

(1970) 08 KL CK 0009
In the High Court Of Kerala
Case No : Writ Appeal No. 7 of 1970

The Sales Tax Officer and Another

APPELLANT

Vs

K.S.V. Gupta

RESPONDENT

Date of Decision : 28-08-1970

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 61

Citation : (1971) 28 STC 722

Hon'ble Judges : P.T. Raman Nayar, C.J.; K.K. Mathew, J

Bench : Division Bench

Advocate : Government Pleader, for the Appellant; T.N. Subramania Iyer, for the Respondent

Judgement

P.T. Raman Nayar, C.J.—This appeal by the revenue is against an order by a learned Single Judge directing the refund to the respondent writ petitioner of the sums of Rs. 22,147.96 and Rs. 16,416.35 collected as sales tax due for the years 1962-63 and 1963-64 respectively from a firm of which the petitioner and his brother were partners. This firm was dissolved on the 21st April, 1964, by reason of the death of the petitioner's brother. This was, no doubt, after the expiry of the years in respect of which the tax was due ; but the final assessments were made only in September and October 1965 (after an assessment made on 4th March, 1964, before the death of the petitioner's brother, for the year 1962-63 had been set aside in appeal and the matter remanded for making a fresh assessment) when the firm no longer existed. For both these years, the assessment was on the firm which, as we have just said, had ceased to exist. The petitioner appealed against both assessments, and, by the order exhibit P3 dated 25th September 1967, the Appellate Assistant Commissioner set aside the assessments in view of the decision of the Supreme Court in *State of Punjab Vs. Jullunder Vegetables Syndicate*, . Thereafter, the Kerala General Sales Tax (Amendment) Act, 1969 (Act 15 of 1969) was enacted with a view to save levies made on dissolved firms and, by Section 3 thereof, a new section, Section 21 A, was introduced in the Kerala General Sales Tax Act, 1963, with effect from 1st

April, 1963, the date of commencement of that Act. This new section runs as follows:

21A. Firm dissolved or business discontinued.--(1) Where any business carried on by a firm is discontinued or where a firm is dissolved, the assessing authority shall make an assessment of the taxable turnover of, and determine the tax payable by, the firm as if no such discontinuance or dissolution had taken place, and all the provisions of this Act, including the provisions relating to levy of penalty or any other amount payable under any provision of this Act, shall apply, so far as may be, to such assessment and determination.

(2) Without prejudice to the generality of Sub-section (1), if the assessing authority in the course of any proceedings u/s 19 in respect of any such firm as is referred to in that sub-section is satisfied that the firm was guilty of wilful non-disclosure of assessable turnover, it may direct payment of a penalty in accordance with the provisions of Sub-section (2) of that section.

(3) Every person who was, at the time of such discontinuance or dissolution, a partner of the firm, and the legal representative of any such person who is deceased, shall be jointly and severally liable for the amount of tax, penalty or other amount payable, and all the provisions of this Act shall apply, so far as may be, to any such assessment or direction for payment of penalty or other amount.

(4) Where such discontinuance or dissolution takes place after any proceedings in respect of any year have commenced, the proceedings may be continued against the persons referred to in Sub-section (3) from the stage at which the proceedings stood at the time of such discontinuance or dissolution, and all the provisions of this Act shall, so far as may be, apply accordingly.

(5) Nothing in this section shall affect the provisions of Section 20.

