**(2007) 03 AHC CK 0185**

**In the Allahabad High Court**

ITC Ltd. APPELLANT

Vs

The Mandi Parishad and Market Committee RESPONDENT

**Date of Decision :** 16-03-2007

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 11, 141
Constitution of India, 1950 — Article 141, 226, 301, 302, 304

**Citation :** (2007) 3 ADJ 383 : (2007) 3 ARC 2241 : (2007) 3 AWC 2241 : (2007) 2 UPLBEC 1828

**Hon'ble Judges :** Yatindra Singh, J;Sanjay Misra, J

**Bench :** Division Bench

**Final Decision :** Disposed Of

# Judgement

Yatindra Singh, J.—These cases revolve around constitutionality, interpretation, and applicability of the explanation to Section 17(iii) of the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 (the Act) and Rule 50-A of the Uttar Pradesh Krishi Utpadan Mandi Niyamavali, 1965 (the Rules). These are quoted in Appendix-1 to this judgment.

THE FACTS

2. ITC Limited (ITC) is a company registered under the Companies Act. Its registered office is at 37, JL Nehru Road, Kolkata (West Bengal). It initially started business with making cigarettes but at present has diversified itself into many other businesses. However, here, we are concerned with its business relating to cigarettes only.

3. In order to make cigarettes, raw tobacco is first converted into cut tobacco thereafter cigarettes are made from the cut tobacco. According to ITC.

? The raw tobacco is purchased in public auction from auction platform maintained by Tobacco Beard of India in the State of Andhra Pradesh and Karnatka.

 

? It has two thrashing units: one at Anaparti (Andhra Pradesh) and the other at Chirala (Andhra Pradesh).

? The raw tobacco is brought to the thrashing units and converted into cubical form. This is sent to its other units for converting it into cut tobacco.

? It has four manufacturing units of cigarettes: they are situate at Saharanpur (UP), Munger (Bihar), Banglore (Karnataka) and Kidderpore (West Bengal). However, the facility for making cut tobacco is only in the first three.

? Thrashed tobacco is first brought into the first three units and converted into cut tobacco. The three units sent part of cut tobacco to the fourth unit at West Bengal.

4. According to the ITC, its Saharanpur unit converts thrashed tobacco into cut tobacco and uses it in three different ways:

(i) A part of it is sent to its unit at west Bengal where there is unit for making cigarettes but has no facility of making cut tobacco.

(ii) A part of it sent to private contractors in Madhya Pradesh for making cigarettes of ITC brand on work contract basis.

(iii) The remaining part is converted into cigarettes at Saharanpur.

5. Initially, the Mandi Samitee Saharanpur was not charging any market fee on transfer of cut tobacco from ITC. Nevertheless, this question arose in 1998. The President of the Mandi Samitee, Saharanpur passed an order on 28.10.1998 holding that the ITC is not liable to pay market fee on the cut tobacco sent to its unit at West Bengal but guidance of the Director, Mandi Parishad was sought in respect of cut tobacco sent to private contractors in Madhya Pradesh.

6. The Director passed an order on 14.1.1999 setting aside the order of the President in respect of cut tobacco sent to its unit at West Bengal and remanded the matter to the Mandi Samitee, Saharanpur to decide afresh after giving opportunity to the petitioner.

7. Against the aforesaid order of the Director, the ITC filed writ petition 9515 of 1999 (the earlier WP) before this Court; it was allowed on 14.1.1999. The High Court held that:

? The Director had no power of revision as there was no valid delegation of power;

? There is no ground to reopen all cases from 31.3.1987;

? The director is under misconception about the presumption under the explanation;

? There was sufficient material to rebut the presumption under the explanation; and

 

? The explanation is being misused to extract mandi fee. On these findings, the order of the Director dated 14.1.1999 was quashed and the same relief was also granted in respect of cut tobacco sent to private contractors at Madhya Pradesh, as was granted in case of transfer of cut tobacco to its own unit by the President of the Mandi Samitee.

WP 3957 of 2000

8. The Mandi Samitee, Saharanpur went up in appeal before the Supreme Court against the aforesaid order. During pendency of the appeal, the Mandi Samitee refused to issue gate passes to ITC unless the market fee was deposited. Aggrieved by this action, the WP 3597 of 2000 has been filed.

