

**Rameswar Prasad Vs. Sales Tax Officer and anr.**

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**Court :** Orissa

**Decided On :** Mar-05-1973

**Reported in :** 39(1973)CLT706; [1973]32STC332(Orissa)

**Judge :** G.K. Misra, C.J. and ;S. Acharya, J.

**Appeal No. :** O.J.C. Nos. 48, 49 and 50 of 1973

**Appellant :** Rameswar Prasad

**Respondent :** Sales Tax Officer and anr.

**Advocate for Def. :** R.K. Mohapatra, Standing Counsel

**Advocate for Pet/Ap. :** R. Mohanty and ;R. Sharma, Advs.

**Disposition :** Application allowed

**Judgement :**

G.K. Misra, C.J.

1. The facts are not in dispute. The petitioner was assessed to pay sales tax to the tune of Rs. 14,898-14 annas, Rs. 9,941-10 annas and Rs. 13,405-10 annas for the quarters ending 30th June, 1953, 31st March, 1954 and 30th June, 1954, respectively. He was directed by the competent sales tax authorities to pay the said sums into the Government treasury according to Section 9-B(3) of the Orissa Sales Tax Act as it stood prior to its amendment on 20th July, 1968, by the Orissa Sales Tax (Amendment) Act, 1968 (Orissa Act 15 of 1968), as directed in the notice of demand.

The petitioner deposited the aforesaid sums in the treasury as directed. He then filed an application for refund of those amounts alleging that they were not collected as sales tax and the State was not entitled to retain the same. This application was rejected by the Sales Tax Officer. The petitioner took recourse to appeal and second appeal without any success as the question of constitutionality of Section 9-B(3) and Section 14-A of the Orissa Sales Tax Act, 1947 (Orissa Act 14 of 1947) (hereinafter to be referred to as the Act), cannot be determined by the authorities created under the Act. The identical facts are the subject-matter of S.J.C. Nos. 12 to 14 of 1964.

The applications have been filed under Articles 226 and 227 of the Constitution for issuing a writ of mandamus directing the opposite parties to make refund of the aforesaid amounts deposited by the petitioner in pursuance of the demand notice.

2. The learned standing counsel does not dispute the legal position that if Section 9-

B(3) and Section 14-A be declared unconstitutional, then the petitioner is entitled to refund of those amounts.

3. Section 9-B(3) and Section 14-A, so far as relevant, are extracted hereunder:

9-B. (3) The amount realised by any person by way of tax shall, notwithstanding anything contained in any other provision of this Act, be deposited by him in a Government treasury within such period as may be prescribed, if the amount so realised exceeds the amount, if any, payable by him as tax.

14-A. Refund of tax in special cases.-Notwithstanding anything contained in this Act or in any other law for the time being in force where any amount is either deposited by any person under Subsection (3) of Section 9-B or paid as tax by a dealer and where such amount or any part thereof is not payable by such person or dealer, a refund of such amount or any part thereof can be claimed only by the person from whom such person or dealer has actually realised such amounts whether by way of sales tax or otherwise and the period of limitation provided in the proviso to Section 14 shall apply to the aforesaid claims.

4. It would thus be seen that Section 9-B(3) is the provision made in the Act directing that the amount realised by any person by way of tax shall be deposited in a Government treasury if the amount so realised exceeds the amount payable by him as tax; in other words, it prescribes that if a dealer realises any sum which is not sales tax, then he cannot retain the same, but must deposit it in the treasury.

The Legislature was well aware of the position that the State had no title in the sum so directed to be deposited. Correspondingly, a provision has been made in Section 14-A that the person entitled to take refund of that sum is not the dealer who deposited it, but a constituent from whom the same was collected by the dealer even though it was not sales tax.

The question for consideration is whether the Orissa Legislature had the legislative competence to enact both these provisions.

5. The matter directly came up for consideration before the Supreme Court in the case of *Abdul Quader & Co. v. Sales Tax Officer, Second Circle, Hyderabad* [1964] 15 S.T.C. 403 (S.C.) and *Ashoka Marketing Ltd. v. State of Bihar* [1970] 26 S.T.C. 254 (S.C.).

In the first case Section 11(2) of the Hyderabad General Sales Tax Act, 1950 (Act 14 of 1950) was held to be unconstitutional. That section ran thus :

11. (2) Notwithstanding anything to the contrary contained in any order of an officer or tribunal or the judgment, decree or order of a court, every person who has collected or collects on or after 1st May, 1950, any amount by way of tax otherwise than in accordance with the provisions of this Act, shall pay over to the Government, within such time and in such manner as may be prescribed the amount so collected by him and in default of such payment the said amount shall be recovered from him as if it were arrears of land revenue.

This Sub-section (2) is analogous to Sub-section (3) of Section 9-B of the Act. It was attempted to justify this provision on the ground that though it was not open to the

State Legislature to make provision for recovery of an amount which is not a tax under entry 54 of List II of the Seventh Schedule, in any law made for that purpose, it was still open to the Legislature to provide for paying over of the amounts collected by way of tax by persons, even though they really are not exigible as tax, as part of incidental and ancillary power to make provision for the levy and collection of such tax.