At the same time Section 7 of the Amendment Act validated levies already made on dissolved firms, and that section is in the following terms :

"7. Validation.--(1) Notwithstanding any judgment, decree or order of any court, tribunal or other authority, any assessment, levy or collection of any tax on the turnover of a firm which has been dissolved or the business carried on by which has been discontinued, made or purporting to have been made under the principal Act before the date of publication of this Act in the Gazette shall be deemed to be as valid and effective as if such assessment, levy or collection had been made under the principal Act as amended by this Act, and accordingly--

(a) all acts, proceedings or things done or taken by any officer or authority in connection, with the assessment, levy or collection of such tax shall, for all purposes, be deemed to be, and to have always been done or taken in accordance with law;

(b) no suit or other proceeding shall be maintained or continued in any court, tribunal or other authority for the refund of any such tax so collected;

(c) no court shall enforce any decree or order directing the refund of any such tax so collected ; and

(d) any such tax assessed under the principal Act before the date of publication of this Act in the Gazette, but not collected before that date, may be recovered in the manner provided under the principal Act as amended by this Act and the rules made thereunder:

Provided that nothing contained in this section shall render any person liable to be convicted of an offence in respect of anything done or omitted to be done by him before the date of publication of this Act in the Gazette, if such act or omission would not be an offence under the principal Act but for the provisions of this Act.

(2) For the removal of doubts, it is hereby declared that nothing in Sub-section (1) shall be construed as preventing any person from claiming refund of any tax paid by him in excess of the amount due from him under the principal Act as amended by this Act.

The question is whether these two provisions of the Amendment Act validate the levy already made on the dissolved firm here concerned and thus preclude the petitioner from claiming a refund.

2. We shall first consider the levy for the year 1962-63. This is governed by the provisions of the General Sales Tax Act, 1125, which was repealed on the 1st April, 1963, by Section 61 of the Kerala General Sales Tax Act, 1963. By Section 3 of the Act of 1125, the charging section, the levy on a dealer is on his total turnover for the year and "year" is defined in Section 2(m) thereof as the financial year ; in other words, the 1st April of each calendar year to the 31st March of the following year, both days inclusive. The section leaves no room for doubt that the liability to pay the tax for a year is incurred at least at the close of the year ; although its quantification by assessment proceedings takes place only later. Therefore, with regard to the year 1962-63 the liability of the firm to pay the tax was incurred at least by the close of the 31st day of March, 1963, just before the Act of 1963 came into force on the 1st April, 1963. Now the repeal of the Act of 1125 by Section 61 of the Act, 1963, is in the following terms :

61. Repeal--(1) The General Sales Tax Act, 1125 (Act XI of 1125), is hereby repealed :

Provided that such repeal shall not affect the previous operation of the said Act or any right, title, obligation or liability already acquired, accrued or incurred thereunder, and subject thereto, anything done or any action taken, including any appointment, notification, notice, order, rule, form, regulation, certificate, licence or permit, in the exercise of any power conferred by or under the said Act, shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act, as if this Act were in force on the "date on which such thing was done or action was taken, and all arrears of tax and other

amounts due at the commencement of this Act may be recovered as if they had accrued under this Act.

(2) Notwithstanding anything contained in Sub-section (1), any application, appeal, revision or other proceeding made or preferred to any officer or authority under the said Act and pending at the commencement of this Act, shall, after such commencement, be transferred to and disposed of by the officer or authority who would have had jurisdiction to entertain such application, appeal, revision or other proceeding under this Act if it had been in force on the date on which such application, appeal, revision or other proceeding was made or preferred.

We might also set out Section 4 of the (Kerala) Interpretation and General Clauses Act, 1125 (Section 6 of the Central Act) which states the effect of a repeal:

4. Effect of repeal.--Where any Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not--

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder ; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed ; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid ; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed.

