KERALA HIGH COURT

Ernakulam Radio Company

Vs

State of Kerala

(K.K Mathew, J.)

03.06.1966

JUDGMENT

K.K. Mathew, J.

1. The petitioner is a dealer in radios and electrical goods. It was assessed to sales tax for the year 1963-64 by exhibit P1 order and the sales tax payable by it was fixed at Rs. 64,546.97 and on this a surcharge at 5% was levied. It is admitted that the turnover of the petitioner exceeded Rs. 30,000 and the question for consideration is whether the levy of surcharge is valid. Petitioner's counsel contended that the Kerala Surcharge on Taxes Act, 1957 (Act 11 of 1957), hereinafter called the Act, is invalid for the reason that the State Legislature had no power to enact the same and therefore the imposition of surcharge in pursuance of the provisions of the Act is unauthorized.

2. The only question for consideration, therefore, is whether the State Legislature had power to enact the Act. Petitioner's counsel contended that the only entry which may possibly justify this legislation is Entry 54 in List II in the Seventh Schedule to the Constitution but that that entry would not take in a levy like the one in question. Section 3 of the Act provides as follows :-

(1) The tax payable under the Travancore-Cochin General Sales Tax Act, 1125, or the Madras General Sales Tax Act, 1939, shall, in the case of a dealer whose turnover exceeds thirty thousand rupees in a year, be increased by a surcharge at the rate of two and a half per centum of the tax payable for that year and the provisions of the Travancore-Cochin General Sales Tax Act, 1125, or the Madras General Sales Tax Act, 1939, shall, as the case may be, apply to the levy and collection of the said surcharge :
Provided that where in respect of declared goods as defined in Clause (c) of Section 2 of the Central Sales Tax Act, 1956, the tax payable by such dealer under the Travancore-Cochin General Sales Tax Act, 1125, or the Madras General Sales Tax Act, 1939, together with the surcharge payable under this Sub-Section, exceeds two per centum of the sale, or purchase price, the rate of surcharge in respect of such goods shall be reduced to such an extent that the tax and the surcharge together shall not exceed two per centum of the sale or purchase price.

(2) Notwithstanding anything contained in Sub-Section (1) of Section 11 of the Travancore-Cochin General Sales Tax Act, 1125, or in Sub-Section (1) of Section 8B of the Madras General

Sales Tax Act, 1939, no dealer referred to in Sub-Section (1) shall be entitled to collect the surcharge payable under the said sub-section. On the basis of the provisions of Sub-Section (2) of Section 3 it was argued that since the dealer cannot pass on the incidence of surcharge on sales tax to the purchaser, surcharge is not really a tax on the sale of goods, but a tax on the dealer and that Entry 54 in List II would not justify the legislation in question. In other words, the argument was that surcharge is a tax on tax, that Entry No. 54 in List II will justify only a legislation imposing a tax on sale of goods, that tax on sale of goods is a tax on the sale itself and that since the dealer cannot pass on the incidence of surcharge to the purchaser or consumer, surcharge is really a tax on the dealer himself and not a tax on the sale of goods. This argument has no substance in it. The Supreme Court in *Konduri Buchirajalingam v. State of Hyderabad*[1] has observed :

It is then said that the sale tax is essentially an indirect tax and therefore it cannot be demanded of the appellant without allowing him to recoup himself by collecting the amount of the tax from the persons with whom he deals. This Court has already decided in the case of *Tata Iron and Steel Co. Limited v. The State of Bihar*[2] that in law a sales tax need not be an indirect tax and that a tax can be a sales tax though the primary liability for it is put upon a person without giving him any power to recoup the amount of the tax payable, from any other party. This observation will clearly show that in law sales tax need not be an indirect tax and that a tax can be a tax on the sale of goods though the primary liability for the same is placed upon the dealer without giving him an opportunity to recoup the same from the consumer. The ultimate economic incidence of the sales tax is on the consumer or the last purchaser and whatever he pays for the goods is paid only as price, that is to say, as consideration for thepurchase. The statutory liability, however, for payment of sales tax is laid on the dealer on his total 'turnover' whether or not he realises the tax from the purchasers. Generally speaking, the price charged by the dealer would be inclusive of sales tax, for, it is to his interest to pass the burden of the tax to the purchaser. So far as the dealer is concerned, the payment of a sum covering the tax made by a purchaser on the occasion of sale, is really part of the price which the purchasers pay for the goods. These observations made by the Andhra High Court in *Government of Andhra v. East India Commercial Co. Ltd*[3]. and approved by the Supreme Court in *George Oakes (Private) Ltd. v. The State of Madras*[4] would further show that the sales tax charged by a dealer is really a part of the price of the articles sold by him. If that be so, I am unable to agree with the contention of counsel that the surcharge imposed in this case is a tax on tax. The preamble to the Act makes it clear that the object of the Act is to increase the sales tax payable by a dealer. The preamble reads as follows :-

