PETITIONER:
SALES TAX OFFICER, SPECIAL CIRCLE, ERNAKULAM & ANR.

Vs.

RESPONDENT:
TATA OIL MILLS CO. LTD.

DATE OF JUDGMENT29/07/1975

BENCH:
KHANNA, HANS RAJ
BENCH:
KHANNA, HANS RAJ
BEG, M. HAMEEDULLAH
GUPTA, A.C.

CITATION:
1975 AIR 1991 1976 SCR (1) 152
1975 SCC (2) 304

ACT:
Kerala Genera Sales Tax Act (15 of 1963) s. 22(3) and Kerala General Sales Tax Rules, 1963, 9(1) Constitution of India 1950, VII Schedule, List II, Entry 54-Section providing for payment to Govt. of tax wrongly collected-if ultra vires.

HEADNOTE:
According to r. 9(1) of the Kerala General Sales-tax Rules framed under. the Kerala General Sales-tax Act, 1963, in determining the taxable turnover of a dealer the excise duty, if any, paid by the dealer to the Government of Kerala or to the Central Government in respect of the goods sold by him shall be deducted. Section ,22(3) of the Act provides that if any dealer or person collects tax on transactions not liable to tax under the Act or in excess of the tax leviable under the Act such dealer or person shall pay to the Government. in addition to the tax payable, the amount so collected unless it was refunded to the person from whom it was collected.

The respondent deducted the sum paid by it as excise duty from its total turnover for the purpose of determining the taxable turnover. The respondent, however, when it sold the goods. had collected, sales-tax from the purchasers on the invoice prices without deducting therefrom the excise duty paid in respect of the said goods. This resulted in the respondent realising a sum in excess of the sales-tax payable in respect of the goods sold by it. The Sales-tax officer held that the respondent was liable to pay that amount to the Government under s. 22(3). The writ petition filed by the respondent was allowed by the High Court on the ground that s. 22(3) was not covered by Entry 54 of the State List in the VII Schedule to the Constitution, and hence, beyond the competence of the Slate Legislature.

Dismissing the appeal to this Court.

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HELD: (1) Entry 54 empowers the State Legislatures to make laws, except in certain cases, in respect of taxes on the sale or purchase of goods. As long as the law relates to taxes on the sale or purchase of goods, it would be within their- legislative competence. But, it would not be

permissible for. the State legislature to enact a law under Entry 54 for recovery by the State of an amount which could not be recovered as sales-tax or purchase-tax in accordance with the law on the subject and which was wrongly realised by a dealer as sales-tax or purchase-tax. Such a l.. would not be a law relating to tax of the sale or purchase of goods but would be one in respect of an amount wrongly realised by a dealer as sales-tax or purchase-tax. [1 55A-C]

(2) The ambit of ancillary or incidental power would not go to the extent of permitting the Legislature to provide that. though the amount collected, may be wrongly, be way of tax,, was not tax, it shall still be paid over to the Government as if it were a tax. [156D-E]

(3) The fact that the amount realised is in excess of the tax leviable and not as amount which was not at all payable as tax, would not make any difference. Any amount realised by a dealer in excess of the tax leviable, stands, for the purpose of determining the legislative competence under Entry 54, on the same footing as an amount not due as tax under the Act. Tax, according to s. 2(xxiv) of the Act, means tax payable under the Act. This necessarily means that everything outside it, collected by the dealer. would be an exaction not authorised by the Act. The amount which was realised by the respondent in excess of what was due as tax cannot be held to be tax, because, such excess amount was not tax payable under the Act. If the State Legislature cannot make a law under Entry 54 directing payment to the State of any amount collected as tax on transactions not liable to lax under the Act, it would likewise be incompetent to make a law directing payment to the State of an amount realised by a dealer in excess of the tax payable under the Act. [157G-158C]

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R. Abdul Quader & co. v. Sales Tax Officer , Hyderabad [1964] SCR 867 and Ashoka Marketing Ltd. v. State of Bihar & Anr. [1970] SCR 455 followed.

JUDGMENT:

CIVIL. APPELLATE JURISDICTION: Civil Appeal Nos. 1988-1989 of 1970.

From the Judgment and order dated the 29th day of October, 1968 of the Kerala High Court in W.P. No. 156 of 1967.

V. A. Seiyed Muhamad and K. M. K. Nair, for the appellant (In C.A.No. 1988/70.

K. M. K. Nair, for the appellant (In C.A. No. 1989/70)

G. B. Pai, A. G. Meneses, for the respondent.

The Judgment of the Court was delivered by

KHANNA, J.-This judgment would dispose of civil appeals No. 1989 and 1989 of 1970, Filed on certificate against the judgment of the Kerala High Court, whereby that court held that it was beyond the competence of the State Legislature to enact law contained in sub section (3) of section 22 of the Kerala General Sales Tax Act, 1963 (Act 15 of 1963) (hereinafter referred to as the Act) in so far as it related to payment of an amount collected as tax on transactions not liable to tax under the Act or in excess of the tax leviable under the. Act.

We may now set out the facts giving rise to one of the appeals. Both the learned counsel are agreed that the decision in that would also govern the other appeal.

