

ALLAHABAD HIGH COURT

Adarsh Bhandar

Vs.

Sales Tax Officer

Civil Misc. Writ No. 3086 of 1956

(Mootham, C.J., Raghubar Dayal and Srivastava, JJ.)

09.05.1957

JUDGMENT

Mootham, C.J.

1. This is a petition under Article 226 of the Constitution in which the petitioner challenges the validity of an assessment order dated 14th September, 1956, made under the U. P. Sales Tax Act (hereinafter called 'the Act') and of a subsequent notice of demand under the same Act dated 15th September, 1956.

2. The petitioner carries on business in Aligarh in vegetable ghee, cloth and sugar and is a registered dealer for the purposes of the Act. On 18th June, 1956, the respondent, who is the Sales Tax Officer, Aligarh, called upon the petitioner to furnish a return of his turnover for the quarter ending 30th June, 1956. The petitioner furnished a return, but he denied that any sales tax could legally be recovered from him on his turnover for this period on the ground that the turnover on the goods in which he dealt was not liable to tax. The respondent, however, by an assessment order dated 14th September, 1956, provisionally assessed the petitioner to a tax of Rs. 75,000 on an estimated turnover of Rs. 12 Lakhs on the ghee, cloth and sugar imported by the petitioner from outside Uttar Pradesh at the rate of one anna per rupee.

3. In order to appreciate the principal argument addressed to us it is necessary to refer to certain provisions of the Act. Sub-section (1) of Section 3-A of the Act as it stood prior to the coming into force of the U. P. Sales Tax (Amendment) Ordinance, 1956, empowered the State Government by notification in the official Gazette to declare that the turnover in respect of any goods shall not be liable to sales tax save at such single point as the State Government may specify. Sub-section (2) of this section then provided that if the State Government makes a declaration under sub-section (1) it may further declare that the turnover of the dealer who is liable to pay tax on the sale of such goods shall, in respect of such sale, be taxed at such rate as

may be specified not exceeding one anna per rupee if the sale related to any of the classes of goods specified in the sub-section and to be taxed at such rate not exceeding nine pies per rupee if the sale was in respect of other goods.

4. On 31st March, 1956, the U. P. Sales Tax (Amendment) Ordinance (hereinafter called "the Ordinance") was published in the Official Gazette of that date. Section 4 of the Ordinance provides that in lieu of sub-section (2) of Section 3-A of the Act two new sub-sections be substituted. We are concerned with the new sub-section (2) which reads thus :

"(2) If the State Government makes a declaration under sub-section (1), it may further declare that the turnover in respect of such goods shall be liable to tax at such rate not exceeding one anna per rupee as may be specified."

The only other section to which reference requires at this stage to be made is Section 1 which, so far as is material, provides that

"1. This Ordinance may be called the U. P. Sales Tax (Amendment) Ordinance, 1956.
2. This section shall come into force at once and the amendments to the U. P. Sales Tax Act, 1948 (hereinafter called the Principal Act) made by Sections 2 to 13 shall.....have effect on and from the first day of April 1956;"

5. On the same date on which the Ordinance was published, namely 31st March, 1956, the Governor of Uttar Pradesh issued a Notification No. ST-905/X which so far as is relevant reads as follows :

"In exercise of the powers conferred by Section 3-A of the U. P. Sales Tax Act, 1948, as amended from time to time, and in supersession of all previous notifications on the subject, the Governor of Uttar Pradesh is hereby pleased to declare that the turnover in respect of the goods specified in the List below shall not with effect from April 1, 1956, be liable to tax except

(a) in the case of goods imported from outside Uttar Pradesh, at the point of sale by the importer; and

(b) in the case of goods manufactured in Uttar Pradesh, at the point of sale by the manufacturer; and the Governor is further pleased to declare that such turnover shall with effect from the said date be taxed at the rate of one anna per rupee." Then follows a list of 47 classes of goods, including vegetable ghee, cloth and sugar.

6. The main contention advanced on behalf of the petitioner is that Notification No. ST-905/X, in so far as it purports to declare that the turnover of a dealer in respect of goods specified in the list attached to the notification shall be taxed from 1st April, 1956, at the rate of one anna per rupee, is invalid on the ground that no such declaration could lawfully be made on 31st March, 1956.

The argument is that the Governor's power to make such a declaration is to be found, if at all, in Section 3-A (2) as amended by the Ordinance. That amendment did not however have effect under Section 1 (2) of the Ordinance until 1st April, 1956. On 31st March, 1956, Section 3-A of the Act stood unamended and under the unamended sub-section the Governor had no power to make the impugned declaration.

7. The learned Standing Counsel has argued that the Governor had authority to make the impugned declaration in anticipation of the amended Section 3-A (2) becoming law by virtue of Section 22 of the U. P. General Clauses Act.

