
(2010) 01 BOM CK 0107

In the Bombay High Court

Case No : Writ Petition No's. 4176 and 4233 of 2008

C.G. International Pvt. Ltd.

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 22-01-2010

Acts Referred:

Bombay Provincial Municipal Corporation (Cess on entry of goods) Rules, 1996 — Rule 25(5), 27(1), 41, 41(2), 41(3)
Bombay Provincial Municipal Corporations Act, 1949 — Section 127, 127(2), 152A, 3, 406
Constitution of India, 1950 — Article 227

Citation : (2010) 3 BomCR 652

Hon'ble Judges : Daga V.C., J

Bench : Single Bench

Advocate : Madhur Baya, for the Appellant; S.D. Rayrikar, A.G.P. for Respondent No. 1 and A.A. Garge, for the Respondent

Judgement

Daga V.C., J.—Rule, returnable forthwith. Learned A.G.P. waives service for respondent No. 1, whereas Mr. Garge waives service for respondent Nos. 2 to 4. Petition is heard finally by consent of parties.

Factual Sketch:

2. These petitions, filed under Article 227 of the Constitution of India are directed against the order dated 11th January, 2008 passed below Exhs. 5 and 15 by the Civil Judge, Senior Division, Thane in Municipal Appeal No. 13/2007, whereby and whereunder the prayers for interim reliefs were rejected and the applications filed by the respondent No. 2- Navi Mumbai Municipal Corporation seeking pre-deposit before entertaining appeals (Exh. 15) were allowed and the petitioners herein are directed to make pre-deposit of the amount found due under the order of assessment and demand with interest and penalty within one month from the date of the order. Both these petitions involve identical issues based on common facts between the same parties, as such they were heard together and are being disposed of by this common judgment. The factual matrix is borrowed

from W.P. No. 4176/2008.

Factual Matrix:

3. The petitioners are an Export Oriented Unit (EOU), inter alia; engaged in export of diamond studded jewellery out of India. The petitioners, in the course of business, have imported in the limits of Navi Mumbai Municipal Corporation diamonds and coloured stones since they are engaged in business of studding of diamonds and colour stones in the jewellery and exporting such diamond studded jewellery out of India. According to the petitioners, they do not carry out any process on the diamonds brought in the limits of Municipal Corporation except studding it into the jewellery, as such diamonds imported in the city are not subjected to levy cess of octroi under the provisions of the Bombay Provincial Municipal Corporations Act, 1949 ("Act" for short).

4. Respondent No. 1 is the State of Maharashtra, whereas respondent No. 2 is the Navi Mumbai Municipal Corporation constituted u/s 3 of the Act. Respondent Nos. 3 and 4 are the officers of respondent No. 2- Corporation discharging duties and carrying out their functions under the said Act. Under Chapter XI-A of the Act, the Municipal Corporation has ordered to levy cess of octroi. The Deputy Commissioner of Cess (Zone-I) of the Corporation passed an order of assessment dated 3rd August, 2006 in respect of petitioners for the assessment year 2005-06 under Rule 25(5) of the Bombay Provincial Municipal Corporations (Cess on Entry of Goods) Rules, 1996 ("BPMC Rules" for short) framed under the Act and issued demand notice in Form-J demanding Rs. 80,189/- for the said year. The petitioners not only paid said amount demanded under demand notice but made excess payment of cess in the sum of Rs. 9,46,570/- which was refunded to the petitioners vide assessment dated 3rd August, 2006.

5. On 21st June, 2007, the petitioners were served with letter dated 19th June, 2007 stating therein that refund under Rule 49 was wrongly granted to them as such assessment made on 3rd August, 2006 required to be reopened and re-assessed under Rule 27(1) of the BPMC Rules. Accordingly, show-cause-notice dated 29th June, 2007 was issued to the petitioners calling upon them to produce specified documents and accounts as well as the details of the refund claimed under Rule 49 of the BPMC Rules.

6. The petitioners submitted their written reply to the show-cause-notice, inter alia; stating that the diamonds retain their original identity/ characteristics at all times and, consequently, the refund under Rule 49 was correctly granted and, therefore, requested to drop the re-assessment proceedings.

