

(2010) 06 KAR CK 0054

In the Karnataka High Court

Case No : Writ Petition No's. 32842-43, 19680-81 and 38117-120 of 2009

Damodar Enterprises, Distributors, Mangalore Ganesh Beedies
Vs
APPELLANT

Deputy Commissioner of Commercial Taxes, Additional
Commissioner of Commercial Taxes, Commissioner of
Commercial Taxes and State of Karnataka
 Mangalore
Ganesh Beedi Works Vs Assistant Commissioner of
Commercial Taxes, Additional Commissioner of Commercial
Taxes, Commissioner of Commercial Taxes and State of
Karnataka
 B. Nirmala Devi and Company and
Raghavendra Traders Vs Deputy Commissioner of Commercial
Taxes and Others
RESPONDENT

Date of Decision : 22-06-2010

Acts Referred:

Karnataka Value Added Tax Act, 2003 — Section 27 (4), 39 (1), 5 (1)
Karnataka Value Added Tax Rules, 2005 — Rule 127, 128, 13, 38, 42

Citation : (2010) 06 KAR CK 0054

Hon'ble Judges : Ram Mohan Reddy, J

Bench : Single Bench

Advocate : Sarangan for Vani. H, for the Appellant; K.M. Shivayogi Swamy, HCGP, for the Respondent

Final Decision : Allowed

Judgement

Ram Mohan Reddy, J.—Common questions of law and that of fact arise for decision-making. Hence, with the consent of the learned Counsel for the parties, the petitions are clubbed together, finally heard and are disposed of by this common order.

2. The petitioner in W.P. No. 19680-81/2009 is a partnership firm carrying on the business of manufacture and sale of beedies in the name and style of Mangalore Ganesh Beedi Works and a registered dealer under the Karnataka Value Added Tax Act, 2003, (for short "KVAT Act") and also under the Central Sales Tax Act, 1956 (for short "CST Act").

3. Petitioners in all the other petitions are registered dealers under the KVAT Act and distributors of beedies manufactured by Mangalore Ganesh Beedi works.
4. The core question for decision-making in these petitions is whether in the facts and circumstances, the notification Annexure-"D" is "ex abundanti cautela" the consistent policy of the State, for over few decades exempting un-manufactured tobacco (including tobacco used for the manufacture of beedis) from tax under the KVAT Act?
5. The pleadings in the petitions disclose that traditionally and conventionally manufacture of beedies using tobacco is carried on through cottage industries, manned by persons having no special skill, training or education, more appropriately at the hands of the poorer Sections of the society, as a means of livelihood. The sale of beedies is also through petty traders while bulk of the consumption is by persons belonging to the economically and socially weaker Sections of the society.
6. The Parliament enacted the Additional Duties of Excise (Goods of Special Importance) Act, 1957, Act No. 58/1957 (for short "Duties Act") to provide for the levy and collection of additional duties of excise on certain goods and for the distribution of the part of the net profit thereof among the states, in pursuance of the principles of distribution formulated and the recommendations made by the Finance Commission in its report dated 18.12.1989, whereunder unmanufactured tobacco and tobacco used in manufacture of beedies were declared goods of special importance, in interstate trade and commerce.
7. The State of Karnataka, keeping in mind the manufacture of beedies through cottage industry providing means of sustenance and livelihood for the poor and marginalised, who would otherwise be a burden upon the state exchequer coupled with the fact that the sale of beedies was through petty traders, the consumption of which was by persons belonging to a lower social strata, exempted the sale of beedies from levy of Sales tax under the Karnataka Sales Tax Act, 1957, ever since its inception and also under the Karnataka Value Added Tax, 2003.
8. The Taxation Laws (Amendment) Act, 2007, Act 16/2007 amended the Duties Act by omitting Section 4 and entries under the headings 2401, 2402 and 2403 and sub-headings and tariff items in the First Schedule and annulled the Second Schedule relating to distribution of additional duties with effect from 26.03.2007. Entry No. 50 in the First Schedule to KVAT Act was omitted with effect from 1.4.2007 by Karnataka Act, 6/2007. Thus, all tobacco products including beedies described in the First Schedule to the Duties Act were amenable to tax at the rate of 12.5% in accordance with Clause (b) of Sub-section (1) of Section 4 of the KVAT Act, more so since there was not corresponding entry in the other schedules fixing the rate of tax for levy of VAT on the sale of beedis.
9. It appears that the Central Government, in coordination with the Governments of different states, constituted an "Empowered Committee of Finance Ministers"

