KERALA HIGH COURT

Kilikar

Vs

Sales Tax Officer

Q.P. 282 of 1965, Writ Appeals 6, 139 and 155 of 1966

(M.S. Menon, C.J. and S. Velu Pillai, J.)

10.07.1967

JUDGMENT

M.S. Menon, C.J.

1. These cases raise a common question, the validity of Section 3 of the Kerala Surcharge on Taxes Act, 1957. They were heard together and a common judgment will suffice.

2. Section 3 of the Kerala Surcharge on Taxes Act, 1957, as it stands at present reads as follows :

> "(1) The tax payable under the Kerala General Sales Tax Act, 1963, 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 five per centum of the tax payable for that year and the provisions of the Kerala General Sales Tax Act, 1963, shall, as the case may be, apply in relation to the said surcharge as they apply in relation to the tax payable under the said Act:
> 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 Kerala General Sales Tax Act, 1963, 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 22 of the Kerala General Sales Tax Act, 1963, no dealer referred to in Sub-section (1) shall be entitled to collect the surcharge payable under the said sub-section.
> (3) Any dealer who collects the surcharge payable under Sub-section (1) in contravention of the provisions of Sub-section (2) shall be punishable with fine which may extend to one thousand rupees and no court below the rank of a Magistrate of the first class shall try any such offence."

3. Five contentions were urged on behalf of the assessees. They are :

(1) Section 3 should be considered as repealed by the Kerala General Sales Tax Act, 1963, which came into force on 1st April, 1963,

(2) Section 3 is ultra vires of Article 14 of the Constitution,

(3) Section 3 is ultra vires of Article 19(1)(f) and (g) of the Constitution,

(4) Section 3 embodies an item of income taxation and is thus beyond the legislative competence of the State, and

(5) Section 3 imposes a tax on "professions, trades, callings and employments" and hence the tax imposed cannot exceed the limit of Rs. 250 per annum fixed by Article 276 of the Constitution.

4. Contention No. (1) - The fact that the Kerala General Sales Tax Act, 1963, is an Act to consolidate and amend the law relating to the levy of a general tax on the sale or purchase of goods in the State, as stated in the preamble, does not by itself mean that every enactment which has a relation to the subject covered by that Act would stand impliedly repealed when it came into force on 1st April, 1963. There is a specific section in that Act, Section 61, which deals with the subject of repeals. That section repeals only one enactment, namely, the General Sales Tax Act, 1125. The non-mention of the Kerala Surcharge on Taxes Act, 1957, in Section 61 should itself be indicative of the fact that the Legislature did not intend that enactment to be repealed, and under such circumstances we will not be justified in inferring any case of an implied repeal. There is also the fact that the Legislature chose to amend Section 3 of the Kerala Surcharge on Taxes Act, 1957, subsequent to the Kerala General Sales Tax Act, 1963, by the Kerala Surcharge on Taxes (Amendment and Validation) Act, 1966.

5. Repeal by implication is not favored and is never accepted except in cases where such a conclusion is all but inevitable. As pointed out by Sutherland:

> "The presumption against implied repeals is classically founded upon the doctrine that the legislature is presumed to envision the whole body of the law when it enacts new legislation, and, therefore, if a repeal of the prior law is intended to expressly designate the offending provisions rather than to leave the repeal to arise by necessary implication from the later enactment" : (Statutory Construction, Volume 1, page 470).

6. It is also settled law that a repeal by implication can be considered to have been effected only when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together. The test was laid down as follows by Smith, J., in *Kutner v. Phillips*[1]

> "Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim, Leges posteriores contrarias abrogant applies. Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless

[1][1891] 9 Q.B. 267

> there is a necessary inconsistency in the two Acts standing together."

And applying the test we have no hesitation in holding that Section 3 of the Kerala Surcharge on Taxes Act, 1957, and the Kerala General Sales Tax Act, 1963, can co-exist, and that the latter does not effect any implied repeal of the former provisions.

7. **Contention No. (2)** - Article 14 of the Constitution provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The contention that this provision has been violated is based on the assumption that the surcharge imposed by Section 3 is discriminatory in character.

8. The tax under the Kerala General Sales Tax Act, 1963, as well as the surcharge under Section 3 of the Kerala Surcharge on Taxes Act, 1957, are geared to the taxable turnover of the dealer concerned. It is submitted that the exemption from the surcharge, however, is geared to the total turnover of a dealer, the exemption being confined to those whose total turnover is Rs. 30,000 or less per year; and that the gearing of the exemption to the total turnover instead of to the taxable turnover produces a differential treatment which is violative of Article 14 of the Constitution.