9. This Court, while entertaining the WP, passed an interim order on 27.1.2000. It was modified on 7.3.2000. These two orders are reproduced in Appendix-2 to this judgment. In substance the interim order is that after deposit of Rs. 20 lakhs, the petitioner is required to deposit 8 lakhs per month before the District Judge who is required to invest it in fixed deposit. On fulfilling these conditions, the Mandi Samitee Saharanpur is required to issue gate pass. There is no dispute between the parties that in pursuance of the interim order, ITC has been depositing the amount mentioned in the order and obtaining gate passes.

10. ITC filed an amendment application in this writ petition on 26.5.2006. The same was allowed on 2.11.2006. The parties have exchanged their pleadings on the amended writ petition also.

11. The Supreme Court has disposed of the appeal against the order of this Court dated 14.1.1999 in WP 9515 of 1999 on 16.11.2006. The Supreme Court held has that:

? The delegation of revisional power to the Director is valid;

? On the merits, there is no scope for interference with the High Courts order because there was no power to open the assessments;

? ITC should produce accounts relating to the period subsequent to 1.8.1998 before the respondents to consider the factual aspects.

WP 22696 of 2006

12. During pendency of the aforesaid appeal in the aforesaid order of the Supreme Court, the Mandi Samiti, Saharanpur issued a notice dated 26.12.2005 asking ITC to produce the documents mentioned therein. The ITC submitted reply on 13.1.2006 and 15.2.2006. Some further documents were called for. These documents were submitted and hearing took place on 13.3.2006 and on 23.3.2006. Thereafter the impugned order assessing market fee and development cess on the cut tobacco that had remained with the Saharanpur unit for the period 2001-02 to 2004-05 was passed on 31.3.2006. Hence, the WP 22696 of 2006.

 

POINTS FOR DETERMINATION

13. We have heard Sri Shanti Bhushan, Sri SP Gupta, Senior Advocates; Sri Sanjay Pathak, and Sri Yashwant Verma advocates for ITC and Sri BD Mandhyan, Senior Advocate, Sri Satish Mandhyan and Sri Sanjay Chaturvedi advocates for the Mandi Parishad and Mandi Samitee; Sri SP Kesarwani, the standing counsel for the State. The following questions arise for determination:

(i) Whether ITC is estopped from raising the questions in WP 3957 of 2000 on the ground of constructive resjudicata.

(ii) Whether the writ petitions are liable to be dismissed on the ground of alternative remedy.

(iii) Whether cut tobacco is specified agriculture produce within the meaning of the Act?

(iv) Whether the explanation to Section 17 of the Act, is ultra vires the part XIII of the Constitution.

(v) Whether Rule 50-A of the Rules is illegal.

(vi) Whether the State of UP has legislative competence to enact explanation to the Section 17 of the Act.

(vii) Whether the petitioner is a licensed trader.

(viii) Whether the presumption under explanation to Section 17(iii) can be raised against a person who is an unlicensed trader.

(ix) What is the scope and interpretation of explanation to Section 17(iii) of the Act and Rule 50-A of the Rules and how do they operate?

(x) Whether, in the circumstances of the case, the presumption under the explanation to Section 17(iii) of the Act is rebutted or not.

(xi) In case the presumption is rebutted then, what procedure should be adopted?

(xii) Whether the order dated 31.3.2006 impugned in the WP 22696 of 2006 is illegal.

(xiii) Who is entitled to the money deposited in pursuance of interim order of this Court.

POINT - 1: NOT BARRED BY CONSTRUCTIVE RESJUDICATA

14. The counsel for the Mandi Samitee submitted that:

? ITC is not entitled to raise the points as in the earlier writ petition No. 5915 of 1999 these points were not raised.

? The decision in the earlier WP is resjudicata between the parties.

In support of the submissions, he also cited rulings that are mentioned in the

 

Endnote-2. The ITC has submitted that the points raised are not barred by constructive resjudicata and has relied upon the rulings that are mentioned in the Endnote-3.

