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M/S. KANPUR VANASPATI STORES, KANPUR

v.

THE COMMISSIONER OF SALES TAX, U.P. LUCKNOW

January 22, 1973

[K. S. HEGDE, P. JAGANMOHAN REDDY AND H. R. KHANNA J.J.] B

U.P. Sales Tax Act, Sec. 3A : "Successive Dealer", whether includes an importer who is the first dealer. U.P. Sales Tax Act, Sec. 9(1) proviso ; "tax admitted"—Whether restricted to admission in memorandum of appeal only.

The assessee, among other things, imports and distributes vanaspati as agent of certain companies.. For the year 1957-58, he filed a return C on a turn over of Rs. 1,66,387.3 P and paid tax of Rs. 1060.30. Before the assessing authority, he accepted the liability of Rs. 10,339.19 p. On independent enquiries, the Sales Tax Officer came to the conclusion that the turn over was Rs. 58,06,132.30 and the tax liability was to the extent of Rs. 3,62,691.62P. The tax authority had to resort to best assessment, as the assessee failed to appear, although 30 adjournments were given. The assessee filed an appeal to the appellate authority without depositing the tax, as required by proviso to Sec. 9 of the Act. D The appeal was dismissed for non-compliance of Sec. 9. At the instance of the assessee, the question of maintainability of appeal was referred to the High Court. During the pendency of the reference, the assessee filed writ petitions challenging the validity of the Notification issued under section 3A and the legality of the proceedings. The High Court held that the appeal was properly dismissed. Before this Court, the following questions were raised : (i) that the assessee-appellant being an E importer cannot be considered as one of the successive dealers in the series of sales as contemplated by Section 3A and, therefore, the Notification under section 3(A) was *ultra vires*, and (ii) that the dismissal of appeal, for want of payment of the admitted tax under section 9(1) of the Act was illegal.

Dismissing the appeal,

HELD : (i) An importer is one of the dealers. He is the first F dealer in the State. Chain of successive dealers begins from the first dealer and it goes to the last dealer. In view of this, dealer in this chain can be considered as a "successive dealer". The series does not begin in the middle. The notification under section 3 is a valid notification *Ram Kumar Rajendra Swaroop* Vs. *Commissioner of Sales* Tax (19 S.T.C. 241) approved. [4266 C-D]

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(ii) The assessee had accepted the liability of Rs. 10,339/- before the tax authorities. Under Rules 41(2) read with 12 he was bound to submit the quarterly return and also deposit the tax due in accordance with the return. The expression "tax admitted" in proviso to Section 9(1) means tax admitted before the assessing authority and not before the appellate authority. As payment of the admitted tax is one of the conditions for the maintainability of the appeal, Section 9(1) would be rendered wholly useless, if it is interpreted to mean tax H admitted in the memorandum of appeal. Ordinarily, no interpretation should be placed on a provision which would have the effect of making the provision either otiose or a dead letter. [426G-H; 427A-D]

A *Chanshyam Dass Balmukand* v. *The State of U.P. & Ors.* (23 S.T.C. 282) *and United Timber & Cashew Products (P) Ltd.* v. *Sales Tax Officer, Cannanore* (28 S.T.C. 526), overruled.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2300 to 2302 of 1969 and 14 & 15 of 1970.

B Appeal by a special leave from the judgment dated August 7, 1968 and 18th August 1969 in Sales Tax Reference No. 574 of 1963, and Special appeal No. 330 of 1963, Misc. Application No. 177 of 1963 and S.A. Nos. 423 and 424 of 1968 respectively.

S. V. Gupte, K. L. Arora, S. K. Bagga and *S. Bagga,* for the C appellant.

N. D. Karkhanis and *O. P. Rana,* for the respondent.

The Judgment of the Court was delivered by

HEGDE, J. These are appeals by special leave. They are filed by the same assessee. They arise from the decision of a D Division Bench of the Allahabad High Court. The judgment under appeal not only deals with references made under the U.P. Sales Tax Act 1948 (hereinafter referred to as the Act) but also the two Writ Petitions filed by the assessee.

The assessee who is a registered dealer under the Act is having E his business at Kanpur. It carries on business in hydrogenated oil and washing soap. It also imports and distributes vanaspati as an agent of Malwa Vanaspati and Chemical Company Ltd., Indore.

