

Commissioner of Sales Tax, U.P

v.

Ganga Sugar Corporation Limited Commissioner of Sales Tax, U.P. v. Behari Lal Ram Prasad. Ganga Sugar Corporation Limited v. Commissioner of Sales Tax, U.P

(Supreme Court Of India)

HON'BLE JUSTICE J. C. SHAH HON'BLE JUSTICE VAIDYNATHIER
RAMASWAMI HON'BLE JUSTICE A. N. GROVER

Civil Appeal No. 711 And 1284 Of 1966 | 10-09-1968

GROVER, J.

1. The two appeals, Civil Appeals Nos. 711 and 1284 of 1966, are by special leave from the judgments of the Allahabad High Court. These appeals as also the writ petition shall stand disposed of by this judgment.

2. In Civil Appeal No. 711 of 1966 the assessee-company manufactures and deals in sugar and its allied products. In the relevant assessment year 1950-51 the assessee had opted to submit its return on the basis of the turnover of the previous year 1949-50 for the period April 1, 1949, to March 31, 1950. The Sales Tax Officer assessed a sum of Rs. 96, 974-5-8 as sales tax on the turnover for the aforesaid period. During the previous year the assessee had realised Rs. 1, 20, 000 as sales tax from its customers and had deposited Rs. 63, 487-2-10 towards its tax liability. The assessee was asked to deposit the balance of Rs. 33, 487-2-10 to meet the total tax liability of Rs. 96, 974-5-8. The Sales Tax Officer also directed the assessee to deposit a sum of Rs. 23, 025-10-4 in the Government Treasury under section 8-A(4) of the U.P. Sales Tax Act, 1948, hereinafter called the Act. The assessee filed an appeal against the regular assessment.

3. The Judge (Appeal) redetermined the tax turnover and reduced the tax liability to Rs. 14, 621-9-4. The assessee applied for refund of Rs. 48, 965-9-6 being the difference between Rs. 63, 487-2-10 deposited and Rs. 14, 621-9-4 being the amount of tax as determined by the Judge (Appeals). The Sales Tax

Officer declined to give any refund on the ground that the assessee had in fact realised Rs. 1, 20, 000 from its buyers on account of sales tax and it was liable to deposit the entire balance after excluding Rs. 14, 621-9-4 and was therefore not entitled to any refund. The assessee filed a revision petition before the Judge (Revisions). The Judge (Revisions) held that only tax realised after January 25, 1950, amounting to Rs. 11, 952-7-10 was liable to be deposited under section 8-A(4). Consequently he directed the refund of Rs. 48, 865-9-6 being the excess amount deposited by the assessee. He further ordered that a sum of Rs. 11, 952-2-6 out of Rs. 23, 025-10-4 after deducting the amount the assessee deposited under section 8-A(4) which came to Rs. 11, 073-2-6 be also refunded.

Thereupon the Commissioner of Sales Tax moved an application under section 11 of the Act for referring the following questions of law to the High Court :

"1. Whether in the circumstances of the case the amount paid by the assesseees and recovered by assesseees from April 1, 1949 to January 25, 1950, is liable to be deposited in the Government Treasury under section 8-A(4) of the U.P. Sales Tax Act ?

2. What tax was chargeable from the assesseees in respect of the assessment year 1950-51 on the the basis of the turnover of the previous year 1949-50 and were they entitled to the refund of the deposit made by them as tax

The reference came up before a Division Bench of the High Court consisting of M. C. Desai, C.J., and Pathak, J. The two learned Judges differed in their opinion and referred the following two questions for the opinion of a third Judge :

"1. Whether in the circumstances of the case the amount paid by the assesseees and recovered by the assesseees from April 1, 1949, to January 25, 1950, is liable to be deposited in the Government Treasury under section 8-A(4) of U.P. Sales Tax Act ?

