CALCUTTA HIGH COURT

Suresh Chandra Bose

Vs.

State of W.B

C.R. No. 1107(W) of 1973

(Sabyasachi Mukharji, J.)

11.11.1975

ORDER

Sabyasachi Mukharji, J.

1. The petitioner is a Sanitary Engineer and works as the Sanitary Contractor under the name and style of "M/s. S.C. Bose" at No. 309, Bowbazar Street, Calcutta. In the year 1950 the petitioner filed an application under Section 7 (2) of the Bengal Finance (Sales Tax) Act, 1941 for making himself registered as a registered dealer under the said Act. The petitioner states that the petitioner got himself registered under a mistaken impression that the petitioner was a dealer under the said Act and was liable to pay the tax under the provisions of the said Act and the Rules made thereunder. On that basis the petitioner duly filed returns from 1951 to 1958 and along with the returns paid a sum of Rs. 18,812.45 p. on account of sales tax. The petitioner states that the same was paid on a mistaken notion of law. As a result of the decision in the case of *Dukhineswar Sarkar and Brothers v. Commercial Tax Officer*[1], and the decision of the Supreme Court in the case of *State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd*[2]., it became apparent that the petitioner was not a dealer and the Rule 2 (ii) (c) of the Bengal Sales Tax Rules, 1941 under which the petitioner was assessed was declared to be void and ultra vires. In the premises, the petitioner became entitled to refund of the Sales Tax already paid and was entitled to have his registration certificate cancelled. The petitioner stated that the petitioner, thereafter, submitted for the years 1959, 1960 and 1961 returns declaring no sales or turn over. On the 10th of April, 1962 the petitioner wrote a letter to the Commercial Tax Officer, Colootolla Charge requesting him to cancel the certificate of registration on the ground that the petitioner was a Contractor and not a Dealer within the meaning of the said Bengal Finance (Sales Tax) Act, 1941 and as such his registration should be cancelled. The petitioner was informed in reply by the Commercial Tax Officer on the 26th of May, 1962 that the said question of cancellation of the certificate of registration would be considered on completion of pending assessments. The petitioner states that the petitioner made a further representation to the said Commercial Tax Officer stating that the said Rule 2 (ii) (c) of the Bengal Sales Tax Rules, 1941 having been declared *ultra vires* by the Supreme Court, the said officer was acting in excess of and/or without jurisdiction in proceeding to assess the petitioner under the said Act. The

[1](1957) 8 STC 478

[2](1958) 9 STC 353
petitioner states that the said representation proved abortive and the Commercial Tax Officer issued a notice in Form VII A under Rule 55 (A) of the Bengal Rules calling upon the petitioner to show cause as to why penalties should not be imposed upon the petitioner for non-payment of the arrears of tax for the years 1955, 1956 and 1957, ending on the 31st of March of each year. Then on the 15th of June, 1962, the petitioner submitted an application before the Commercial Tax Officer stating that the assessments made under Rule 2 (ii) (c) of the Bengal Sales Tax Rules, 1941 were *ultra vires* and as such the assessments were without jurisdiction and requested Commercial Tax Officer to withdraw the said notices. The Commercial Tax officer did not accede to the request made by the petitioner, the petitioner moved an application under Article 226 of the Constitution of India and obtained a rule nisi being Rule No. 388(W) of 1962. The said rule was ultimately discharged by this Court on the 6th of January, 1965 by the learned single Judge.

2. Being aggrieved with the said decision the petitioner preferred an appeal and the appeal came up for hearing and was disposed of by the bench decision of this Court on the 6th of January, 1962. The Division Bench observed, inter alia, as follows:-

> "Rule 2 (ii) (1) of the Rule framed under the Act having been declared to be ultra vires, the tax imposed on the appellant under the assessment orders for the years mentioned above cannot be sustained. Secondly, if the imposition of tax itself was invalid, no proceedings can be taken against the appellant for imposing a penalty upon him for default in payment of the tax."

