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**(1959) 11 KL CK 0011**

**In the High Court Of Kerala**

**Case No :** O.P. No"s. 60, 368, 369, 401 and 675 of 1958

Varkey Thomas and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

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**Date of Decision :** 06-11-1959

**Acts Referred:**

Kerala Surcharge on Taxes Act, 1957 — Section 3(1), 6

**Citation :** (1960) 11 STC 60

**Hon'ble Judges :** T.K. Joseph, J;M.S. Menon, J

**Bench :** Division Bench

**Advocate :** K.K. Mathew and George Vadakkal, in O.P. No. 60 of 1958, P. Govindan Nair and P.K. Kurien, in O.P. Nos. 368, 369 and 401 of 1958 and P.K. Shamsuddin, in O.P. No. 675 of 1958, for the Appellant; The Government Pleader, for the Respondent

**Final Decision :** Allowed

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## Judgement

M.S. Menon, J.—These five petitions raise a common question relating to the levy of the surcharge u/s 3(1) of the Kerala Surcharge on Taxes Act, 1957. That subsection (omitting the proviso thereto) reads as follows :

The tax payable under the Travancore-Cochin General Sales Tax Act, 1125, or the Madras General Sales Tax Act, 1939, shall, in the case of a dealer whose turnover exceeds thirty thousand rupees in a year, be increased by a surcharge at the rate of two and a half per centum of the tax payable for that year and the provisions of the Travancore Cochin General Sales Tax Act, 1125, or the Madras General Sales Tax Act, 1939, shall, as the case may be, apply to the levy and collection of the said surcharge.

2. The Act came into force on 1st September, 1957. The question for consideration is whether the surcharge can be levied on the sales tax in respect of transactions which occurred in 1956-57 (1st April, 1956, to 31st March, 1957), i.e., prior to the date on which the Act came into force.

3. It is conceded that the Act has no retroactive operation. The contention on behalf of the State is that the surcharge is only on the sales tax "payable", that no sales tax becomes "payable" until assessed and demanded, that the assessments in all the five cases were subsequent to 1st September, 1957 and that as a result the surcharge levied is valid and has to be sustained.

4. The learned Government Pleader summarised his contention as follows :-

The question whether a dealer is liable to surcharge on sales tax in respect of the year 1956-57 must depend on the meaning of the words "tax payable". The tax is payable only when it is quantified and demanded. Then alone it becomes due. Nothing is payable that is not due. It must follow that the sales tax assessed and demanded after the commencement of the Act is subject to levy of surcharge, even though the tax relates to an year prior to the commencement of the Act.

5. We propose to assume, without deciding, that the expression "tax payable" relates to a tax assessed and demanded as contended by the State. Even then it does not follow that the levy of surcharge in these cases is valid.

6. The sub-section makes it clear that the surcharge is payable only" in the case of a dealer whose turnover exceeds thirty thousand rupees in a year". The tense used is significant and conclusive.

7. In Rao Bahadur A.T. Pannirselvam Vs. A. Veeriah Vandayar and Another, , the court had to consider the operation of a proviso worded as follows:

Provided further that, if any question arises either before or after an election whether any person is or is not disqualified under this sub-section, the question shall be referred to the local Government, whose decision shall be final.

Reilly, J., said :-

It is suggested that, when that provision came into force, the Subordinate Judge lost jurisdiction to decide the question which was properly before him in the election petition already instituted. Now to my mind the natural reading of that second proviso is not to that effect. Its words are : " If any question arises ". That in itself is no indication of the past. The next words on which the learned Advocate General laid stress were " either before or after an election". Those words, I do not think, help him because they are still in the natural construction of the sentence referring to future matters. " If any question arises before an election " that does not mean "has arisen in the past". "If any question arises after an election " neither does that refer to any question in the past. And it is of interest to notice that the whole of the Sub-section (2), Section 54, in its new form is grammatically in the future tense, a matter which we cannot ignore when dealing with the contention that a particular provision, not explicitly retrospective, not described explicitly as declaratory, is yet to be construed as retrospective in its effect. The importance of the use of the future tense was pointed out in *Smithies v. National Association of Operative Plasterers* 1909 78 L.J.K.B. 259, in connection with the question whether a new provision should be

applied to a pending action.

8. A taxing statute in order to affect a period of time anterior to the date of its enactment must be retroactive in character (See Bindra, Interpretation of Statutes, 2nd Edition, page 549). As pointed out by Sutherland the terms "retroactive" and "retrospective" are synonymous in judicial usage and they describe Acts which operate on transactions which have occurred or rights and obligations which existed before the passage of the Acts (Statutory Construction, 3rd Edition, Vol. 2, Section 2202). If the Act has no retroactive operation, it must follow that the years in respect of which the surcharge can be levied must be years subsequent to 1st September, 1957.

9. Section 6 of the Kerala Surcharge on Taxes Act, 1957, provides:

If any difficulty arises in giving effect to the provisions of this Act, the Government may, as occasion may arise, by order do anything which appears to them necessary for the purpose of removing the difficulty.

In exercise of the powers conferred by this section the Government issued a notification on 28th November, 1957, which reads as follows :

Whereas certain difficulties have arisen in giving effect to the provisions of the Kerala Surcharge on Taxes Act, 1957 (Act II of 1957):

Now, therefore, in exercise of the powers conferred by Section 6 of the said Act, the Government of Kerala hereby order that,

(1) Surcharge shall be levied on assessments on the turnover or income of the year 1956-57 onwards but it shall be confined only to assessments made on or after 1st September, 1957;

(2) Where the turnover or income for periods prior to 1956-57 is pending assessment surcharge shall not be levied on such assessments when made.

According to the learned Government Pleader the notification is sufficient to sustain the levy of a surcharge in respect of 1956-57 (1st April, 1956, to 31st March, 1957).

10. The submission is not correct. What Section 6 authorises is the removal of difficulties in giving effect to the provisions of the Act. What the Government has done is to give a retroactive operation to the Act which the Legislature had not chosen to give.

11. This is clearly unsustainable. We cannot but hold that the notification to the extent it permits a surcharge in respect of 1956-57 (1st April, 1956, to 31st March, 1957) is invalid as contended by the petitioners.

12. In the light of what is stated above these petitions have to be allowed and we do so though in the circumstances of the case without any order as to costs.

13. Various other contentions are raised in these petitions. They were not

pressed before us and are not, therefore, considered in this judgment.