

Dispensing Chemist Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Dec-13-1983

Reported in : [1984]56STC162(Raj)

Judge : Dwarka Prasad and; Kanta Bhatnagar, JJ.

Appeal No. : D.B. Sales Tax Reference No. 30 of 1973

Appellant : Dispensing Chemist

Respondent : State of Rajasthan

Advocate for Def. : A.K. Mathur, Additional Adv.-General

Advocate for Pet/Ap. : S.K. Kakkar, Adv.

Judgement :

Dwarka Prasad, J.

1. This reference has been made by the Board of Revenue for Rajasthan at Ajmer under Section 15(3A) of the Rajasthan Sales Tax Act, 1954 (hereinafter called 'the Act'), at the direction of this Court and following questions of law arising out of the order of -the Board of Revenue dated 23rd January, 1970, have been referred:

(1) Whether the assessing authority was justified in treating the exemption certificate not valid, even when it was not properly cancelled ?

(2) Whether the period of 30 days prescribed under Rule 12 of the Act for filing renewal application is directory and whether the assessing authority was not competent to ignore the renewal on the ground of delay in the submission of the application and taking into consideration the turnover for the period from 1st April, 1957, to 5th May, 1957 ?

2. The assessee is a dealer registered under the Act and carries on the business of selling allopathic medicines. The Government of Rajasthan by Notification No. F. 21(7)SR/55 dated 14th April, 1955, granted exemption from payment of sales tax to dealers in allopathic medicines subject to their obtaining an exemption certificate on payment of fixed annual fee of Rs. 10. The assessee obtained an exemption certificate in accordance with the aforesaid notification, regarding the sale of allopathic medicines on 3rd June, 1957, for the financial year 1957-58. During the proceedings for assessment of sales tax for the period from 1st April, 1957, to 31st March, 1958, the assessee claimed exemption on the basis of the aforesaid certificate in respect of sales of allopathic medicines for the period from 1st April, 1957, to 5th May, 1957, as the provisions in respect of exemption were modified by the notification dated 6th May, 1957. The assessing authority, namely, Commercial Taxes Officer, Jodhpur, disallowed the assessee's claim for exemption on the ground that he had applied for renewal of the exemption certificate on 7th May, 1957 while the exemption could have been granted under the notification dated 14th April, 1955, up to 5th May, 1957, only. According to Rule 12 of the Rajasthan Sales Tax Rules; 1955, an application for granting an exemption certificate or renewal thereof could have been filed within 30 days, i.e., up to 30th April, 1957.

3. The assessee filed an appeal before the Deputy Commissioner (Appeals), Commercial Taxes, Jodhpur, who dismissed the appeal by his order dated 22nd June, 1962. The assessee thereafter preferred a revision petition before the Board of Revenue for Rajasthan at Ajmer. A Division Bench of the Board of Revenue dismissed the revision petition by its order dated 21st March, 1969, holding that according to the notification dated 14th April, 1955, it was a condition precedent for obtaining benefit of the exemption that the assessee must hold a valid certificate of exemption. It was further held that the post-dated certificate could not

form the basis of relief retrospectively.

4. The assessee thereafter filed an application before the Board of Revenue under Section 15(1) of the Act, requesting it to refer to this Court questions of law arising out of its order passed on the revision petition. However, as the Board of Revenue failed to dispose of the application under Section 15(1) within the period of 180 days, the assessee applied to this Court under Section 15(3A) of the Act, praying that the Board of Revenue may be directed to refer three questions to this Court for its opinion. This Court, by its order dated 28th August, 1970, reframed the questions and directed the Board of Revenue to refer the questions mentioned above to this Court for its opinion. Thereupon, the Board of Revenue by its order dated 13th April, 1972, submitted a statement of case and referred the aforesaid two questions to this Court.

5. Sub-section (2) of Section 4 of the Act authorises the State Government, by issuing a notification in the Official Gazette, to exempt from tax under the Act any goods or class of goods or any person or class of persons on such conditions and on payment of such fee as may be specified in the notification, if in its opinion it is necessary or expedient in the public interest to do so. By the notification issued on 14th April, 1955, in exercise of the powers conferred under Sub-section (2) of Section 4 of the Act, the State Government exempted the sale of allopathic and homoeopathic medicines and drugs from tax on the condition that the dealer claiming exemption holds a valid certificate of exemption, for which a fixed annual fee of Rs. 10 was prescribed. It is not in dispute that the assessee held an exemption certificate under the aforesaid notification in respect of the financial years 1956-57. It is also not in dispute that the assessee submitted an application on 7th May, 1957, for renewal of the exemption certificate. The Sales Tax Officer, Jodhpur City, issued the exemption certificate to the assessee on 3rd June, 1957, and ordered that the turnover of the assessee of allopathic and homoeopathic medicines and drugs will be exempted from payment of sales tax up to 5th May, 1957. The said exemption certificate specifically mentions that 'this certificate shall be valid till the 5th May, 1957, unless cancelled earlier'.