15. The principle of resjudicata is contained in Section 11 of the CPC (the CPC) Section 141 of the CPC provides that the procedure provided in the CPC in regard to the suits shall, as far as possible, be applicable in all proceeding of any case of civil jurisdiction. However, it is clarified in the explanation that the proceedings do not include any proceeding under Article 226 of the Constitution. Thus, Section 11 of the CPC does not apply by its own force to the proceedings under Article 226. However, the principle of resjudicata are based on the public policy and are applicable to the proceedings under Article 226 also. Nevertheless, it has its limitation and as we will show, that in the circumstances of this case, it can not be pressed into service.

16. The Supreme Court decided the earlier WP on 24.11.2006. It has been held that:

(i) The delegation of revisional power to the Director is valid.

(ii) The assessment prior to 1.8.1998 cannot be reopened. In our opinion only these two points are resjudicata and can not be reopened by the parties.

17. The petitioner, by amendment, has raised questions regarding constitutionality and applicability of the explanation to Section 17(iii) by the amendment. These questions were neither raised in the earlier WP nor were decided. In our opinion, ITC cannot be debarred from raising these questions on the ground of constructive resjudicata for the following reasons:

(i) The questions are important ones and relate to the constitutionality of the Act. The Mandi Samitee or the Parishad are created under the Act. They can not decide the constitutionality of any provision of the Act.

(ii) The earlier WP was filed against the order of the Director dated 14.1.1999. The present writ petition is filed against the inaction of the Mandi Samitee in not issuing gate pass. The cause of action for these two writ petitions is different.

(iii) The amendments have been allowed. The amendments go to the root of the matter. The question raised by the amendment were not raised in the earlier writ petition. They have neither been decided by the High Court nor by the Supreme Court.

(iv) On the similar facts, these questions can well be raised by any person who was not party in the earlier WP as law was not declared on these points. If this is so then, there is no point in estopping ITC from raising these points.

18. The counsel for the respondent further submitted that the order passed by the Supreme Court is law declared by the Supreme Court and is binding upon us under Article 141 of the Constitution. He has also cited rulings that are mentioned in the endnote-4

 

19. No ruling is necessary to support the proposition that law declared by the Supreme Court is binding: it is mandate of our Constitution. But what is the law declared by the Supreme Court in the earlier WP. The law declared by the Supreme Court is that delegation of power to the Director is valid and assessment prior to 1.8.1998 can not be reopened. We are afraid, the Supreme Court has not declared any other law in that judgment.

POINT-2: NOT LIABLE TO BE DISMISSED ON THE GROUND OF ALTERNATIVE REMEDY

20. The counsel for the parties have cited rulings to support their submissions whether WPs should be dismissed on the ground of alternative remedy or not. These rulings are mentioned in the Endnotes-5 and 6.

21. We have already stated the case of ITC in paragraph 3 and 4 of this judgment. According to ITC, it brings raw tobacco from outside and processes it to make cut tobacco. A part of the cut tobacco is sent outside Saharanpur and the remaining part is consumed at Saharanpur. WP 3957 of 2000 and WP 22696 of 2006 involve levy of market fee and development cess on the cut tobacco that is being sent outside Saharanpur and that remains at Saharanpur respectively. Beth of these aspects are interconnected and arise out of one transaction. In our opinion, they have to be decided together and not separately.

22. In WP 3957 of 2000, constitutionality, applicability and interpretation of explanation to Section 17(iii) read with Rule 50-A is involved. We have already held while deciding point-1 that ITC is not barred from raising this plea. The question relating to constitutionality and validity has to be decided here. As beth aspects are interconnected and should be decided together, there is no justification in relegating ITC to revision in WP 22696 of 2006. We will like to clarify that these two WPs were connected and are being heard together as the points involved in these two WPs are interconnected.

23. Apart from abeve, (as we have indicated while discussing point-xii) factual controversy is involved in WP 22696 of 2006. The Mandi Samitee, Saharanpur has merely assessed market fee and development cess on the storage or for the use and consumption of the cut tobacco at Saharanpur. There is no finding that any sale has taken place. Even accepting the finding recorded by Mandi Samitee in WP 22696 of 2006, no market fee or development cess can be levied. It is in view of this that we are deciding WP 22696 of 2006 on merit, instead of relegating the controversy to the revisional jurisdiction.

