and Others Vs. Superintendent of Taxes, Nowgong and Others*, wherein the Supreme Court had taken the view that when once a levy in terms of an assessment order is held to be bad, such an assessee should not be deprived of the consequential relief of refund; that the point of time when refund is sought for, even for the purpose of testing whether it is a reasonable time or not, should be examined from the angle of the time at which the cause of action arose and not linking it to the date of the assessment order.

14. Placing reliance on the decision referred to above, submission of Sri Keshava Murthy, learned Counsel for the petitioner is that this court for the first time declared the levy in terms of Section 5B read with entry 25 to be bad in the year 1999, but the petitioner came to know of it only in the year 2001, when it was reported in a law journal by which time, the SLP of the State before the Supreme Court had also been dismissed and the law had attained finality and in the meanwhile as the petitioner was making attempt to secure refund before the authorities by filing 25A application which was entertained by the authorities in

respect of several others, but the petitioner was stumped because of the same being beyond the period of five years from the date of the assessment order, has carried the matter to this court for relief of refund, etc., and submits that on applying the principle of law as laid down by the Supreme Court in *Salonah Tea Co. Ltd. and Others Vs. Superintendent of Taxes, Nowgong and Others*, , the petitioner is entitled for seeking of quashing of the assessment orders and consequential relief.

15. Writ petition is contested. It is averred by the respondents that when the levy was made, the levy was valid as the law came to be declared by this court only in the year 1999, but the assessment orders had already been completed even during the year 1993-94. It is also averred that the petitioner cannot seek for refund at such a belated point of time in respect of tax levied in the year 1993-94 by filing a writ petition in the year 2002 and therefore the writ petition should be dismissed as hit by laches.

16. Mr. Veda Murthy, in addition, submits that the petitioner cannot seek for refund and this court should not exercise its discretionary jurisdiction for passing an order of this nature as a refund order in favour of the petitioner only amounts to permitting unjust enrichment, in the sense that, though for payment of tax in terms of Section 17(6) of the Act, the petitioner is debarred from expressly passing on the tax liability to the customers, nevertheless, in fixing the price of the end-product or the value of the product, the petitioner would have necessarily added the component of tax liability and therefore it amounts that the petitioner who had collected that amount from his customers as an amount to be passed on to the State is now asking for return of the same and at this point of time, this court should not entertain a petition for ordering refund in favour of the petitioner.

17. One other circumstance pointed out by Sri Veda Murthy, Government Pleader is that the petitioner having himself opted for composition and having paid the taxes and having not carried the matter by way of appeal, payment was without any demur, without any protest and therefore now cannot turn round and seek for refund of the amount on the premise that the levy is now unauthorised in law.

18. In support of his submission, Sri Veda Murthy, relies on the decision of the Supreme Court in the case of *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, , wherein the Supreme Court has taken the view that one should discourage unjust enrichment of such dealers, who not only collect the tax from the customers but are loath to either pay it to the State and after having paid to the State, seek for refund which they in turn do not pass on to the customers.

19. I am of the view that, no doubt courts have taken the view as between the State and a person like the petitioner as to who should retain such amount collected from the customers purporting to be for the benefit of the State, the court should definitely lean in favour of State for retention. But, the question is

as to whether the doctrine of "unjust enrichment" should be held against the petitioner for the purpose of denying relief in this writ petition.

20. In so far as the legal position is concerned, there is no impediment for quashing the assessment order as the very law enabling the levy has been declared to be invalid though Mr. Veda Murthy, learned Government Pleader, submits that the State had carried the matter further on the decision of this court in the second round invaliding the levy through amended provision by the reintroduction of entry 25 by the amending Act and that the matter is as of now pending before the Supreme Court.

21. Assuming that such an appeal of the State is now pending before Supreme Court, that in itself does not become the law, but the law as of now is what is declared by this court and until and unless that declaration of law is reversed by the Supreme Court, such law holds the field.

22. If the assessment orders are to be quashed, refund follows as a consequence. The only impediment that is pointed out is the delay and further the doctrine of "unjust enrichment".

23. On the question of delay, the Supreme Court having taken the view that the petition under Article 226 of the Constitution of India within a period of three years can be held to be a petition within a reasonable time and should not be thrown out on the ground of laches and in the instant case, the petitioner having approached this court for relief within three years from the date of declaration of law by this court, the petition is not one that should be thrown out by this court only on the ground of laches.

24. Even on the ground of denying the relief, applying or calling in aid the doctrine of unjust enrichment, I am of the view that the doctrine need not be applied to the petitioner's case, inasmuch as, it is submitted by the learned Counsel for the petitioner that on the part of the respondents, in respect of many similarly placed dealers, such dealers had sought for rectification of the assessment orders by filing an application u/s 25A for the purpose of claiming refund of tax that they had paid under the assessment orders and the authorities had entertained and allowed such rectification applications and granted refund wherever the applications had been made within a period of five years from the date of the assessment order.

25. So far as the petitioner is concerned, the petitioner is denied only because application was filed beyond the period of five years as indicated in the endorsement. If the State has not carried the matter further in appeal in respect of orders passed for allowing of such refund applications in the case of other similarly placed dealers, calling in aid the doctrine of "unjust enrichment" as a defence in the petitioner's case cannot be justified nor can this court permit the same. There cannot be different standards in respect of some other dealers and in respect of the petitioner. It is for this reason that I reject the defence of unjust enrichment so far as this case is concerned.

26. However, if any refund is to be ordered in any tax matter, the basic requirement is that the tax should have been paid. An assessment order is not proof of tax payment. Even if the assessment order is quashed, it does not automatically result in refund order, unless it is shown to the satisfaction of the court or the authorities that the tax in terms of the assessment orders has been paid and reached the coffers of the State.

27. In the circumstances, this writ petition is allowed without any orders as to costs. The assessment orders passed for the assessment years 1989-90, 1990-91 and 1991-92 (copy of annexures A, A1 and A2 respectively) are hereby quashed by issue of a writ of certiorari. Rule made absolute.

28. A consequential mandamus is issued directing the respondents to consider the claim of the petitioner as one for refund in terms of Rule 20 of the Karnataka Sales Tax Rules, 1957 read with Section 12 of the Act, inasmuch as, once the assessment orders are quashed, all payments made under the assessment orders become excess payment and the petitioner can definitely claim for refund by filing an application under this provision. On production of satisfactory proof of tax having been paid, the assessing authority shall pass orders for refund within a period of six weeks from the date of filing of such application by the petitioner.