8. Section 22 of the U. P. General Clauses Act was amended with effect from 19th January, 1957, by Section 3 read with Item 2 of Sch. II of the Uttar Pradesh Repealing and Amending (Second) Act, 1956 (U. P. Act No. 5 of 1957), hereinafter called the Amending Act. It was conceded that the declaration in question was not saved by Section 22 prior to this amendment; but it is contended that the amended section which has been given retrospective effect validates the declaration. The first question is, therefore, whether this contention is well founded.

9. Item 2 of Sch. II of the Amending Act, so far as is material, reads as follows :

"For Section 22 of the U. P. General Clauses Act, 1904, the following shall be and be deemed always to have been substituted :

Making of rules or bye-laws and issuing of orders and notifications between publication and commencement of enactment.

22. Where by any Uttar Pradesh Act, which is not to come into force on the day on which it is first published in the Official Gazette a power is conferred to make rules or bye-laws or to issue orders or notifications, with respect to the application of the Act or in the exercise of any power exercisable thereunder or under any enactment thereby amended, or with respect to the establishment of any Court or Office, or the appointment of any Judge or Officer thereunder, or with respect to the person by whom, or the time when, or the place where, or the manner in which, or the fees, taxes, cess or other dues for which, anything is to be done under the Act, then that power may be exercised at any time after the Act has been published as aforesaid; but rules, bye-laws, orders or notifications so made or issued shall not take effect till the commencement of the Act."

10. The learned Standing Counsel's argument is that the Ordinance did not come into force within the meaning of Section 22 of the U. P. General Clauses Act, on 31st March; that advantage could accordingly be taken on the provisions of that section and the notification embodying the Governor's declaration dated 31st March, 1956, was valid. Alternatively the argument is that Section 22 should be so construed as to apply whenever there is an interval of time between the publication of an Act and the date upon which any section of that Act comes

into force.

11. Section 22 is an enabling provision. It provides that where a power is conferred by an Act to make rules or bye-laws or to issue orders or notifications with respect to the matters specified in the section, and where the Act is not to come into force on the day on which it is first published in the Gazette, then such power may be exercised at any time after the Act has been published, but that such rules, bye-laws, orders or notifications shall not take effect till the commencement of the Act. By virtue of Section 30 of the U. P. General Clauses Act, the provisions of that Act apply to an Ordinance made by the Governor under the Constitution as they apply to an Uttar Pradesh Act. Our attention was drawn to the fact that under Section 30 of the (Central) General Clauses Act, 1897, the expression 'Central Act', in Section 5 of that Act does not include an Ordinance made by the President; but the proviso to Clause (b) of Section 30 of the U. P. General Clauses Act makes specific provision for the application of that Act to Ordinances made by the Governor.

12. In my opinion no question of the application of Section 22 of the U. P. General Clauses Act for the purpose of establishing the validity of the notification issued by the Governor on 31st March, 1956, arises. That notification was issued in exercise of powers "conferred by Section 3-A of the U. P. Sales Tax Act, 1948, as amended from time to time". This can mean only that the notification was issued by the Governor in exercise of the power conferred on him under the unamended Section 3-A. The notification was issued, in other words, under Section 3-A prior to its amendment by Section 4 of the Ordinance. In my opinion recourse can be had to Section 22 of the U. P. General Clauses Act only if a notification is issued under an Act or Ordinance which had been published but had not then come into force. Had the notification been issued under Section 3-A "as in force on 1st April, 1956", the position might well have been different but it was not so issued; and as it is common ground that under the unamended Section 3-A the Governor had no power to issue the notification, I am of opinion that the notification is invalid. I have not overlooked Section 5 of the Amending Act which declares that, for the removal of doubts, notifications of the nature specified in Section 22 of the U. P. General Clauses Act issued after the 1st January, 1956, shall be deemed to be as good and valid in law as if the provisions of the Amending Act had been in force at all material dates. No reliance has however been placed on this section by the State, presumably because it merely makes clear that notifications covered by Section 22 will be deemed to be valid notifications.

13. I am further of opinion that this petition; must also succeed on another ground advanced by the petitioner namely that R. 41 (3) of the U. P. Sales Tax Act did not, on 14th September, 1956, empower the Sales Tax Authorities to make a provisional assessment of the tax payable by the petitioner in respect of the quarter ending 30th June, 1956.

14. The assessment order dated 14th September, 1956, purported to be made under Rule 41 of the United Provinces Sales Tax Rules, 1948, (hereinafter called the Rules), sub-rules (1), (2) and

(3) of which read as follows :

"Rule 41. Returns of assessment year : (1) Every dealer whose estimated turnover during the assessment year is not less than Rs. 15,000/- and who elects to submit returns of such year shall submit to the Sales Tax Officer a return of his gross turnover of each month of the assessment year before the expiry of the next succeeding month in Form IV. Provided that every dealer or firm, to whom the provisions of sub-section (3) of Section 18 are applicable shall submit such returns within seven days of the expiry of each month during the year in which the business is commenced.