POINT-3: CUT TOBACCO IS SPECIFIED AGRICULTURAL PRODUCE

24. Market fee can be charged on the sale of agricultural produce. The word ''agricultural produce'' is also defined in Section 2(a) of the Act (kindly see Appendix-1). For our purpose, it means produce of agriculture specified in the schedule including things processed therefrom.

25. Section 6 of the Act empowers the State Government to declare any area as

a market area in respect to agriculture produce with effect from the date specified in the declaration. Section 8 of the Act empowers the State Government to include or exclude any agricultural produce from the list of agricultural produce. Section 4-A of the Act empowers the State Government to add, amend or omit any of the items of the agricultural produce mentioned in the schedule. Tobacco is mentioned as agricultural produce in the schedule by the notification dated 11.4.1978. Thee is no dispute between the parties that raw tobacco is an agricultural produce within the meaning of this Act. But the dispute is whether cut tobacco is processed form of tobacco or not. In case it is then it is a specified agricultural produce as defined in Section 2(a) of the Act, otherwise it is not.

26. There is no direct case on the point whether cut tobacco is processed form of tobacco or not. However, the counsel for the parties relied upon different rulings to support their case on this point. They are mentioned at Endnote-7 and 8. The counsel for ITC also placed reliance on entries in the Custom and Excise Act to show that cut tobacco is not processed form of tobacco.

27. The first two decisions cited by the counsel for ITC (Endnote-7) are under the Excise Act or the Income Tax Act. These rulings or the entries mentioned in the custom and Excise are for purposes of those Acts only. They may not be taken to interpret the word ''agricultural produce'' in the Act.

28. The remaining two rulings are under the Mandi Samitee Act but relate to the seeds. However, as explained in the Pilibhit Pantnagar case (ruling No. 4 in the Endnote-7) (at paragraphs 34 and 35) the production of seeds is an integrated process and needs to be regulated at every stage in order to maintain genetic identity and genetic purity. It was further explained in Seedsman Association Hyderabad Principal Secretary to Government: 2004 (7) SCC 56 (paragraph 9, 10) that seeds are chemically treated and are not fit for human consumption. It is for these reasons that seeds are not treated as items that are processed form the specified agricultural produce and are treated as a different product than grains: a separate commodity. But this is not true in the case of cut tobacco.

29. The petitioner has filed process for making cut tobacco. It is annexed as Anenxure1-A to WP 3957 of 2000. The leaf portion of raw tobacco known as Lamina and stalk is treated, sliced, and cut into pieces. It is not a complicated process. The purpose of grains and seeds are different however, the purpose of tobacco and cut tobacco is the same. The two division benches of our court reported in Ram Bharose and other KUM 1995 ALJ 115 and Kesarwani Zarda Bhandar State of UP and Ors. 2003 (53) ALR 478 have held that chewing tobacco and Zarda are processed form of tobacco and are specified agricultural produce within the Act. Considering the totality of the circumstances, we hold that cut tobacco is processed form of tobacco and is an agricultural produce within the meaning of the Act.

POINT-4 & 5: NOT VIOLATIVE OF PART XIII - RULE VALID

30. Part XIII of the Constitution is titled as Trade, Commerce and Intercourse

 

within the territory of India''. Article 301 states that subject to provision of this part, trade, commerce and intercourse throughout the territory of India shall be free. Article 302 of the Constitution empowers the Parliament to impose restriction in the public interest on freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India. Similarly Article 304(b) of the Constitution empowers the State legislature to impose reasonable restriction in the public interest on freedom of trade, commerce or intercourse with or within that State. However its proviso clarifies that bill or amendment for this purpose will not be introduced or moved in the Legislature of a State without the previous sanction of the President.

