

In Re: S. Hamsa Koya

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Court : Kerala

Decided On : Aug-09-1956

Reported in : [1957]8STC18(Ker)

Judge : Sankaran;and Kumara Pillai, JJ.

Appeal No. : Criminal Reference No. 1 of 1956

Appellant : In Re: S. Hamsa Koya

Advocate for Def. : C.M. Kuruvilla, The Public Prosecutor

Advocate for Pet/Ap. : M. Bhaskara Menon,; T.V. Prabhakaran,;S. Narayanan Potti;and A. Hariharasubramanian, Advs.

Judgement :

Kumara Pillai, J.

1. This is a reference made by the Additional First Class Magistrate of Ernakulam under Section 432(1) of the Code of Criminal Procedure. The reference arises out of a prosecution of an assessee by the Sales Tax Department for his failure to pay a provisional assessment to sales tax.

2. Section 3(1)(a) of the Travancore-Cochin General Sales Tax Act (XI of 1125) provides that 'every dealer shall pay for each year a tax on his total turnover for such year'. By the rules made by the Government under Sub-sections (4) and (5) of Section 3 and Section 24 of the Act this tax was allowed to be realised in certain cases by two assessments-a provisional assessment and a final assessment. Rules 9, 10 and 11 relate to provisional assessments and Rule 14 to final assessments. The provisional assessment under Rules 9, 10 and 11 is to be made shortly after the commencement of the financial year on the basis of the estimated turnover for the whole year and subject to the final assessment and adjustments consequent thereon, and the final assessment under Rule 14 is to be made after the close of the year and on the basis of the actual turnover for the whole year. Rules 12 and 13 provide for the issue of a notice to the dealer about the provisional assessment and for payment of the tax provisionally fixed in monthly instalments. Rule 15 provides for the adjustment after the final assessment. If the final assessment is lower than the provisional assessment the dealer has the option either to get a refund of the excess tax paid by him under the provisional assessment or to have the excess credited against the next year's tax, and if the final assessment is higher than the provisional assessment the dealer has to pay the difference.

3. For the year 1953-54 the accused in C.C. No. 507 of 1955 on the file of the Additional First Class Magistrate, Ernakulam, was provisionally assessed to sales tax in accordance with the provisions of Rules 9 to 11 by the Sales Tax Authorities, and a demand notice was also issued to him on 25th May, 1953. Although the assessee accepted the notice on 5th June, 1953, he did not pay the tax, nor did he show cause why the amount was not paid. Therefore the Sales Tax Department prosecuted him under Section 19 of the Act, and C.C. No. 507 of 1955 mentioned above is the case registered against him at the instance of the Sales Tax Department. On

behalf of the assessee it was contended before the learned Magistrate that the provisional assessment was invalid and without jurisdiction as Rules 10 and 11 which prescribe provisional assessments are repugnant to and ultra vires of Section 3 of the Act and that, the prosecution was not therefore maintainable. The argument of the defence counsel before the Magistrate is set out as follows in paragraphs 3 to 5 of the letter of reference.

3. The main point advanced by the defence counsel in his argument is the following :-

Rules providing for the provisional assessment of tax are ultra vires Section 3 of the Sales Tax Act. Rules 9 to 11 of the Sales Tax Rules, 1950, are the rules providing for the provisional assessment of tax. According to Rule 9, the registered dealer has to submit to the assessing authority a statement in Form 1-A showing the estimated gross and net turnover for the first twelve months of his business. This statement has to be submitted at the commencement of every accounting year. Rules 10 and 11 empower the assessing authority to fix provisionally on the basis of the return or otherwise the tax payable by the dealer.

4. Section 3(1)(a) of the Act is the charging provision. According to that section 'every dealer shall pay for each year a tax on his total turnover for such year'. The turnover is defined as the aggregate amount for which goods are either bought by or sold by the dealer.

