(2014) 07 KAR CK 0052

In the Karnataka High Court

Case No : Tax Appeal - Entry Tax No. 1 of 2014

H. Narayanappa APPELLANT

Vs

The Additional Commissioner of Commercial Taxes RESPONDENT

Date of Decision : 16-07-2014

Acts Referred:
Karnataka Tax on Entry of Goods Act, 1979 — Section 15(2), 8

Citation : (2014) 80 KarLJ 38 : (2015) 79 VST 84

Hon'ble Judges : N. Kumar, J;B. Manohar, J

Bench : Division Bench

Advocate : G. Sarangan, Senior Advocate for Gouthamdev C. Ullal, Advocate for the Appellant; S. Sujatha, Additional Government Advocate, Advocate for the Respondent

Judgement

N. Kumar, J.—This appeal is preferred by the assessee challenging the order passed by the Additional Commissioner of Commercial Taxes, Zone-3, Bangalore, holding that, Bitumen Emulsion is included in the broader category of Bitumen, which finds a place in Sl. No. 1 of the Notification dated 30-3-2002. The assessee is a Works Contractor executing contract works like formation of road, construction of houses and other works mainly relating to Government Departments. He is a registered dealer under the Karnataka Value Added Tax Act, 2003. The assessee has a taxable turnover under entry tax in a sum of Rs. 2,36,76,940/- regarding purchase of bitumen and machinery. He submitted Form 40 for a turnover of Rs. 1,34,11,634/- and paid the taxes regularly. A notice came to be issued by the Assessing Authority in Form VAT 275 of the Karnataka Value Added Tax Rules, 2005 on 14-10-2011, calling upon him to show cause why tax should not be paid for the turnover of bitumen emulsion. The assessee filed his reply. However, the assessment order was concluded and the claim of the assessee was disallowed holding that the bitumen emulsion is a dispersion of bitumen in water or other additives in the same way as water and oil do not mix easily. Water additives and bitumen together do not get on. The bitumen is emulsified so that it is applied at ambient reducing the risk of burns and exposure to Hydro Carbon fumes. In other words, it was held bitumen emulsion is similar in nature to bitumen and therefore, it was held the assessee is liable for entry tax at the rate of 5%. Aggrieved by the said order, the assessee preferred an appeal to the Joint Commissioner of Commercial Taxes (Appeals-6), Bangalore.

2. The First Appellate Authority held bitumen emulsion is not a scheduled commodity and it does not fall under Entry (e) Tar and others because this serial number specifies Tar and others, whereas bitumen as "asphalt" is listed under entry (d). If the under entry (d) was bitumen and others, then Bitumen Emulsion would fall under that. Further he held on verification of Part II of the Commercial Tax Rates of Entry Tax 2010-2011 i.e., with effect from 2010-2011, only following entries are found. Serial No. 1 Asphalt 5%, Sl. No. 5 bitumen 5% and Sl. No. 35 Tar 5%. Nowhere the Bitumen Emulsion is mentioned. Therefore, the order of the Assessing Authority levying entry tax on the same is not sustainable in the eye of law and therefore, the said order was quashed.

3. The Additional Commissioner of Commercial Taxes, by virtue of the power conferred under Section 15(2) of the Karnataka Tax on Entry of Goods Act, 1979 (for short hereinafter referred to as ''the Act'') initiated suo motu revision proceedings against the order of the First Appellate Authority. After issue of notice to the assessee, after receiving the statement of objections filed and after hearing both parties, he held that, all kinds of petroleum products are liable to entry tax when caused into the local area for the purpose of consumption, use or sale therein. The only excluded items are Liquefied Petroleum Gas (LPG), aviation fuel and kerosene. With the exception of these petroleum products, all other petroleum products are liable to entry tax. It is an undisputed fact that bitumen emulsion is a dispersion of bitumen in water or other additives. Bitumen in its nascent form is emulsified, so that it can be applied at ambient temperature reducing the risk of burn and exposure to carbon fumes. The very purpose of usage of bitumen emulsion is on par with bitumen i.e., for cementing and surfacing of the roads. The Sl. No. 1(ix)(e) of the aforesaid notification classifies "tar and others". The word "others" appearing in the aforesaid entry refers to all other petroleum products, which have not been specifically prescribed in Sl. No. 1 of Notification dated 30-3-2002. Relying on the judgment of the Apex Court in Indian Aluminium Company Ltd. Vs. Asstt. Commissioner of Commercial Taxes (Appeals) and Another etc. etc., had observed that the words "and others" would refer to petroleum products other than those which are specifically mentioned therein. The very fact that there is an exclusion clause, means that but for the said exclusion, aviation fuel, LPG, etc., would be included in the said entries and as they are not specifically mentioned, they would be covered by reason of the words "and others". Thus, on the basis of the usage of bitumen emulsion and upon consideration of the Sl. No. 1 of the notification, he held that bitumen emulsion is nothing but an emulsified form of bitumen and same continues to be a petroleum product and liable to tax at the rate of 5% and therefore, the order passed by the First Appellate Authority was set aside and the order of the Assessing Authority was restored. It is against the said order, the

present appeal is filed.