31. The counsel for the ITC submitted that if the case of the Mandi Samittee is accepted and transaction of sending cut tobacco to its unit in West Bengal and to the private contractors is treated as sale then it will be interstate commerce. In such an event the explanation to Section 17 read with Rule 50-A will be ultravires as,

? It was added by UP Act No. 12 of 1987;

? This explanation places restrictions on interstate trade as well as on the trade and commerce within territory of India;

? This amendment was made without previous sanction of the President of India.

32. The Act as it was originally enacted was passed with the previous sanction of the President. However no previous sanction of the President was obtained before amending it by UP Act No. 12 of 1987. The counsel for the parties have cited rulings (see Endnote-9) for the proposition whether prior sanction of the President is necessary or not for the amendments in the Act but in view of our finding regarding scope of Part XIII of the Constitution, it is not necessary to decide this submission.

33. The scope of part XIII of the Constitution is explained in the following three rulings of the Supreme Court:

(i) Atiabari Tea Co., Ltd. Vs. The State of Assam and Others,

(ii) The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others,

(iii) Jindal Stainless Ltd. and Another Vs. State of Haryana and Others,

34. The Supreme Court in the Atiabari case explained Article 301 as follows: ''We think it would be reasonable and proper to hold that restrictions, freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301. The argument that all taxes should be governed by Article 301 whether or not their impact on trade is immediate or mediate, direct or remote, adopts, in our opinion

 

an extreme approach which cannot be upheld. (Paragraph 51)....

Our conclusion, therefore, is that when Article 301 provides that trade shall be free throughout the territory of India it means that the flow of trade shall run smooth and unhampered by any restriction either at the beundaries of the States or at any other points inside the States themselves. It is the free movement or the transport of goods from one part of the country to the other that is intended to be saved, and if any Act imposes any direct restrictions on the very movement of such goods it attracts the provisions of Article 301 and its validity can be sustained only if it satisfies the requirements of Article 302 or Article 304 of Part XIII. (Paragraph 52)

35. The Atiabari case was considered in the Automobile Transport case. It was explained that regulatory measure do not impede the freedom of trade and are excluded from purview of part XIII of the Constitution. The Court explained it as follows:

After carefully considering the arguments advanced before us we have come to the conclusion that the narrow interpretation canvassed for on behalf of the majority of the States cannot be accepted namely, that the relevant articles in Part XIII apply only to legislation in respect of the entries relating to trade and commerce in any of the lists of the Seventh Schedule. But we must advert here to one exception which we have already indicated in an earlier part of this judgment. Such regulatory measures as do not impede the freedom of trade, commerce and intercourse and compensatory taxes for the use of trading facilities are not hit by the freedom declared by Article 301. They are excluded from the purview of the provisions of Part XIII of the Constitution for the simple reason that they do not hamper trade, commerce and intercourse but rather facilitate them. (Paragraph 14)

We have, therefore, come to the conclusion that neither the widest interpretation nor the narrow interpretations canvassed before us are acceptable. The interpretation which was accepted by the majority in the Atiabari Tea Co., Ltd. Vs. The State of Assam and Others, is correct, but subject to this clarification. Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Article 301 and such measures need not comply with the requirements of the proviso to Article 304(b) of the Constitution. (Paragraph 17)

36. The Automobile Transport case also laid down a test to find out whether the tax is compensatory tax or not. In the subsequent cases, some doubts had arisen regarding the same and the matter was referred to the Constitution Bench in the jindal Stainless case. The Constitution Bench of the Supreme Court held that the text laid down in the Automobile Transport case is still valid. The Supreme Court explained,

The concept of compensatory taxes was propounded in Automobile Transport in which compensatory taxes were equated with regulatory taxes. In that case, a working test for deciding whether a tax is compensatory or not was laid down. In that judgment, it was observed that one has to enquire whether the trade as a class is having the use of certain facilities for the better conduct of the trade/ business. This working test remains unaltered even today.(Paragraph 49)

37. The regulatory measures are excluded from part XIII of the Constitution. The Act imposes a fee. It is in the nature of regulatory fee. It is excluded from the purview of Part XIII of the Constitution. It can not invalidated on this ground. Explanation to Section 17 (iii) of the Act alongwith Rule 50-A of the Rule can not be invalidated on this account.