2. Before submitting the return under sub-rule (1), the dealer shall deposit in the treasury the amount of tax calculated by him on the turnover shown in such return and shall submit the treasury challan with the return, or submit with the return a cheque for the amount so calculated.

3. If no return is submitted in respect of any month before the expiry of the succeeding month, or if the return is submitted without the treasury challan or cheque, the Sales Tax Officer shall, after making such enquiry as he considers necessary, determine the turnover to the best of his judgment, assess the tax payable for the month and serve upon the dealer a notice in Form XI; and the dealer shall pay the sum demanded within the time and in the manner specified in the notice".

15. Prior to its amendment by the U. P. Act VIII of 1954, sub-section (1) of Section 7 of the U. P. Sales Tax Act, so far as is material, provided that

"7. Determination of turnover and assessment of tax :-

(1) Subject to the provisions of Section 18, every dealer whose turnover in the previous year is Rs. 12,000 or more in a year shall submit such return or returns of his turnover of the previous year within sixty days of the commencement of the assessment year in such form and verified in such manner as may be prescribed :

Provided that the Provincial Government may prescribe that any dealer or class of dealers may submit, in lieu of the return or returns specified in this section, a return or returns of his turnover of the assessment year at such intervals, in such form and verified in such manner as may be prescribed, and thereupon all the provisions of this Act shall apply as if such return or returns had been duly submitted under this section."

It was this proviso, read with R. 41, which gave an option to a dealer to submit a return or returns of his turnover of the assessment year in lieu of a return of his turnover of the previous year in accordance with sub-section (1). Rule 41, in other words, applied only to those dealers who exercised the option for which provision was made in Section 7 (1).

16. This option was however taken away by U. P. Act VIII of 1954. By Section 6 of that Act Section 7 (1) and the first proviso thereto of the Sales Tax Act were repealed and a new sub-

section inserted, which, so far as is material reads thus :

"7 (1). Every dealer who is liable to pay tax under this Act shall submit such return or returns of his turnover of the previous year or the assessment year as may be applicable within such period, in such form and verified in such manner, as may be prescribed:",

and by Section 7 a new section 7A was inserted which runs as follows :

"7A (1). The State Government may require any dealer or class of dealers to submit, in addition to the return or returns mentioned in section 7, a return of turnover of such portion of the assessment year and at such intervals and in such manner as may be prescribed and the Assessing Authority may without prejudice to the provisions of the said section make a provisional assessment in respect of the portion of the year in accordance with the provisions of this Act in so far as they can be made applicable.

(2) Where a dealer is required under sub-section (1) to file a return for portion also of the assessment year and the Assessing Authority has made a provisional assessment for such portion of the year, the Assessing Authority shall not, by reason of such assessments, be precluded from making the assessment and redetermining the turnover for the whole year."

17. It is apparent, therefore, that after the coming into force of U. P. Act, VIII of 1954 the making of return of his turnover in respect of a portion of the assessment year ceased to be at the option of the dealer but was at the discretion of the State Government; and that sub-rules (1) to (3) of R. 41 became useless. A new sub-rule (1) of Rule 41 was accordingly substituted for the existing sub-rule (1). Under this substituted sub-rule a dealer was required to submit a quarterly return on certain prescribed dates, but the substitution of the new sub-rule for the old was not effected until the 29th September, 1956. Between the coming into force of U. P. Act VIII of 1954 and the 29th September, 1956, it appears that there was no rule which authorised the assessing officer to make a provisional assessment. It has not been argued that the assessing authority could make a provisional assessment under Section 7A read with Section 7 of the U. P. Sales Tax Act, as then in force, nor have we been referred to any order of the State Government requiring dealers to submit quarterly returns, or prescribing the necessary forms.

18. Other questions have been agitated in the course of the hearing of this petition and I think it proper, in defense to the arguments which have been addressed to us, to state shortly the conclusions at which I have arrived.

19. It has been contended on behalf of the State that the Ordinance did not come into force on the day on which it was first published in the Gazette, and that accordingly the provisions of Section 22 of the U. P. General Clauses Act, having been given retrospective effect, would operate to render valid the Governor's declaration embodied in the notification of the 31st March, 1956. We

have given our reasons for holding that the notification cannot be affected by the provisions of Section 22, but the question has been argued at some length whether the Ordinance was one which was not to come into force within the meaning of that section on the date on which it was first published in the official Gazette.

20. Now in seeking to determine when an Act comes into force the provisions of Section 4, clause (10) and of Section 5 (1) (b) are important. Clause (10) of Section 4 defines the word 'Commencement' used with reference to an Act, as meaning the day on which the Act comes into force; and Section 5(1) (b) provides that

"5 (1). Where any Uttar Pradesh Act is not expressed to come into force on a particular day, then

(a).....

