

SUPREME COURT OF INDIA

State of M.P.

Vs.

Haji Hasan Dada

C.A.No.1007 of 1964

(K. Subba Rao, J. C. Shah and S. M. Sikri, JJ.)

02.12.1965

JUDGEMENT

SHAH, J.:

1. By order dated April 17, 1952 the respondent Haji Hasan Dada was assessed by the Assistant Commissioner of Sales Tax, Nagpur Region, to pay tax under the Central Provinces and Berar Sales Tax Act 21 of 1947 on the turnover from his business in yarn for the period November 13, 1947 to November 1, 1948. The respondent paid the amount of tax assessed on July 8, 1952. Thereafter relying upon S.13 of the C. P. and Berar Sales Tax Act, 1947 he applied on November 20, 1952 to the Assistant Commissioner of Sales Tax for an order refunding Rs. 837/10 on the plea that in the turnover of his business were included dyeing charges which were not taxable under the Act, and which since the order of assessment were held by the Board of Revenue to be not taxable. The Assistant Commissioner rejected the application, and the order was confirmed by the Commissioner of Sales Tax in appeal. The Board of Revenue, Madhya Pradesh, however, set aside the order and ordered that the case be returned to the commissioner "for disposal afresh in the light of the legal principles explained in *Gauhar Sheikh Nazir v. The State*, 1952 - 3 STC 331 (MP-BR)"

2. During the pendency of the proceedings before the taxing authorities, S. 13 of the Act was amended with retrospective effect. It is claimed by the State that under the amended section the right to obtain refund in cases similar to those under examination was taken away retrospectively.

3. The state of Madhya Pradesh moved the Board of Revenue for a reference under S 23 of the Act to the High Court and the Board or Revenue referred the following three questions:

"1. Is ruling 57 (in *Sheikh Gauhar's case* 1952 - 3 STC 331 (MP-BR)) good law? In other words, was the Board right in holding that the Privy Council's decision in *Commissioner of Income-tax, West Punjab North West Frontier and Delhi Provinces Lahore v. Tribune Trust, Lahore* AIR 1948 PC 102, constituted no bar to the examination on merits of claims for refund made under the original S 13 of the Sales Tax Act XXI of 1947 within the time limit mentioned in it?

2. Has S. 24 of Act XX of 1953 been enacted, in so far as it seeks to give retrospective effect to the amended S. 13 of Act XXI of 1947 - as from the very commencement of the latter on 1st June, 1947? and

3. If the answer to question No. 2 is in the affirmative, does sub-section (3) of the new S. 13

constitute a bar to the examination on merits of the claim for refund made by the assessee in the present case?"

The High Court held that by S. 13 of the Act as originally enacted the respondent had "a valuable right to ask for refund of the amount of the tax paid by him in excess of the amount lawfully due" and that "the right to obtain a refund being a substantive right given to the respondent by the statute and not being a matter of mere procedure", this right could not be taken away except by clear and unambiguous words, and S. 13 as amended was not legislation which satisfied that test. The High Court accordingly answered the questions as follows:

"1. Ruling No. 57 is good law, and, in our opinion, the Board was right.

2. Section 24 of Act XX of 1953 has been validly enacted.

3 The new S.13 sub-section (3), does not bar an examination on merits of the claim for refund made on 20th November, 1952 by the assessee."

With special leave the State of Maharashtra upon whom the rights of the State of Madhya Pradesh have devolved by virtue of the States Reorganisation Act, 1956, has appealed to this Court.

4. We are of the view that the first question alone need be answered in this appeal, and on the answer we propose to record the claim made by the respondent must stand rejected. Section 13 of the Act, as originally enacted, and which applied during the year of assessment, read as follows:

"The Commissioner shall, in the prescribed manner and either by cash payment or. at the option of the dealer, by deduction of such excess from the amount of tax due in respect of any other period, refund to a registered dealer applying in this behalf any amount of tax or penalty paid by such dealer in excess of the amount due from him under this Act:

Provided that no claim for refund shall be allowed unless it is made within twelve months from the date on which the order of assessment with or without penalty was passed or within six months from the date on which the final order is passed on appeal, revision, review or reference in respect of the order of assessment with or without penalty."

The amendment to S. 13 by Act XX of 1953 need not, for reasons already set out, be considered.

5. Section 13, in terms authorised the Commissioner to grant refund to a registered dealer applying in that behalf, of any amount of tax or penalty paid by such dealer in excess of the amount due from him under the Act. The section implies that refund may be granted only of the amount which is not lawfully due, and whether a certain amount is lawfully due or not, must be determined by the Assistant Commissioner in making the order of assessment or re-assessment. The order of the Assistant Commissioner is undoubtedly not final: it is liable to be set aside in appeal or modified in a revision application under the provisions of the Act. But so long as the order passed by the Assistant Commissioner is not so set aside or modified, a dealer cannot call upon him to ignore the previous order, and grant refund contrary to the plain direction of the order.

6. There is abundant authority for the view that until it is set aside by appropriate proceedings under the Act which authorises the levy of tax, full effect must be given to an order of assessment, even if it be later found that the order was erroneous in law e.g. 74 Ind App. 306: AIR 1948 PC 102. In that case the Trust which had been in previous years assessed to, and had paid, income-tax claimed in

respect of its assessment for the year 1932-33 that it was exempt from taxation. In appeal which was carried to the Judicial Committee, the contention was upheld. Before the judgement of the Judicial Committee was pronounced, assessments to Income-tax were made on the Trust for the years 1933-34 to 1938-39. After the Board's decision the Trust applied to the Commissioner of Income-tax for an order for refund of Income-tax. The High Court of the Lahore held in a reference under S. 66 (3) of the Indian Income-tax Act that the assessments made for the years 1933-34 to 1938-39 "were a nullity" and that the Trust could not be denied the relief. The Judicial Committee reversed the order of the High Court and held that the assessments which were duly made by the Income-tax Officer in the proper exercise of his duty were validly made and were effective until they were set aside.

7. The Assistant Commissioner appointed under the Act is within the limits of his jurisdiction and authority competent to decide all the questions which arise before him: his orders, it is true, are liable to be set aside in appeal or modified in revision as provided by the Act. But under the Act the Assistant commissioner- who exercises the powers of the Commissioner - has no power to review his decision, nor is he authorised to ignore his previous order, and to pass an order for refund inconsistent with his previous order which has not been set aside by appropriate proceedings.

8. It is somewhat unfortunate that a later decision of the Bombay High Court in *State of Bombay v. Purshottamdas Dwarkadas* 1957-8 STC 379 (Bom) - a case arising under S. 13 of the Bombay Sales Tax Act, 1946 which decided the identical question which arose in this appeal, was not brought to the notice of the High Court. In that case it was held by the High Court that an application for refund of sales tax paid under an order of assessment cannot be entertained by the Sales Tax Officer on the plea that the order was made on an erroneous view of the law, unless the order was set aside in appropriate proceedings by way of appeal or revision. The Court in that case in a reference made under the Bombay Sales Tax Act disapproved of the view of the Board of Revenue which had in arriving at its decision followed the precedent in *Gauhar Sheikh Nazir's case*, 1952 - 3 STC 331 (MP-BR).

9. Application for refund of tax was therefore not maintainable under S. 13 of the C. P. and Berar Sales Tax Act. 1947 as originally framed.

10. The appeal must therefore be allowed. The parties to bear their own costs in this Court and in the High Court

Appeal allowed

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