POINTS-6: STATE HAS LEGISLATIVE COMPETENCE

38. We have held that cut tobacco is a specified agricultural produce. Market fee and development cess can be charged on the sale of cut tobacco that takes place within the market area of the Mandi Samitee. According to ITC, there is no sale as,

? Part of cut tobacco is transferred to its unit in West Bengal for converting it into cigarette; and

? Some part is sent to the private contractors in the State of MP for making cigarette for ITC.

However, the counsel for ITC has gone a step further. According to him, if the case of Mandi Samittee is accepted and the transaction is treated to be a sale, even then neither the state of UP nor its instrumentality is entitled to charge fee or cess as it will be interstate sale.

39. The counsel for the petitioner has elaborated their submissions by categorising sales into three types of sales:

(i) Sale occurring outside the State;

(ii) Sale which are interstate sale; and

(iii) Sale within the State.

According to them, the State of UP has no legislative competence to enact a law or charge fee/tax in respect of first and second kind of sale.

40. The Union and the State are empowered to enact legislation regarding fee (excluding the fee taken in any court) in respect of any of the matter mentioned in the list 1 or list 2 respectively: this is due to entry 96 of list 1 and Entry 66 of list 2. A State has power to legislate law for its own territory. It has no competence to enact law for any other territory. It can not legislate in respect of sale occurring outside the State.

41. Entry 42 of list 1 is interstate trade and commerce. There is no such entry in list 2. It is clear that if any fees is to be charged in respect of interstate trade and commerce then it can be charged by the law made in pursuance of entry 42

 

and 96 of the list or by a law enacted by the Parliament and not by the State Government. If a fee is charged for the interstate sale, it will be beyond legislative competence of the State. But does explanation to Section 17(iii) provide charging fee for interstate sale?

42. Section 17(iii) of the Act is a charging section. It imposes a fee for the sale held within the market area namely, within the State of UP. It is not the case of the State that it is levying any fee on the interstate sale. On the contrary, the case of the State is that it is competent to charge fee in respect to sale within the State of UP and the fee is imposed in respect to sale within the market area of a Mandi Samitee.

43. Explanation to Section 17(iii) of the Act does not make a interstate sale a sale within the market area, it merely provides a rule of evidence: a presumption that in case any specified agricultural produce is moving out of the market area of a Mandi Samitee then it will be presumed that the sale has taken within that market area. This is rebuttable presumption. Evidence can always be led to prove that the transaction is not a sale or if it is a sale then it is outside the State or is interstate sale. In case the presumption is rebutted then this explanation does not convert the transaction into a sale within the market area entitling Mandi Samitee to charge market fee. In our opinion, this is the correct interpretation of the explanation to Section 17(iii) of the Act. If this is the scope and interpretation of the explanation then it can not be said that it is beyond legislative competent of the State Legislature.

POINT-7 & 8: PRESUMPTION CAN BE RAISED

44. Section 17(iii)(b) is the charging section under the Act, (kindly see Appendix-1). It states that market fee and development cess shall be payable on transaction of sale of the specified agricultural produce within the market area. The explanation has been added in the end of the section. This explanation is for the purposes of Sub-section (iii) of Section 17. It provides a presumption of sale within the market area if any specified agricultural produce is taken out from market area.

45. The counsel for the ITC emphasised on the use of the words ''by or on behalf of licensed trader'' in the explanation and submitted that:

? The presumption under the explanation can only be raised if the specified agricultural produce is being taken out by or on behalf of the licensed trader,

? It can not be raised if the specified agriculture produce are being taken out by an unlicensed trader;

? The petitioner is not a licensed trader within the meaning of the Act; and

? The explanation is not applicable to it.

46. It is admitted case that the ITC has got some licences. According to ITC it has licence to store raw tobacco. It has also got licence (under protest) for

 

selling tobacco waste. The word ''trader'' is defined u/s 2(y) of the Act (see Appendix-1). It means a person who is engaged in buying and selling of agricultural produce as a principal or as a duly authorised agent. It also includes the person engaged in processing of agricultural produce namely tobacco. There is dispute between the parties whether the petitioner is selling agricultural produce or not. However we have already held that cut tobacco is processed from of the specified agricultural produce tobacco. The petitioner is processing an agricultural produce. He is licensed trader within the meaning of Section 2(y) of the Act and the explanation is applicable to him. However we do no decide this point against the petitioner only for this reason.