(b) in the case of an Uttar Pradesh Act made after the commencement of the Constitution, it shall come into operation on the day on which the assent thereto of the President or the Governor, as the case may require, is first published in the official Gazette." This latter section read with the proviso to Section 30 makes it clear that an Uttar Pradesh Ordinance made after the commencement of the Constitution will come into force on the day on which it is published in the Gazette unless the Ordinance is expressed to come into force on a particular day. Is Ordinance No. IX of 1956 such an Ordinance?

21. Section 1 of the Ordinance came into force immediately on the publication of the Ordinance in the Gazette. Sub-section (3) of Section 3 deletes R. 7 of the U. P. Sales Tax Rules; it therefore does not come within the ambit of Section 1 (2) of the Ordinance, and no date being specified on which it shall come into force it must, in my opinion, even if Section 5 of the U. P. General Clauses Act has no application, come into force at once. The Ordinance does not state in terms on what date Sections 2 to 13 shall come into force. What sub-section (2) of Section (1) says is, that "the amendments to the U. P. Sales Tax Act, 1948..... made by Sections 2 to 13..... shall have effect on and from the first day of April 1956". Why this phraseology was adopted has not been explained. If, as urged on behalf of the State, it was the intention that Sections 2 to 13 should come into force on the 1st April it is difficult to understand why the Ordinance did not plainly say so. With the exception however of sub-section (3) of Section 3 each of the sections 2 to 13 amends a section of the U. P. Sales Tax Act, and in these circumstances I can see no substantial difference between the coming into force of Sections 2 to 13 and the coming into force of the amendments made by them. It is in my judgment an over-refinement to say, as was suggested in the course of argument, that these sections came into force on one date and the amendments made by them on another.

22. The position then is (in any view) that Sections 1 and 3 (3) came into force on the day on which the Ordinance was first published in the official Gazette, and that the remaining provisions of the Ordinance came into force on the following day. The phrase used in Section 5 of the U. P.

General Clauses Act is "expressed to come into force" which means, in my opinion, that the Act or Ordinance must contain a provision stating the date upon which it is to come into force. In the past it was not unusual for provision to be made in an Act that the whole Act would come into force on a future date - the Court Fees Act 1870, the Code of Criminal Procedure 1898, the Code of Civil Procedure 1908 and the U. P. Municipalities Act 1916 are examples but in recent times it has become increasingly common either for an Uttar Pradesh Act to come into force in different areas at different times or for different sections of an Act to come into force in different areas on different dates. I think it is taking too narrow a view of the matter to conclude that because certain sections of an Act have not come into force that therefore the Act has not come into force; or that because one or more sections of an Act have come into force that the Act has necessarily come into force. An Act may come into force notwithstanding the fact that the commencement of certain sections has been postponed. Sub-section (3) of Section 1 of the United Provinces Medical Act, 1917, provides that

"Sections 30 and 32 shall not come into force until the day to be appointed in this behalf by the State Government by notification in the official Gazette."

There can I think be no doubt that that Act came into force at once. So also an Act may come into force on a future date notwithstanding the fact that certain sections are to come into force immediately. The Town and Country Planning Act, 1947, (10 and 11 Geo. VI c. 51) received the Royal assent on the 6th August 1947. Section .120 enacted that "This Act shall come into force on the appointed day" - which was the 1st July 1948 - but this was subject to the proviso that certain sections of the Act and part of Ninth Schedule thereto "shall come into force on the date of the passing of this Act". It was held by the Divisional Court and subsequently by the Court of Appeal that this was an Act to which Section 37 of the Interpretation Act 1889 (which corresponds to Section 22 of the U. P. General Clauses Act) applied, and that accordingly an order made by the Minister under the Tenth Schedule to the Act on the 16th June 1948 was valid : *Rex v. Minister of Town and Country Planning; Ex parte, Montague Burton Ltd¹*. The Act was described by the Lord Chief Justice in the Divisional Court as being in 'a state of suspended animation' until it came into force on July 1, 1948, (1950) 66 TLR 141 at p. 144 . I am therefore unable to hold that because one or more sections of an Act have come into force on the day the Act was published it necessarily follows that the Act has come into force. Whether it has done so or not must in my opinion depend on the intention of the Legislature to be derived from the enactment itself.

23. Now in the case of the present Ordinance there can I think be little doubt that it was the intention of the Governor that the Ordinance should come into force on the 1st April. The purpose of the Ordinance was to amend the U. P. Sales Tax Act, 1948: that purpose was to be achieved by Sections 2 to 13 of the Ordinance, and the amendments effected by those sections were not to be effective until the 1st April, 1956. The Ordinance was, in the words of Lord Goddard, in a state of suspended animation, until that date.