to prepare a road map to introduce goods and service tax with effect from 1.4.2007. The said committee consisting of State Finance Ministers, in the minutes of the 4th meeting held on 25.04.2007 Annexure-"A", having regard to the notification amending Duties Act, allowed States to tax tobacco and tobacco products without losing 1% devolution, and recommended that the states should tax tobacco and tobacco products at 12.5% except un-manufactured tobacco, beedies and tobacco used in the manufacture of beedis. In the said meeting the State of Karnataka was represented by its Deputy Secretary. Finance Department and Joint Commissioner of Commercial Taxes. The Additional Commissioner, issued a letter dated 26.04.2007 Annexure-"B" addressed to the Principal Secretary, Finance Department enclosing a draft notification to extend tax exemption on unmanufactured tobacco including tobacco used for manufacture of beedies which when brought to the notice of the Deputy Chief Minister and Finance Minister, approval was accorded for exemption with effect from 1.4.2007 Annexure-"C". However, at the intervention of the Principal Secretary that retrospective effect of exemption was impermissible, on the premise that dealers "would have already passed on their tax liability on sales", in the absence of any effort to ascertain whether tax was collected by the petitioners and the ilk, the Deputy Chief Minister is said to have approved the exemption from tax with effect from the date of notification, followed by the notification dated 15.05.2007 Annexure-"D".

10. The Budget speech delivered by the Deputy Chief Minister and Finance Minister, admittedly, did not indicate a proposal to omit from the First Schedule to the KVAT Act, unmanufactured tobacco and tobacco products including tobacco used in the manufacture of beedis. So also, there was not proposal to impose a cess under the KVAT Act on the sale of beedies unmanufactured tobacco and tobacco used for the manufacture of beedis. Thus, petitioners were taken by surprise when the State enacted Amendment Act 6/2007 omitting Item No. 50 to the First Schedule so as to impose and collect a cess on the sale of unmanufactured tobacco, beedies including tobacco used for manufacture of beedies with effect from 1.4.2007.

11. Petitioners, aghast over the sudden change in the attitude of the State, quite contrary to its consistent policy not to impose a cess on sale of tobacco products including tobacco used for manufacture of beedies made a representation dated 18.05.2007 seeking clarification over the tax exemption. At the same time, the manufacturer/petitioner having filed returns declaring the entire sales as exempt from levy of VAT, nevertheless was visited with notice Annexure-"F" u/s 38(5) and 39(1) of the KVAT Act proposing reassessment for April 2007 upto 14.05.2007 and determining VAT on the sales turnover at 12.5% together with penalty u/s 72(2) of the KVAT Act at 10% of the tax proposed. The response of the petitioners was by way of a common reply dated 22.06.2007 Annexure-"H". The 1st respondent passed a common order dated 16.10.2007 Annexure-"J" u/s 39(1) of the KVAT Act for the tax period April and May 2007 confirming the proposed levies and thereafter passed an order dated 30.10.2007 Annexure-"K"

u/s 9(2) of the CST Act read with Section 38 of the KVAT Act, levying tax on the inter-state sale of beedies and interest u/s 36 of the KVAT Act as well as penalty. The orders when challenged in two separate appeals before the Joint Commissioner of Commercial Taxes (Appeals), though dismissed by common order dated 23.02.2008 Annexure-"L", was modified to the extent of Central sales tax on actual sales turnover as recorded in the manufacturer/petitioners' books. The request for rectification was allowed by order dated 15.03.2008 Annexure-"M" reducing the quantum of central sales tax.

