Wijesuriya. J V. Amit. H. R

31[PRIVY COUNCIL]1965

Present: Lord Reid, Lord Morris of Borth-y-Gest, Lord Hodson, Lord Pearce and Lord Wilberforce

J. WIJESURIYA, Appellant, and H. R. AMIT, Respondent

PRIVY COUNCIL APPEAL No. 17 OF 1964 S. C. 934 of 1962—M. C. Matara, 28

Heavy Oil Motor Vehicles Taxation (Amendment) Act, No. 20 of 1961—Section 2 (2)—Retrospective effect—Scope—Heavy Oil Motor Vehicles Taxation Ordinance (Cap 249), ss. 2 (1) (2), 3 (2), 4 (1) (2), 5 (1) (2)—Interpretation Ordinance, s. 6 (3).

Although section 2 (2) of the Heavy Oil Motor Vehicles Taxation (Amendment) Act No. 20 of 1961 legalises retrospectively, for the period 13th July 1956—25th April 1961, Heavy Oil Tax already collected or received from registered owners of motor vehicles propelled by Diesel oil, an order for the recovery of such tax under the provisions of the collection and enforcement sections 4 and 5 of the principal Ordinance cannot lawfully be made. In order to enable such tax to be collected "it was not sufficient merely to date back the operation of the amendment; it was necessary expressly to adapt the existing scheme to the new conditions created by the amendment by specifying the date on which the past tax was to be due, who was to pay it, within what time and what place, and stating clearly what consequences to what person would follow if payment was not made".

APPEAL, with special leave, from a judgment of the Supreme Court.

E. F. N. Gratiaen, Q.C., with *John Baker*, for the appellant. *Dick Taverne, Q.C.*, with *Eugene Cotran*, for the respondent.

Cur. adv. vult.

October 21, 1965. (Delivered by LORD WILBERFORCE)—

The appellant was the registered owner, for the period from September to December 1959, of a motor vehicle propelled by Diesel fuel. There was in force at that time an enactment (which may conveniently be referred to as "the original ordinance") called the Heavy Oil Motor Vehicles Taxation Ordinance, first passed in 1935, by which a tax was imposed on heavy oil motor vehicles. These vehicles were, by the definition in force in 1959, those which used or were adapted to use crude petroleum, liquid fuel, gas oil "or any other oil not subject to import duty". Since Diesel oil had been subject to import duty since 13th July 1956, the appellant was not, during the stated period, liable to the heavy motor oil vehicle tax.

On 25th April 1961 there was passed an act to amend the original ordinance. This amending Act substituted, in the definition appearing in the original ordinance, for the words "or any other oil not subject to import duty" the words "or Diesel oil", so creating a liability for tax on vehicles such as the appellant's. By section 2 (2) of this amending Act it was provided that this amendment "shall be deemed to have come into effect on the 13th July 1956". The present appeal is concerned with the liability of the appellant to this tax in respect of the period from September to December 1959.

On 11th May 1962 a notice was sent to the appellant under section 4 (2) of the original ordinance requiring him to pay the sum of Rs. 472, in respect of tax on the vehicle, within seven days and warning him that in default he would be liable to punishment under section 5 of the Ordinance. The appellant did not pay the tax. On 1st June 1962 two steps were taken: first a letter was sent to the Magistrate at Matara informing him that the appellant was in default in payment of the tax, stating that the appellant was "now resident" at Matara, and enclosing a certificate under section 4 (1) of the original ordinance stating the amount of the tax due and the fact of his default. Secondly a charge sheet was issued, which charged that the appellant on 8th September 1959 possessed a motor vehicle in respect of which Heavy Oil Tax was not paid on the said date in contravention of section 5(1) of the original ordinance as amended,

and thereby committed an offence punishable under section 5 (2) as read with section 4 (1) of the original ordinance. A plea of not guilty was entered on behalf of the appellant to the charge.

A hearing took place on 11th October 1962 before the Magistrate at Matara who decided that the appellant was liable for the tax for the period stated, and that the Government Agent was entitled to have the amount of the tax levied as a fine. On appeal to the Supreme Court this decision was affirmed. The appellant has been granted special leave to appeal from the judgment of the Supreme Court.

Before their Lordships there was some discussion whether the appellant's liability bore a penal or a civil character: the ordinance provides both for a fine, as for an offence, under section 5, which however cannot exceed Rs. 100 and for an order that the amount of tax due may be recovered as though it were a fine under section 4 (1). The Magistrate's order was it seems made under the latter section. No submission however was based by either the appellant or the respondent upon this distinction and their Lordships will decide the appeal upon the issue whether an order for recovery of the tax could lawfully have been made.

The amending ordinance bears the character of retrospective legislation but it is not contended that it is for this reason invalid. It was conceded that the legislature has power both to impose a tax retrospectively and retrospectively to make non-payment of the tax a penal offence. The question is whether the amending ordinance has effectively done so.

It is clear, to their Lordships, that no answer to this question is given by the Ceylon Interpretation Ordinance. The only section of possible application is section 6 (3) which relates to repeals: but even assuming that this is a case of repeal, and that what is sought to be done by the amendment is to affect the past operation of something done, or a right or liberty acquired, under the repealed law, the section does not apply "in the absence of express provision to that effect". The question therefore remains whether the express provision of the amending ordinance was sufficient to bring about the result for which this Government Agent contends. This question

is to be determined according to the ordinary principles of construction which apply to a statute which is (a) retrospective, (b) fiscal and (c) in parts penal. It must be shown that the enacting words clearly cover the case to which it is sought to apply them. The Court will no doubt prefer an interpretation which gives effect to the amending ordinance rather than one which denies it any efficacity, but it will not strain the language used, nor will it rewrite or adapt it to cover cases other than those to which it clearly applies.

