COMMISSIONER OF SALES TAX, U.P.

v.

M/S SWADESHI POLYTAX LTD., GHAZIABAD

SEPTEMBER 28, 2005.

[S.N. VARIAVA AND TARUN CHATTERJEE, JJ.]

Taxation:

U.P. Trade Tax Act, 1948—Section 29A (prior to 1971 amendment):

Tax collected in excess of prescribed limit by the dealer—Held: Required to be deposited in Government treasury—Order of refund of excess amount to the dealer is not correct—It could only be refunded to party from whom it was wrongly collected.

Provision requiring the dealer to deposit in Government treasury the tax collected in excess of prescribed limit—Constitutionality of—Held: Constitutionally valid.

Constitution of India, 1950—Article 141—Provision declared invalid by High Court—On appeal, Supreme Court declared it valid—Binding effect—Held: Appeal is a continuation of same proceeding and the finality could only be given by judgment of Supreme Court—As the said provision is held valid, it always remained on the statute, hence need not again be legislated.

In terms of Section 29-A of U.P. Trade Tax Act, 1948, a dealer is required to deposit excess tax recovered from its customers in the Government Treasury. Respondent, a dealer of Staples Fiber had collected tax in excess of prescribed limit. Assessing Officer ordered the amount to be deposited in Government treasury. Appellate authority upheld the same. On appeal, Trade Tax Tribunal directed the refund of excess amount to the respondent. In an earlier decision, Allahabad High Court had struck down Section 29-A as invalid. High Court relied upon the said earlier decision and dismissed the revision.

In appeal to this Court, Revenue challenged the constitutionality of Section 29A of U.P. Trade Tax Act and legislative competence of the State Legislature to make a provision directing the dealer to deposit the amount of

A **tax collected by him from a customer in excess of the prescribed tax.**

Allowing the appeal, the Court

HELD: Even though the High Court had held Section 29A of U.P. Trade Tax Act to be unconstitutional, in the Appeal carried to this Court it was B **declared that the Section was within the legislative competence of the State Legislature. The Appeal is a continuation of the same proceeding and the finality could only be given by the Judgment of this Court. Thus unamended Section 29-A always remained on the statute book and required no re-enactment. Under the unamended Section 29-A the amount cannot be refunded** C **to the Respondent. It could only be refunded to the party from whom it was wrongly collected. No such party has made such a claim for refund. Therefore, directing this amount to be deposited in the Treasury was correct.**

[669-D-E-F]

Assistant Commissioner (Judicial), Sales Tax and Ors. **v.** *Kheria* D *Brothers and Anr.,* **[1999] 8 SCC 137, relied on.**

State of U.P. and Anr. **v.** *Annapurna Biscuit Manufacturing Co.,* **[1974] 3 SCC 121, Overruled.**

Abdul Quader & Co. **v.** *Sales Tax Officer, Hyderabad,* **[1964] 6 SCR** E **867;** *Ashoka Marketing Ltd.* **v.** *State of Bihar and Anr.,* **[1970] 1 SCC 354;** *R. S. Joshi, Sales Tax Officer, Gujarat and Ors.* **v.** *Ajit Mills Limited and Anr., etc.,* **[1977] 4 SCC 98;** *M/s Kasturi Lal Harlal* **v.** *State of U. P. and Ors.,* **[1986] 4 SCC 704;** *Orient Paper Mills Ltd.* **v.** *State of Orissa,* **[1962] 1 SCR 549;** *State of Orissa* **v.** *Orissa Cement Ltd.,* **[1985] Supp. SCC 608;** *Behram Khurshed Pesikaka* **v.** *The State of Bombay,* **[1955] 1 SCR 613;** *Saghir Ahmad* F **v.** *The State of U. P. and Ors.* **[1955] 1 SCR 707;** *Deep Chand* **v.** *State of U. P. and Ors.* **AIR (1959) SC 648;** *Mahendra Lal Jaini* **v.** *The State of Uttar Pradesh and Ors.,* **[1963] Supp. 1 SCR 912 and** *B. Shama Rao* **v.** *The Union Territory of Pondicherry,* **[1967] 2 SCR 650, referred to.**

G CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3742 of 2000.

From the Judgment and Order dated 13.10.98 of the Allahabad High Court in S.T.R. No. 1117 of 1990.

Ms. Shobha Dikshit, Rajeev Kumar Dubey and Kamlendra Mishra for H the Appellant.

Manoj Goel, Shuvodeep Roy and Ms. Abha R. Sharma for the Respondent. A

The Judgment of the Court was delivered by

S.N. VARIAVA, J. This appeal is against the Judgment dated 13th October, 1998 passed by the Allahabad High Court. B

Briefly stated the facts are as follows.

The Respondent is a manufacturer and dealer of Polyester Staples Fiber. It had collected, from its customers, tax in excess of what was prescribed. It is an admitted position that these amounts were deposited with the Government. C The Respondent had challenged the assessment and its Appeal was allowed. As the tax liability was held to be lower, the concerned Officer passed an Order of refund but directed that the amount be deposited in the Treasury in view of Section 29-A of the U.P. Trade Tax Act.