5. According to Section 3(1)(a), the charging section, tax can be levied only on the total turnover, i.e., the aggregate amount for which sale or purchase has been effected. The rules referred to above provide for fixing the tax on estimated turnover provisionally at the commencement of the year. According to the defence counsel these rules are inconsistent with and repugnant to Section 3 of the Act.

Since a decision upon this contention involves a pronouncement as to the validity or otherwise of Rules 10 and 11 and since it is provided by Section 24(5) of the Act that all rules made under the said section shall be published in the Gazette and upon such publication shall have effect as if enacted in the Act, the learned Magistrate considered that a reference to this Court was necessary under Section 432(1) of the Code of Criminal Procedure and has made the reference accordingly.

4. Two points arise for decision in the reference, namely, (i) whether the Magistrate was competent to decide himself the validity or otherwise of Rules 10 and 11 or whether he was bound to make a reference to this Court under Section 432(1) of the Code of Criminal Procedure for deciding that question, and (ii) whether Rules 10 and 11 are repugnant to Section 3 of the Act and ultra vires of the powers of the rule-making authority.

5. Section 432(1) of the Code of Criminal Procedure reads as follows :-

Where any court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation, or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the court shall state a case setting out its opinion and the reasons therefor, and refer the same for the decision of the High Court.

In view of this section until the Supreme Court or the High Court to which he is subordinate has made a definite pronouncement on the subject it is not competent for a Magistrate to hold any particular provision in a statute to be invalid or ultra vires. Section 24(5) of the Travancore-Cochin General Sales Tax Act specifically enacts 'all rules made under this section shall be published in the Gazette and upon such publication shall have effect as if enacted in this Act'. The effect of Section 24(5) of the Act is that the rules in question have to be treated for all purposes of construction or obligation exactly as if they were provisions in the Act itself, that is to say, they also must be considered as provisions enacted in the Act itself and as part of the Act and courts of law must treat them in the same manner as provisions in the Act itself. One of the consequences of a

particular provision being enacted in a statute or Act is that the said provision will attract Section 432 of the Code of Criminal Procedure and the consequence of that attraction is that it will not be open to a Magistrate to pronounce the particular provision to be invalid or inoperative until and unless the Supreme Court or the High Court to which he is subordinate has declared it to be so. No doubt, by the mere enactment in the Act that the rules shall have effect as if enacted in the Act, the rules will not be rendered valid and courts of law are competent, notwithstanding such a provision, to consider whether the rules have been validly made under the Act and are intra vires of the rule-making authority. In the case of M.P. Kumaraswami Raja, In re A.I.R. 1955 Mad. 326, the Madras High Court has quoted with approval the following statement of law from Halsbury's Laws of England :-

Statutory rules, orders and bye-laws differ from statutes in that they may be open to the judiciary to question their validity, to examine if they have complied with conditions precedent, or if they are inconsistent with the statute under which they are made, and in the case of bye-laws to consider if they are reasonable. If they fail to comply with such conditions, the court may quash them or treat them as unenforceable. The court is not precluded from inquiring into the validity of an order because the statute authorising the making of the order provides that it shall have effect as if it were enacted in the statute.' and observed that there is abundant authority in decisions of the courts in India for this position. While this is the general law, the matter stands on a slightly different footing so far as subordinate criminal courts are concerned, by reason of Section 432(1) of the Code of Criminal Procedure. When the validity of a particular rule made under a provision in the Act, which says that the rules made thereunder shall have effect as if enacted in the Act, is challenged if the court decides that the particular rule is valid, that rule will have to be treated as part of the Act. The challenge is in effect about the validity of a provision which has to be treated as part of the Act. In such a case, on account of Section 432(1) of the Code of Criminal Procedure, a subordinate criminal court is incompetent to pronounce the rule to be invalid or inoperative until the Supreme Court or the High Court to which that court is subordinate has declared it to be so. The question of the validity of Rules 10 and 11, which by virtue of Section 24 have to be considered as part of the General Sales Tax Act itself and as embodied in that very Act, having been raised before him and there being no previous pronouncement by the Supreme Court or by this High Court as to their validity, in view of Section 432(1) of the Code of Criminal Procedure, the learned Magistrate had no alternative but to make this reference.