In these appeals we are concerned with the assessee's assessment of sales tax for the assessment year 1957-58. Its return for that year disclosed a gross as well as net turnover of F Rs. 1,66,387.03 P. Along with its return the assessee paid Rs. 1,060.30P. towards the tax due. Before the assessing authority the assessee admitted that its tax liability was Rs. 10,339.19P. It is admitted as well as proved that the assessee had collected from its purchasers the said amount of Rs. 10,339.19P. The Sales Tax Officer after making certain enquiries came to the conclusion that the total turnover of the assessee during the assessment year in G question was Rs. 58,06,132.30P. The assessee was given opportunity to show that the estimate made by the Sales Tax Officer was not correct. From the records of the case we find that as many as 30 adjournments were given to the assessee to establish its case but the assessee did not take advantage of those opportunities. The case was finally posted for bearing on 24th March, 1962. That day H the assessee was absent; but it made an application for adjournment of the case by 15 days. That adjournment was not granted and it could not have been granted because the assessment would have been barred by the end of the financial year 1961-62. Hence the

assessing authority, on the basis of its best judgment determined the turn-over of the assessee at Rs. 58,06,132.30P. and determined its tax liability at Rs. 3,62,691.62P. under section 3A of the Act. A

Against the order of assessment the assessee filed an appeal within 30 days from the date of the order of assessment. At the time of filing the appeal the assessee deposited only a sum of Rs. 1,600. It appears that the office of the Appellate Judge raised some objections as to the maintainability of the appeal. After receiving some explanation from the assessee the appeal was entertained and notice issued to the assessing authority. When the Sales Tax Officer put in his appearance in the appeal he objected to the maintainability of the appeal on the ground that the Priviso to Section 9 of the Act had not been complied with. That objection was accepted and the appeal was dismissed as not maintainable. Thereafter at the instance of the assessee certain questions were referred to the High Court for ascertaining its opinion. During the pendency of that reference the assessee filed a Writ Petition under Article 226 of the Constitution challenging the validity of the Notification issued under Section 3A. Thereafter another application was made under Article 227 of the Constitution challenging the recovery proceedings. Both the Writ Petitions were dismissed. In the reference made by the Appellate Judge the High Court came to the conclusion that the appeal was properly dismissed. B C D

Mr. Gupte, the learned counsel for the assessee-appellant advanced the following contentions before us;— E

(1) That the appeal was illegally dismissed;

(2) That the assessee-appellant being an importer cannot be considered as one of the successive dealers in the series of sales as contemplated by Section 3A; and F

(3) That the Notification issued under Section 3A was ultra vires the power granted on the government.

In order to appreciate the contentions advanced, it is necessary to refer to certain provisions of the Act. G
Section 3(1) of the Act provides :

> "Subject to the provisions of this Act every dealer shall, for each assessment year, pay a tax at the rate of three pies per rupee on his turnover of such year, which shall be determined in such manner as may be prescribed." (Remaining portion of the provision is not relevant for our purpose). H

A Section 3A(1) reads thus :

> "Notwithstanding anything contained in Section 3, the State Government may, by notification in the official Gazette, declare that the turnover in respect of any goods or class of goods shall not be liable to tax except
B at such single point in the series of sales by successive dealers as the State Government may specify." (Remaining portion of Section 3A is not relevant for our purpose).

Now we come to Section 9(1) and this section provides :

> "Any dealer objecting to an order allowing or refus-
C ing an application for exemption certificate under clause (b) of sub-section (1) of Section 4 or to an order refusing an application under Sec. 30 or to an order inposing a penalty under Section 15-A or an assessment made under Section 7, 7-A, 7-B 18 or 21, may within 30 days from the date of service of the copy of the order or
D notice of assessment, as the case may be, appeal to such authority as may be prescribed :
>
> Provided that no appeal against an assessment shall be entertained unless it is accompanied by *satisfactory proof of the payment of the amount of tax admitted by the appellant to be due, or of such instalments thereof as may*
E *have become payment* : (emphasis supplied)" (Second Proviso is not relevant for our present purpose).

We may now turn to rules 12 and 41(2). Rule 12 provides for the submission of the quarterly returns by an importer. Rule 41 prescribes the mode of submission of returns and assessment. Sub-
F Rule 2 of Rule 41 prescribes :—

> "Before submitting the return under sub-rule (1), the dealer shall deposit in the treasury the amount of tax calculated by him on the turnover shown in such return and shall submit the treasury challan with the return or submit with the return a cheque for the amount so calcula-
G ted." (Proviso is not relevant for our present purpose).

Having referred to the material provisions in the Act and the Rules, let us now turn back to the contentions advanced before us. We shall take up the last two contentions first, namely; that the assessee, who is an importer, not being one of the "successive dealers" could not have been brought to tax under section 3A and as
H such the notification issued by the Government under section 3A bringing to tax the import of vanaspati made by the assessee from Indore under Section 3-A, is *ultra vires*. It may be noted that Section 3 is the general provision. It provides for multipoint tax.

