SUPREME COURT OF INDIA

M/s. Kanthi Enterprises

Vs.

State of Karnataka

C.A.Nos.7540-7551 of 1999

(Syed Shah Mohammad Quadri and Ruma Pal JJ.)

10.9.2002

JUDGMENT

Syed Shah Mohammed Quadri, J.

1. These appeals are from the common judgment and order of Division Bench of the High Court of Karnataka at Bangalore in a batch of writ appeals and writ petitions dated September 2, 1999 and judgments and orders passed, following the same, in various writ petitions.

2. In writ petitions filed under Article 226 of the Constitution, the appellants challenged the validity of retrospective operation of the Explanation to the first provision to sub-section (1-A) of Section 5 of the *Karnataka Sales Tax Act, 1957* (for short, `the Act') which was inserted by Act No. 1 of 1996 on March 5, 1996 with effect from April 1, 1988. The sub-section was omitted by Act No. 5 of 2000, w.e.f. April 1, 2000. During the short period it was on the statute book, it gave rise to a series of litigation including the present appeals. The challenge against retrospective operation of the impugned Explanation was unsuccessful before the learned Single Judge of the High Court as well as the Division Bench of the High Court, hence these appeals.

3. Mr. Joseph Vellapally, the learned senior counsel appearing for the appellants, contended that on account of retrospective operation of the said Explanation, the appellants were put to huge economic loss and great hardship because they could not pass the burden of tax on consumer for the past years, therefore, the retrospectivity might be declared as unreasonable and arbitrary.

4. Mr. A.K. Ganguli, the learned senior counsel, while adopting the argument of Mr.Vellapally pleaded that this Court could relieve the appellants of the burden of tax imposed on them on account of retrospectivity of the Explanation as by virtue of Section 18, 18A and 29 of the Act the appellants could not have collected the tax from the consumers between August 18, 1995 and March 5, 1996 except on pain of penalty and prosecution.

5. Mr. T.L.V. Iyer, the learned senior counsel appearing for the State, argued that after the clarifactory circular, issued by the Commissioner on June 19, 1988, was quashed by a learned Single Judge of the Karnataka High Court on August 18, 1995, the legislature inserted the said Explanation on March 5, 1996 clarifying the first proviso taking note of the judgment of the High Court; merely because the Explanation is given retrospective effect, submits the learned counsel, it cannot be held illegal much less unconstitutional. Even when a liability by imposing burden of a tax is created for the first time retrospectively the legislation cannot be faulted; in instant case the legislature has only clarified the existing liability having regard to the pronouncement of the High Court. There is, therefore, no valid reason to assail the impugned legislation.

6. To appreciate the contentions of the learned senior counsel it would be useful to refer to the background in which the Explanation to the first proviso to sub-section (1-A) cam to be inserted. By Act No.15 of 1988 sub-section (1-A) was inserted in Section 5 of the Act w.e.f. April 1, 1988 which was as under:

> "5. Levy of tax on sale or purchase of goods. –
>
> (1) *** *** ***
>
> (1-A) Notwithstanding anything contained in sub-section (1), every dealer shall pay for each year tax on his taxable turnover of sales (at every point of sale) (other than the last sale in the State) relating to all kinds of alcoholic liquors for human consumption (other than toddy, arrack {fenny, beer and wine}) at the rate of {fifty} per cent of such turnover:
>
> Provided that at any point of sale other than first point of sale and the last point of sale, the taxable turnover shall be arrived at by deducting the turnover of such goods on which tax has been levied under this sub-section at the immediately preceding point of sale."

7. In regard to computation of taxable turnover, referred to in the afore-mentioned proviso, the Commissioner of Commercial Taxes (for short, `the Commissioner') issued a circular on June 19, 1988 which provided that the tax component forming a part of the turnover will not qualify for deduction under the first proviso to Section 5(1-A) of the Act. The validity of that circular (along with some other notification with which we are not concerned here) was assailed in the first round of the litigation in the High Court. By order dated August 18, 1995, a learned Single Judge of the High Court quashed the circular holding that for the purpose of the first proviso to Section 5(1-A) of the Act, sales tax paid will also form part of the turnover envisaged therein. To clarify the true intention of the legislature of the Karnataka State, the following Explanation to the first proviso to sub-section (1-A) of Section 5 of the Act was inserted by Act No. 1 of 1996 on March 5, 1996, which is re-produced hereunder:

> *"Explanation* : For the purpose of this proviso "turnover of such goods on which tax has been levied" means taxable turnover and shall not include tax".

