

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6708 OF 2008
(Arising out of SLP (C) No. 380 of 2007)

Corporation Bank Appellant

Versus

M/s. Saraswati Abharansala and another Respondents

JUDGMENT

S.B. SINHA, J.

1. Leave granted.
2. First respondent is a dealer in bullion gold. It entered into transactions of purchase of gold from the appellant herein during the period 6th April, 1999 and 10th December, 1999. The total transactions during the said period were for a sum of Rs.423748518/-. Indisputably the rate of tax which was prevailing at the relevant time was 1%. The amount of sales tax at the said rate was collected from respondent No.1. The amount so collected, indisputably had been deposited with the sales tax authorities.

3. On or about 27th December, 1999 vide S.R.O. No.1075/99 the rate of sales tax was reduced from 1% to 0.5% which was given a retrospective effect from 1st of April, 1999. The said Notification reads thus :-

“9	Any dealer	Sale of bullion and specie to registered dealer within the State.
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This notification shall be deemed to have come into force on first day of April, 1999”

It was given a retrospective effect.

4. The original SRO 1728/93 on the subject provided that “tax if any collected at the higher rate, shall be paid over to Government and tax if any paid over to Government shall not be refunded”. Clause 9 of Schedule IV of SRO 1728/83 provided as under :-

“9	Minerals and Metals Corporation of India and Banks	Sale of bullion to registered dealers in jewellery for manufacture of gold jewellery within the State for export.”
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This entry in SRO 1728/93 stood amended by SRO 301/99 to read :-

“9	Minerals and Metals Corporation of India and Banks	Sale of bullion to registered dealers in jewellery for manufacture of gold jewellery within the State for export.”
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The said entry, as stated above, was further amended by SRO 1075/99.

5. Appellant on or about 19th January, 2000, in view of the aforementioned Notification, requested the Assistant Commissioner, Sales Tax, Special Circle I, Calicut to refund the excess amount of sales tax collected from the respondent No.1 amounting to Rs.20,97,763.50. The Assistant Commissioner Sales Tax, however, rejected the said prayer in terms of its letter dated 3rd March, 2000, which reads as under :-

“You may please see that the Government as per the above mentioned SRO amended the original notification in SRO 1728/93. According to the said original notification, tax if any collected at the higher rate shall be paid over to the Government and tax if any paid over to the Govt. shall not be refunded. So you may please inform your customer accordingly.”

6. The first respondent was communicated the same by the appellant in terms of its letter dated 6th June, 2000 stating :-

“While referring to your representation on the subject matter, it has been informed by our higherups that as per the letter from the Asst. Commissioner of Commercial Taxes, Calicut viz: 3301/1150/99-2000, it has been clarified that according to the GO., SRO 1728/93 “Any tax collected at the higher rate shall be paid over to the Govt. and tax, if any paid over to the Govt. shall not be refunded.

Kindly note the same for your information.”

7. A writ petition was filed by the first respondent against the appellant before the High Court of Kerala questioning the validity of the said order.

- “i) declare that the petitioner is liable to pay sales-tax at ½% for the transactions referred to in Ext. P2 and that collection of any amount in excess thereof is illegal and is liable to be refunded;
- ii) issue a Writ of Mandamus or any other appropriate writ, order or direction directing the respondent to refund to the petitions an amount of Rs.20,97,261/- with interest @ 21% per annum from the date of collection of the amounts shown in Ext. P2 till the date of actual payment;

- iii) issue a writ of Certiorari or any other appropriate writ, order or direction quashing Ext. P3;”

8. The said writ petition was dismissed by a learned Single Judge of the said Court by his order dated 4th April, 2006 holding :-

“There cannot be any dispute that the petitioner is entitled to move the Commissioner. Whether the petitioner had to pay any tax in excess of the due rates and if so what is the fate of such excess payment is certainly a dispute. The petitioner has to move the Commissioner for appropriate orders. It will be open to the petitioner to take all available contentions on the claim for refund before the Commissioner. Accordingly, without expressing any opinion as to the merits of the case, this writ petition is disposed of as follows:-

In the event of the petitioner moving the Commissioner (Commercial Taxes), government of Kerala, Thiruvananthapuram within a period of two months from today, the Commissioner shall consider the issue with notice to the petitioner and the first respondent and take appropriate action in accordance with law in the matter within another four months.”

9. An intra court appeal was filed by the first respondent and a Division Bench of the High Court by reason of the impugned judgment dated 7th November, 2006 allowed the said writ appeal opining :

“When the legislature or the government had given that relief with retrospective effect, necessarily, that relief shall reach the concerned eligible citizen. The bank had opportunity to file the return showing the real tax liability based on Ex.P1 and claiming refund in terms of Section 33 and could pay over the amount to the appellant, the customer of the first respondent. If that had been claimed, necessarily, the assessing authority would have refunded it with 10% interest as provided in Section 44(4).”

10. Mr. R. Mohan, learned Additional Solicitor General, appearing on behalf of the appellant-bank at the outset submits that the writ petition for refund of tax was not maintainable. It was contended that in any event it was not permissible for the Division Bench of the High Court to direct the appellant to refund the excess amount collected and granting liberty to it to file a claim application thereafter with the sales tax authorities, which is per say unjust.

11. Mr. R. Sathish, learned counsel appearing on behalf of the respondent No.2/State of Kerala would submit that despite amendment the original condition attached with SR No.1728/93 i.e. the tax if any collected at the higher rate, shall be paid over to Government and the tax, if any paid over to Government shall not be refunded, having remained un-amended, the State

is not liable to refund the amount. It was urged that although the High Court has taken note of the said condition laid down in SOR No. 1728/1993, but failed and/or neglected to consider the same in its proper perspective.