6. It may be pointed out here that the exemption certificate issued by the Sales Tax Officer was stated to be valid only up to 5th May, 1957, because the notification dated 14th April, 1955, was partially modified by the notification issued by the State Government on 6th May, 1957, with effect from that very day and thereafter the sale of allopathic and homoeopathic medicines and drugs were exempted from payment of sales tax subject to the dealer obtaining an exemption certificate on the basis of his annual turnover.

7. Before taking up the questions referred to this Court for consideration, it would be proper for us to refer to the provisions contained in the Rajasthan Sales Tax Rules relating to the procedure connected with the grant of exemptions under Sub-section (2) of Section 4 of the Act. Rule 8 prescribes that it shall be necessary for the person claiming exemption under a notification issued under Section 4(2) to obtain a certificate of exemption and in the absence of such certificate of exemption, such exemption shall not be allowed and such sales shall be liable to payment of sales tax. Rule 9 relates to fee to be paid by the dealer for obtaining the exemption certificate. Rule 10 provides that an application in form S. T. 1 shall be submitted by the dealer to the assessing authority within 30 days from the date of issue of the notification, for obtaining an exemption certificate according to the notification issued under Sub-section (2) of Section 4. Rule 12 provides that the exemption certificate granted under Rule 10, unless it is cancelled or the business is discontinued, shall remain valid till the expiry of the assessment year in respect of which the fee is paid and it shall also continue to be valid thereafter provided the fee specified therefor is paid for each subsequent assessment year within 30 days or with any return that may fall due within 3 months before the commencement of any such year. Rule 14 provides for cancellation of exemption certificate by the assessing authority concerned, after giving the dealer a reasonable opportunity of hearing, if the assessing authority is satisfied that the dealer has contravened the provisions of Rule 13 relating to maintenance of separate accounts in respect of the turnover of the goods mentioned in the certificate of exemption or has contravened any condition of the exemption certificate or if the certificate has been obtained by fraud.

8. Now, we shall take up the first question referred to us as to whether the exemption certificate could be considered as invalid by the assessing authority even when it was not properly cancelled. The argument of the learned Additional Advocate-General who appeared before us on behalf of the revenue is that as the assessee did not submit an application for obtaining the exemption certificate within 30 days as required under Rule 12, the exemption certificate granted by the Sales Tax Officer in favour of the assessee on 3rd June, 1957, was a nullity and the same was rightly ignored by the assessing authority as well as by the appellate authority and the Board of Revenue. The contention of the learned Additional Advocate-General is that the submission of an application for obtaining an exemption certificate within the prescribed period of 30 days was an essential pre-requisite for the Sales Tax Officer obtaining the jurisdiction to issue an exemption certificate. It was further contended that the Sales Tax Officer was a Tribunal of limited jurisdiction and if the essential pre-requisites were not complied with, there was total absence of jurisdiction. It is, of course, not denied nor it is disputed before us that the exemption certificate granted by the Sales Tax Officer on 3rd June, 1957, was not cancelled or set aside by any competent authority, either the Sales Tax Officer himself or by any higher authority in appeal or revision. The contention of Mr. Kakkar on the other hand is that the exemption certificate issued by the Sales Tax Officer in favour of the assessee was a valid certificate of exemption in spite of the fact that the application for obtaining such certificate was filed by the assessee beyond the period of 30 days. His submission is that once a certificate of exemption was granted by the Sales Tax Officer, the same could not be ignored by the taxing authority even if it was irregular or illegal, unless the same was set aside or cancelled, either by the assessing authority by recourse to proceedings for rectification under Section 17 of the Act, or by the Board of Revenue in revision proceedings under Section 14 of the Act. Learned counsel referred to Sub-section (3) of Section 26 of the Act and submitted that penalty for disobedience or breach of any provision of the Rules could be made punishable by the State Government with fine not exceeding Rs. 500, and in the case of a continuing offence with a fine not exceeding Rs. 25 for every day till the offence continues. Thus, the argument of the learned counsel for the assessee is that so long as the exemption certificate was neither cancelled nor set aside, the same

could not be ignored by the Sales Tax Officer and the benefit of the exemption should have been allowed to the assessee for the period between 1st April, 1957, to 5th May, 1957.