3. The petitioner states that in view of the aforesaid decision the petitioner was advised that the said assessments having been made on the basis that the petitioner was a dealer and not a contractor, were all invalid and the money paid by the petitioner in respect of the assessments became refundable to the petitioner. In the premises, the petitioner sent a letter to the Secretary, Department of Finance, West Bengal, Calcutta on the 2nd of May, 1972 claiming the refund of the said amount of Rs. 18,812.45 p. No reply was received by the petitioner. On the contrary steps were taken for realization of the dues on the basis of the assessment for the years 1963, 1964 and 1965 and certain proceedings have been taken which have been mentioned in 4 Annexure 'D' of the petition. Thereafter, the petitioner made an application for cancellation of the registration certificate which was cancelled by the Commercial Tax Officer with effect from 22nd of August, 1972. On the 1st of September, 1972 the petitioner made seven sets of applications before the Commercial Tax Officer Colootola Charge, claiming refund of diverse amounts of taxes realized illegally and/or without any authority of law from him, according to the petitioner, as set out below:-

Year	Amount
(1)1951-52	Rs. 5348.62P.
(2)1952-53	Rs. 667.00P.
(3)1953-54	Rs. 2044.47P.

(4)1954-55	Rs. 4664.34P.
(5)1955-56	Rs. 2999.40P.
(6)1956-57	Rs. 2338.62P.
(7)1957-58	Rs. 760.00P.

4. On 12th of January, 1973, the petitioner received seven letters from the Commercial Tax Officer, Colootola Charge informing that the said applications for refund of the taxes have been rejected by orders dated 10th of January, 1973 on the ground that no excess payment had been made by the petitioner during the assessment periods. In this application under Article 226 of the Constitution the petitioner challenges the failure of the respondent to refund to the petitioner the sum of Rs. 26,798.01 P. as mentioned in paragraphs 28 and 29 of the petition on account of the refund and also asks for direction restraining the respondents from proceeding with the certificates mentioned in paragraph 30 of the petition. The question is, whether the petitioner is entitled to the reliefs prayed for.

5. The fact that the petitioner has paid these amounts on the basis that the petitioner was a dealer is not in dispute. The fact that the petitioner is not a dealer and was not liable to pay taxes as a dealer cannot also, in my opinion, be disputed. The only question that arises, on the fact and in the circumstances of the case is, whether having paid the taxes the petitioner is entitled to refund of the said taxes. On behalf of the respondents it was contended that the right to obtain refund under the Bengal Finance (Sales Tax) Act, 1941 must be found within the four corners of Section 12 of the Act. Section 12 provides as follows:-

> "Section 12.- (1) The Commissioner shall, in the prescribed manner refund to a 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, 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 other period : Provided that no refund shall be made unless the claim for refund is made within twelve months from the date of the assessment of tax or the date of the imposition of penalty or within six months from the date of any final order passed on appeal, revision or review under Section 20 or reference under Section 21, whichever period expires later.
> (2) Nothing in sub-section (1) shall be deemed to empower the Commissioner to amend, vary or rescind any assessment or to amend, vary or rescind any order passed on appeal, revision or review under Section 20 or reference under Section 21, or to confer on a dealer any relief in addition to what he is entitled under the provisions of this Act."

6. It was contended that the tax paid on the mistaken notion that the petitioner was a dealer was not tax paid "in excess of the amount due" from him as contemplated in Sub-section (1) of Section 12 of the Act. I am unable to accept this contention urged on behalf of the respondents. If the petitioner was not liable to pay any tax then the "entire tax" paid by the petitioner would be tax "in excess of the amount due" from him under the Act. If a person is not liable under the Act yet on a mistaken basis he pays the tax, in my opinion, it could be said that he has paid the tax in

excess of the amount due from him under the Act. In that case the entirety of the amount paid would be in excess of the amount due from him under the Act because it is not due from him under the Act. The construction urged on behalf of the respondent, in my opinion, would be illogical because in that event if a person had paid tax say of Rs. 10/- in excess would be entitled to refund but if a man who was not liable to pay any tax at all, has paid Rupees 1000/- as tax would not be entitled to any refund. Such a construction, in my opinion, should not be made unless the statute compels me to do so. I find no warrant for such a compulsion in the language used in Section 12 of the Act. But Section 12 cannot have any application in this case, because the proviso to the section makes it clear that in order to be a claim for refund there must be an assessment. The proviso enjoins that there must be existence of an order of assessment or an order of penalty. Where, however, the order of assessment or order of penalty is non est, being based on *ultra vires* provision, Section 12 in terms cannot have any application. In any event, in this case no claim for refund having been preferred within the time mentioned in the proviso, the petitioner was not entitled to base his claim on Section 12 of the Act. Section 12 is only of significance in this case for the purpose of an indication of the legislative intent of granting refunds in certain cases of excess payment, a factor which is of some importance as would be noticed later.

