
(1971) 02 KL CK 0006
In the High Court Of Kerala
Case No : O.P. No. 4193 of 1969

T.N. Athar Rowther

APPELLANT

Vs

State of Kerala and another

RESPONDENT

Date of Decision : 16-02-1971

Acts Referred:

Constitution of India, 1950 — Article 226, 286

Contract Act, 1872 — Section 72

Kerala General Sales Tax Act, 1963 — Section 14, 15, 8(2)

Citation : (1971) KLJ 704

Hon'ble Judges : M.U. Isaac, J

Bench : Single Bench

Advocate : T.L. Viswanatha Iyer and E.R. Venkiteswaran, for the Appellant;

Final Decision : Allowed

Judgement

M.U. Isaac, J.—The petitioner is a dealer in charcoal, who sells it in the State and also inter-State. For the years 1959-60 to 1963-64 both inclusive, the petitioner was assessed under the Central Sales Tax Act, 1956 (hereinafter referred to as the Central Act) by the second respondent, the Sales Tax Officer, Palghat in respect of inter-State sales by his orders Exts. P-1, P-2, P-3, P-4 and P-5 dated 31-5-1963, 28-3-1963, 28-7-1965, 10-4-1964 and 2-8-1965 respectively. By these orders, the second respondent charged the petitioner at 1% on the turnover covered by "C" Forms, and at 7% in respect of the turnover not covered by "C" Forms. The second respondent also assessed the petitioner under the Kerala General Sales Tax Act, 1963 for the year 1963-64 on the sale of charcoal inside the State at 3% of the turnover, by his order Ext. P-6 dated 14-8-1965. Section 15 of the Central Act provides, among other things, that the tax payable under the sales tax law of a State in respect of any sale or purchase of declared goods inside the State shall not exceed 2 % of the sale or purchase thereof. The above rate has been increased to 3% by an amendment of the Section with effect from 1-7-1966. Section 14 of the Central Act enumerates declared goods; and "coal including coke in all its forms" is item (i) in the list. Section 8(2) of the

Central Act provides, among other things, that in the case of declared goods the tax payable by a dealer on his turnover relating to inter-State sale shall be calculated at the rate applicable to sale or purchase of such goods in the appropriate State. Under the General Sales Tax Act, 1125, which was in force in Kerala State till 31-3-1963, the rate of sales tax payable for charcoal was 2% of the turnover while it is 3% under the Kerala General Sales Tax Act, 1963. The effect of the above provisions in the Central Act is that, both under this Act and under the State law, sale or purchase of declared goods cannot be charged at more than 2 % of the turnover. The assessments as per Exs. P-1 to P-6 were made on the assumption that charcoal does not fall under item (i) in section 14 of the Central Act, namely "coal including coke in all its forms", and it is not therefore a declared goods. The Supreme Court held in *Commissioner of Sales Tax v. Jaswant Singh Charan Singh* (1967) 19 S.T.C. 469 that coal includes charcoal, and that charcoal is a declared goods. That decision was rendered on 23-2-1967. In the light of the law declared in the above decision, the petitioner has filed this writ petition on 6-10-1969 to quash the above orders of assessment in so far as the second respondent charged the petitioner sales tax in excess of 2%, and for a writ of mandamus against the State Government and the Sales Tax Officer to refund to the petitioner amounts of tax collected in excess of the said rate under the above assessments. There is no dispute that the charge of sales tax in excess of 2% of the turnover under the above orders of assessment cannot be sustained in the light of the above decision of the Supreme Court, In support of his contention that the petitioner is entitled to recover the excess amounts paid by him under the circumstances alleged by him, his counsel relied on the decisions of the Supreme Court in *Sales tax Officer v. Kunhaiya Mukund Lal Saraf* (1958) 9 C.T.C. 747, *State of Madhya v. Bhailal Bhai* (1964) 15 S.T.C. 450 and *State of Kerala v. Aluminium Industries Ltd.* (1965) 16 S.T.C. 689. He also relied on the Single Bench decisions of this Court in *Mohamed Ismail Rowther v. Sales Tax Officer* (1968) 22 S.T.C. 410; and *Abdul Muthalif v. Sales Tax Officer* in O.P. No. 1953 of 1968 dated 18th December 1968. The latter decision was rendered on identically similar facts. The learned Government Pleader submitted that *Kunhaiya Lal's* case related to levy of sales tax on forward contracts and *Bhailal Bhai's* case related to levy of sales tax on tobacco imported into the State, while the *Aluminium Industries'* case related to levy of sales tax under the State law on inter-State sales; that in all these cases the levy and collection were under an invalid law; and that these decisions would not apply to the instant case, wherein the only objection was that the assessment and collection had been in excess of the rate prescribed under law. He further submitted that this is not a case where the levy and collection of the tax was without authority of law; but it is a case where the assessment made was not correct according to law. He also submitted that in any event when a tax is paid under an assessment which has become final under law, the assessee cannot claim a refund of the same on the ground that the assessment or the rate of tax fixed therein was wrong under law, without first having the order of assessment set aside, and that he cannot seek to set aside such an assessment under Article