6. On the second point, the argument advanced on behalf of the assessee is that since under Section 3 of the Sales Tax Act, it is only the turnover of the year for which the assessment is made that can be assessed, no assessment can be made before the close of the year when only the actual turnover can be ascertained. It was also contended that the Sales Tax Act as passed by the Legislature had contemplated only one assessment for the whole year and had not contemplated a provisional assessment and a final assessment in respect of the same year and that Rules 10 and 11 which provide for a provisional assessment are therefore repugnant to and ultra vires of Section 3. Reliance was placed in support of these contentions on In re M.P. Kumaraswami Raja A.I.R. 1955 Mad. 326 referred to above, wherein it was held that a rule framed under Section 19 of the Madras Sales Tax Act (which corresponds to Section 24 of the Travancore-Cochin General Sales Tax Act) cannot go beyond the Act and make the dealer pay a tax provisionally calculated on an estimated turnover. As in that case it was contended before us also that in view of the language used in Section 3(1)(a), namely, that every dealer shall pay for each year a tax on his turnover for such year, no assessment can be made before the close of the year for which it is made and that the apposite analogy furnished by Section 18A of the Indian Income-tax Act would show that the Legislature had contemplated only one assessment in the case of sales tax and no provisional assessment at all. The assessee's counsel contended that if the Legislature had contemplated provisional and final assessments to be made in respect of one and the same year some section analogous to Section 18A of the Income-tax Act would have been enacted in the Sales Tax Act also. The argument based on Section 18A of the Income-tax Act overlooks one important difference between the charging section in the Income-tax Act and the charging section in the Sales Tax Act. Under Section 3(1) (a) of the Sales Tax Act, which is the charging section, the tax for each year is on the turnover for that year itself. The section is ' every dealer shall pay for each year a tax on his total

turnover for such year'. Under Section 4 of the Indian Income-tax Act the tax for each year is not on the income of that year but on the income of the previous year. Section 18A was inserted in the Income-tax Act by an amendment in 1944, and regarding the necessity for the enactment of that section it is said at page 643 of the third edition of 'The Law and Practice of Income-tax' by Kanga and Palkhivala:

It has been noted above that under this Act the subject of charge is the income of the previous year and not the income of the assessment year; in other words, the tax is assessed and paid in the next succeeding year upon the results of the year before. Secondly, there is no liability of tax until the annual Finance Act is passed charging the income of the previous year. This section contrives to reconcile the principle of advance payment of tax with the scheme of the Act which is to tax the income of the previous year. The basis of the section is the principle of 'pay as you earn', i. e., paying tax by instalments in respect of the income of the very year in which the tax is paid. But the section cannot directly levy any tax on the income of the assessment year, because under the charging sections which are Sections 3 and 55 income-tax and super-tax respectively can be levied at the rates specified in the annual Finance Act only in respect of the income of the previous year. So Sub-section (1) of this section provides for the payment of tax in respect of the income of 'the latest previous year', while under Sub-section (11) the tax so paid is treated as having been paid in respect of the income of the year of payment and credit therefor is given to the assessee in the regular assessment made in the next financial year. The advance payment of tax is only provisional, and if after the regular assessment is made the tax paid in advance is found to be in excess of the tax payable, the assessee would be entitled to a refund of such excess.

The scheme of the Sales Tax Act is entirely different. Sales tax is levied not in respect of the turnover for the previous year but in respect of the turnover of the year for which the tax is levied. The argument that since the tax for the year is on the turnover for that year the taxing authority should in all cases wait till the close of the year and is not competent to make in any case an assessment before the close of the year because the turnover of the year cannot be ascertained before the close of the year also appears to us to be far-fetched. To take an illustration about which there can be no dispute, if a dealer winds up his business long before the close of the year and his turnover for that year can thereby be ascertained before the close of the year why should the Sales Tax Authorities wait to make the assessment on him till the year is over In this connection reference has also to be made to Clauses (4) and (5) of Section 3 and Clause (2) (a) of Section 24. Clauses (4) and (5) of Section 3 read :

(4) For the purposes of this section and the other provisions of this Act, turnover shall be determined in accordance with such rules as may be prescribed.

