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(1992) 12 OHC CK 0005

In the Orissa High Court

Case No : Tax Appeal No. 1 of 1985

Tangudu Gopalan and Sons — APPELLANT

Vs

State of Orissa and Others — RESPONDENT

Date of Decision : 16-12-1992

Acts Referred:
Constitution of India, 1950 — Article 265
Contract Act, 1872 — Section 72
Orissa Sales Tax Act, 1947 — Section 9B(3)

Citation : (1993) 1 OLR 228

Hon'ble Judges : R.K. Patra, J;A. Pasayat, J

Bench : Division Bench

Advocate : B.K. Mohanty, Bibek Mohanty and S. Udgata, for the Appellant; S.K. Patnaik, A.S.C. (C.T.), for the Respondent

Judgement

A. Pasayat, J.—Legality of order passed by the Commissioner of Sales-tax, Orissa (respondent No, 2) setting aside the order of Sales-tax Officer, Ganjam-I Circle, Barhampur holding that no penalty u/s S-B,(3)of the Orissa Sales-tax Act, 1947 (in short, the''Act'') was leviable, is the subject-matter of this appeal.

2. Background facts shorn of unnecessary details are as follows :

The appellant is a dealer registered under the Act. During the assessment year 1974-75 and 1975-76, the appellant had collected sale-tax on the sale of dry cell batteries ''12%.A writ application bearing OJC No. 928 of 1973 was filed in this Court for a direction that dry cell batteries were taxable ''5%,and not ''12% as luxury goods. By judgment dated 8 7-1975 this Court held that the dry cell batteries are taxable at the rate of 5% and not at 12% as luxury goods. The validity of Finance Department Notification No, 23710 dated 16-6-1991 notifying the rate of tax on the sale of dry cell batteries at 12% with effect from 17-1971 was the subject-matter of challenge. Undisputedly, the appellant had collected sales-tax on dry cell batteries '' 12 % and had deposited it. Keeping in view the decision of this Court, the Assessing Officer by his order dated 31-12-1977 for

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the assessment year 1974-75 assessed sale of dry cell batteries to tax''5% and allowed refund of Rs. 16,388.00. The amount was refunded to the dealer. During the year 1975-76, the dealer collected tax ''12% from 8-7-1975 i.e. date of judgment of this Court arid thereafter by way of contingent deposit differential amount''7% was charged from the purchasers with a declaration that the same shall be refunded in case of non-success. The Assessing Officer assessed the sale of dry cell batteries''5%,and allowed refund of Rs.12,285,00. After refund of the aforesaid amounts to the appellant, the Sales-tax Officer by his letter No. 13883 dated 13-8-1992 required appellant to show cause as to why penalty u/s 9-B (3) of the Act for excess collection of tax for the two periods shall not be imposed. The said letter notice was issued on the basis of objection raised by Auditor General, In response to notice, appellant appeared and furnished show cause reply and contended that there was no mens tea in collecting the excess amount and therefore, question of levy of penalty did not arise. So far as collection of tax for the assessment years 1975-76 is concerned, it was urged that out of the amount of refund a sum of Rs. 12,285/-, a sum of Rs. 12,002/-retated to collection before the date of judgment of this Court and Rs. 283/- related to collection as contingent deposit. After judgment of this Court, the State Government had moved the Apex Court by filing a SLP and therefore, contingent deposits were made. Appellant''s stand was that provisions of Section 9-B (3) of the Act have no application, because when collections were made. Notification No. 23714-OTA-57/79/F dated 16-6-1971 operating from 1-7-1971 was in force. Subsequently, this Court gave its verdict on 8-7-1973 and consequentially question of refund arose. The Sales-tax Officer was of the view that payment was made under a mistake and Government was duty-bound to return the amount of. tax, irrespective of the consideration whether money had been paid voluntarily or not. In R. S. Joshi, Sales Tax Officer, Gujarat v. Ajit Mills Limited and Anr.. (1977) 40 STC 497 on which the Auditor General had placed reliance to find fault was held to be distinguishable. It was held that the said case related to forfeiture and essence of judgment was principles of mens rea have no application to the case of excess amount collected within the purview of Bombay Sales-tax Act. On facts, it was concluded that there was no Criminal intention, the conduct did not reflect contumacy and therefore, penal provisions of Section 9-B (,3) were not applicable. The Commissioner exercised powers u/s 23 of the Act read with Rule 80 of the Orissa Sales-tax Rules, 1947 (in short, the "Rules'') and held that the order of the Sales-tax Officer dropping the proceeding was not legal. it was held that collection made by the petitioner is excess of what had been ultimately found payable amounted to clear case of excessive collection and therefore, action of the Sales tax Officer in dropping the proceeding was not legal. The legality and propriety of the Commissioner''s order is impugned.

3. Learned counsel for appellant has urged that provisions of Section 9-B (3) of the Act have no application to the facts of the present case, because there was no collection in excess of the amount payable as tax. It has been submitted that at the point of time collection was made, notification which was subsequently

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nullified was in operation and therefore,it cannot be said that the appellant had realised any amount by way of excess tax. According to him, question of mens rea loses its significance, when no offence, is made out. further submission is that even if it is conceded that mens rea is not the sine qua non for application of Section of Section 9-8 (3) if no offence is made out, question of resorting to that provision does not arise. Learned counsel for the Revenue on the other hand, contended that the provisions of Section 9-B (3) clearly indicate that whenever a registered dealer realises any amount in excess of what is payable by him* they are attracted. The fact that this Court subsequently held that particular rate of tax is applicable makes it operative althrough and therefore, amount collected in excess was to be forfeited by way of imposition of penalty,

4. For resolution of dispute, reference to Section 9-B (3) of the Act is necessary. The same reads as follows :

"9-8- Collection of Tax by dealers-

(1) xx xx (2) xx xx (3) (a) Where any person-

(i) not being a registered dealer realises any amount by way of tax, or

(ii) being a registered dealer realises any amount by way of tax in excess of the amount payable by him as tax under this Act,

the Commissioner may, notwithstanding anything contained in this Act, direct that such person shall pay in the prescribed manner, by way of penalty, a sum not exceeding thrice the amount so realised by such person.