9. The exemption from sales tax under the Kerala General Sales Tax Act, 1963, is also geared to the total turnover, the exemption being confined to those whose total turnover is less than Rs. 10,000 per year. Section 5 of the Act which deals with the exemption speaks of the total turnover and not of the total taxable turnover of a dealer.

10. Exemption limits are inevitable in a tax like the one before us. We are not prepared to say that the differential treatment involved in the fixation of an exemption limit is a discrimination which is either unreasonable, or devoid of a nexus between the provision incorporated and the object sought to be achieved by the enactment.

11. Article 14 of the Constitution no doubt enacts a prohibition which in terms is strict and absolute. The doctrine of classifications, however, has been incorporated by judicial decisions, and as pointed out in Seervai's Constitutional Law of India, the article, as interpreted by the courts, should run in some such words as these.

> "The State shall not deny to any person equality before the law or equal protection of the law provided that nothing herein contained shall prevent the State from making a law based on or involving a classification founded on an intelligible differentia having a rational relation to the object sought to be achieved by the law." (page 188).

And so read there can be no doubt that Section 3 of the Kerala Surcharge on Taxes Act, 1957, is not violative of Article 14 of the Constitution.

12. **Contention No. (3)**. - This contention is based on Article 19(1)(f) and (g) of the Constitution which provides that all citizens shall have the right to acquire, hold and dispose of property and to practice any profession, or to carry on any occupation, trade or business. Tax laws too are subject to the fundamental rights under Article 19(1)(f) and (g) and challenge to them under

those provisions is not precluded in appropriate cases. The challenge, however, is of a very limited character and has to be confined to those cases where it can be said that under the guise of imposing a tax the law effects a confiscation of property. As pointed out by Seervai in the treatise mentioned above :

> "The reasonableness of a taxing statute would be wholly beyond the competence of a court for it involves an evaluation of factors which the court is neither entitled, nor competent, to evaluate. The objects to be taxed, the persons to be taxed, the amount of the tax to be levied, the political, social and economic policies which a tax is designed to subserve, are all matters of political and legislative judgment, and they have been entrusted to the legislature and not to the courts.
> As long as a tax retains its avowed character and does not confiscate property to the State under the guise of a tax, the reasonableness of a tax cannot be questioned" (page 292).

It is not possible for us to hold that Section 3 effects a confiscation of property or that it transcends its avowed character of a provision imposing a surcharge on sales tax. It follows that this contention also should fail.

13. Contention No. (4).-Section 3 imposes a tax on the sale or purchase of goods. It cannot be considered as an item of income taxation as contended by the assessees. In other words the tax imposed by Section 3 comes under entry 54 in List II (State List) of the Seventh Schedule to the Constitution-Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I-and not under entry 82 in List-I (Union List) of the Seventh Schedule to the Constitution-Taxes on income other than agricultural income.

14. In the O.P. from which Writ Appeal No. 139 of 1966 arises the petitioner contended that the use of the words "by the levy of a surcharge on such taxes" in the preamble to the Kerala Surcharge on Taxes Act, 1957, indicated that what the Legislature wanted was to impose a tax on the sales tax and not on the sale of goods, and that the surcharge was, therefore, not warranted by entry 54 in List II (State List) of the Seventh Schedule to the Constitution. Mathew, J., said :

> "I am unable to agree with this contention. 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 realized 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." [1966 K.L.T. 809]

We are in agreement with this view.

15. A sales tax is nothing else than a sales tax so long as the base of the tax is nothing other than

a sale of goods. In *Konduri Buchirajalingam v. State of Hyderabad*[2] the Supreme Court observed as follows :

> "It is then said that the sales 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 & Steel Co. Ltd. v. The State of Bihar*[3], 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."

16. Contention No. (5)-The contention is based on Article 276 of Constitution under which taxes on professions, trades, callings and employments shall not exceed two hundred and fifty rupees per annum. In order to attract the article the tax must be a tax on professions, trades, callings and employments. As we have already indicated, the tax with which we are concerned is a sales tax coming under entry 54 in List II (State List) of the Seventh Schedule to the Constitution. It is impossible to say that it is in any sense a tax on professions, trades, callings and employments within the meaning of those expressions as used in Article 276 of the Constitution.

17. In the light of what is stated above we must dismiss the original petition as well as the three writ appeals before us. We do so, but in the circumstances of the case without any order as to costs.

Dismissed.

[2][1958] 9 S.T.C. 397

[3][1958] 9 STC 267