24. I do not see any good reason why Section 22 of the U. P. General Clauses Act should be narrowly construed. It is, as I have said, an enabling section; and in the public interest it should be liberally interpreted. In my opinion the Ordinance did not come into force, within the meaning of Section 22, on the day on which it was published.

25. The remaining submissions made by learned counsel for the petitioner fall into two groups.

26. I. On the assumption that the effect of Section 22 of the U. P. General Clauses Act is, prima facie, to validate the notification of the 31st March, 1956, it is contended, first, that the retrospective operation of Section 22 involves discrimination and offends against Article 14 of the Constitution; and linked with this is the further submission that a tax on goods, the burden of which cannot be passed on by the dealer to the consumer, is not a tax on the sale of goods within the meaning of item 54 of List II of the Seventh Schedule to the Constitution; and, secondly, that the words "in the exercise of any power exercisable thereunder or under any enactment thereby amended", added to Section 22 of the U. P. General Clauses Act by the Amending Act, have no meaning.

¹1951-1 KB 1

27. II. The validity of the assessment proceedings is challenged on the grounds (a) that R. 41 (3) of the Sales Tax Rules, even if a valid and subsisting rule at the date of the assessment order, had no application to the case of the petitioner; (b) the petitioner was not afforded an opportunity "to substantiate his allegations", and (c) he had no opportunity of being heard when the assessing authority made an assessment of the petitioner's turnover to the best of his judgment.

28. The argument in support of the contention that the retrospective operation of Section 22 of the U. P. General Clauses Act involved an infringement of Article 14 of the Constitution was put like this. A sales tax is an indirect tax and shares, with all indirect taxes, the characteristic that its burden is passed on to the consumer. The notification dated the 31st March, 1956, which enhanced the rate of sales tax on the commodities in which the petitioner deals, being invalid, it had to be ignored by the petitioner. In fact, if the petitioner had charged sales tax from his customers on the basis of the Notification he would have been liable to prosecution under Section 14 of the U. P. Sales Tax Act. The petitioner and other dealers in the commodities in question did not, therefore, charge any sales tax from their customers. If the Notification is now to be held valid with retrospective effect, the result will be that the class of dealers, including the petitioner, who deals in the commodities in question will have to pay the sales tax now levied on the basis of the validated Notification without being able to pass on the burden of that tax to the consumer. On the other hand dealers in commodities to which the Notification did not apply could, and did, pass on to their customers the burden of the sales tax which they had to pay. The petitioner and other dealers in the commodities in which he deals have, in this way, been discriminated against without any fault on their part. There is, it is argued, no reasonable or rational basis for imposing a sales tax which can be passed on to the customers of one class of dealers while imposing a similar tax which cannot be passed on to the customers of another class

of dealers.

29. It is also contended that as the ability to pass on the burden of a sales tax to the consumer is an essential feature of such a tax, it follows that if a tax is imposed in the guise of sales tax which does not possess that essential feature, it is not a tax which can fall under item 54 of List II of the Seventh Schedule of the Constitution and is beyond the competence of the State Legislature.

30. There are several assumptions underlying this argument which, in my opinion are not justified.

31. In the first place, where the consumer has to pay sales tax, as such, each time he makes a purchase in the market, it is difficult to classify the tax as an indirect tax. It can be called 'indirect' only in the sense that the Government does not Collect it directly from those who actually pay it but collects it through intermediaries, the dealers. The method of collection does not necessarily change the nature of the tax.

32. Secondly, I do not think that it is an essential feature of a tax on the sale of goods that the burden thereof must be capable of being passed on to the consumer. There is nothing in the U. P. Sales Tax Act which makes it compulsory for the dealer to pass on the burden of the tax to the consumer. The Act provides that registered dealers can, if they like, realize the tax from their customers, but it is open to a dealer to pay the tax out of his own profits without adding it to the price paid by his customers if he so wishes. As the Act stood prior to its amendment by U. P. Act XIX of 1956 non-registered dealers, if their turnover exceeded the prescribed limit, could not realise the tax, as such, from their customers but were bound to pay it to the Government. Like many other taxes, sales tax is certainly a tax the burden of which can ordinarily be passed on to the consumer and is, in most cases, so passed on, but it cannot in my opinion be said that the tax will cease to be a tax on sales if, on any ground, the burden rests on the dealer.

33. Thirdly, the assumption that a tax of which the burden can be passed on to the consumer cannot be levied retrospectively is, I think, untenable. It cannot be disputed that an excise duty is a tax burden of which can be passed on to the consumer. The retrospective levy of an excise duty has however been upheld as valid by this Court in *Motibhai Lalloobhai and Co. v. Union of India*², and the same view has been taken by the Nagpur High Court in *Chhotabhai Jethabhai Patel and Co. v. Union of India*³, and by the Rajasthan Court in *Mewar Textile Mills Ltd., Bhilwara v. Union of India*⁴,

34. Fourthly, there appears to be nothing in item 54 of List II of the Seventh Schedule which prevents the State Government from levying a sales tax the burden of which cannot be passed on to the consumer. For example, it appears to be open to the State to impose a tax on sales and to provide expressly that it shall not be passed on to the consumer. Learned counsel for the applicant has not been able to cite any authority in support of the proposition that a sales tax

cannot be imposed with retrospective effect. On the other hand, in the case of *Darsan Rai v. State of Bihar*⁵, a sales tax had been imposed in the Chhota Nagpur area with retrospective effect, and its validity was not questioned on that ground.