(5) The taxes under Sub-sections (1) and (2) shall be assessed, levied and collected in such manner and in such instalments, if any, as may be prescribed. * * *

Clause (2) (a) of Section 24 reads :

Power to make rules-(1) Government may make rules to carry out the purpose of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for :

(a) all matters expressly required or allowed by this Act to be prescribed.

Under these three provisions the Government has the power to frame rules as to how the turnover is to be ascertained, the manner of the assessment, levy and collection of the tax, and for assessing, levying and calculating the tax in such manner and such instalments as they deem fit. As the provisional assessment under Rules 10 and 11 are subject to the final assessment under Rule 14 and final adjustment under Rule 15, the rules for making provisional assessments are nothing more than provisions for making the assessment for the year and the levying and the collection of tax in instalments.

These sections read with Section 3(1)(a) confer upon Government ample powers for making the rules to

enable provisional assessments subject to final assessment and for determining the turnover for the purpose of the provisional assessments. Considering the scheme of the Sales Tax Act which is quite unlike the scheme of the Indian Income-tax Act and the provisions referred to above we are of the opinion that there is nothing in Section 3(1) (a) of the Sales Tax Act which renders a provisional assessment on an estimated turnover subject to a final assessment and adjustment on the basis of the final assessment illegal or contrary to the spirit of the Act, and that such provisional assessments appear to have been contemplated by the Legislature and are in keeping with the spirit of the charging section. It was probably because of the difference in the schemes between the Income-tax Act and the Sales Tax Act that it was not thought necessary at first to enact in the Sales Tax Act a specific section similar to Section 18A of the Indian Income-tax Act. Referring to a similar rule under the Madras Sales Tax Act for provisional assessment and advance payment of tax, Venkatarama Ayyar, J. (now of the Supreme Court) has said in *V.M. Syed Mohamed and Co. v. State of Madras* A.I.R. 1953 Mad. 105, at p. 116 :

It is also contended that it is wrong on principle that a tax should be levied before it is finally determined ; that under Section 3(2) of the Act the assessment should be only on the annual turnover and that, therefore, Rule 15 (2) which provides for advance payments of tax every month before the liability to pay arises, which is only when the goods are actually tanned or exported is unconstitutional and that the position is not altered by Rule 15 (5) which provides for deduction of the amounts which turn out in the events not to have been payable in the returns for subsequent months. But advance payment of tax is a well-recognised feature in the mode of realising tax and the provision in Rule 15 (2) is in accordance with the practice generally obtaining in this branch of the law. In discussing the validity of a somewhat similar provision in a taxing statute of Southern Iowa, the court observed:

'It is of course true that as the report is required on the twentieth of the calendar month for transactions of the preceding month, there may at times be gasoline received in the month covered by the report which has not been exported by the twentieth of the succeeding month ; but the distributor is entitled to a credit for such exportation in his report made in the next month, and the mere fact that he cannot claim an anticipatory credit for gasoline not yet exported, but intended so to be, seems to us to be too slight a burden to be of any moment, or to raise a substantial constitutional question' : *Monamotor Oil Co. v. Johnson* 292 U.S. 86.

The attack on Rule 15 (2) must accordingly fail.

No doubt these observations were obiter in that case, but on a careful consideration of all the arguments advanced to us relating to this question which actually arises for consideration in the present case we respectfully agree with his Lordship's observations.

7. We therefore hold that Rules 9 to 11 do not offend or contravene Section 3 of the Act and are not ultra vires of that section or of the powers of Government. Rules 10 and 11 have to be treated as valid and integral parts of the Sales Tax Act. Reference is answered accordingly.

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