2. Where the assesseees, the tax chargeable on whom in respect of the assessment year 1950-51 on the basis of the turnover of the previous year 1949-50 was Rs. 14, 621-9-4, entitled in the circumstances of the case to the refund of

the deposit made by them as tax ?"Before the third Judge (Manchanda, J.) a question was mooted based on a decision of this court in R. Abdul Quader & Co. v. Sales Tax Officer, Hyderabad ([1964] 6 S.C.R. 867; 15 S.T.C. 403), that section 8-A(4) of the Act was ultra vires the Constitution and therefore the sales tax authorities were not entitled to call upon the assessee to deposit any part of the amount of Rs. 1, 20, 000 which had been realised by it as sales tax from its constituents. Manchanda, J., sent the case back to the Division Bench saying that he could only answer the points which had been referred to his on a difference of opinion and that he could not embark on any enquiry as to the vires of section 8-A (4). The Division Bench then recorded an order observing that the learned Judge to whom the case had been referred owing to difference of opinion had to express his opinion on both the questions which were required to be answered and that it was open to him when answering question No. 2 to consider the vires of the impugned section. Manchanda, J., gave his judgment on September 23, 1964, answering point No. 1 in the affirmative and against the assessee. On the second point he was of the view that section 8-A(4) of the Act was ultra vires in view of the decision of this court in Abdul Quader's case ([1964] 6 S.C.R. 867; 15 S.T.C. 403). On the second point therefore the answer was in the affirmative and in favour of the assessee. The Division Bench then made a final order on November 13, 1964, answering the first question referred to the High Court in the affirmative and as regards the second question no answer was returned to the first part but on the second part the answer was returned in the affirmative.

4. In view of the settled rule that in a tax reference the question of vires of a taxing provision cannot be gone into the assessee has filed a petition under article 32 of the Constitution in this court challenging the vires of section 8-A(4) of the Act on the ground of back of legislative competence of the State Legislature and also being violative of the fundamental rights under article 19(1)(f) of the Constitution. So far as the vires of section 8-A(4) of the Act is concerned, it would appear that the matter has been settled by the decision in R. Abdul Quader's case ([1964] 6 S.C.R. 867; 15 S.T.C. 403). There the validity of section 11(2) of the Hyderabad General Sales Tax Act, 1950, was canvassed. The section reads as follows :

"11. (2) Notwithstanding anything to the contrary contained in any order of an officer or tribunal or the judgment, decree or order of a court, every person who has collected or collects on or after 1st May, 1950, any amount by way of tax

otherwise than in accordance with the provisions of this Act, shall pay over to the Government, within such time and in such manner as may be prescribed the amount to collected by him, and in default of such payment the said amount shall be recovered from him as if it were arrears of land revenue."

5. It was decided that the State Legislature could not be regarded as having directly legislated for the imposition of sales and purchase tax under entry 54, List II, in the Constitution when it made the provisions of section 11(2) because on the face of the provisions the amount though collected by way of tax was not exigible as tax under the law. This is what was observed at page 873 :

"We do not think that the ambit of ancillary or incidental power goes to the extent of permitting the Legislature to provide that though the amount collected - may be wrongly - by way of tax is not exigible under the law as made under the relevant taxing entry, it shall still be paid over to Government, as if it were a tax."

6. Reliance by counsel was placed in that case on a decision of the Madras High Court in *Indian Aluminium Co., Ltd., Calcutta v. The State of Madras* ([1962] 13 S.T.C. 967). That decision was with respect to section 8-B of the Madras General Sales Tax Act (9 of 1939 as amended by Madras Act 1 of 1956). It as observed that though the words in section 8-B(2) were not exactly the same as in section 11(2) of the Hyderabad Act, the provision in substance was to the same effect as in section 11(2). Therefore the Madras decision must be held to be incorrect. Now section 8-B(2) of the Madras Act was in the following terms :-

"8-B. (2) Every person who has collected or collects any amount purporting to be by way of tax under this Act, on or after the 1st day of April, 1947 (whether or not any tax is due from him under this Act in respect of the transaction in which he has collected or collects such amount) shall pay over to the (State) Government within the such time and in such manner as may be prescribed, all amounts so collected by him if they are in excess of the tax, if any, paid by him for the period during which the collections were made."