7. It was next contended that the assessment orders not having been set aside and in this application as the petitioner had not asked for setting aside of the assessment orders, he was not entitled to claim refund of the moneys paid under those assessments. It has to be noted that it is not the case of the petitioner that the moneys were paid on erroneous assessments, moneys were paid on assessments which were void because the rules under which the said assessments had been made were ultra vires. A thing which is void is non-est and it is not necessary to set that aside though it is sometimes convenient to do so. If that is the position then as the said assessments were nullities those are not required to be actually set aside.

8. Learned Counsel for the respondents drew my attention to the observations of the Judicial Committee in the case of *Commr. of Income-tax, West Punjab v. The Tribune Trust, Lahore*[3], That, however, was a case where in a previous decision the Judicial Committee had held that certain incomes were exempt from tax so the assessments were not nullities but valid and effective assessments until those were set aside because that was the case where the particular trust was entitled to exemption being wholly one for charitable purpose. The question, whether a particular assessable entity is entitled to exemption or not and whether particular income is exempt from tax or not are questions within the jurisdiction of the authorities concerned. But the question is entirely different where the assessment is being challenged on the ground that the assessment was made under a provision which was *ultra vires* and as such it was void. That being the position, in my opinion, the facts that the petitioner has not asked for setting aside the assessments and the said assessments have not been set aside do not debar the petitioner from asking for the refund of the amount.

9. The next contention on behalf of the respondents was that this application was belated. It was contended that Rule 2 (ii) (c) of the Bengal Sales Tax Rules, 1941 under which the petitioner had been assessed as a dealer was declared *ultra vires* by the Supreme Court as

[3]16 ITR 214

early as in 1958, and in any event since 1962 the petitioner knew that the petitioner had paid the tax on a mistaken notion. But the petitioner made the present application on 4th of May, 1973. In

the premises it was urged that the petitioner was not entitled to any relief and application should be refused. In aid of this submission reliance was placed on the case of the *State of Kerala v. Aluminium Industries Ltd*[4]*.,* There the Supreme Court had observed that the money paid under a mistake of law was within the word "mistake" in Section 72 of the Contract Act, and there was no question of estoppel when the mistake of law was common to both the assessee and the taxing authority. Where the assessee did not raise the question that the relevant sales were outside the Taxing statute and were therefore exempt under Article 286 (1) (a) of the Constitution (as it then was), the Sales Tax Officer had no occasion to consider it, and sales tax was levied by mistake of law, it was ordinarily the duty of the State, subject to any provision of law relating to Sales Tax, to refund the tax. If refund was not made, remedy through court was open, subject to the same restriction and also to the bar of limitation under Article 96 of the Limitation Act, 1908, namely, three years from the date when the mistake became known. It was the duty of the State to investigate the facts when the mistake was brought to its notice and to make a refund if the mistake was proved and the claim was made within the period of limitation.

10. My attention was also drawn to the observations of the Supreme Court in the case of *State of Madhya Pradesh v. Bhailal Bhai*[5]*,* where the Supreme Court had earlier reiterated more or less the same principle.

11. Supreme Court recently had occasion to consider this aspect of the matter in the case of *Raja Jagdambika Pratap Narain Singh v. Central Board of Direct Taxes*[6]. There the petitioner appellant was the owner of a mango grove from which he had been deriving income from fruits and fallen trees. Way back in 1939-40 he had claimed this income to be agricultural and therefore immune from income-tax. His objection was overruled and the income was taxed under the Income-tax Act. Year after year he was similarly assessed and he carried the matter to High Court. The final pronouncement came from the High Court in 1963 holding that it was agricultural income and not liable to tax under Section 4 (3) of the Indian Income-tax Act, 1922. He applied to the Central Board of Direct Taxes for refund which was dismissed in 1968 and thereafter he applied to the High Court under Article 226 for relief of refund of taxes paid. The High Court dismissed the petition on two grounds (a) that the assessment orders for the relevant years had become final, the assessee not having taken advantage of his remedy provided for in the statute, (b) that several years had lapsed between the last impugned order which related to the assessment year 1961-62 and the writ petition which was filed in September, 1968. However, the High Court made an observation that if so advised, the petitioner might file appeals under Section 30 of the Indian Income-tax Act, 1922 and pray for condonation of delay under Section 30 (2) of the said Act. Against the order of the High Court the assessee came up in appeal before the Supreme Court.