4. Sri Sarangan, learned Senior Counsel appearing for the appellant, assailing the impugned order contends, "Bitumen" and "Bitumen Emulsion" are two different goods. As Bitumen Emulsion is not specifically mentioned in the Schedule, the Government has no jurisdiction to levy entry tax on the said goods. In support of his contention, he relied on the judgment of the Madhya Pradesh High Court in the case of Tiki Enterprises and another Vs. Commissioner of Commercial Tax, M.P., Indore, , whereafter noticing the difference between the bitumen and bitumen emulsion, it was held, bitumen if not mixed with emulsifier, then its use would be difficult and dangerous. Bitumen in its original form would not absorb or mix with water, but after emulsifier is fired upon the raw bitumen, it is clear that the quality of absorbing or mixing with water would come into being. If the quality of a new product is different and it is commonly and commercially known as a different commodity, it cannot be said that the new product would fall under the original entry. Thus, bitumen and emulsified bitumen are two different commodities in the commercial world, though use of the said articles sometimes may be common, but sometimes, even the cost of the use as would also require to be considered to vary and use of the new product which is commercially different economically to some extent. Therefore, it was contended that, in the light of the aforesaid judgment, the two commodities are totally different and therefore, in the notification, as bitumen emulsion is not notified, no tax is leviable.

5. Per contra, learned Additional Government Advocate appearing for the State relying on the judgment of this Court in the case of Essar Project Ltd. Vs. Commissioner of Commercial Taxes, , where the question, which arose of consideration, was whether levy of entry tax in respect of bitumen, emulsion, which is a product manufactured from processing bitumen and certain other chemicals, is authorised and legally justified under Serial No. 1(viii) of Government Notification dated 30-3-2002. After referring to the meaning of the words "bitumen" and "bitumen emulsion" and referring to the judgments of the Apex Court, it was held, use of bitumen (asphalt) and bitumen "emulsion" is for one and the same purpose. Bitumen "emulsion" is used for road and construction and maintenance, water proofing, soil stabilization and in many other special circumstances where cold application of bitumen is desirable. Whereas the bitumen (asphalt) is exclusively used as binder in road construction and maintenance. Therefore, bitumen (asphalt) and bitumen "emulsion" are used for road construction. Accordingly, answered the substantial question of law in favour of the Revenue and against the assessee.

She also relied on a judgment of the Allahabad High Court in the case of A.R. Thermosets (Private) Limited v. Commissioner of Commercial Tax, decided in Sales/Trade Tax Revision No. 1156 of 2009 on 30th August, 2012, wherein it is held, technical reports obtained from the Government Approved Laboratories show that, bitumen and bitumen emulsion are one and the same thing. The end result of bitumen emulsion is that it makes the bitumen easily usable in its emulsified form and both are the items which are used in the construction of roads etc. The identity, commercial character and use of both the things is the same. The Tribunal by its order has not reached to the conclusion nor it has recorded any finding that the identity, character and use of the product changes either in its solid form or in its soluble emulsified form. The end result is always bitumen. The use also does not change and in the commercial sense also bitumen remains bitumen which is commonly known in Hindi as "Damar".

6. In the light of the aforesaid judgments, what emerges is, the bitumen "asphalt" and bitumen "emulsion" are made of the same material. Bitumen emulsion has the quality of absorbing or mixing in the water whereas, bitumen in its original form would be absorb or mix with the water.

7. The Supreme Court in the case of Commissioner of Sales Tax, UP Vs. M/s. Lal Kunwa Stone Crusher (P)Ltd., and Divisional Deputy Commissioner of Sales Tax and Another Vs. Bherhaghat Mineral Industries, was of the opinion that, entry "stone" is wide enough to include its various forms, such as boulders, small stones, chips, etc. It was of the opinion that "stone" even after it is crushed or broken, would continue to be "stone" though it may be named as "boulder", "small stone", "chips", "gitti", etc. Therefore, even bitumen after it is transformed into bitumen emulsion is used in the construction of roads for the qualities it has as bitumen. The characteristics of bitumen in its original form continues even after it is converted into bitumen emulsion by firing upon the raw bitumen. Both the products are used for road and construction and maintenance, water proofing, soil stabilisation, etc. The bitumen asphalt and bitumen emulsion are used as binder in road construction and maintenance. In that view of the matter, the orders passed by the Revisional Authorities holding that bitumen emulsion is also liable to tax at 5% is just and proper and do not call for interference.

8. Insofar as imposition of penalty is concerned, it is not automatic. The facts of this case disclosed that the First Appellate Authority was also of the view, as bitumen emulsion is not specifically mentioned in the Notification and bitumen emulsion is different from bitumen, there is no tax liability. In other words, the authorities within the Department are also not clear about the taxability of bitumen emulsion. Under these circumstances, if the tax was not paid, believing it to be not taxable, question of imposing penalty would not arise. Now that the authorities have taken a consistent stand, which is now approved by us, the tax is payable. If tax is not paid, the assessee is not liable to pay penalty. Hence, it is open to the authorities to invoke Section 8 of the Act, if they choose to recover any interest for delayed payment. In that view of the matter, we pass the following order:

"The appeal is partly allowed. The finding of the Revisional Authority that tax is leviable is concerned, is hereby affirmed, whereas the finding so far as penalty is concerned, it is set aside. Liberty is reserved to the authorities to impose interest under Section 8 of the Act, if they choose to do so."