226 of the Constitution, without regard to any period of limitation. According to the learned Government Pleader, the period of limitation must ordinarily be ninety days from the date of communication of the impugned order of assessment which is the established convention of this Court in entertaining writ petitions, and that in any view of the matter it cannot exceed three years from the above date. He submitted that, to allow an assessee to move the High Court under Article 226 of the Constitution for refund of an amount of tax which, under the law as declared by a decision of the Supreme Court, should not have been assessed or collected, at any time within three years from the date of the said decision irrespective of any consideration as to when the assessment or the collection was made, would amount to reopening of transactions closed and settled decades ago.

2. I am unable to accept these arguments in the light of the authorities above referred to. It is true that the decisions of the Supreme Court relate to levy and collection of tax under a law, declared to be invalid. But in all these cases, the payments have been held to be payments made under mistake of law, and the assessees were held to be entitled to recover the amounts so paid by them by virtue of Section 72 of the Indian Contract Act by an action under Article 226 of the Constitution instituted within three years from the date on which the mistake became known to them. These decisions also indicate that the date on which the mistake of law comes to the knowledge of the assessee cannot be earlier than the date of the decision of the Supreme Court, which declares or lays down the correct law. I shall read the following passage from the decision in the Aluminium Industries case (Page 692):- There is no doubt in view of the decision of this Court *Sales Tax Officer v. Kanhaiyalal* (1958) 9 S.T.C. 747) that money paid under a mistake of law comes within the word "mistake" in Section 78 of the Contract Act and there is no question of estoppel when the mistake of law is common to both the parties which was the case here in as much as the respondent did not raise the question relating to Article 286 of the Constitution and the Sales Tax Officer had no occasion to consider it. In such a case where tax is levied by mistake of law it is ordinarily the duty of the State subject to any provision in the law relating to sales tax and no such provision has been brought to our notice to refund the tax. If refund is not made, remedy through Court is open subject to the same restrictions and also to the period of limitation (see Article 96 of the Limitation Act, 1908), namely three years from the date when the mistake becomes known to the person who has made the payment by mistake (see *State of Madhya Pradesh v. Bhailal* (1964) 15 S. T. C. 450).

In all these cases, the refund claimed by the assessees related to amounts paid by them under assessments which had become conclusive. It is true that it was not contended in those cases, that the assessees were not entitled to claim the refund, without the orders of assessment being set aside, and that the orders of assessment cannot be attacked under Article 226 of the Constitution beyond a reasonable period from the date the said orders became final. But the decisions of the Supreme Court are based on an assumption that such a consideration is

not relevant, when the claim for recovery is governed by Section 72 of the Indian Contract Act. The two Single Bench decisions of this Court to which reference has been already made, also proceed on that basis. In the light of these authorities, it is not possible for me to hold that the fact that amounts sought to be recovered had been paid under orders of assessment which had become final several years ago, would make a difference in the maintainability of the action under Article 226 of the Constitution.

In the result this writ petition is allowed; and the second respondent is directed to recompute the tax payable by the petitioner during the years covered by the orders of assessment Exs. P-1 to P-6 at the rate of 2% in respect of the turnover relating to charcoal and refund the excess amount to the petitioner within six months from date hereof. In the circumstances of the case there will be no order as to costs.