9. The question as to whether an order is a nullity or it is merely illegal, depends upon the question whether the act was done in breach of a mandatory provision. If the provision of a statute is only directory, an act done in contravention thereof is manifestly not a nullity. Even if the provision is couched in a mandatory form, yet the act done in breach thereof is not per se a nullity. In *Ashutosh Sikdar v. Behari Lal Kirtania* (1908) ILR 35 Cal 61, Mookerjee, J., observed as under:

No hard and fast line can be drawn between a nullity and an irregularity; but this much is clear, that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding, or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it, or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated.

10. Whether a provision falls under one category or another is not easy to decide, but in ultimate analysis the distinction between a nullity and an illegal order depends upon the nature, scope and object of a particular provision, in contravention of which the order was passed. A workable test in this respect was laid down by Coleridge, J., in *Holmes v. Russell* (1841) 9 Dowl 487 in the following terms:

If is difficult sometimes to distinguish between an irregularity and a nullity, but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity.

11. In *Vellayan Chettiar v. Government of the Province of Madras* AIR 1947 PC 197, their Lordships of the Privy Council held that although the provisions of Section 80, Civil Procedure Code, were mandatory in nature, yet the officer or authority for whose benefit they were made was entitled to waive the same. Their Lordships observed as under in the aforesaid case :

There is no inconsistency between the propositions that the provisions of the section are mandatory and must be enforced by the court and that they may be waived by the authority for whose benefit they are provided...there appears to their Lordships to be no reason why the notice required to be given under Section 80, should not be waived if the authority concerned thinks fit to waive it, it is for his protection that notice is required; if in the particular case he does not require that protection and says so, he can lawfully waive his right.

12. In *Sheo Dayal Narain v. Mt. Kuer* AIR 1942 Pat 238, Meredith, J., while pointing out the distinction between a voidable sale and a sale held without jurisdiction, observed as under :

Non-compliance with this provision would be a good ground for setting the sale aside. But that is only to say that it is voidable, not that it is void. It is one thing to hold that the sale is bad on this ground and another thing to hold that it is completely without jurisdiction, so that it can be ignored without being set aside.

13. Their Lordships of the Supreme Court pointed out the distinction between lack of inherent jurisdiction and on illegality in the exercise of jurisdiction, in *Dhirendra Nath Gorai v. Sudhir Chandra Ghosh* AIR 1964 SC 1300 in the following words:

'Where the court acts without inherent jurisdiction, a party affected cannot by waiver confer jurisdiction on it, which it has not. Where such jurisdiction is not wanting, a directory provision can obviously be waived. But a mandatory provision can only be waived if it is not conceived in the public interests, but in the interests of the party that waives it.'

14. Thus, it is clear that not only the language but also the context, subject-matter and object of the statutory provision must be considered to determine the question whether the same is mandatory and strict compliance is essential for the validity of the act done or substantial compliance would be enough. Lord Campbell observed in *Liverpool Borough Bank v. Turner* (1861) 30 LJ Ch 379 as under:

No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for

disobedience. It is the duty of Courts of Justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.

15. Their Lordships of the Supreme Court quoted with approval the following passage from Crawford's Statutory Construction in *State of U.P. v. Manbodhan Lal Srivastava* AIR 1957 SC 912.

The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other....

16. In *State of U.P. v. Babu Ram Upadhya* AIR 1961 SC 751 their Lordships of Supreme Court observed as follows :

The court may consider, inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or, is not visited by some penalty, the serious or trivial consequences that flow therefrom; and, above all, whether the object of the legislation will be defeated or furthered.

17. If general inconvenience will be created to innocent persons without very much furthering the object of the enactment, the provision should be construed as directory.

18. In the present case, it cannot be held that the Sales Tax Officer lacked inherent jurisdiction to issue an exemption certificate in favour of the assessee. The jurisdiction to grant an exemption certificate to a dealer arises from the provisions of Section 4(2) read with Rule 8. The remaining provisions of rules 9,

10, 11 and 12 are procedural in nature.