7. The Deputy Commissioner (Cess), after hearing the petitioners, vide his order dated 10th August, 2007, disallowed the refund of Rs. 9,46,570/- already granted to the petitioners under Rule 49 of the BPMC Rules and called upon them to pay the same with interest in the sum of Rs. 10,03,364/- under Rule 41(3)(b) and penalty Rs. 35,00,000/- under Rule 41(2)(c)(ii) of the BPMC Rules. Accordingly, a demand notice dated 10th August, 2007 was issued to the

petitioners.

8. Aggrieved by the aforesaid order dated 10th August, 2007, petitioners preferred Municipal Appeal No. 13/2007 before the Civil Judge, Senior Division, Thane along with application seeking stay of the operation of the order dated 10th August, 2007 and praying for waiver of pre-deposit with interest and penalty. The learned Civil Judge, after hearing the parties, vide his order dated 11th January, 2008, rejected prayer for stay made by the petitioners and directed them to deposit entire amount of cess, interest and penalty in compliance with the provision of Section 406(2)(c) of the Act.

9. Being aggrieved by the aforesaid order, petitioners have invoked writ jurisdiction of this Court under Article 227 of the Constitution of India.

Rival Submissions:

10. At the outset, Mr. Baya, learned Counsel appearing for the petitioners submits that the entire amount of disputed tax has already been paid by the petitioners since Section 406(2)(c) mandates deposit of the disputed tax as a pre-condition for hearing and determining the appeal. According to him, the term "tax" has been defined u/s 127 of the Act. It provides for imposition of various taxes under the Act; one of them being "cess" as enumerated in Clause (aa) of Sub-section (2) of Section 127, as such cess by way of octroi; has been deposited by them.

11. Mr. Baya further submits that the concepts of "cess" (tax); "interest"; and "penalty" are distinctly recognised under the scheme of the Tax laws which can also be seen from the scheme of Sections 127 and 152-A of the Act (in respect of cess) and Rule 41 framed thereunder relating to the provision for levying interest and penalty. With this foundation, he proceeded to urge that if the provision of Section 406(2)(e) of the Act is read in absolute terms, it merely requires that the amount of disputed tax is required to be deposited with respondent No. 3. He placed reliance on the judgment of the Apex Court in the case of Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others, .

12. Mr. Baya further submits that word "cess" used in the context of Section 406(2)(e) of the Act shows that what the legislature intends is that merely the amount of cess/tax sought to be levied under the provision of Chapter 11-A of the Act needs to be deposited prior to consideration of the appeal. He further submits that learned Judge has wrongly interpreted the provision of Section 406(2)(e) of the Act to mean that entire amount of tax together with interest and penalty need to be deposited before consideration of appeal. At the cost of repetition, he submits that it is settled law that tax, interest and penalty are three different concepts, which, according to him, learned Judge has failed to notice.

13. Mr. Baya also raised certain contentions on the merits with regard to the charge-ability of cess on the studded jewellery exported by the petitioners

contending that the petitioners do not carry out any process on the diamonds so purchased by them as such the diamonds per se are not subjected to any physical or chemical process to bring any change in the diamonds so used. Consequently, benefit under Rule 49 of the BPMC Rules is available to the petitioners and has been rightly claimed by them. He, thus, tried to challenge the very right of the Corporation to impose cess on the export of diamonds studded in the jewellery out of India. He also made grievance about the right of the Corporation to resort to the process of re-assessment for the reasons stated in the petition.

14. Per contra, learned Counsel appearing for the respondent Corporation submits that the deposit of the amounts covered by notice of demand is a condition precedent for entertaining the appeal preferred by the petitioners. He submits that the appeal cannot be entertained unless amount demanded in the notice of demand is deposited by the petitioners. He further submits that there is no power in the learned Judge to stay operation and execution of the impugned order or to dispense with pre-deposit in toto. He placed reliance on the judgment of the learned single of this Court dated 6th July, 2007 in the matter of Navi Mumbai Municipal Corporation v. Pan India Infravest Put. Ltd. Writ Petition No. 4183/2004 (unreported) in support of his submission.

Consideration:

15. Having heard rival parties, it is not in dispute that recovery of the cess by the Corporation under Chapter XI-A of the Act is a tax u/s 152-A of the said Act in lieu of octroi. Clause (e) of Sub-section (2) of Section 406 of the Act reads as under:

406. Appeals when and to whom to lie.

(1)... ..