12. In the meanwhile, the Karnataka Beedi Industry Association (Regd), submitted to the State, a representation dated 18.05.2007 Annexure-"N" for clarification over exemption from tax with effect from 1.4.2007, in the light of the observations of the Apex Court in W.P.I.L. Ltd., Ghaziabad Vs. Commissioner of Central Excise, Meerut, U.P., . W.P. No. 3250/2008 filed by members of the association, was disposed of on 29.02.2008 Annexure-"P" with a direction to consider the representation as expeditiously as possible, within eight weeks from the date of receipt of the order. That representation is said to be pending before the State.

13. The manufacturer/petitioner having preferred second appeals in STA.366 and 367/2008 before the Karnataka Appellate Tribunal calling in question the orders of the Joint Commissioner of Commercial Taxes (Appeals) and the orders of the 1st respondent, were dismissed by common order dated 28.04.2009 Annexure-"Q". The other petitioners suffered orders of re-assessments. Hence, the writ petitions by the manufacturer and the distributors of beedis.

14. Petitions are opposed by filing statement of objections dated 24.02.2010 of the 4th respondent inter alia contending that beedies though exempt from VAT, were subjected to tax at 12.5% on omitting Item No. 50 in the First Schedule to KVAT Act by Act, 6/2007 with effect from 1.4.2007, in accordance with Section 4(1)(b) of the KVAT Act and that the exemption was once again available with effect from 15.05.2007 under the notification of even date. According to the state, the recommendations of the Empowered Committee of Finance Ministers in its 4th meeting of 2007, proposed not to impose tax on unmanufactured tobacco including tobacco used for manufacture of beedis. The Commissioner for Commercial Taxes requested the State Government to extend tax exemption on un-manufactured tobacco including tobacco used in manufacture of beedies and in addition, stated that as the month of April 2007 was coming to an end, specifically requested the Government to extend tax exemption in respect of sale of transition stock of cigarettes and not on the sale of beedis.

15. Heard the learned Counsel for the parties. There is force in the contention of the learned Senior Counsel for the petitioners that in the light of inclusion of tobacco, tobacco products and beedies in the First Schedule to the Duties Act in the year 1957 declared as goods of special importance in inter-state trade or commerce, providing additional duties of excise, a part of which was to be distributed amongst the states, the State of Karnataka exempted the said goods

from incidence of sales tax under the Karnataka Sales Tax Act, 1957 and thereafter under the KVAT Act and therefore, the omission of the said goods from the First Schedule to KVAT Act by Act 6/2007 with effect from 1.4.2007 followed by the subsequent notification dated 15.05.2007 Annexure-"D" exempting tax payable by a dealer, is a strong indication of absence of public interest to support withdrawal of that concession. Yet again, having regard to the recommendation of the Empowered Committee of the State Finance Ministers in the minutes of the 4th meeting of 2007. Annexure-"A" that the state should not tax unmanufactured tobacco including tobacco used for manufacture of beedies, coupled with the consistent policy of the state in exempting from tax, the sale of unmanufactured tobacco and tobacco used in manufacture of beedies, declared as goods of special importance, and keeping in mind that the manufacture of beedies is through cottage industries, the omission from the First Schedule of KVAT Act by Amendment Act 6/2007 with effect from 1.4.2007, and the later notification dated 15.05.2007 Annexure-"D", exempting from tax the sale of beedies, cannot be construed as a withdrawal of the exemption and as if exemption was granted for the first time. In these circumstances, the period of 45 days intervening between the two notifications, the subsequent notification dated 15.5.2007 cannot but be held to be clarificatory and no duty could be demanded on the sale of the said goods. The Learned Senior Counsel is correct in placing reliance upon the decision of the Larger Bench of the Apex Court in WPIL's case *supra*, wherein on facts similar though not identical, held thus:

15. The Learned Counsel for the appellant is also right in relying upon a decision of this Court in *Collector of Central Excise, Shillong Vs. Wood Craft Products Ltd.*, . In that case, this Court held that a clarificatory notification would take effect retrospectively. Such a notification merely clarifies the position and makes explicit what was implicit. Clarificatory notifications have been issued to end the dispute between the parties.

