(2000) 03 AP CK 0021

Andhra Pradesh High Court

Case No: Writ Petition No. 4089 of 2000

Kanaka Durga Agro Oil Products Limited, Vijayawada		APPELLANT
	Vs	
Commercial Tax Officer, Vijayawada and another		RESPONDENT

Date of Decision: March 21, 2000

Acts Referred:

- Andhra Pradesh General Sales Tax Act, 1957 - Section 19, 33B
- Constitution of India, 1950 - Article 226, 265, 38, 39
- Contract Act, 1872 - Section 72
- Limitation Act, 1963 - Article 113, 17(1)

Citation: (2000) 3 ALD 28 : (2000) 2 ALT 624

Hon'ble Judges: P. Venkatarama Reddi, J; D.S.R. Varma, J

Bench: Division Bench

Advocate: Mr. S. Krishna Murthy, for the Appellant; Special Government Pleader for Taxes, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

P. Venkatarama Reddi, J

1. In this writ petition, the order of the Appellate Deputy Commissioner (CT), Vijayawada dated 1-1-2000 rejecting the petitioner''s appeal in limine on the ground of delay has been questioned.

2. For the assessment year 1995-96, assessment was made by the first respondent on 11-3-1997. The petitioner agreed for the proposed assessment and gave a letter of consent to that effect. Long thereafter, the petitioner filed an appeal against the said assessment order with a delay of 533 days. The contention raised in the appeal was that a turnover of Rs. 76,72,2607- representing the sales of oil extracted from oil

cakes was subjected to higher rate of tax unlike oil extracted from oil seeds. Reliance was placed on the decision of this Court in Rajasree Oils and Extractions Limited v. Deputy Commissioner, Nellore 1998 (27) APSTJ 53, in which Entry 24(a) of Schedule 1 to the APGST Act was declared unconstitutional. The petitioner therefore contended in the grounds of appeal that ground nut oil and sun flower oil extracted from oil cakes and sold within the State was illegally subjected to higher rate of tax. It may be stated that Entry 24(a) deals with ground nut oil or refined oil and as far as sun flower oil is concerned, it is covered by a separate entry i.e.. Entry 128. However, the petitioner has questioned the levy of tax both on the groundnut oil and sun flower oil. In fact, the turnover of ground nut oil is much less than sun flower oil. Be that as it may, the petitioner did not even state in the memorandum of appeal the reasons for filing the appeal belatedly. It does not appear that he filed any separate petition for condonation of delay. The Appellate Authority after hearing the petitioner''s representative passed the following order on 1-1-2000 :

"The appellants filed the present appeal petition with a delay of 533 days though they were basing on the abovesaid judgment. The appellate Deputy Commissioner is empowered to condone a delay of 30 days as the delay is 533 days the power of condonation of delay had been ceased by the amendment with effect from 4-1-1997. Therefore, the delay cannot be condoned and in the result, the appeal petition is rejected."

3. The time for referring appeal u/s 19 of the APGST Act is 30 days from the date of service of the order. The Appellate Authority is empowered to condone the delay upto 30 days beyond the prescribed period. Naturally, the appeal which was field with a time gap of-533 days could not be taken on file. Hence, it was rejected in limine. The petitioner did not prefer any appeal against this order to the Tribunal.

4. The petitioner contends in this writ petition that he filed the appeal "well within the period of limitation" inasmuch he came to know of the judgment of this Court on 25-7-1998 when it was published in the Law Journal and the starting point of the limitation should be reckoned from that date. Reliance is sought to be placed on the decision of the Supreme Court in Mahabir Kishore v. Stale of Madhya Pradesh 78 STC 404. We are of the view that the contention is wholly untenable and files in the face of the specific provision of law. It is trite to say that the remedy of appeal is a creature of statute. If the special statute prescribed a particular period of limitation for preferring the appeal, the appeal has to be necessarily filed within that date. If there is provision for condonation of delay and sufficient cause is shown, the Appellate Authority can condone the delay if it is satisfied with the reasons for the delay. The proviso to Section 19(1) as it originally stood empowered the Appellate Authority to admit an appeal after a period of 30 days, if it is satisfied that the dealer had sufficient cause for not preferring the appeal within the prescribed period of 30 days subject to the payment of the admitted tax due. Under the amended provision, the delay can only be condoned upto a further period of 30 days. In any of the

events, i.e., whether the appeal is filed within the time prescribed in Section 19(1) or within the further period of 30 days under the proviso thereof, the starting point of limitation is the date on which the order or proceeding was served on the dealer. The petitioner cannot seek to substitute some other starting point of limitation based on the general law of limitation. Mahabir Kishore''s case (supra) was a case in which a suit was filed for refund of money (cess) paid under mistake of law. Hence Article 113 of the Limitation Act, 1963 and Section 17(1)(c) were applied. The period of limitation, according to Section 17(1)(c) begins to run from the date of knowledge of particular law wherein the money was paid being declared void and this was interpreted to mean "the date of the judgment of a Competent Court declaring that law void". The principle laid down in that case based on the interpretation of Section has absolutely no 17(1)(c)application here where the remedy is sought to be worked out within the four corners of the Sales Tax Act. Incidentally, it may be mentioned that the broad proposition laid down in Mahabir Kishore''s case (supra), based on the judgment in S.T.O v. Kanhaiyalal, 9 STC 747, that tax paid under mistake of law is refundable u/s 72 of the Indian Contract Act has been considerably eroded by the nine-Judge Bench decision of the Supreme Court in Mafatlal Industries Limited v. Union of India (1998) 111 467 STC. The decision in Kanhaiyalal''s case (supra) was disapproved by the Supreme Court. Even the ultimate conclusion reached in that case (Mahabir''s case) is open to question in the light of the Mafatlal Industries case (supra). However, we are not concerned with that larger question.