(2) No such appeal shall be entertained unless

(a)... ..

(b)... ..

(c)... ..

(d)... ..

(e) in the case of an appeal against a tax, or in the case of an appeal made against a rateable value the amount of the disputed tax claimed from die appellants or the amount of tax chargeable on die basis of the disputed rateable value, upto the date of filing, the appeal has been deposited by the appellants with the Commissioner.

16. The aforesaid section makes it clear that in case of an appeal against a tax, the amount of disputed tax claimed from the appellants has to be deposited by the appellants with the Commissioner. In fact, deposit of the said tax is condition

precedent for entertaining the appeal. The perusal of re-assessment order dated 18th August, 2007 passed by the Deputy Commissioner shows that by and under the said order the demand was for recovery of amount of cess (tax) refunded to the petitioner together with interest calculated thereon and the penalty levied on them, the details of which are as under:

17. With the aforesaid factual backdrop, in the teeth of the above statutory provisions, one cannot dispute that tax, interest and penalty are three different concepts. Tax becomes payable by an assessee by virtue of the charging provision in a taxing statute. Penalty ordinarily become payable when it is found that an assessee has willfully violated any of the provisions of the taxing statute. Interest is ordinarily claimed from an assessee who has withheld payment of any tax payable by him and it is always calculated at the prescribed rate on the basis of the actual amount of tax withheld and the extent of delay caused in paying it. It is, therefore, clear that interest is compensatory in character and not penal. ACC Cement Co. Ltd. v. Commercial Tax Officer (supra) Para-23

18. Having found three different concepts referred to above, if one turns to Clause (e) of Sub-section (2) of Section 406 of the Act, what is required to be deposited is the amount of disputed tax or the amount of tax chargeable on the basis of the disputed ratable value upto the date of filing of appeal. If that be so, the submission advanced by the petitioners that the said sub-section does not require the appellant to pre-deposit interest and penalty amount needs to be accepted.

19. At this juncture, it is relevant to note that the Legislature amended Section 406 of the Act by Maharashtra Act No. IV of 2009 with effect from 3rd October, 2008 by inserting the words "including interest and penalty imposed" in Clause (c) of Sub-section (2) thereof after the words "any tax".

20. The unamended Clause (c) together amended Clause (c) of Sub-section (2) of Section 406 are reproduced side by side for comparison:

(Emphasis supplied)

Comparison of the aforesaid provision would demonstrate that Legislature tried to include interest and penalty in the concept of tax with effect from 3rd October, 2008. However, the consequential amendment which was expected in Clause (e) has not been done. With the result, the petitioners are justified in contending that what is required to be deposited by way of pre-deposit is only the amount of disputed tax claimed from the appellant or the amount of tax chargeable (cess) and not the amount of interest calculated thereon or the penalty levied.

21. The petitioners in the aforesaid backdrop are entitled to succeed in their contention. Thus, the impugned order to the extent it directs the petitioners to deposit the amount of interest and penalty by way of pre-deposit is liable to be quashed and set aside.

22. In the result, impugned order to the extent it directs deposit of interest and

penalty by way of pre-deposit is quashed and set aside. It is declared that the petitioners shall be liable to deposit by way of pre-deposit only the amount of disputed tax claimed by the respondents within four weeks from the date of receipt of copy of this order with the lower appellate Court. If the Court below finds that the amount of tax has already been deposited by the petitioners, in that event, the Court shall proceed to hear the appeal on merits with expeditious despatch. If the Court finds any deficiency in the said amount, then the Court is expected to grant reasonable time to the petitioners to make the deficiency good.

23. It needs to be clarified that so far as all other contentions raised in the petitions and canvassed at the Bar are concerned, they require no consideration as this Court is not expected to dwell upon those contentions since appeals are still pending for consideration on merits. Petitioners shall be at liberty to canvass all those contentions before the lower appellate Court, which the lower appellate Court shall consider and decide on its own merits by a reasoned order with expeditious despatch, at any rate, within six months from the date of receipt of copy of this order.

24. Petition is partly allowed. Rule is made absolute in terms of this order with no order as to costs.