35. In the present case it is not contended on behalf of the petitioner that there was anything discriminatory in the Notification that was issued on the 31st March 1956. All dealers in the commodities mentioned in the Notification were dealt with on the same footing. It is further conceded that there is nothing discriminatory in the amended provision of Section 22 of the U. P. General Clauses Act. That, too, applies to every one in the same manner. In the ultimate analysis, therefore, the real basis of the grievance that the retrospective validation of the Notification is discriminatory as against the petitioner and the class of dealers to which he belongs is the contention that a sales tax cannot be levied with retrospective effect. We are unable to accept this contention. A person who is subjected to a tax cannot, if all persons similarly placed are similarly taxed, complain of discrimination.

36. The petitioner then contends that the first of the amendments made in Section 22 of the U.P. General Clauses Act by the Amending Act is without meaning. That section after amendment, so far as is material reads thus :

"22. Where by any Uttar Pradesh Act.....a power is conferred.....to

²1956 All LJ 820: AIR 1957 All 84 ⁴ AIR 1955 Raj114

³ AIR 1952 Nag 139 ⁵ AIR 1957 Pat 173

issue notifications..... in the exercise of any power exercisable there under or under any enactment thereby amended.....then that power may be exercised at any time after the Act has been published.....but.....notifications so.....issued shall not take effect till the commencement of the Act."

The words "in the exercise of any power exercisable thereunder" appear to us to mean simply "under that Act"; and if that be so, the provision is sufficiently clear, the effect of the amendment being to enable any power to issue notifications conferred by an Act (to which Section 22 applies) to be exercised prior to the Act coming into force, although the Notification will not of course have effect until that event occurs. I hesitate to express an opinion as to the precise meaning, in the context in which they are used, of the words "under any enactment thereby amended", and it is undesirable that I should attempt to do so as no reliance has been placed on these words on behalf of the State and no argument has been addressed to us in this connection on its behalf.

37. I now refer briefly to the three submissions made on behalf of the petitioner with regard to the invalidity of the assessment proceedings.

38. (a) Under sub-rule (3) of Rule 41 the Sales Tax Officer is empowered to make an assessment

to the best of his judgment when no return is submitted or when a return is submitted but is not accompanied by a treasury chalan in proof of the deposit in the treasury of the amount of tax calculated by the dealer on the turnover shown in such return or by a cheque for that amount. The dealer is required to calculate the tax payable in accordance with the prescribed rate. Neither sub-rule (2) nor sub-rule (3) provide that a treasury chalan or cheque need accompany the return only when the dealer admits liability for the tax. These sub-rules require the payment of tax (or its deposit in the treasury) on the turnover shown by the dealer in his return, and they do not authorise the dealer to withhold payment of tax on the ground that he is not liable therefor. In the present case the return submitted by the petitioner was not accompanied by a treasury chalan or cheque. I am therefore of opinion that the Sales Tax Officer was - assuming R. 41 to be valid - free to determine the turnover of the petitioner to the best of his judgment, and provisionally to assess the tax payable by the petitioner for the quarter ending the 30th June 1956.

39. (b) The petitioner's contention is that under Section 7-A of the U. P. Sales Tax Act read with the proviso to sub-section (3) of Section 7 of that Act the assessing authority could not proceed to make a best judgment assessment, on the ground that the assessee's return was incorrect or incomplete, without first giving the assessee a reasonable opportunity of proving the correctness and completeness of his return; and that the petitioner had no such opportunity.

40. This complaint however is not to be found among the grounds on which relief is sought in the petition. No statement is made in the affidavit filed in support of the petition that the petitioner was not in fact afforded an opportunity of proving the correctness of his return; such an assertion is made for the first time in the rejoinder-affidavit. The "allegations" mentioned in the grounds of the petition, which according to the petitioner he had no opportunity to substantiate, refer to another matter, namely his contention that he was not in law liable to pay sales tax on his turnover for the quarter in question. I am of opinion that this complaint ought not in these circumstances to be entertained.