In the Appeal, the Deputy Commissioner (Appeals) granted relief to the D extent of Rs. 417 but confirmed the Order of the Assessing Authority directing deposit of the balance amount. The Respondent then filed an Appeal before the Trade Tax Tribunal who directed refund of the excess amount in spite of the provisions of Section 29-A of the U.P. Trade Tax Act. The Revision filed by the Appellant was dismissed by the High Court by the impugned judgment. E The High Court followed two earlier Judgments of that Court one of which was the case of one Kheria Brothers. In this case, relying on the Judgment of this Court in the case of *State of U.P. and Anr.* v. *M/s Annapurna Biscuit Manufacturing Co.,* reported in [1974] 3 SCC 121, the Allahabad High Court struck down Section 29-A as being beyond the legislative competence of the State Government. At the time the impugned Judgment was passed an Appeal, F against the High Court's Judgment in Kheria Brothers case was pending in this court.

At this stage Section 29-A must be set out. Section 29-A reads as follows:-

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> "Where any amount is realized from any person by any dealer purporting to do so by way of realization of tax on the sale of any goods to such person, such dealer shall deposit the entire amount so realized into the Government Treasury, within such period as may be prescribed notwithstanding that the dealer is not liable to pay such H

A amount as tax or that only a part of it is due from him as tax under this Act."

Section 29-A set was amended on 22nd August 1971 to read as follows:-

"29-A. (1) Where any amount is realized from any person by any B dealer purporting to do so by way of realization of tax on the sale of any goods to such person, such dealer shall deposit the entire amount so realized into the Government treasury, within such period as may be prescribed, notwithstanding that the dealer is not liable to pay such amount as tax or that only a part of it is due from him as tax under this Act.

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(2) Any amount deposited by any dealer under sub-section (1) shall, to the extent it is not due as tax, be held by the State Government in trust for the person from whom it was realized by the dealer, or for his legal representatives, and the deposit shall discharge such dealer of the liability in respect thereof to the extent of the deposit.

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(3) Where any amount is deposited by any dealer under sub-section (1), such amount or any part thereof shall, on a claim being made in that behalf in such form as may be prescribed, be refunded, in the manner prescribed, to the person from whom such dealer had actually realized such amount or part, or to his legal representatives, and to E no other person:

Provided that no such claim shall be entertained after the expiry of three years from the date of the order of assessment or one year from the date of the final order on appeal, revision or reference, if any, in F respect thereof, whichever is later.

Explanation.- The expression 'final order on appeal, revision or reference' includes an order passed by the Supreme Court under Article 32, Article 132, Article 133, Article 136 or Article 137, or by the High Court under Article 226 or Article 227 of the Constitution."

G The constitutional validity of the amended provision was challenged. The Allahabad High Court held the amended Section 29-A to be *ultra vires* the power of the State Legislature to enact and declared the provision to be unconstitutional. This Court in *M/s Annapurna Biscuit Manufacturing Cos.* case (supra) upheld the decision of the Allahabad High Court and held the H amended Section 29-A to be unconstitutional. The Court relied upon the

decision of this Court in the case of *Abdul Quader & Co.* v. *Sales Tax Officer, Hyderabad,* reported in [1964] 6 SCR 867, wherein it was observed as follows:-

> "The provision however is attempted to be justified on the ground that though it may not be open to a State Legislature to make provision for the recovery any amount which is not a tax under Entry 54 of List II in a law made for that purpose, it would still be open to the Legislature to provide for paying over all the amounts collected by way of tax by persons, even though they really are not exigible as tax, as part of the incidental and ancillary power to make provision for the levy and collection of such tax..... 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."

In *M/s Annapurna Biscuit Manufacturing Co's* case reliance was also placed upon the observations of this Court in the case of *Ashoka Marketing Ltd.* v. *State of Bihar and Anr.*, reported in [1970] 1 SCC 354, to the following effect:-

> "A provision which enables the dealer to pass on the liability for payment of tax is incidental to legislation for sales-tax. But we are unable to hold that a provision under which a dealer is called upon to pay to the State an amount which has been collected by him on a representation - express or implied - that an equal amount is payable by him under the Bihar Sales Tax Act, is a provision incidental to the power to levy 'tax on sale or purchase of goods' within the meaning of Entry 54, List II of the Seventh Schedule. Entry 54, List II of the Seventh Schedule comprehends the power to impose tax, to prescribe machinery for collecting the tax, to designate officers by whom the liability may be imposed and to prescribe the authority, obligation and indemnity of the officers. The State Legislatures may under Entry 54, List II be competent to enact a law in respect of matters necessarily incidental to 'tax on the sale and purchase of goods'. But a provision compelling a dealer who has deliberately or erroneously recovered an amount from the purchaser on a representation that he is entitled to recover it to recoup himself for payment of tax, to pay over that

A amount to the State cannot, in our judgment, be regarded as necessarily incidental to Entry 54, List II. In effect the provision is one for levying an amount as tax which the State is incompetent to levy. A mere device cannot be permitted to defeat the provisions of the Constitution by clothing the claim in the form of a demand for depositing the money with the State which the dealer has collected, but which he was not entitled to collect."