The effect of the provision contained in section 2 (2) of the amending ordinance, by which the relevant amendment, applying the tax to Diesel propelled vehicles, was deemed to have come into effect on 13th July 1956, certainly has the effect of legalising, as from that date the levy of that tax, so that if any tax was collected from or paid by any person, during the period before 25th April 1961, the collection or receipt would be valid and no proceedings for recovery of it, or in respect of steps taken to recover it, would lie against the Government. But this is not enough to make persons in the position of the appellant liable to pay the tax. Before this can be so, it must be shown that in the original ordinance, as amended, machinery exists which enables the taxing authorities to recover the tax for the period in question. This must be positively shown as a matter of construction, for there is no necessary implication to be drawn from the fact that the collection of the tax has been legalised, that power has been conferred to enforce its payment through the pre-existing enforcement machinery of the original ordinance.

Their Lordships therefore must consider carefully the collection and enforcement sections: these are by no means simple. The original ordinance starts by providing (section 2 (1)) that the registered owner is liable to pay the tax in the manner thereinafter provided. Under section 2 (2) payment is to be made in advance either annually or monthly: if annually, the tax is due on the 1st January and must be paid on or before the 7th January; if monthly, it is due on the first of the month and must be paid on or before the 7th of the month. The place of payment is at the office of the Government Agent having jurisdiction over the place set out in the certificate of registration as the place where the vehicle is usually kept. Section 3

(2) provides for the issue by that office of a tax payment card which has to be carried on the vehicle. The collection provisions are to be found in section 4. These involve the following steps (a) a notice to the registered owner in default in the payment of any tax due, (b) issue to the magistrate having jurisdiction where the registered owner is resident of a certificate of the tax due and of the fact of service of the notice upon him. There is also provision for (c) seizure by the police of the vehicle in respect of which default has been made. Section 5 contains a penal provision which is in these terms: "5 (1) No person shall possess or use a heavy oil motor vehicle in respect of which any tax due and payable under the provisions of this Ordinance has not been paid." and sub-section (2) provides for a fine or imprisonment.

It is obvious that both the provisions as to collection and the penal section are based upon and geared to a state of affairs when tax is "due". This in turn is founded upon the requirement that tax has to be paid in advance in a specified manner, on specified dates, and in a specified place, and that a certain time must have elapsed since the payment date. The question then is whether these requirements can be fulfilled in relation to a tax for which liability was retrospectively created on 25th April 1961.

The amending legislation contains no provisions as to when tax thereby imposed is "due": the only provision which can possibly relate to this matter remains section 2 of the original ordinance. It must therefore be asked—when was the tax (for which the appellant has been held liable) due? The charge sheet, issued on 1st June 1962, was prepared on the basis that the tax was overdue on 8th September 1959: this must be on the assumption that it became due in advance, on 1st September 1959, and should have been paid within seven days. To say that a tax, which did not in fact exist at that date, became due in advance on 1st September 1959 by virtue of an enactment passed on 25th April 1961 seems highly artificial, but the objection is not merely one of artificiality. For if the tax was due then, it became an offence to possess or use the vehicle on 8th September 1959, though at the time the registered owner had no reason to doubt, and it was the fact, that such

possession and use were lawful. These difficulties become intensified when consideration is given to the case which may well arise if the vehicle has changed hands. Any person who has possessed or used the vehicle has been guilty of an offence and, under section 4 (2), if the present registered owner differs from the registered owner as in September 1959, the vehicle would be liable to be seized in the hands of the former on account of a default of the latter.

An alternative method of operating the original ordinance was suggested to their Lordships. According to this, the tax, though relating to the whole period subsequent to 13th July 1956, first became due on the passing of the amending Act. Thereupon it was open to the Government Agent under section 4 (2) of the original ordinance to serve a notice calling upon the registered owner to pay the tax, after which the default and penal provisions could be applied. This construction escapes the difficulty of creating retrospectively a penal offence, but encounters others: for it must either tax a registered owner (viz., the present owner) who may not have had any interest in the vehicle during the period covered by the tax, or it must tax a prior registered owner, in which case difficulties arise as to the place of payment and as to the right to seize the vehicle of which mention has already been made.

Their Lordships would not be disposed to place undue emphasis on minor difficulties of administration, and they recognise that retrospective legislation is likely, in its nature, to give rise to some anomalies and maladjustments. But they are forced to the conclusion in this case that it is not possible to apply the recovery or enforcement provisions of the original ordinance to the case of tax in respect of the past period without modifications and violence to the scheme of that ordinance greater than it is legitimate, by a process of construction to make. In other words in order to enable tax to be collected it was not sufficient merely to date back the operation of the amendment; it was necessary expressly to adapt the existing scheme to the new conditions created by the amendment by specifying the date on which the past tax was to be due, who was to pay it, within what time and what place, and stating

clearly what consequences to what person would follow if payment was not made. In the absence of provisions of this kind, their Lordships cannot arrive at the conclusion that tax for the period 13th July 1956—25th April 1961 can be levied under the provisions of the original ordinance or that the enforcement provision of the original ordinance were properly operated against the appellant.

They will humbly advise Her Majesty that the appeal should be allowed, the judgment of the Supreme Court set aside and the order made by the Magistrate quashed. The respondent must pay the appellant's costs in the Supreme Court and of this appeal.

Appeal allowed.