Whereas it is considered necessary to increase the taxes on agricultural income, taxes on the sale or purchase of goods and taxes on profession, by the levy of a surcharge on such taxes. No doubt, counsel for the petitioner said that by the use of the expression "by the levy of a surcharge on such taxes" the Legislature really wanted to impose a tax on sales tax and therefore it is clear that surcharge is levied on sales tax itself and is not justified by Entry 54 in List II. I am unable to agree with this contention also. The object of the Act, as is clear from the preamble, is only to increase the tax on the sale or purchase of goods and the fact that its quantum is determined with reference to the sales tax imposed would not alter its character. Counsel for the petitioner submitted that since no surcharge could be realised by the dealer from the purchaser there is no meaning in the contention of the State that it is a tax on the sale of goods. It may be noted that surcharge is to be imposed on a dealer if the turnover exceeds Rs. 30,000 a year. It is a tax on the aggregate of sales effected by the dealer during the year in question. The surcharge therefore is really an enhancement of the sales tax when the turnover of the dealer exceeds Rs. 30,000 a year,

and is a tax on the aggregate of sales effected by the dealer during the year. Vaidialingam, J., has held in S. *Ramanatha Shenoy and Co. v. Sales Tax Officer*[5] that surcharge on sales tax is a tax on sale of goods coming within Entry 54 in List II.

3. Counsel for the petitioner then submitted on the basis of Article 271 of the Constitution that unless there is express authorisation by the Constitution the State Legislature has no power to impose a tax by way of surcharge. Article 271 reads thus : Notwithstanding anything in Articles 269 and 270, Parliament may at any time increase any of the duties or taxes referred to in those articles by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part of the Consolidated Fund of India.
The contention of counsel for the petitioner was that unless there is express authorisation for the State Legislature also to impose surcharge, there is no power in that behalf for the Legislature to enact a measure for that purpose. In order to understand the meaning of that article, it is necessary to look at Articles 269 and 270. Article 269 provides that the Government of India shall levy and collect the duties and taxes mentioned in the article and assign them to the States in the manner provided in Clause (2) of the article. Clause (2) is as follows :-

(2) The net proceeds in any financial year of any such duty or tax, except in so far as those proceeds represent proceeds attributable to Union territories, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that duty or tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law. Article 270 directs that taxes on income other than agricultural income shall be levied and collected by the Government of India and distributed between the Union and the States in the manner prescribed in Clause (2). Clause (2) reads thus :-
(2) Such percentage, as may be prescribed, of the net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to Union territories or to taxes payable in respect of Union emoluments, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that tax is leviable in that year, and shall be distributed among those States in such manner and from such time as may be prescribed.Then follows Article 271 saying that it will be open to Parliament to increase those duties and taxes by a surcharge for the purpose of the Union and the whole proceeds shall form part of the Consolidated Fund of India. It was to avoid a possible contention on the part of the States that the surcharge levied and collected by the Union should also be assigned to the States by the Union or distributed between the Union and the States, that Article 271 was enacted, providing that notwithstanding the fact that the taxes and duties levied and collected under Articles 269 and 270 must be assigned to States or distributed between the Union and the States as the case may be, the surcharge shall form part of the Consolidated Fund of the Union. In other words, the Parliament may impose a surcharge on the duties and taxes mentioned in Articles 269 and 270 and credit it to the Consolidated Fund of the Union exclusively. But for Article 271, the States could successfully contend that surcharge levied and collected by the Union must be assigned to the States or distributed between the Union and the States as the case may be. The article cannot be pressed in aid of the contention that but for that article the Parliament would have no power to levy surcharge on taxes and duties which the Parliament is competent under the Constitution to levy.
4. The only other contention advanced by counsel for the petitioner was that since there was no previous recommendation by the Governor for moving the Bill in the State Legislature the Act is

invalid. This contention is raised on the basis of Article 207(1), which runs as follows :- A Bill or amendment making provision for any of the matters specified in Sub-Clause (a) to (f) of Clause (1) of Article 199 shall not be introduced or moved except on the recommendation of the Governor, and a Bill making such provision shall not be introduced in a Legislative Council: Provided that no recommendation shall be required under this clause for the moving of an amendment making provision for the reduction or abolition of any tax. It was argued that previous recommendation of the Governor was necessary for introducing or moving a money bill in the Legislature and as no previous recommendation was made by the Governor the Act is invalid. Assuming for a moment that there was no previous recommendation by the Governor, his subsequent assent to the Bill is sufficient in law to cure the defect arising out of the want of previous recommendation by him. Article 255 is decisive of the question. No Act of Parliament or of the Legislature of a State and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given-(a) where the recommendation required was that of the Governor, either by the Governor or by the President. Even assuming that there was no previous recommendation of the Governor, that would not invalidate the Act.
I dismiss the petition with costs.

Cases Referred.

1[1958] 9 S.T.C. 397
2[1958] 9 S.T.C. 267
3A.I.R. 1957 A.P. 83
4[1961] 12 S.T.C. 476
5[1962] K.L.J. 277