(b) Where any person contravenes the provisions of Clause (b) of Sab-sec, (1),Sub-section (2) and Sub-section (2-a), the Commissioner may, notwithstanding anything contained in this Act, direct that such person shall pay in the prescribed manner, by way of penalty, a sum not less than rupees five and not exceeding the tax due whichever is higher in. respect of the turnover of sale or purchase for which record ha$ not been maintained :

Provided that no penalty shall be imposed under this Sub-section without giving the person conceded a reasonable opportunity of being heard"

On a plain leading, it is apparent that only where a registered dealer realises any amount by way of tax in excess of the amount payable by him as tax under the Act, the provisions are attracted. There is substantive force in the stand of appellant that at the point of time he had collected tax, the same was in reality the amount payable by it. Because of the subsequent nullification of the notification benefit of payment of tax at a lower rate accrued on it and accordingly, refund was granted. Strictly speaking Section 9-B (3) has no application to the facts of the case. Collections made prior to judgment of this Court were in accordance with the notification which held field. The Commissioneir was therefore, wrong in holding that the view of the Sales-tax Officer in dropping the proceeding was erroneous. The controversy whether mens

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tea is to be established in respect of forfeiture, and ''''the applicability of the view expressed by the ApexCourt in R S.Joshi''s case (supra) loses its significance on that background. This is a case where no offence was committed, The facts did not make out any offence. Therefore,the Sales-tax Officer was justified in holding that Section 9-B (3) has no application, though the reasoning indicated were somehow different.

5. But that is not end of matter. The question whether appellant should be allowed to retain money which it had collected from the customers and thereby enriched itself at the cost of customers and consequently, making the State suffer, Undisputedly, amount has not been paid back to the customers. Learned counsel for appellant has strenuously urged that principles of unjust enrichment cannot be pressed into service in a proceeding relating to applicability of Section 9-B (3) of the Act.

6. The mandate of Art. 265 of the Constitution is that there must always be a valid law for making assessment and recovery of a tax. No tax can be levied or collected except by authority of law. The Government has a duty to refund any sum collected without authority to the person who paid the said tax. Payment of tax or duty which is without authority of law is a payment made under mistake within the meaning of Section 72 of the Indian Contract Act. The Apex Court in Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, , Mohinder Singh and Others Vs. State of Punjab and Another, and State of Madhya Pradesh Vs. Vyankatlal and Another, referred to unjust enrichment in cases u/s 72 of the Contract Act. The said section is based on equitable principles. Therefore, by claiming to retain the tax which has been collected without the authority of law, the Government cannot enrich itself and is liable to make restitution to the person who had made payment under mistake or under coercion. While it would be abhorrent to principles of justice to hold that the State which has unjustly enriched itself by collecting tax without authority of law ought to be permitted to retain the money unjustly gained, it would be equally so where a party has collected excess amount under the authority of law at the relevant point of time, but subsequently is not required to pay, and in the process enriches itself. When a party claims refund of tax collected without authority of law and State cannot deny that it collected without lawful authority, but disputes its obligation to refund on the ground that claimant had passed on burden, there is really no conflict of equities. The Court has to strike a balance and also prevent any party from making unjust enrichment.

7. Tax collected in excess ought to be returned to the person from whom it had been collected. If such a person cannot be found and possibility of identification is bleak, question is whether it would be allowed to be retained by the concerned party or it should go to the State. The question is what is the law applicable to the case. Null no doit senrichir aux depens des authres-No one ought to enrich himself at the expense of others. As Lord Diplock has said, there is no genera! doctrine of "unjust enrichment". In Sinclair v. Brougham, (1894) ACJ 398 Lord

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Haldane said that law could not de Jure impute promises to reply whether for money "had and received" otherwise, which may, if made de facto, it would Inexorably avoid. As observed by the apex Court in Mahabir Kishore and others Vs. State of Madhya Pradesh, the relatively modern principle of restitution is of the nature of quasi-contract. The principle of unjust enrichment requirest first, that the defendant has been "enriched" by the receipt of a "benefit"; secondly, that this enrichment is "at the expense of the plaintiff"; and thirdly, that the retention of the enrichment be unjust. This justifies restitution. Enrichment may take the form of direct advantage to the recipient''s wealth such as by the receipt of money or indirect one for instance where inevitable expense has been saved.

8. Another analysis of the obligation is of quasi-contract. It was said," if the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt, and gives this action founded in the equity of the plaintiff''s case, as it were, upon a contract {quasi ex contractu) as the Roman law expresses it. As Lord Wright in Fibrosa Spolka v. Fairbairn Lawson (1943) ACJ 32 : (1942) 2 All ER 122 pointed out "the obligation is as efficacious as if it were upon a contract. Such remedies are quasi contract or restitution and theory of unjust enrichment has not been closed in English Law." While therefore, holding that Section 9-B (3) has no application to the facts of the case, we are of the view that the amount collected should be returned to the State. If at any point of time person who made payment of sales-tax makes a motion for refund of differential amount from him, said motion shall be duly considered by the State. The State cannot in such a case enrich itself at the expense of the customer.

The appeal is accordingly disposed of. No costs.

R.K. Patra, J.

9. I agree.

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