IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2765 OF 2009
(Arising out of S.L.P.(C) No.1471/2008)

M/s. Varkisons Engineers ...Appellant(s)

Versus

State of Kerala & Anr. ...Respondent(s)

O R D E R

Leave granted.

Appellant-M/s. Varkisons Engineers is a partnership firm having its crushing unit at Kadiyiruppu, Kolenchery, Ernakulam District. It is a registered dealer under the Kerala General Sales Tax Act, 1963 (for short, the KGST Act) as well as the Central Sales Tax Act, 1956.

In lieu of payment of tax under Section 5(1) of the KGST Act for the Assessment Year 2001-2002, appellant opted to pay turnover tax under Section 7 which provides for payment of tax at the compounded rate. In short, the appellant opted for an alternate method of taxation provided for by Section 7 of the KGST Act.

To complete chronology of events, it may be stated, that the appellant had applied for permission for payment of tax under Section 7 read with Rule 30 of the Kerala General Sales Tax Rules. That application was made on 9th April, 2001 for

the Financial Year commencing from 1.4.2001 to 31.3.2002. Vide Order dated 9th April, 2001, the assessing authority granted permission to the appellant to pay tax under Section 7. That permission was granted for the full Financial Year commending from 1.4.2001 to 31.3.2002. The demand for payment of tax under Section 7 read with Rule 30 was accordingly quantified. At this stage, it also may be noted that under the scheme of Section 7 read with Rule 30, once the dealer opts for the alternate method of taxation, the dealer has to pay the tax in monthly instalments. In short, in the present case, the entire exercise stood concluded on 9th April, 2001. On 9th January, 2003, notice under Section 43 of the KGST Act came to be issued by the S.T.O., inter alia, seeking to rectify the permission/order dated 9th April, 2001 and seeking enhanced rate per machine with effect from 23rd July, 2001 by the Finance Act, 2001 (Act 7 of 2001). It may be noted that by Finance Act, 2001, the rate per machine stood enhanced from Rs.30,000/- to Rs.90,000/- from 23rd July, 2001 and not from 1st April, 2001 which, as stated above, was the first date of the Assessment Year 2001-2002. This notice under Section 43 came to be challenged by the appellant herein by filing Original Petition No.1501/2003.

When the matter came for hearing before the learned Single Judge, an order of reference was made as the point involved was of public importance. The purpose of the reference made by the learned Single Judge was whether the amended provisions of Kerala Finance Act, 2001, which came into effect from 23rd July, 2001, was applicable for the Assessment Year 2001-2002 as there was no provision under the Act for making the assessment of the compounded tax under

Section 7(1)(b), either for part of the year or the fraction of the year.

This reference was disposed of by the Division Bench by a very cryptic reasoning, which is reproduced hereinbelow:

> **"Merely because there is no provision in the amendment brought in for making an assessment of compounded tax coming under this clause for fraction or part of the year, the petitioner cannot claim that it is entitled to pay tax at the rates applicable on the beginning of the assessment year in question, i.e. 1.4.2001, nor can it be said that the amendment would be operative from the next assessment year only. A retrospective law in the legal sense, is the one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty or attaches a new disability, in respect of transactions or considerations already passed. Accordingly, we hold that the amendment made in clause (b) of sub-section (1) of Section 7 of the Kerala General Sales Tax is applicable for the assessment year 2001-2002."**

The main argument of the dealer before us was that the alternate method of taxation is very similar to the taxation under the Income Tax Act. The argument of the dealer was that once the method of taxation proceeds on the basis that unit of assessment was the full assessment year commencing from 1st April, then, the law prevailent on the first day of the assessment year should prevail. That, there cannot be bifurcation of the assessment year, particularly in the absence of the amendment to the machinery provision in the Act. That, the Division Bench was required to consider in that context whether in the absence of machinery of computation, was it open to levy the tax at a different rate in the middle of the assessment year, that is, from 23rd July, 2001.

On the other hand, Mr.Iyer, learned senior counsel, submitted that it is always open to the Legislature to amend the law retrospectively. Mr.Iyer further

contended that the word 'assessment' is an ambiguous term. Under certain Acts, the word 'assessment' could cover all the three stages, viz., accrual of liability, computation of liability and its recovery whereas in certain other enactments, mere payment of fixed quantum of tax could also come within the meaning of the word 'assessment'. According to the learned senior counsel, although the word used is 'assessment' in the 1963 Act, strictly it covers recovery of tax at the rate fixed by the Legislature and, therefore, it is always open to the Legislature to introduce vide the Finance Act in the midst of the assessment year the revised rate of tax in Section 7(1)(b)(i).

We have broadly indicated the arguments advanced in this case on both sides. Our attention has also been invited to some of the important judgments of this Court in the case of *State of Kerala & Anr. Vs. Builders Association of India & Ors. ([1997] 2 SCC 183), M/s. Mycon Construction Ltd. Vs. State of Karnataka & Anr. (AIR 2002 SC 2089), Mathuram Agrawal Vs. State of M.P. ([1999] 8 SCC 667), The Karimtharuvi Tea Estate Ltd. Vs. The State of Kerala, (AIR 1966 SC 1385) and State of Kerala Vs. Alex George & Anr. ([2005] 1 SCC 209).* We may usefully quote para 8 to para 14 of the judgment in the case of *Karimtharuvi Tea Estate Ltd.* (supra), which read as under:

> **"(8) Now, it is well-settled that the Income-tax Act, as it stands amended on the first day of April of any financial year must apply to the assessments of that year. Any amendments in the Act which come into force after the first day of April of a financial year, would not apply to the assessment for that year, even if the assessment is actually made after the amendments come into force.**