16. In view of the consistent policy of the Government of exempting parts of power driven pumps utilized by the factory within the factory premises, it could not be said that while issuing Notification No. 46/94 of March 1, 1994, the exemption in respect of said item which was operative was either withdrawn or revoked. The action was taken only with a view to rescinding several notifications and by issuing a composite notification. The policy remained as it was and in view of demand being made by the Department, a representation was made by the industries and on being satisfied, the Central Government issued a clarificatory Notification No. 95/94 on April 25, 1994. It was not a new notification granting exemption for the first time in respect of parts of power driven pumps to be used in the factory for manufacture of pumps but clarified the position and made the position explicit which was implicit.

16. The contention of the learned Counsel for the respondent - State that exemption was granted only with effect from 15.05.2007 and that during the intervening period of 45 days from 1.4.2007 to 15.05.2007, sale of beedies was

liable to VAT, while there was no tax on sale of cigarettes smacks of discrimination. The sale of cigarettes was exempt from VAT for a period of one month on the recommendation of the Empowered Committee of Finance Ministers in view of the transition stock having not been factored with sales tax on the Maximum retail price (M.R.P), while sale of beedies, similarly circumstanced, with m.r.p. not factored with sales tax was not extended the very same benefit. The adage as to what sauce is good for the goose, must be good for the gander too applies on all its fours. Apparently, the State has practiced invidious discrimination.

17. Although Learned Senior Counsel for the petitioners points out to the definition of the terms "taxable turnover", "total turnover", "turnover" and "year" in Sub-sections 34, 35, 36 and 38 of Section 2 and Sub-section (4) of Section 27 of the KVAT Act as well as Rules 13, 38, 42, 127 and 128 of the KVAT Tax Rules, 2005 to contend that tax is referable to the year commencing from 1st of April of that year and therefore, the notification ought to be read as if the exemption was granted from 1.4.2007, by placing reliance upon the decision of a Single Judge of this Court in Deepam Silk International and Others Vs. State of Karnataka and Others, , I am not impressed by that submission. The facts in Deepam Silk's case related to an exemption notification by Act No. 5/2001 of the Karnataka Tax on Luxuries Act, 1979, more appropriately as regards the entry relating to "silk fabrics" inserted at Item No. 4 in the Schedule to the Act with effect from 1.4.2001. His lordship having noticed in the notification the use of the words "tax payable under the said act by Stockist on his turnover of stock of silk fabrics" held that the notification did exempt levy of tax from 1.4.2001. Such is not the position in the notification Annexure-"D". The facts in Deepam Silk's case being different and not identical to the facts of this case, that judgment, has no application.

18. The authorities below, including the Karnataka Appellate Tribunal, in its order Annexure-"Q", while recording a categorical finding that the levy of tax for the short period of 45 days cannot be held to be in public interest on the premise that exemption was in existence for number of decades in the past, nevertheless concluded that, it is a matter to be decided by this Court or the Apex Court under its extra-ordinary jurisdiction and the KAT has no jurisdiction as it is a wrong forum, and directed the petitioners to approach this Court under Article 226 of the Constitution. In my opinion, the orders of the authorities below and that of the KAT cannot but be illegal, perverse and unsustainable.

19. The question framed supra is answered in the affirmative.

20. In the result, the petitions are allowed. The notification No. FD. 167. CSL. 2007 dated 15.05.2007 Annexure-"D" issued under Sub-section (1) of Section 5 of KVAT Act, 2003, is declared to be ex abundanti cautela effective from 1.4.2007. The notice initiating action for reassessment of tax on sale of beedies followed by the orders of the authorities, the appellate authority and the order of the KAT in the Second appeals are quashed. As a consequence, the State is

directed to forthwith refund all the monies paid by the petitioners pursuant to the notice of re-assessment.