Reading the two provisions together, it seems to be quite clear that if a proceeding had been initiated under the 1125 Act before its repeal it will be deemed to have been initiated under the provisions of the 1963 Act and can be continued accordingly--see *Cheru v. Sales Tax Officer, Ponnani* 1966 KLT 902. But, if no proceeding had been initiated under the repealed Act, then the enforcement of the liability under the repealed Act can only be under the provisions of that Act and the rules made thereunder--*Arya Vaidya Pharmacy Ltd. v. State of Kerala* 1967 KLT 964 . We are unable to accede to the argument that the proceedings for assessment for the year 1962-63 had been initiated under the repealed Act because a provisional assessment had been made thereunder. The provisions of the repealed Act as well as of the new Act make it abundantly

clear that the provisional assessment is an entirely different thing from the final assessment and that proceedings for the levy of the provisional assessment and of the final assessment are entirely independent proceedings, the one having nothing to do with the other, although adjustments have to be made after the final assessment if there has been an over-collection or an under-collection in pursuance of the provisional assessment. That being so, the proceedings for the levy of the tax for the year 1962-63 can only be regarded as maintainable under the provisions of the 1125 Act, and that Act not providing for a levy on a dissolved firm, the rule in *State of Punjab Vs. Jullunder Vegetables Syndicate*, still applies to make the assessment invalid. The amendment of the 1963 Act by the introduction of the new Section 21A and the validation of assessments made under the 1963 Act by Section 7 of the Amendment Act, it is obvious, can be of no avail to validate an assessment made under the provisions of the Act of 1125.

3. Turning now to the levy for the year 1963-64, this is governed by the provisions of the 1963 Act and the Rules made thereunder. Here, it seems to us that the new Section 21A introduced in this Act with retrospective effect from 1st April, 1963, and the validating provision in Section 7 of the Amendment Act are a complete answer to the petitioner's claim. The assessment, as we have seen, was made on 6th October, 1965, at a time when Section 21A enabling an assessment on a dissolved firm must be deemed to have been in force. Therefore, but for the fact that the assessment order was set aside in appeal the order would have been in force as a valid and legal order, even apart from the validation by Section 7 of the Amendment Act. And, so far as the setting aside of the assessment in appeal is concerned, there is the provision in Section 7 of the Amendment Act, which, applied to the facts of this case, says that notwithstanding the order of the Appellate Assistant Commissioner setting aside the order of assessment, the order of assessment shall be deemed to be as valid and effective as if such assessment had been made under the Act of 1963 as amended. The conditions on which the Appellate Assistant Commissioner's order was based have been so fundamentally altered by the Amendment Act that the decision could not have been given in the altered circumstances. Therefore, the effect of the Amendment Act is to neutralise the effect of the order of the Appellate Assistant Commissioner which becomes ineffective after the change of the law. This is not a case where the Appellate Assistant Commissioner's order is merely set side. The law itself is changed and the cause for the ineffectiveness or invalidity of the levy has been removed. There is, therefore, no question here of legislative encroachment on judicial power--see in this connection *Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others*, , the following passage wherein vindicates what has been done by the Amendment Act:

Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for

jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which the tax was collected and by legislative fiat makes the new meaning binding upon courts. The Legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the Legislature and legal and adequate to attain the object of validation. If the Legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a validating law, therefore, depends upon whether the Legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the validating law for a valid imposition of the tax.

That the conditions postulated in the last sentence of this passage are here satisfied is beyond question.

4. It follows from what we have said that the levy for the year 1962-63 was bad and has not been validated while that for the year 1963-64 although bad at the time it was made must be deemed to have been validly made.

5. In the result we allow this appeal to this extent, namely, that the order of the learned Single Judge directing a refund is set aside so far as the levy for the year 1963-64 is concerned; it is affirmed so far as the levy for the year 1962-63 is concerned. We direct the appellant revenue to pay the costs of the respondent writ petitioner both here and before the learned Single Judge. Advocate's fee Rs. 250 both here and before the learned Single Judge.

6. Perhaps a word of explanation is necessary as to why we are making this direction regarding costs; Although the validating Act, namely, the Amendment Act, 1969, was pleaded in three places in the counter-affidavit filed by the revenue, counsel for the revenue addressed no argument before the learned Single Judge on the basis of that Act. Indeed, the learned Single Judge has observed that counsel was not able to show any provision of law entitling the department to retain the amounts collected after the orders of assessment had been set aside.