(9) In Scindia Steam Navigation Co. Ltd. v. Commr. of Income-tax, (1954) 26 ITR 686: (AIR 1955 Bom 230), a Division Bench of the Bombay High Court, consisting of Chagla, C.J., and Tendolkar, J., considered the question as to the effect of an amendment which came into force after the commencement of financial year. The facts in that case were these. The assessee's ship was lost as a result of enemy action. The Government paid the assessee in 1944 a certain amount as compensation which exceeded the original cost of the ship. The Income-tax Officer included the difference between the original cost and the written down value of the ship in the total income of the assessee for the assessment year 1946-47. The Tribunal upheld that decision and referred the question, whether the sum representing the difference between the original cost and the written down value was properly included in the assessee's total income computed for the assessment year 1946-47. It was argued that the fourth proviso to S.10(2)(vii) of the Income-tax Act (inserted by the Amendment Act of 1946 with effect from May 4, 1946) under which the inclusion of the amount was justified by the department, had no application to the case.

(10) The learned Judges held that as it was the Finance Act of 1946 that imposed the tax for the assessment year 1946-47, the total income had to be computed in accordance with the provisions of the Income-tax Act as on April 1, 1946; that as the amendments made by the Amendment Act of 1946 with effect from May 4, 1946 were not retrospective, they could not be taken into consideration merely because the assessee was assessed after that date; and that the assessee was not liable to pay tax on the sum because the fourth proviso to S.10(2)(vii) of the Income-tax Act under which it was sought to be taxed was not in force in respect of the assessment year 1946-47.

(11) This Court affirmed this decision in Commr. of Income-tax, Bombay v. Scindia Steam Navigation Co.Ltd., (1962) 1 SCR 788: (1961) 42 ITR 589: (AIR 1961 SC 1633), where it was stated at p.816 (of SCR): (at p.1646 of AIR), as follows:

> **"On the merits, the appellant had very little to say. He sought to contend that the proviso though it came into force on May 5, 1946, was really intended to operate from April 1, 1946, and he referred us to certain other enactments as supporting that inference. But we are construing the proviso. In terms, it is not retrospective, and we cannot import into its construction matters which are ad extra legis, and thereby alter its true effect."**

In Commr. of Sales Tax, Uttar Pradesh v. Modi Sugar Mills Ltd., (1961) 2 SCR 189: (AIR 1961 SC 1047), this Court held by a Majority at p. 199 (of SCR): (at p. 1051 of AIR), as follows:

> **"A legal fiction must be limited to the purposes for which it has been created and cannot be extended beyond its legitimate field. The turnover of the previous year is fictionally made the turnover of the year of assessment; it is not the actual or the real turnover of the year of assessment. By the imposition of a different tariff in the course of the year, the incidence of tax liability may competently be altered by the Legislature, but for effectuating that alteration, the Legislature must devise machinery for enforcing it against the tax payer and if the Legislature has failed to do so, the Court cannot resort to a fiction which is not prescribed by the Legislature and seek to effectuate that alteration by devising machinery not found in the statute."**

(12) In the instant case, there is no escape from the conclusion that the Surcharge Act not being retrospective by express intendment, or necessary implication, it cannot be made applicable from April 1, 1957, as the Act came into force from September 1, of that year.

(13) The High Court has, however, relied upon a decision of this Court in I.-T. Commr. vs. I.S. Lines, AIR 1953 SC 439, where it was held as follows:

> **"It will be observed that we are here concerned with two datum lines: (1) the 1st of April, 1940, when the Act came into force, and (2) the 1st of April 1939, which is the date mentioned in the amended proviso. The first question to be answered is whether these dates are to apply to the accounting year or the year of assessment. They must be held to apply to the assessment year, because in income-tax matters the law to be applied is the law in force in the assessment year unless otherwise stated or implied. The first datum line, therefore, affected only the assessment year of 1940-41, because the amendment did not come into force till the 1st of April 1040. That means that the old law applied to every assessment year up to and including the assessment year 1939-40."**

This decision is authority for the proposition that though the subject of the charge is the income of the previous year, the law to be applied is that in force in the assessment year, unless otherwise stated or implied. The facts of the said decision are different and distinguishable and the High

Court was clearly in error in applying that decision to the facts of the present case.

(14) The Surcharge Act having come into force on September 1, 1957, and the said Act not being retrospective in operation, it could not be regarded as law in force at the commencement of the year of assessment 1957-58. Since the Surcharge Act was not the law in force on April 1, 1957, no surcharge could be levied under the said Act against the appellant in the assessment year 1957-58."

It may be noted that the above-quoted paragraphs are not only confined to Income Tax Act, they also deal with legal fictions prevalent under Sales Tax Laws.

On reading the above quoted observations in the judgment of this Court, the point which required the decision upfront was whether imposition of a different tariff in the middle of the assessment year could be given effect to in the absence of a proper machinery for computing the tax liability. In this connection, the Court was required to consider the scheme of the entire Act particularly the difference between Sections 5 and 7 of the 1963 Act. It may be stated that Section 5 which deals with normal assessment refers to tax on the turnover whereas Section 7(7) refers to payment of tax on the amount of contract. The Court was also required to consider whether Section 43 could be invoked by Department in cases following under alternate mode of taxation u/s 7 of 1963 Act.

In the circumstances, we set aside the impugned judgment dated 4th October, 2007 and we restore Original Petition No.1501/2003 to the file of the Kerala High Court for *de novo* consideration in accordance with law and in accordance with the directions given hereinabove.

We make it clear that any observations made hereinabove are only in

support of the order passed today remitting the case to the Division Bench. We express no opinion on the merits of the case. All contentions are expressly kept open.

Civil Appeal stands disposed of accordingly.

.....J.
(S.H. KAPADIA)

.....J.
(HARJIT SINGH BEDI)

New Delhi,
April 23, 2009.