(2013) 05 MP CK 0087

In the Madhya Pradesh High Court

Case No : Writ Petition No. 7683 of 2012

G.K. Micro Metal Private Limited APPELLANT

Vs

State of M.P. and Others RESPONDENT

Date of Decision : 15-05-2013

Acts Referred:

Citation : (2013) 64 VST 147

Hon'ble Judges : S.K. Gangele, J;D.K. Paliwal, J

Bench : Division Bench

Advocate : H.D. Gupta, with N.D. Gupta and Santosh Agrawal, for the Appellant; Vivek Khedkar, Deputy Advocate-General, for the Respondent

Judgement

S.K. Gangele, J.—The petitioner has filed this petition against the order dated June 26, 2010 (annexure P/1), dated June 8, 2012 (annexure P-1/A) and also against the order dated June 28, 2010 (annexure P/2). The petitioner was assessed for payment of tax at 12.5 percent on aluminium powder. As per the petitioner, he is not liable to pay tax on aluminium powder at 12.5 percent.

2. It is an admitted fact that the petitioner has not availed of the alternative remedy of appeal available to the petitioner u/s 46 of the VAT Act and also under the Central Sales Tax Act.

3. The petitioner submitted tax returns for the financial years 2007-08, 2008-09, 2009-10, calculating the rate of tax at four percent. The authority assessed the tax of the petitioner at 12.5 percent. Entry No. 36 of Schedule II, Part II of the VAT Act prescribes rate of tax on aluminium at four percent. The aforesaid entry is as under:

4. The assessing authority has held that because the petitioner has been producing aluminium granules (powder), hence, the petitioner is liable to pay tax in accordance with Schedule II, Part IV, which is a residuary entry and attracts payment of tax at 12.5 percent. The petitioner has been producing aluminium granules (powder) mentioned by the assessing authority itself in the return. The

aforesaid product as per the respondents is different from aluminium, hence, the petitioner is liable to pay tax at 12.5 percent.

5. The honourable Supreme Court in the case of Modi Inds. Ltd. v. State of Orissa reported in [2005] 141 STC 155 (SC) has held as under in regard to coconut in powder form:

The only question now is whether the desiccated coconut that is produced by the respondents falls outside the scope of ''copra'' within sub-entry (viii). Having regard to the fact that there is material on the record, which has been accepted by the High Court, to show that copra is produced by breaking the coconut, it is difficult to hold that desiccated coconut, which is shredded copra, is not copra within the meaning of sub-entry (viii). It is not in dispute, as the High Court has noted, that coconut oil can be extracted from watery coconuts, copra and desiccated coconut. The main object of the coconut for use in the kitchen is met as well by the shredded copra as it is by the coconut itself. The distinction that is sought to be made on behalf of the appellant that shredded coconut would not be considered as appropriate an offering on an auspicious occasion as the coconut is, is not an acceptable reason for holding that desiccated coconut is not coconut. Emphasis is on the fact that the Encyclopedia Britannica states that it is the fresh meat of the coconut which is shredded and dried which results in the desiccated coconut appears to us to be misplaced for copra is also the result of drying the fresh meat of sections of the coconut.

....

10. The learned Solicitor-General appearing for the respondent-State of Orissa sought to reply upon a decision of this court in Rajasthan Roller Flour Mills Association and another Vs. State of Rajasthan and others, , to contend that the words ''that is to say'' prior to the mentioning of the different items would mean that anything which generally fell within the definition must be excluded except to the extent specified. This argument does not answer the case of the appellant, namely, that copra had been specified and copra and powdered copra are the same. When this court has already, as narrated earlier, come to the conclusion that the desiccated coconut in whatever form comes within the definition of copra, we see no reason to restrict the meaning of copra to exclude copra in powdered form. The submission of the learned Solicitor-General that regard must be had to the fact that the itemisation was in respect of oil-seeds also does not take us much further. It is nobody''s case that copra is an oil-seed as generally understood. It has been deemed to be an oil-seed for the purposes of Act by statutory definition. If copra is an oil-seed according to the statutory definition, then powdered copra can also be an oil-seed, for the purposes of the notification.

6. From the aforesaid decision of the honourable Supreme Court, it is clear that copra in powder form is copra mentioned in section 3B of the Orissa Sales Tax Act, 1947.

7. The learned single judge of this court in the case of S. Kumar Ltd. Vs.

Additional Commissioner of Sales Tax and Others, has held as under in regard to rate of tax on coal ash:

In view of the expressed language, a very wide meaning has been ascribed to this entry. Thus, in the considered opinion of this court, coal ash would be covered under entry 1 of Part IV of Schedule II and not under entry 1 of Part VI of Schedule II of the Act, which is residuary entry. It is well-settled that when a commodity is covered under a specific entry then for the purposes of determining the rate of tax, Revenue is not permitted to resort to the residuary entry. One has to draw distinction between exigibility of tax on a goods, i.e., taxability of a goods and the rate of tax payable on the sale of such goods. The Full Bench was not concerned with the rate of tax but with the question of taxability of unserviceable stores items including coal ash sold by the Hukumchand Mills after amendment in the definition of ''business''. The question was whether sales tax was exigible on the sale of unserviceable stores items or not. The Full Bench after noticing the change introduced in the definition of ''business'' held that petitioner in Hukumchand Mills Ltd. Vs. Commissioner of Sales Tax, , was liable to pay sales tax on sale of the unserviceable stores items. No doubt, the coal and the coal ash are two different commodities having different commercial values but the question in the present cases is what would be the rate of tax payable on the sale of coal ash. It is not disputed that the petitioner is liable to pay tax on the sale of coal ash. The question is only with regard to the rate of tax. In the considered, opinion of this court the test laid down by the Supreme Court in Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh, , applies on all fours to the present cases. Even after the Full Bench decision, the division Bench in Mansingh''s case (M.P. No. 1891 of 1983, decided on September 8, 1992--Madhya Pradesh High Court), took the view that rate of sales tax would be four percent as the coal ash is covered by entry No. 1 of Part IV of Schedule II. The division Bench while deciding the aforesaid case distinguished the ratio decidendi of the Full Bench and preferred to follow the earlier division Bench decisions reported in Binod Mills Co. Ltd. Vs. Commissioner of Sales Tax, and Commissioner of Sales Tax, M.P. v. Samrathmal Dhoolchand reported in [1972] 29 STC 418 (MP) (App). It may also be pointed out that for the assessment year 1989-90, the assessing officer had assessed the sales tax at the rate of 12 percent following the Full Bench view. That order was set aside by the Deputy Commissioner, Ujjain Division, holding that the Full Bench in Hukumchand Mills Ltd. Vs. Commissioner of Sales Tax, , is not for a proposition that the rate of tax payable on the sale of coal ash was at the rate of 12 percent instead of four percent. Despite the aforesaid order, the assessing officer for the period from April 1, 1990 to March 31, 1991 once again assessed the sales tax at 12 percent. That order was challenged by the petitioner before this court in Writ Petition No. 959 of 1995 (decided on August 7, 2001) and it was held by the learned single judge that the ratio laid down in the Full Bench decision is inapplicable to the determination of rate of tax and it was held that the rate of tax would be at the rate of four percent because the coal ash would fall under entry 1 of Part IV of Schedule II of the Act.

8. From the aforequoted decisions of the honourable Supreme Court and this court, it is clear that the residuary entry would not be applicable when a specific rate of tax has been prescribed on a particular commodity. In the present case, the rate of tax on aluminium has been prescribed as four percent. The Revenue is not permitted to levy the tax at 12.5 percent on the ground that the petitioner has been selling aluminium granules (aluminium powder) because nature of the product has not been changed. It is the aluminium granules which have been supplied by the petitioner to the railways. It is used as aluminium. There is no different use. Hence, in our opinion, the petitioners are liable to pay tax at four percent.

9. The learned Deputy Advocate-General has contended that the petitioner has made a product of aluminium powder from aluminium. The petitioner has manufactured a new product from aluminium. Hence, the petitioner is liable to pay tax at 12 percent. To support the contention, the learned Deputy Advocate-General appearing on behalf of the respondents/State relied on the following judgments:

(i) Collector of Central Excise, Jaipur Vs. Rajasthan State Chemical Works, Deedwana, Rajasthan, .

(ii) Monga Rice Mill etc. Vs. State of Haryana and Another, .

(iii) Ashirwad Ispat Udyog and Others Vs. State Level Committee and Others, .

(iv) Commissioner of Central Excise, Jaipur Vs. Mahavir Aluminium Ltd., .

10. In our opinion, the cases relied on by the learned Deputy Advocate-General are distinguishable because in the present case, the question is that whether the petitioner is liable to pay tax at four percent which is provided for aluminium in entry No. 36 of Schedule II, Part II of the VAT Act or 12.5 percent, which is a residual entry. As we have held earlier that since the nature of the product is same and use is same, hence, in our opinion, the petitioner is not liable to pay tax at 12.5 percent.

11. The next question is of availability of alternative remedy. It is an admitted position of law that for writ of certiorari the alternative remedy is not a bar. In regard to the alternative remedy, the honourable Supreme Court in the case of Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, , has held as under:

When an alternative and equally efficacious remedy is open to a litigant he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ. But, the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ petition unless there are good grounds therefor. But it should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self-imposed limitation, a rule of policy, and discretion rather than a rule of law and the Court may therefore in exceptional cases issue a writ such as a writ of certiorari, notwithstanding the fact that the statutory remedies have not been exhausted.

There are at least two well-recognised exceptions to the doctrine with regard to the exhaustion of statutory remedies. In the first place, it is well-settled that where proceedings are taken before a Tribunal under a provision of law, which is ultra vires it is open to a party aggrieved thereby to move the High Court under article 226 for issuing appropriate writ for quashing them on the ground that they are incompetent, without his being obliged to wait until those proceedings run their full course.

12. The honourable Supreme Court in the case of Union of India (UOI) and Others Vs. Mangal Textile Mills (I) P. Ltd. and Others, , quoted the observations of the earlier judgment of the honourable Supreme Court in Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, and has held as under:

9. In Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, , enumerating the contingencies in which the High Court could exercise its writ jurisdiction in spite of availability of the alternative remedy, this court observed thus:

7. ...that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

13. In the present case, the question is of interpretation of aluminium mentioned in the entry. Hence, the petition is maintainable.

14. Hence, the writ petition is disposed of with the following directions:

(1) That the respondents are directed to re-assess the tax liability of the petitioner after calculating the payment of rate of tax payable by the petitioner at four percent on aluminium granules (powder). Revise orders be passed accordingly.

No order as to costs.