Under section 5 of the Act, tax is payable by a dealer on his tax able turnover. "Taxable turnover‘’ is defined in

section 2(xxv) of the Act as the turnover on which a dealer is liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed by the rules under the Act. It does not, however, include the turnover of purchase or sale in the course of inter-State trade or commerce or in the course of export or import of goods. The Kerala General Sales Tax Rules have been framed be the State Government in exercise of the powers conferred by section 57 of the Act. According to clause (i) of rule 9 of the sail rules. in determining the taxable turnover the following amount shall be deducted from the total turnover of the dealer: "the excise duty, if any paid by the dealer to the Government of Kerala or the Central Government in respect of the goods sold by him". It may be stated that clause (i) was omitted subsequently but we are concerned with the period when that clause was an integral part of the rule.

The respondent is an incorporated company engaged in the manufacture and sale of soaps, toilets and other goods. The respondent's accounts disclosed that it had collected from the persons to whom it sold goods a sum of Rs. 30,591.71 as sales tax in excess of the tax which the respondent was liable to pay under the Act. The respondent, it would appear, paid Rs. 6,62,958 as excise duty and deducted the same from its total turnover for the purpose of determining the taxable turnover. When, however, the respondent company sold the

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goods it collected sales tax from the purchasers on the invoice price without deducting there from the excise duty paid in respect of the said goods. This resulted in the respondent company realising Rs. 30,591.71 in excess of the sales tax payable in respect of the goods sold by it: The sales tax officer held that the respondent was liable to pay the aforesaid amount of Rs. 30,591.71 to the Government under section 22(3) of the Act. The respondent then filed writ petition in the Kerala High Court to challenge its liability to pay the aforesaid amount on the ground that the provisions of section 22 in so far as they imposed a liability on a dealer to pay over to the Government any amount collected by him as sales tax, even though that amount was not payable as tax, was unconstitutional. The learned single Judge dismissed the petition filed by the respondent. On appeal, however, the Division Bench held, as already mentioned earlier, that the impugned provision was beyond the legislative competence of the State Legislature.

Sub-section (3) of section 22 of the Act reads as under:

> "(3) If any dealer or person collects tax on transactions not liable to tax under this Act or in excess of the tax leviable to under this Act, such dealer or person shall, unless it is established to the satisfaction of the assessing authority that the tax so collected has been refunded to the person who had originally paid tax, pay over to the Government, in addition to the tax payable the amount so collected within such time and in such manner as may be prescribed."

The learned Judges of the High Court in holding the above provision. in so far as it related to payment of an amount collected as tax on transactions not liable to tax under the Act or in excess of the tax leviable under the Act to he beyond the legislative competence of the State Legislature, referred to entry 54 of the State List in the Seventh Schedule to the Constitution upon which reliance had been

placed on behalf of the State. It was held that the State Legislature was incompetent to enact the impugned provisions contained in sub-section (3) of section 22 of the Act under the above entry.

In appeal before us Dr. Seiyed Muhammad on behalf of the appellants has assailed the judgment of the Division Bench of the High Court. As against that, Mr. Pai on behalf of the respondent has canvassed for the correctness of the said judgment. After hearing the learned counsel, we are of the opinion that there is no merit in these two appeals.

A State Legislature is competent to make a law under entry 54 of List II in Seventh Schedule to the Constitution in respect of "taxes on the sale or purchase of goods other than newspapers subject to the provisions of entry 92A of List I". Entry 92A of List I relates to taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce, and we are not concerned with this entry.

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Entry 54 enpowers State Legislatures to make law, except i certain cases with which we are not concerned, in respect of taxes on the sale or purchase of goods. As long as the law relates to taxes on the sale or purchase of goods, it would be within the competence of the State Legislature to enact such a law. It would not, however, b permissible for the State Legislature to enact a law under entry 54 for recovery by the State of an amount which could not be recovered as sales tax or purchase tax in accordance with the law on the subject and which was wrongly realised by a dealer as sales tax or purchase tax. Such a law plainly would not be a law relating to tax on the sale or purchase of goods but would be one in respect of an amount wrongly realised by a dealer as sales tax or purchase tax. It looks perhaps odd that a dealer should recover in the course of business transactions certain sums of money as sales tax or purchase tax payable to the State and that he should subsequently decline to pay it to the State on the ground that the same amount is not exigible as sales tax or purchase tax. Whatever might be the propriety of such a course, the question with which we are concerned is whether the State Legislature is competent to enact a law under entry 54 for recovery by the State of an amount, which though not exigibie under the State law as sales tax or purchase tax was wrongly realised as such by a dealer. The answer to such a question has to be in the negative. The matter indeed is not res integra and is concluded by two decisions of this Court.

A Constitution Bench of this Court examined in the case of R. Abdul Quader & Co. v. Sales Tax officer, Hyderabad(1) the validity of section l l (2) of the Hyderabad Sales Tax Act, 1950 which reads as under:

> "(2) Notwithstanding anything to the contrary contained in any order of an officer or tribunal or judgment, decree or order of a Court, every person who has collected or collects on or before 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 lay him, and in default of such payment the said amount shall be recovered from him as if it were arrears of land revenue."