12. It was held by the Supreme Court that Article 226 was not a blanket power, regardless of temporal and discretionary restraints. If a party was inexplicably insouciant and unduly belated due to laches, the Court might ordinarily deny redress and if the High Court had

[4](1965) 16 STC 689 (SC)
[5](1964) 15 STC 450
[6]100 ITR 698

exercised its discretion to refuse, the Supreme Court should decline to disturb such exercise unless the ground was too untenable. To awaken the Supreme Court's special power gross injustice and grievous departure from well-established criteria in this jurisdiction had to be made out. In the case in question, long years had elapsed after the High Court had held the taxed

income to be agricultural. The reason for the inaction was stated to be an illusory expectation of suo motu modification of assessment orders on representation by the party. The High Court examined and dismissed the plea and consequentially refused relief. The Supreme Court therefore declined to interfere.

13. In the instant case before me it has to be borne in mind that the amounts which the petitioner is asking for refund are amounts paid in respect of assessments which are void ab initio. It is not a question of assessments having been declared being erroneously made. In view of the fact that the rules under which the said assessments had been made have been declared to be ultra wires by the Supreme Court, it must be taken that the said assessments were from the beginning nullities. It is apparent from the narration of events mentioned hereinbefore that soon after the decision of the Supreme Court the assessee had been demanding from the assessing authorities the amounts and asking them for cancellation of the registration certificate. The assessing authority on the other hand, had been postponing that on the plea that the question was to be decided at the time of the future assessment and even proceeded to impose penalty on the ground that the petitioner had not paid the tax obviously on the basis that the petitioner was liable to pay the taxes for subsequent years also. Therefore, it must be presumed that the assessing authority was not accepting the position that the petitioner was not liable to pay the taxes. That stand of the assessing authority was corrected or rectified by the bench decision of this Court which was delivered on 5th January, 1972 as mentioned hereinbefore. Soon thereafter the assessee made an application for refund and on rejection moved this Court. In a case of this nature where the taxing authorities have realized tax which the taxing authorities are not entitled to the question arises as to in what fashion the discretion of the court should be exercised. The claim to direct refund in this case has to be judged in the light of these facts. It has to be borne in mind that when moneys are paid to the State which the State has no legal right to receive the same, it is ordinarily the duty of the State, subject to any special provision of any particular statute or special facts and circumstances of the case, to refund the tax or the amount paid, (See the observation of the Supreme Court in the case of *State of Kerala v. Aluminium Industries Ltd., (1965) 16 STC 689 (SC)* (supra). This is also in consonance with justice, equity and good conscience. In the case of Raja Jagadambika Pratap Narain, 100 ITR 698 (supra) the Supreme Court observed that a legal system in a developing country must permit judges to play a creative role to ensure justice without doing violence to the language used by the legislature. Sub-section (2) of Section 12 of the Act has, in my opinion, no application to the facts and circumstances of this case because the assessments under which moneys in question were paid are void being on provisions which are ultra vires. Sub-section (1) of Section 12 is an indication of the legislative recognition of the ordinary duty to refund in cases of excess realisation. There is no specific provision disentitling the petitioner from getting the refund. The present fiscal climate has also to be borne in mind. Attempts are being made to generate the attitude of tax compliance and create an atmosphere of co- operation between the tax-payers and tax-collectors, knowledge and evidence of the fact that, taxes not due if paid or realized would be refunded, would create an atmosphere of confidence which will be conducive to adherence to tax provisions. Periods of limitation prescribed for suits are not decisive - but only factors to be taken into consideration. In the aforesaid view of the matter and in view of the facts and circumstances of the case noted above, and in the light of the provisions of the statute, I am of the opinion, that directing refund to the petitioner of the amounts paid which he was not liable to pay, would ensure justice and would not be violative of the legislative intent.

14. So far as the second part of the prayers of the petition, namely, injunction restraining the respondents from enforcing the certificate mentioned in paragraph 30 of the petition is concerned, it can hardly be disputed that the petitioner is entitled to the same and the said certificates should not be enforced.

15. In the premises there will be an order in terms of prayers (a) and (b) and the respondent Commercial Tax Officer is directed to refund to the petitioner the sums of money which the petitioner has paid for the various years for which due evidence would be produced before the respondent Commercial Tax Officer. There will also be an order in terms of prayer (f) restraining the respondents from enforcing certificate mentioned therein. The Rule is made absolute to the extent indicated above. There will be no order as to costs.

16. Let there be a stay for operation of this order for six weeks from date.
Ordered accordingly.