19. If an application for obtaining a certificate of exemption is not filed by a dealer within the time provided in Rule 12, then the Sales Tax Officer could refuse to issue an exemption certificate on the ground that the application was (not) filed by him within the permissible time. However, if the exemption certificate is issued by the Sales Tax Officer on the basis of an application filed beyond the time prescribed in Rule 12, then it cannot be said that the exemption certificate was void or invalid by itself. In case the assessee complied with the requirements of the notification dated 14th April, 1955, he was entitled to obtain a certificate of exemption, in accordance with the provisions of Rule 8 and the mere fact that such a certificate was issued on an application filed beyond the period of 30 days, could not take away the force or effectiveness of the exemption certificate. To our mind, the provisions contained in Rule 12, requiring an application for renewal of an exemption certificate should be submitted by the assessee within 30 days, appears to be merely regulatory in nature. It cannot be held that public interest was likely to suffer if an application for obtaining renewal of an exemption certificate was not filed within the period of 30 days. The position in this regard is further reinforced by the fact that the rule-making authority itself later on amended the provisions of Rule 12 by inserting a proviso therein to the following effect:

Provided further that a dealer shall be liable to a penalty not exceeding double the fee specified for an exemption certificate in case the said fee is not deposited within the prescribed period and to the payment of tax if such tax has been charged by such dealer after the commencement of the assessment year for which the fee was to be deposited.

20. The aforesaid amendment was introduced in Rule 12 by the amending notification dated 28th June, 1961. We may also point out that another proviso to the same effect was added to Rule 10 by a notification dated 13th June, 1978, which authorises the assessing authority to condone the delay in filing an application for obtaining an exemption certificate. If the assessing authority was satisfied that there was sufficient reason for the assessee for not obtaining the exemption certificate within the period of 30 days, such delay could be condoned

on payment of penalty of Rs. 25 by the dealer for each calendar year or part thereof. Thus, it is apparent that there was no public interest involved in prescribing the provision of 30 days for filing an application for obtaining an exemption certificate nor there was any public policy behind such a provision. The obvious intention of the rule-making authority for making such a provision appears to be to regulate and control the grant of exemption certificates and the renewal thereof and to provide a reasonable period during which the dealers should normally file an application for obtaining an exemption certificate or renewal thereof. In this view of the matter, the exemption certificate granted by, the Sales Tax Officer, even on the basis of an application filed beyond the period of 30 days, could not be held to be ab initio void and it could not be held that the Sales Tax Officer lacked inherent jurisdiction to grant such an exemption certificate. Of course, the Sales Tax Officer committed an obvious illegality, inasmuch as he proceeded to grant the renewal of an exemption certificate to the dealer, ignoring the fact that the application for obtaining the said exemption certificate was not filed within the period of 30 days.

21. Even if the period prescribed in Rule 12 may be considered to be mandatory, it may be observed that cases of nullity may arise when there is total lack of jurisdiction at the stage of commencement of an enquiry, namely, the enquiry is initiated on the basis of an ultra vires statute or the Tribunal is not properly constituted or is designed to act or the subject-matter of the parties are such over which the Tribunal has no authority to enquire or there is want of essential requirements prescribed by law for the commencement of the proceedings. Cases of nullity may also arise during the course or at the conclusion of the proceedings, such as where the Tribunal wrongly decided a jurisdictional question of fact or law or where the Tribunal fails to follow the fundamental principles of judicial procedure or passes an order without giving an opportunity of hearing to the party affected or violates the fundamental provisions of the enactment or takes into consideration extraneous or irrelevant matters or acts in bad faith or grants a relief or makes an order which it has no authority to grant or make under the law. The order granting the renewal of an exemption certificate in the present case cannot be classified as a nullity merely because a regulatory provision was ignored, and the exemption certificate was granted. The remedy lay with the revenue of getting