The appellant in that case collected sales tax from the purchasers of betel leaves in connection with the sales made by it. The appellant however, did not pay the amount

collected to the government. The Government directed the appellant to pay the amount to the Government. The appellant thereupon filed a writ petition in the High Court questioning the validity of section 11(2). The main contention of the appellant before the High Court was that section 11(2) which authorised the Government to recover a tax collected without the authority of law was beyond the competence of the State Legislature because a tax collected without the authority of law would not be a tax levied under the law and it would therefore not be open to the State to collect

(1) [1964] 6 S.C.R. 867.

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under the authority of a law enacted under entry 54 of List II of the Seventh Schedule to the Constitution any such amount. The High Court upheld the validity of section 11(2). On appeal to this Court it was observed by the Constitution Bench as under:

> "The first question therefore that falls for consideration is whether it was open to the State legislature under its powers under entry 54 of List II to make a provision to the effect that money collected by way of tax, even though it is not due as a tax under the Act, shall be made over to Government. Now it is clear that the sums so collected by way of tax arc not in fact tax exigible under the Act. So it cannot be said that the State legislature was directly legislating for the imposition of sales or purchase tax under entry 54 of List II when it made such a provision, for on the face of the provision. the amount, though collected by way of tax, was not exigible as tax under the law."

An attempt was made on behalf of the State in that case to sustain the validity of section 11(2) of the Hyderabad Act on the ground that the Legislature had enacted that law as part of the incidental and ancillary power to make provision for the levy and collection of sales or purchase tax. This contention was repelled and it was observed that the ambit of ancillary or incidental power did not go 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 question again arose in this Court before a Bench consisting of six Judges in the case of Ashoka Marketing Ltd. v. State of Bihar & Anr.(1). In that case in determining the appellant's turnover for assessment to sales tax for the year 1956-57, the Superintendent of Sales Tax included an amount representing Railway freight in the appellant's sales of cement. The appellate authority set aside the orders directing the inclusion of the Railway freight in the turnover. After the introduction of section 20-A of the Bihar Sales Tax Act the Assistant Commissioner issued a notice under section 20-A(3) of the Act requiring the appellant to show cause why an amount representing sales tax on the Railway freight which became refundable under the orders of assessment be not forfeited. The appellant's contention that section 20-A was ultra vires the State Legislature was rejected by the Assistant Commissioner as well as by the High Court in a writ petition under article 226 of the Constitution. On appeal filed by the assessee this Court held that sub-sections (3), (4) and (5) of section 20-A were ultra vires the State legislature. As a corollary thereto, sub-sections (6) and (7) of that section were also held to be invalid. Subsection (3) of section 20-A

of the Bihar Sales Tax Act read as under:

"(3)(a) Notwithstanding anything to the contrary contained in any law or contract or any judgment, decree or order of

(1) [1970] 1 S. C. R. 455.

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any Tribunal, Court or authority, if the prescribed authority has reason to believe that any dealer has or had, at any time, whether before or after the commencement of this Act, collected any such amount, in a case in which or to an extent to which the said dealer was or is not liable to pay such amount, it shall serve on such dealer a notice in the prescribed manner requiring him on a date and at a time and place to be specified therein neither to attend in person or through authorised representative to show cause why he should not deposit into the Government treasury the amount so collected by him.

(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 reason able 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."

In holding sub-section (3) and other impugned provisions of section 20-A to be beyond the legislative competence of the State Legislature, this Court in the case of Ashoka Marketing Ltd. (supra) relied upon the decision of this Court in Abdul Qadar's case (supra).

Dr. Muhammad has, however, tried to distinguish the above two cases on the ground that the present case relates to an amount realised in excess of the tax leviable under the Act and not to an amount which was not payable at all as tax under the Act. This fact, in our opinion, would not prevent the applicability of the principle laid down in the cases of Abdul Qadar and Ashoka Marketing Ltd. (supra). Any amount realised by a dealer in excess of the tax leviable under the Act stands, for the purpose of determining the legislative competence under entry 54, on the same footing as an amount not due as tax under the Act. Dr. Muhammad's argument involves inventing a category of a "deemed tax" which is not there in the Act. The provisions of the Act contain a definition of "tax". This necessarily means that every thing outside it collected by the dealer would be an exaction not authorised by the Act. "Tax", according to section 2(xxiv) of the Act, means the tax payable under the Act. The amount which was realised by the respondent in excess of what was due as tax cannot

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be held to be "tax", because such excess amount was not tax payable under the Act. If the State Legislature cannot make a law under entry 54 of List II of the Seventh Schedule to the Constitution directing the payment to the State of any amount collected as tax on transactions not liable to tax under the Act, it would likewise be incompetent to make a law directing payment to the State of an amount realised be a dealer in excess of the tax payable under the Act. The amount realised in excess of the tax leviable under the Act would not stand for this purpose on a footing different from

that of the amount realised as tax, even though the same could not be recovered as tax under the Act.

We would, therefore, dismiss the two appeals with costs. One hearing fee.

V.P.S. Appeals dismissed.

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