Section 8-A(4) of the Act may be reproduced :

"8-A. (4) Without prejudice to the provisions of clause (g) of sub-section (2) of section 14, the amount realised by any person as tax on sale of any goods shall, notwithstanding anything contained in any other provision of this Act, be deposited by him in Government treasury within such period as may be prescribed, if the amount so realised exceeds the amount payable as tax in respect of that sale or if no tax is payable in respect thereof."

7. Mr. C. B. Agarwala has not been able to point to much difference between section 8-B(2) of the Madras Act and section 8-A(4) of the Act. He has, however, contended that in R. Abdul Quader's case ([1964] 6 S.C.R. 867; 15 S.T.C. 403), section 11(2) related to tax which had been collected otherwise than in accordance with the provisions of that Act. It was for that reason that it was held that the relevant entry under which the legislation had been enacted could not have covered such a provision even by invoking the theory of ancillary or incidental powers. In the present case, according to him, the State Legislature was perfectly competent to legislate about imposition of the tax under the corresponding entry in the Government of India Act, 1935, on inter-State sales before the enactment of the Constitution in which article 286 created a bar to the imposition of tax on inter-State sales except in accordance with the provisions of that article. A perusal of the orders made by the sales tax authorities in the present case and the judgments of the High Court as also the section itself would show that section 8-A(4) of the Act was applicable only where an assessee had realised amounts of sales tax from his customers which were unauthorised in the sense that the amount realised exceeded the amount payable as tax or no tax was payable. At any rate, it is perfectly clear that the tax liability of the assessee came to Rs. 14, 621-9-4 only and therefore the excess which had been realised by him (the total amount realised being Rs. 1, 20, 000) could not be regarded as having been realised lawfully. It seems to us that the decision in R. Abdul Quader's case ([1964] 6 S.C.R. 867; 15 S.T.C. 403) squarely applies and section 8-A(4) of the Act must be held to be ultra vires the competence of the State Legislature. In Civil Appeal No. 1284 of 1966, where the facts were similar to the other appeal the point about the vires of section 8-A(4) of the Act was specifically raised and decided without any objection by the Commissioner of Sales Tax. It has now been laid down by this court in *M/s. Tikaram & Sons Ltd. v. The Commissioner of Sales Tax, U.P.* (Civil Appeals Nos. 1682 to 1691 of 1967; since reported at [1968] 22 S.T.C. 308), decided on March 22, 1968, that when the jurisdiction of the High Court

is not challenged to examine the question of law regarding constitutional validity of a taxing provision in a sales tax reference it is not open to the sales tax authorities to challenge the jurisdiction of the High Court to examine such a question of law and to pronounce upon the constitutional validity of the impugned section.

8. In view of the above discussion the two appeals and the writ petition shall stand disposed of in the following manner :

(1) In Civil Appeal No. 711 of 1966, section 8-A(4) of the Act being ultra vires, the answer given by the High Court to the second part of question No. 2 in the affirmative in favour of the assessee is affirmed. The answers to the other questions become unnecessary.

(2) In Civil Appeal No. 1284 of 1966, the answer to the second question as returned by the High Court in the affirmative in favour of the assessee is upheld. No answer need be given to the other question.

(3) Writ Petition No. 225 of 1968 is allowed and it is declared that section 8-A(4) of the Act is ultra vires the State Legislature. Let refund be made in terms of prayer (B) in the writ petition on the petitioners making a formal application to the authorities concerned.

9. The Commissioner of Sales Tax, U.P., shall pay the costs to the respondents in the two appeals (one hearing fee). There will, however, be no order as to costs in the writ petition. Appeals dismissed.

10. Petition allowed.