the exemption certificate set aside either by way of rectification under Section 17 or by filing a revision before the Board of Revenue under Section 14. However, so long as the exemption certificate was not cancelled or set aside by any competent authority, in accordance with the procedure provided in the Act or the Rules made thereunder, the exemption certificate should have been given effect to. The assessing authority could not go behind the exemption certificate and ignore the same on the ground that the assessee had applied for obtaining the exemption certificate beyond the period of 30 days. Whether the application for granting an exemption certificate was filed within the period of 30 days or not, was a matter which was to be considered by the Sales Tax Officer while granting or refusing to grant the exemption certificate under Rule 8 or renewing the same under Rule 12, but once the certificate was granted by the competent authority, the assessee was entitled to obtain an exemption in respect of sales made by the dealer up to 5th May, 1957, so long as the exemption certificate was not cancelled or set aside. The fact that the exemption certificate specifically mentions that it shall be valid up to 5th May, 1957, goes to show that the Sales Tax Officer while granting the exemption certificate on 3rd June, 1957, was conscious of the fact that the period of validity of the certificate has already elapsed and further that an exemption on the basis of such certificate could not be availed of beyond 5th May, 1957, on account of the notification dated 6th May, 1957, providing for exemption thereafter on the basis of annual turnover of the assessee. We are, therefore, of the view that the assessing authority was not justified in treating the exemption certificate as invalid, so long as it was not lawfully cancelled or set aside and our answer to the first question is in the negative and against the revenue.

22. As regards the second question, we have already observed above that the provision of 30 days in Rule 12 appears to us to have been introduced by the rule-making authority as a regulatory measure for keeping effective control on the process of grant of exemption certificate. It may be observed that Rule 12 provides that the exemption certificate granted for the earlier year shall not only be valid for the year but shall continue to remain valid even after the expiry of the previous year, provided specified fee for renewal was paid within the period of 30 days. Thus, during the period of first 30 days of the new financial year, the exemption certificate granted for the earlier year would continue to hold good and if the

application for renewal of exemption certificate along with specified fee is filed within 30 days, the new exemption certificate granted even at a later date, would have retrospective effect from the date of the commencement of the new year. As such, we are not impressed with the argument which prevailed with the Board of Revenue that an exemption certificate could not be made effective from retrospective date or that relief could not be claimed by the assessee on the basis of a post-dated certificate for the retrospective period. We would like to observe in this respect that in every case when application for grant or renewal of an exemption certificate is filed within the period of 30 days of the commencement of the new year, some time is likely to be taken by the Sales Tax Officer in each case in issuing an exemption certificate and then the exemption certificate so granted would always be a post-dated document in a limited sense that after the same would be granted, it will become effective from the date of commencement of that financial year. We may further observe that the Board of Revenue committed an error in thinking that the word 'held' should mean that the assessee must possess the required certificate at the relevant time. Even if an application for obtaining an exemption certificate might have been filed by a dealer within the period of 30 days, the Sales Tax Officer could on the basis of such an application grant a certificate at a later date. Even if the Sales Tax Officer refused to grant such an exemption certificate, the dealer has a right to file an appeal before the Deputy Commissioner (Appeals) and in case his appeal is allowed, yet considerable time is bound to elapse on account of the pendency of the appeal before the exemption certificate could be granted on the basis of the appellate order. Then the exemption certificate necessarily would be granted much later in point of time than the date of its commencement and in some cases, such certificate may be granted beyond the period of its expiry. Thus, to our mind the provision contained in Rule 12 relating to the period prescribed for filing of a renewal application appears to be directory. We have already observed above, that the delay in filing an application for obtaining the exemption certificate could be taken into consideration by the Sales Tax Officer at the time of granting the exemption certificate, as he has a discretion at that time to refuse to grant an exemption certificate, for which the application was filed beyond the period of 30 days. But once the exemption certificate is granted, then the assessing authority, during the course of the

assessment proceedings, could not ignore the renewed exemption certificate nor could it go behind the exemption certificate and take into consideration the fact that the application for grant of such exemption certificate was filed by the assessee beyond the period of 30 days. As the exemption certificate granted by the Sales Tax Officer stands and has not been cancelled or set aside, the assessee was entitled to exemption of his turnover in respect of sales of allopathic medicines during the period of 1st April, 1957, to 5th May, 1957. The assessing authority was, therefore, not justified in imposing tax upon the assessee in respect of his turnover relating to sale of allopathic medicines during the aforesaid period from 1st April, 1957, to 5th May, 1957. The second question is answered accordingly.

23. Thus, our answer to the first question is in the negative and against the revenue. As regards the second question we have held that the period of 30 days prescribed in Rule 12 for filing renewal application is directory and the renewal of the exemption certificate once granted could not be ignored, until set aside or cancelled by competent authority in accordance with law.

24. We are, therefore, of the view that the turnover of the assessee relating to sale of allopathic medicines during the period from 1st April, 1957, to 5th May, 1957, could not be taxed and the imposition of tax in respect thereof is liable to be set aside.