This contention was negatived. Their Lordships observed thus :

These incidental and ancillary powers have to be exercised in aid of the main topic of legislation, which in the present case, is a tax on sale or purchase of goods. All powers necessary for the levy and collection of the tax concerned and for seeing that the tax is not evaded are comprised within the ambit of the legislative entry as ancillary or incidental. But where the legislation under the relevant entry proceeds on the basis that the amount concerned is not a tax exigible under the law made under that entry, but even so lays down that though it is not exigible under the law, it shall be paid over to Government, merely because some dealers by mistake or otherwise have collected it as tax, it is difficult to see how such a provision can be ancillary or incidental to the collection of tax legitimately due under a law made under the relevant taxing entry. We do not think that the ambit of ancillary or incidental power goes to the extent of permitting the Legislature to provide that though the amount collected may be wrongly by way of tax is not exigible under the law as made under the relevant taxing entry, it shall still be paid over to Government, as if it were a tax. The Legislature cannot under entry 54 of List II make a provision to the effect that even though a certain amount collected is not a tax on the sale or purchase of goods as laid down by the law, it will still be collected as if it was such a tax. This is what Section 11(2) has provided. Such a provision cannot in our opinion be treated as coming within the incidental or ancillary power which the Legislature has got under the relevant taxing entry to ensure that the tax is levied and collected and that its evasion becomes impossible. We are therefore of opinion that the provision contained in Section 11 (2) cannot be made under entry 54 of List II and cannot be justified even as an incidental or ancillary provision permitted under that entry.

Their Lordships ultimately held that Section 11(2) was not within the competence of the State Legislature under entry 54 of List II.

6. On the aforesaid reasoning Section 9-B(3) of the Act was not within the competence of the Orissa State Legislature and must be declared ultra vires.

7. In the second case a similar question again came up for consideration (*Ashoka Marketing Ltd. v. State of Bihar* [1970] 26 S.T.C. 254 (S.C.)). There the constitutionality of the relevant provisions of Section 20A introduced by amending Act 20 of 1962 in the Bihar Sales Tax Act, 1959 (19 of 1959), was challenged. Sub-sections (3), (4) and (5) of Section 20A of the Bihar Act correspond to Section 9-B(3) of the Act and Sub-section (8) thereof corresponds to Section 14-A of the Act.

Sub-section (3)(b) and Sub-section (8) of Section 20A of the Bihar Act may be extracted :

(3)(b) On the day specified in the notice under Clause (a) or as soon thereafter as may be, the prescribed authority may, after giving the dealer or his authorised representative a reasonable opportunity of being heard and examining such accounts

and other evidence as may be produced by or on behalf of the dealer and making such further enquiry as it may deem necessary, order that the dealer shall deposit forthwith into the Government treasury, the amount found to have been so collected by the dealer and not refunded prior to the receipt of the notice aforesaid to the person from whom it had been collected.

(8) The person from whom the dealer has collected the amount deposited in pursuance of an order under Sub-section (3) or Subsection (4) or deemed, under Sub-section (5), to have been so deposited shall be entitled to apply to the prescribed authority in the prescribed manner for refund of the amount to him and the said authority shall allow the refund if it is satisfied that the claim is in order...

Thus Section 20A of the Bihar Act made provisions corresponding to Section 9-B(3) and Section 14-A of the Act.

On the same reasoning as was given in *Abdul Quader and Co. v. Sales Tax Officer* [1964] 15 S.T.C. 403 (S.C.), their Lordships held that Sub-sections (3), (4) and (5) of Section 20A of the Bihar Sales Tax Act, 1959, prescribed the procedure for requiring a dealer to deposit in the State treasury amounts collected by a dealer, which he is not entitled to collect or liable to pay, are ultra vires the State Legislature, notwithstanding the addition of Sub-section (8) which enables the purchaser to claim refund from the State of the amount collected from him within the period of limitation for a similar claim by a suit against the dealer. As a corollary thereto Subsections (6) and (8) of the section were held to be invalid.

In both the aforesaid Supreme Court decisions reliance was placed by the revenue on an earlier decision in *Orient Paper Mills Ltd. v. State of Orissa and Ors.* [1961] 12 S.T.C. 357 (S.C.). At page 258 of 26 S.T.C. 254 (*Ashoka Marketing Ltd. v. State of Bihar*) the case in 12 S.T.C. 357 (*Orient Paper Mills Ltd. v. State of Orissa*) was distinguished by their Lordships by saying:

At the hearing of the petition, the taxpayer challenged the levy on the ground that it infringed his fundamental right under Article 19(1)(f) and did not press the contention that the State Legislature was incompetent to enact Section 14-A of the Orissa Sales Tax Act.

Again their Lordships observed :

That case (*Orient Paper Mills Ltd. v. State of Orissa* [1961] 12 S.T.C. (S.C.)) does not support the plea that the State Legislature is competent to legislate for demanding payment of or retaining amounts recovered by a registered dealer but which are not due as sales tax to the State.

In *Orient Paper Mills'* case [1961] 12 S.T.C. 357 (S.C.) the constitutionality of Section 9-B(3) was not examined. That case cannot be regarded as an authority for the proposition that Section 9-B(3) and Section 14-A are intra vires.

8. On the aforesaid analysis, the Orissa State Legislature had no legislative competence to enact Sections 9-B(3) and 14-A of the Act. Both the sections are ultra vires.

9. It follows that the petitioner is entitled to the refund of the amount deposited as

directed in the notice of demand which we have already indicated while narrating the facts.

10. In the result, the writ applications are allowed. Writs of mandamus be issued directing the opposite parties to refund the amount deposited by the petitioner in pursuance of the direction in the notice of demand.

In the circumstances, there would be no order as to costs.

S. Acharya, J.

11. I agree.

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