To this general Rule cartain exceptions are provided. One of the exceptions is that provided under Section 3A. That Section permits the Government to Select certain items of goods for a single point levy. Vanaspati is one of the items of goods for a single point levy. The appellant does not contest the competence of the legislature to enact Section 3A. It also does not contest the validity of the power conferred on the Government to select sale of certain goods for single-point taxation. What is contended on its behalf is that section 3A provides that single-point levy can be imposed only on the "successive dealers" in the series of dealers; an importer is not one such dealer; he being the very first dealer in the State. Undoubtedly, an importer is one of the dealers. He is the first dealer in the State. The chain of successive dealers begins from the first dealer and it goes upto the last dealer. Any one of the dealers in this chain can be considered as a "successive dealer". The series do not being in the middle. It must necessarily begin at the very beginning. This is also the view taken by the Allahabad High Court in *Ram Kumar Rajendra Swaroop vs. Commissioner of Sales Tax* (1). It is an obvious conclusion. If an importer is one of the successive dealers, which undoubtedly he is, necessarily the notification issued by the Government must be considered to be a valid notification. In this view we reject the last two contentions advanced by Mr. Gupte.

Now turning our attention to the first contention advanced by Mr. Gupte, we find there are several difficulties in the way of accepting the same. As mentioned earlier the assessee in his return has shown what its turnover was and at what rate the tax is payable by it. It had admitted before the assessing authority what its turnover was. Further it had also admitted before that authority that it was liable to pay tax at the rate of one anna per rupee on its turnover which comes to Rs. 10.339.19p. It had also admitted before the same authority that it had collected that amount from its purchasers. It did not dispute before the assessing authority the validity of the notification issued under section 3A. Under Rule 41(2) read with Rule 12 it was bound to submit quarterly returns. We take it that it must have submitted its quarterly returns. Under sub-rule 2 of Rule 41 the assessee was bound to deposit the tax due from it according to its returns. In other words even according to the assessee it was bound to deposit into the Treasury or pay cheque to the assessing authority of Rs. 10,339.19p. Admittedly, it had not done so. What is urged by the learned counsel is that whatever might be the facts admitted in the return and whatever might be the admissions made before the assessing authority it was open to the assessee to take a different stand in its memorandum of appeal and what is relevant for the purpose of Section 9 is the

(1) 19 S.T.C. 241.

A stand taken by the assessee in the memorandum of appeal. In support of that contention two decisions; One of the Allahabad High Court in *Ghanshyam Dass Balmukund* vs. *The State of Uttar Pradesh & Ors.*(1) and the other of the Kerala High Court in *United Timber & Cashew Products (P) Ltd.* vs. *Sales Tax Officer, Cannanore,*(2) were cited. Those decisions undoubtedly support the contention of the Appellant but we find it difficult to accept the conclusions reached by the Allahabad High Court and the Kerala High Court. In his decision the learned single Judge of the Kerala High Court has merely followed the Allahabad High Court's decision. If we come to the conclusion that the expression "tax admitted" in the proviso to Section 9(1) means that admitted in the memorandum of appeal, section 9 can be made wholly useless. All that an assessee has to do is not to admit his liability in the memorandum of appeal, whatever his stand might have been before the assessing authority. Ordinarily no interpretation should be placed on a provision which would have the effect of making the provision either otiose or a dead letter. Further, to find out the true meaning of the expression "tax admitted" we must take into consideration the remaining words of the proviso namely "or such instalments thereof as may become payable". Those words furnish a key to the interpretation. If one of the conditions for maintainability of the appeal is payment of the instalments which have become payable under Rule 41(2). It means that the admission that has got to be taken into consideration is that made before the assessing authority and not before the appellate authority. That apart we do not think that the stand taken by the Appellant before the appellate authority can be considered as a *bona fide* stand. We are of the opinion that the contention taken by the appellant, before the appellate authority that it cannot be brought within the scope of section 3A of the Act was an after-thought. No such contention was taken before the assessing authority. If the assessee believed that contention to be true it would not have collected from its purchasers the tax @ 1 anna per Rupee Further it is now well settled by the decision of this court that no one can challenge the validity of a provision of an Act or Rule made thereunder or even a notification issued either under the Act or under the Rules made before the authorities constituted under the Act. It is true as contended by Mr. Gupte that these decisions were rendered long after 1962 but the fact remains that the decisions in question merely interpret what the law is.

We find neither merit nor equity in these appeals. Hence these appeals are dismissed with costs; hearing fee one set.

SBW *Appeals dismissed.*

(1) 23 S.T.C. 282.

(2) 28 S.T.C. 526.