47. The levy is charged u/s 17(iii)(b) of the Act and the explanation refers to Sub-section (iii) of Section 17 of the Act. This explanation has to be read in the light of the Sub-section 17(iii) of the Act. The charging section applies to any one who is selling and buying specified agricultural produce within the market area. In case the submission of the petitioner is accepted then a person who is doing everything legal after taking a licence is within the purview of the explanation but a person who is doing business illegally by not taking licence will not be within the same. This can not be the intention of the legislature. The purpose of the explanation is to raise a presumption of sale within the market area if the specified agricultural produce leaves the market area. In our opinion, this presumption is applicable to everyone who is doing the business of specified agricultural produce within the market area irrespective of the fact whether the person is licensed trader or not. The presumption under the explanation has to be raised against ITC as it does take out specified agricultural produce from the market area of the Mandi Samitee, Saharanpur.

POINT- 9 to 11: PRESUMPTION REBUTTED - THE PROCEDURE TO BE ADOPTED

48. Rule 50-A is titled as ''gate pass''; it provide procedure for taking gate passes. It states that a person has to give declaration in form No. V before any gate pass can be issued. The form includes a declaration that sale has taken place and market fee has been paid. The form and the declaration does not contemplate the case of the trader, where no sale has taken place. In this sense, it may be slightly defective however, this defect may be overcome in case the trader provides a declaration that no sale has taken place.

49. Here, the case of ITC is that no sale has taken place and as such it is not liable to pay any mandi fee and development cess. ITC has been submitting declaration stating that there is no sale as only stocks are being transferred. It has averred in paragraph 24 of the WP 3957 of 2000 that alongwith this declaration, the following documents has been filed to show that no sale has not taken place:

(a) Industrial licence/registration showing the list of factories owned by ITC

(b) Excise gate passes showing the dispatches as stock transfer and snot for sale.

 

(c) Form A.R. 3A which is the rewarehousing certificate under the Central Excise Act, 1944.

(d) Affidavits to the effect that cut tobacco is not sold at any point of time by the Petitioners and that at no point of time does the ownership of the property passes from ITC to anyone else.

50. It is further averred by ITC that it has filed the following documents in the case of cut tobacco sent to private contractors in the State of MP:

(a) Manufacturing agreements,

(b) Affidavits of contract manufacturers to the effect that cut tobacco received by them is used exclusively for manufacture of cigarettes on behalf of the company and not sold at any point in time.

(c) Excise gate passes showing the dispatches as stock transfer and not for sale.

(d) Payment vouchers of manufacturing charges.

(e) Vouchers showing the reimbursement of excise duty paid by the contract manufacturers.

(f) Insurance policies showing that ITC insures the goods while in the possession of the contract manufacturers.

51. Paragraph 24 of the writ petition, has been answered in paragraph 20 of the counter affidavit. It is not denied that these documents were not filed alongwith declaration. What has been stated therein is, that these documents are not sufficient to show that the sale has not taken place. There is no reasoned order considering these documents.

52. The documents filed by the petitioner include excise gate pass and Form AR 3A. These are statutory forms. These documents show that some cut tobacco is being sent to the own factory of ITC at West Bengal or is being sent to private contract manufacturers in the Stale of MP. The other documents show that manufacturing charges are paid to the contractors and Excise duty is being reimbursed to them. The insurance of cut tobacco is in the name of the petitioner. These documents are sufficient to rebut the presumption raised in the explanation to Section 17(iii) of the Act. The question is, if the presumption is rebutted then what procedure should be adopted.

53. The counsel for Mandi Samittee has brought to our notice an unreported decision of the Supreme Court in civil appeal No. 1769-1773 of 1998, Krishi Utpadan Mandi Samitee v. Sarswati Cane crusher (the Sarswati Cane case) decided on 25.3.1998 and submitted that the same procedure as mentioned therein be adopted.