41. (c) The contention is that the enquiry which the Sales Tax Officer may consider necessary to make for the purpose of determining the turnover of the dealer to the best of his judgment is a judicial enquiry in which the dealer is entitled to participate and at which he has the right to be heard. With this submission I am unable to agree. The dealer is required to furnish a full and correct return and he is entitled to an opportunity of proving that his return is a proper one. If he fails to satisfy the assessing authority that this is so he, in effect, drops out of the picture, and it is then for that authority to make an assessment according to his best judgment in accordance with the principles laid down in *Commissioner of Income-tax, United and Central Provinces v. Badri Das Ram Rai Shop, Akola*⁶,

42. In the result, therefore, I am of opinion that this petition succeeds and that a writ of certiorari should issue quashing the assessment order dated the 14th September 1956, and the demand notice dated the 15th September 1956.

Raghubar Dayal and Srivastava, JJ.

43. We agree with the conclusion arrived at by the Hon'ble Chief Justice and the observations made by him in respect of the various points argued by the learned counsel except one. We have not been able to persuade ourselves to share his view on the question whether the Sales Tax Amendment Ordinance, 1956, came into force on the day on which it was first published in the gazette or not. We would therefore like to give in brief our reasons for not accepting the submissions of the State counsel on the point.

44. Article 213 of the Constitution empowers the Governor to promulgate an Ordinance in certain circumstances which include a circumstance that the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action. An Ordinance must, therefore, become effective immediately it is promulgated as the need for immediate action was one of the factors justifying the promulgation of the Ordinance. The preamble of the U. P. Ordinance in suit is 'Whereas the Governor is satisfied that circumstances exist which render it necessary immediately to amend the U. P. Sales Tax Act, 1948.' This makes it clear that the Governor considered it necessary to amend the U.P. Sales Tax Act immediately. Such an immediate amendment could be the result only if the Ordinance came into force at once on its promulgation.

45. Section 5 of the United Provinces General Clauses Act provides that where an Uttar Pradesh Act is not expressed to come into force on a particular day, then such an Act made after the commencement of the Constitution shall come into operation on the day on which the assent thereto of the Governor or the President, as the case may be, is first published in the official gazette. According to Section 30, the provisions of the Act apply to an Ordinance promulgated by the Governor under Article 213 of the Constitution as they apply in relation to Uttar Pradesh Acts made

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by the State Legislature.

Where such an Ordinance is not expressed to come into force on a particular day, it shall therefore come into operation on the day on which it is first published in the official gazette. The relevant date is the date of the first publication of the Ordinance in the Gazette in view of the proviso to Section 30 of the U. P. General Clauses Act. It is not directly expressed in the Ordinance that it would come into force on any particular day. The Ordinance therefore came into operation on the day it was first published in the U. P. Gazette, that is, on the 31st of March 1956.

46. Section 36 (2) of the Interpretation Act, 1889 (52 and 53, Victoria C 63) is :

"Where an Act passed after the commencement of this Act, or any order in council, order, warrant, scheme, letters patent, rules, regulations, or bye laws made, granted or issued,

under a power conferred by any such Act is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day."

In Maxwell on the Interpretation of Statutes, 10th Edition, page 409, it is noted :

"A statute takes effect from the first moment of the day, on which it is passed, unless another day be expressly named, in which case it comes into operation immediately on the expiration of the previous day."

It is further noted at the same page with reference to the provisions of the Acts of Parliament (Commencement) Act, 1793, that the Clerk of Parliaments should endorse on every Act, immediately after its title, the date of its passing and receiving the Royal assent, and such endorsement was part of the Act and was the date of its commencement when no other time was provided. These notes imply that a particular day is to be expressly mentioned as the day on which the Act is to come in force. In the absence of such a provision, the Act will come in force at once.

47. An Ordinance promulgated by the Governor of Uttar Pradesh will come into operation from its first publication in the Gazette, unless it be definitely mentioned in the Ordinance that it will come into force from any subsequent date.

48. The word 'Act' or 'Ordinance' must refer to the entire piece of legislation described by that word. It does not mean individual enactments (vide definition in Section 4 (14) of the General Clauses Act) or sections or paragraphs of the Act. Sub-section (1) of Section 1 of the Ordinance is : "This Ordinance may be called the U. P. Sales Tax Act (Amendment) Ordinance, 1956." The expression 'This Ordinance' does not mean any particular section or sections but means the entire Ordinance. It is the coming into force of the entire Ordinance that we have to look to. The entire Ordinance as such is not expressed to come into force on any particular day and, therefore, must be held to have come into force on the 31st March 1956, when it was first published in the U. P. Gazette.

49. Learned Standing Counsel has drawn our attention to Section 30 of the General Clauses Act, 1897, according to which the expression 'Central Act' in Section 5 of the Act and the word 'Act' in certain clauses including Clause (13) of Section 3 do not include an Ordinance. Section 5 refers to the coming into operation of the Act and is :

"5. (1) Where any Central Act is not expressed to come into operation on a particular day, then it shall come into operation on the day on which it receives the assent, -
(a) in the case of Central Act made before the commencement of Constitution, of the Governor-General, and (b) in the case of an Act of Parliament of the President.