5. For the foregoing reasons, we are of the view that the Appellate Authority which had no power to condone the delay was perfectly justified in not admitting the appeal on account of the delay. In fact, as already stated, even the petition to condone the delay was not filed. It was not even averred before the Appellate Authority that the tax was paid under the alleged mistake of law and the petitioner came to know of the true legal position only after the decision of this Court was published in the Law Journals. Thus, neither any foundation was laid factually for reckoning the starting point of limitation from July, 1997, nor is there any legal basis for the contention that Section 17(1)(c) of the Limitation Act, 1963 should be read into Section 19 and other remedial provisions of the APGST Act.

6. There is yet another impediment which comes in the way of the petitioner. It is not the case of the petitioner that he refrained from passing on the tax burden to his buyers/consumers and that he would suffer toss or prejudice on account of the illegal collection of tax by the State. As a prudent businessman, he would have collected the tax. As observed by the Supreme Court in Mafatlal''s case (supra), "it would be legitimate for the Court until contrary is established to presume that an indirect tax burden has been passed on" (vide observations in Para 73). The Supreme Court while dealing with a claim for refund of the duty paid under an unconstitutional law and clarifying that the right to refund arises by virtue of Article 265, in such a case, nevertheless clarified that there is no automatic or unconditional right of refund. It was observed that even in such a case, equitable considerations

have to be kept in view. The dicta laid down in Para 69 and the concern expressed therein against unjust enrichment of an assessee are quite apposite. We quote:

"Article 265 cannot be in isolation. It must be read in the light of the concepts of economic and social justice envisaged in the preamble and the guiding principles of State policy adumbrated in Articles 38 and 39 - an aspect dealt with at some length at a later stage. The very concept of economic justice means and demands that unless the claimant (for refund) establishes that he has not passed on the burden of the duty/tax to others, he has no just claim for refund. It would be parody of economic justice to refund the duty to a claimant who has already collected the said amount from his buyers. The refund should really be made to the persons who have actually borne its burden-that would be economic justice. Conferring an unwarranted and unmerited monetary benefit on an individual is the very antithesis of the concept of economic justice and the principles underlying Articles 38 and 39".

Again while summarising the propositions, it was laid down at Page 548:

"(v) Article 265 of the Constitution has to be construed in the light of the goal and the ideals set out in the preamble to the Constitution and in Articles 38 and 39 thereof. The concept of economic justice demands that in the case of indirect taxes like Central Excise Duties and Customs Duties, the tax collected without the authority of law shall not be refunded to be the petitioner-plaintiff unless he alleges and establishes that he has not passed on the burden of duty to a third party and that he has himself borne the burden of the said duty.

(vi) Section 72 of the Contract Act, 1872 is based upon and incorporates a rule of equity. In such a situation, equitable considerations cannot be ruled out while applying the said provision.

(vii) While examining the claims for refund, the financial chaos which would result in the administration of the State by allowing such claims is not an irrelevant consideration. Where the petitioner-plaintiff has suffered no real loss or prejudice, having passed on the burden of the tax or duty to other person, it would be unjust to allow or decree his claim since it is bound to prejudicially affect the public exchequer. In case of large claims, it may well result in financial chaos in the administration of the affairs of the State".

7. Applying the above principles, the petitioner will not be entitled to the refund of the tax paid under Entry 24(a). In fact there is a specific provision under the APGST Act which disables the dealer from obtaining refund of tax the levy of which is held to be invalid unless the dealer proves that the tax has not been collected from the purchaser (vide Section 33-BB).

8. We have referred to the aforesaid provision and also the observations in Mafatlal Industries case (supra) dealing with the refund of tax collected under an invalid provision not because the petitioner has made a direct claim for refund before this

Court, but because it has an intimate bearing on the relief sought by the petitioner. The ultimate relief which the petitioner seeks is to have the appeal restored to file and decided on merits in view of the Full Bench decision. Let us take it that the appeal is allowed partially insofar as the levy of ground nut oil is concerned. However, the petitioner gains nothing unless he is able to get the refund of tax. As the petitioner is not in a position to aver and establish that the tax was not passed on to the buyers, ultimately, he would not get any benefit. The jurisdiction under Article 226 need not be exercised to promote an exercise in futility or to clear the way to the petitioner to make an unjust claim for refund of the lax to the detriment of public exchequer. When unjust enrichment is the ultimate aim of the dealer, the Court should not exercise its writ jurisdiction to encourage and lend support to such move.

9. Thus, viewed from any angle, the petitioner is not entitled to any relief. He has indulged in speculative litigation after having invited the assessment on the basis of consent, long back. The writ petition is dismissed without costs.