8. It was given retrospective operation from April 1, 1988 as on that date sub-section (1-A) was inserted in Section 5 of the Act. A perusal of the said proviso would show that it deals with any point of sale other than the first point of sale and the last point of sale; in other words it deals with intermediary points of sale. For purposes of such a sale the proviso lays down the mode for determining taxable turnover which has to be arrived at by deducting the *turnover of such goods on which tax has been levied under this sub-section at the immediately preceding point of sale.* Having perused the definitions of "taxable turnover" and "turnover" in clauses (u-1) and (v), respectively, of Section 2(1) of the Act, we are of the view that the words, in italic, mean that "the turnover" therein which qualifies for deduction is not the price of goods impregnated with tax component but excluding it. To put it precisely, it means, "the turnover without the tax component". Inasmuch as at the point of the first sale, it is the price of the goods on which tax will be levied and that will form the turnover of the seller ; at the next point (intermediary point) of sale such turnover, it is obvious, will have two elements, the first being the price of the goods to the purchaser and the second is the tax which he would pay. But at the immediately preceding point of sale turnover of such goods on which tax has been levied under sub-section (1-A) could only mean the price of the goods because it is on t hat component the tax has been levied. The following example may be helpful in understanding the import of the proviso. Suppose at the point of first sale the price of the goods is Rs. 100/- and the sales tax levied on it is Rs. 50/-, so the turnover impregnated with tax component is Rs. 150/- and the turnover without the tax is Rs. 100/-. At the point of second sale, the intermediary sale, the immediately preceding point of sale would be the first sale and in terms of the proviso the total turnover of the goods has to be arrived at by deducting that part of the turnover of the goods on which tax has been levied and that would be Rs. 100/- because it is on that amount tax of Rs. 50/- was levied. That is what the Commissioner in his circular stated. That was, however, not accepted as correct by the learned Single Judge of the High Court. It is for this reason the said explanation was inserted to bring out the true intention of the legislature in calculating "total turnover" mentioned in the proviso. It is merely declaratory of the meaning of the proviso and cannot be treated as imposing a new burden of tax on the appellants with retrospective effect.

9. It is not possible to accede to the second contention of the learned senior counsel for the appellants that as insertion of the Explanation works harshly and causes great hardship to the appellants, it is unreasonable and so they have to be given relief, insofar as they could not pass the burden of tax on the ultimate consumer.

10. It would be well to bear in mind that sales tax is an indirect tax, the burden of payment of tax is on the dealer. The Act does not require but permits a dealer to pass on the burden of tax to the consumer; ensuring that in the guise of tax no more than the actual amount of tax payable under the Act should be collected from the ultimate consumer. To check misuse of this liberty the legislature has taken care to provide by Section 18 of the Act that a person who is not a registered dealer but is liable to pay tax shall not collect any amount by way of tax or purporting to be by way of tax under the Act nor shall a registered dealer collect any amount by way of tax or purporting to be by way of tax at a rate or rates exceeding the rate

or rates at which he is liable to pay tax under the provisions of the Act. The prohibition in the above terms is reinforced by incorporating Section 18A and providing penalty for collection of any amount in contravention of Section 18. Further, Section 29, which enumerates offences and penalties, includes in clause (g) of sub-section (2), collection of any amount by way of turnover tax or purporting to be by way of turnover tax in contravention of sub-section (3) of Section 18. Such an offence is punishable with simple imprisonment which may extend to twelve months or with a fine which shall not be less than five thousand rupees but which may extend to twenty-five thousand rupees or with both and when the offence is a continuing one, with a daily fine not exceeding two hundred rupees during the period of continuance of the offence. The summary of the provisions, referred to above, shows that no unregistered dealer can pass on the burden of tax to the consumer and a registered dealer cannot collect any tax more than what he would be liable to pay.

11. Even if it be true that they could not collect the tax for which they are now made liable, because of an erroneous interpretation of the said proviso by the High Court, the Court cannot relieve the appellants of the burden of tax legally payable by them.

12. It is a settled position that the legislature can impose tax retrospectively though it cannot be arbitrary and unreasonable. At first sight it appears that the Explanation which was inserted on March 5, 1996 retrospectively with effect from April 1, 1988, casts burden of paying tax for about eight years on the appellants. But on a closer scrutiny it becomes clear that till August 18, 1995 (date of pronouncement of High Court Judgment) they could have and in fact collected the tax. The Explanation was inserted on March 5, 1996 so, in effect, the retrospectivity which really affects them, is only for about six months. Even if they have not passed on burden of tax to the customers during that period, the effect cannot be said to be so unreasonable, arbitrary and harsh as to invalidate the Explanation. Such occasional hiccups are not unusual incidents of business. In any event neither on principle nor on authority can such a relief be granted to the appellants.

13. However, having regard to the facts and circumstances of the case, we permit the appellants to pay sales tax levied/leviable during the period August 18, 1995 to March 5, 1996 in six equal instalments, to be paid in each month commencing from October 1, 2002. If any of the appellants fails to pay any instalment within two weeks of the same becoming due, it would be open to the concerned authority to collect the amount of tax due, in lump sum, in accordance with law.

Subject to the above observations the appeals are dismissed with no order as to costs.

Appeals dismissed.