Thereafter a seven Judge bench of this Court in the case of *R.S. Joshi, Sales Tax Officer, Gujarat and Ors.* v. *Ajit Mills Limited and Anr., etc.*, reported in [1977] 4 SCC 98 disapproved of *Abdul Quadir's* and *M/s Annapurna Biscuit Manufacturing Cos'* cases. In this case, the question, under the Bombay Sales Tax Act, was whether the State Legislature had legislative competence to make a provision directing a dealer to deposit the amount of tax collected by him from a customer in excess of the prescribed tax. It was held that such a provision would be within the legislative competence as a punitive measure to protect public interest in the enforcement of fiscal legislation. It was held that this was within the implied powers of the State Legislature.

Following *R.S. Joshi's* case, a Constitution Bench of this Court upheld the constitutional validity of Section 29-A (as it stood prior to its amendment) in the case of *M/s Kasturi Lal Harlal* v. *State of U.P. and Ors.*, reported in [1986] 4 SCC 704. The Constitution Bench noted that this question stood concluded by *R.S. Joshi's* case (supra). It also took note of *Ashoka Marketing's* case (supra) and observed that the decision in *Ashoka Marketing's* case did not follow an earlier decision in *Orient Paper Mills Ltd.* v. *State of Orissa,* reported in [1962] 1 SCR 549. It was held that *R.S. Joshi's* case disapproved of the decision in *Ashoka Marketing's* case and reaffirmed the view taken in *Orient Paper Mills's* case. The Constitution Bench also took note of a subsequent decision in the case of *State of Orissa* v. *Cement Ltd.*, [1995] Supp. SCC 608, wherein also *Ashoka Marketing's* case was held to have been dissented in *R.S. Joshi's* case. The Constitution Bench of this Court upheld the constitutionality of the unamended Section 29-A and held that it was within the legislative competence of the State Legislature to enact.

The Appeal in *Kheria Brothers* case thereafter reached hearing before a two-Judge Bench of this court which referred the matter to a three Judge Bench in view of the above mentioned decisions of this court. However subsequently a three Judge Bench of this Court has allowed the Appeal in the decision reported in [1999] 8 SCC 137. The three Judge Bench has held that the Judgment in *M/s Annapurna Biscuit Manufacturing Cos'* case stands

overruled. We are in agreement with this view. A

Faced with this situation, it was submitted by Mr. Goel that even if the decision in *Annapurna Biscuit's* case is held to be erroneous, the position will be that amended Section 29-A having declared to be void and beyond the legislative competence, cannot revive by itself. It was submitted that the Section can only revive if it is re-enacted. In support of this submission, B reliance was placed upon certain observations made in the case of *Behram Khurshed Pesikaka* v. *The State of Bombay*, reported in [1955] 1 SCR 613; *Saghir Ahmad* v. *The State of U.P. and Ors.*, reported in [1955] 1 SCR 707; *Deep Chand* v. *State of U.P. and Ors.*, reported in AIR (1959) SC 648; *Mahendra Lal Jaini* v. *The State of Uttar Pradesh and Ors.*, reported in [1963] C Supp. 1 SCR 912 and *B. Shama Rao* v. *The Union Territory of Pondicherry*, reported in [1967] 2 SCR 650.

We do not agree with this submission. However, in our view, it is not at all necessary to go into this submission. In this case, we are concerned with the unamended Section 29-A. Even though the Allahabad High Court D had held this provision to be unconstitutional, in the Appeal carried to the Court it has been declared that the Section was within the legislative competence of the State Legislature. The Appeal was a continuation of the same proceeding and the finality could only be given by the Judgment of this Court. Thus in any view of the matter it will have to be held that unamended section 29-A always remained on the statute book and required no re- E enactment. Thus, even if the submission of Mr. Goel is accepted, the effect would be that it is only the amended Section 29-A which might require re-enactment and in its absence the unamended section 29-A would continue to be valid and effective. In that event the amendments of 1971 would be deemed never to have taken place. Even under the unamended Section 29-A the F amount cannot be refunded to the Respondent. It could only be refunded to the party from whom it was wrongly collected. No such party has made such a claim for refund. Therefore, directing this amount to be deposited in the Treasury was correct. We however clarify that we are not in agreement with the submission that amended Section 29-A would require re-enactment.

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In this view of the matter, we set aside the impugned Judgment and the Judgment of the Trade Tax Tribunal and restore the Order of the Commissioner (Appeals), Ghaziabad.

The Appeal is accordingly allowed with no order as to costs.

D.G. Appeal allowed. H