2. Unless the contrary is expressed, a Central Act or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement."

Clause (13) of Section 3 lays down that the word 'commencement' used with reference to an Act or Regulation shall mean the day on which the Act or Regulation comes into force. Though the position is different in the case of State Ordinances in view of clause (b), Section 30 of the U. P. General Clauses Act, the fact that a Central Ordinance is not included in the expression 'Central Act' in Section 5 or the word 'Act' in Section 3, clause (13), tends to support the view expressed earlier that by its nature an Ordinance which is to be promulgated on occasions necessitating immediate action must come into operation immediately and it could not be contemplated that some other point of time could be fixed for an Ordinance to come into operation.

50. It is to be seen now whether the Ordinance expresses any particular day for its coming into force.

51. Section 1 of the Ordinance is :

"1. (1) This Ordinance may be called the U. P. Sales Tax (Amendment) Ordinance, 1956.
(2) This section shall come into force at once and the amendment to the U. P. Sales Tax Act, 1948 (hereinafter called the principal Act) made by Sections 2 to 13 shall subject as herein provided have effect on and from the first day of April 1956; provided that the amendment made by Sections 10 and 13 shall also apply in relation to assessments for any year before the first day of April 1956 whether such assessments have or had at any stage been completed or not."

52. In view of this section, Section 1 and sub-section (8) of Section 3 which does not relate to an amendment of the U. P. Sales Tax Act of 1948 came into operation at once. The amendments made by Sections 2 to 13 were to have effect on and from the 1st April 1956. This does not necessarily mean that these Sections 2 to 13 had not come into force along with the other provisions on the 31st March 1956, when the Ordinance was published. The amendments made to the Act by these sections were to have effect from the 1st of April 1956. They must have been made before they could have effect. Had the making of the amendments and the taking of effect been intended to be simultaneous, it would have been provided that sections making the amendments would themselves come into force on 1-4-1956. We know that some Acts come into force on a certain day but certain provisions of those Acts do not take effect till a much later date. Those provisions as part of the Act do come into force when the Act itself comes into force, but do not operate or become effective till a later date on account of the provisions of the Act itself. It is just incidental that in this particular Ordinance Sections 2 to 13 are the substantive enactments and, but for the provisions of sub-section (3) of Section 3, amend the provisions of the U.P. Sales Tax Act, 1948, but it can be easily visualized that an Ordinance might have had many other

provisions as well whose coming into effect was not put off to a later date. The question would still have been whether that Ordinance came into force at once or not. To us it is clear that the Ordinance would be deemed to have come into force at once and that its provisions which were to take effect later were to do so on account of the provisions of the Ordinance itself and not on account of the fact that the Ordinance had not come into force.

53. Lastly, sub-section (2) of Section 1 simply provides that the amendments to the U. P. Sales Tax Act, 1948, made by Sections 2 to 13 shall have effect on and from the first day of April 1956. It seems to presume or to provide that the amendments to the Sales Tax Act would be made on the promulgation of the Ordinance but the amended provisions will have effect on and from the first day of April 1956. This means that nothing could be done in accordance with those provisions till the first day of April 1956. Any action to be taken in accordance with those provisions will have to be taken after these provisions came into effect and not earlier merely on the basis of these provisions having found a place in the Statute. Any action purporting to be under those provisions and taken before the first day of April 1956 would not be in the exercise of the powers under those provisions. The impugned notification, therefore, issued on the 31st March 1956 was bad, the Governor having no power that day to make the notification in accordance even with the amended provisions of the U. P. Sales Tax Act as the amended provisions were to take effect from the first of April 1956.

54. As the Ordinance had come into operation on the 31st of March 1956 on account of its publication in the Gazette, Section 22 of the U. P. General Clauses Act has no application to the impugned notification. The requirements for its application to any notification are that a power be conferred to issue that particular notification by the Ordinance which was not to come into force on the day on which it was first published in the official Gazette. It is such a power conferred by such an Act or Ordinance that can be exercised at any time after the Act had been published and before the coming into force of the Act. If the Act or Ordinance had already come into force, the exercise of any powers under that Act would not be the matter for whose validity resort could be had to Section 22 of the U. P. General Clauses Act.

55. We are, therefore, of the opinion that the provisions of Section 22 of the U. P. General Causes Act as amended by U. P. Act V of 1957 do not apply to the impugned notification and therefore fail to validate it which admittedly could not have been issued under the unamended Section 3-A of the U. P. Sales Tax Act of 1948 as it stood on the 31st March 1956.

BY THE COURT

56. This petition is allowed, and a writ of certiorari will issue quashing the assessment order dated 14th September 1956, and the demand notice dated the 15th September 1956.

57. The petitioner is entitled to his costs which we assess at Rs. 300.
Petition allowed.