12. Mr. M.K. Sreegesh, learned counsel appearing on behalf of the first respondent, however, would submit that the Notification should be construed keeping in view the objective, it seeks to achieve as would appear from Notification dated 27th December, 1999.

13. It was contended that the amendment had been brought into force with retrospective effect. The condition laid down therein must be held to have been repealed.

14. Indisputably the gold in bulk quantity was sold by the Bank within the State. Purchase was required to be effected at least worth Rs.25 lakhs at a time. It was, however, felt that the intermediary dealers, who normally buy gold from the banks and primarily cater to the requirements of local goldsmith and jewellers, would not be in a position to carry out their activity since they would not be eligible for the reduced rate of 0.5% when they buy the material from banks or other first sellers within the State. In

the aforementioned situation, the Government had taken a decision to make the said rate of tax applicable when the bullion and specie are sold to any registered dealer within the State.

15. The aforementioned objective on the part of the State would appear from the note appended to SOR No. 1075/99 dated 27th December, 1999. It is true that the original Notification SRO 1728/1993 contained a provision for not refunding the amount of tax collected at a higher rate.

16. Subsequent Notification, namely SOR No. 301/1999, however, reduced the rate provided the sale is effected within the State for manufacture of ornaments. SRO 1728/1993, as noticed hereinbefore, was further amended by SRO No. 1075/1999, in terms whereof a legal fiction was created giving it a retrospective effect and retroactive operation on or from 1st April, 1999.

17. The rate of tax which was applicable on 1st April, 1999 by reason of the said legal fiction was, therefore, 0.5 %. The effect of a legal fiction is well known. It must be given full effect. It must be taken to its logical conclusion.

18. Sales tax is leviable on sale of goods. It must be collected by the dealer as an agent of the State at such rate as may be specified:

19. Neither the State nor the agent is entitled to collect tax at a rate higher than specified. The Kerala General Sales Tax Act, 1963 also contains a provision for refund in Section 44 thereof which reads as under :-

“Refund:- (1) When an assessing authority finds at the time of final assessment, that the dealer has paid in excess of what is due from him, it shall refund the excess to the dealer.

(2) When the assessing authority receives an order from any appellate or revisional authority to make refund of tax or penalty paid by a dealer it shall effect the refund.

(3) Notwithstanding anything contained in sub-section (1) and (2), the assessing authority shall have power to adjust the amount due to the refunded under sub-section (1) or sub-section (2), towards the recovery of any amount due on the date of adjustment, from the dealer.

(4) In case refund under sub-section (1) or sub-section (2) or adjustment under sub-section (3) is not made within ninety days of the date of final assessment, or as the case may be, within ninety days of the date of receipt of the order in appeal or revision or the date of expiry of the time for preferring appeal or revision, the dealer shall be entitled to claim interest at the rate of ten percent per annum on the amount due to him from the date of expiry of the said period upto the date of payment or adjustment.”

20. Article 265 of the Constitution of India mandates that no tax shall be levied or collected except by authority of law.

21. In terms of the said provision, therefore, all acts relating to the imposition of tax providing, inter alia, for the point at which the tax is to be collected, the rate of tax as also its recovery must be carried out strictly in accordance with law.

22. If the substantive provision of a statute provides for refund, the State ordinarily by a subordinate legislation could not have laid down that the tax paid even by mistake would not be refunded. If a tax has been paid in excess of the tax specified, save and except the cases involving the principle of 'unjust enrichment', excess tax realized must be refunded. The State, furthermore is bound to act reasonably having regard to the equality clause contained in Article 14 of the Constitution of India.

23. It is not even a case where the doctrine of unjust enrichment has any application as it is not the case of the respondent//State that the buyer has passed on the excess amount of tax collected by it to the purchasers.

24. In view of the admitted fact that tax had been collected and paid for the period 6th April, 1999 and 10th December, 1999 @ 1 % of the price which having been reduced from 1st April, 1999 to 0.5 %, the State, in our opinion, is bound to refund the excess amount deposited with it.

25. Furthermore the Notification having been given a retrospective effect must be construed on the touchstone of the purpose and object it sought to achieve. Principle of purposive construction should be applied in a case of this nature to find out the object of the Act. When a statute cannot be considered in such a manner which would defeat its object, the legislature is presumed to be aware of the consequences flowing therefrom. The statute should be considered in such a manner so as to hold that it serves to seek a reasonable result. The statute would not be considered in such a manner so as to encourage defaulters and discourage those who abide by the law.

26. The statute furthermore, it is trite, should be read in the manner so as to do justice to the parties. If it is to be held, without there being any statutory provision that those who have deposited the amount in time would be put to a disadvantageous position and those who were defaulters would

be better placed, the same would give rise to an absurdity. Construction of the statute which leads to confusion must be avoided.

27. Thus the condition of non refund of the excess amount must be held to have been repealed by necessary implication as the rate of tax so applied to the transaction of sale of gold bullion was with retrospective effect.

28. As all the facts are admitted and the State had refused to refund the excess amount of tax realized from the appellant, in our opinion, the writ petition was maintainable.

29. We are, therefore, of the opinion that the interest of justice would be served if instead of the appellant refunding the amount to the first respondent and later claiming refund from the authorities, if the State of Kerala is directed to refund the amount of tax collected with interest at the rate of 10% per annum to the first respondent at an early date, and not later than four months from the date of communication of this order. It is ordered accordingly. If, however, the amount is not paid within the aforementioned period, the outstanding amount shall carry interest @ 15 % per annum.

30. The appeal is allowed with the aforementioned observations and direction. In the facts and circumstances of the case, however, there shall be no order as to costs.

.....J.
(S.B. SINHA)

.....J.
(CYRIAC JOSEPH)

New Delhi
November 19, 2008