54. The observations made by the Supreme Court in the Sarswati Cane case has to be seen in the light of the facts of that case. That appeal arose out of division bench decision of our Court reported in Shri Mahalaxmi Sugar Works v. State of

 

UP 1987 UPLBEC 957 where the division bench of our court had provided a procedure, which was partially modified by the Supreme Court.

55. In the Sarswati Cane case, there was no denial of the sale by the trader; the dispute therein was whether the sale takes place within the market area of a Mandi Samitee or not. According to the traders, it takes place outside the market area whereas the Mandi Samitee was claiming that presumption regarding sale has to be raised in view of the explanation to Section 17(iii) of the Act. This is clear from paragraph 9 and 10 of the High Court judgment as well as the following observation of the Supremo Court,

We conceive that when demands are raised by the Krishi Utpadan Mandi Samiti against a trader before he could ask for transit of goods outside the market area, the trader would be entitled to tender a valid rebuttal to say that no sale had taken place within the notified area.

56. The procedure and observations made by the Supreme Court were on the aforesaid facts. Here the facts are different. The case here is that there is no sale. There are documents including the statutory forms that support the case of ITC. These documents rebut the presumption under the explanation. In our opinion, in such a case where presumption of sale altogether is rebutted, the mandi samitee has to issue gate pass, however it is subject to final decision. This is to be done unless there are some reason in writing. There is no such reasons in the present case. Mere assertion that they do not rebut the presumption is not sufficient.

57. We hold that in all cases where,

? The case of the trader is that there is no sale but only a stock transfer or transfer for manufacturing purposes; and

? The trader files sufficient documents to rebut the presumption under explanation to Section 17(iii); then

? The Mandi Samitee has to issue gate pass.

However, this does not prohibit the Mandi Samitee from investigating the matter. In case Mandi Samitee investigates and passes a speaking order as to why the case of the trader is not acceptable, then it may impose mandi fee or development cess and recover the same. However, in such event, the mandi samittee has to afford opportunity and confront the trader with any adverse evidence. The mandi samitee may also require a party to supply relevant documents under exercise of powers granted to it under the Act, but once the presumption is rebutted then the gate pass has to be issued.

POINT NO-12: THE ORDER IS ILLEGAL

58. By the order dated 31.3.2006, the Mandi Samitee Saharanpur has charged market fee and development cess on the cut tobacco that remained with the manufacturing unit of ITC at Saharanpur. This has been done on the following

 

findings:

(i) ITC and manufacturing unit of ITC at Saharanpur are two different commercial units;

(ii) ITC has brought raw tobacco from outside the State and sold it to its unit within the market area of Mandi Parishad;

(iii)The cut tobacco which remained with the manufacturing unit of ITC at Saharanpur for the year 2001-02 to 2004-05 is 499216.00 quintals. Its value is Rs. 2,85,90,10,032.00. Mandi fee and development cess has been charged at the prescribed rate on this value.

59. ITC is a registered company under the Companies Act. It has manufacturing units and offices throughout the country. This is for the convenience for conducting business. The fact that it has different offices or different units at different places does not mean that the offices and units have separate legal commercial identity. Offices, manufacturing units of one company are one legal identity. No statutory provision of law or general law has been brought to our notice that in case any company has different units or offices then they are different commercial units. Offices and different manufacturing units of the same company cannot be treated as different legal entities and have to be treated as one entity. Transfer from one office to another office or from one unit to another or from office to a unit or vice Versa cannot be a sale: a person can not sell anything to itself. (Kindly see English Electric Co. of India Ltd. and Another Vs. The Deputy Commercial Tax Officer and Others, and Sahney Steel and Press Works Limited and Another Vs. Commercial Tax Officer and Others, Hindustan Metal Works v. Commission of Sales Tax (1971) 27 STC 55 SC (at 558)}.

60. Explanation to Section 17(iii) of the Act, raises a presumption about sale in Case the specified agricultural produce leaves the market area. It is rebutable presumption. There is no statutory provision raising a presumption of sale within the market area in case of entry. The impugned order states the ITC has brought tobacco from outside State from ITC and sold it to its manufacturing unit. There is neither any evidence nor any statutory presumption or basis that agricultural produce brought by ITC from outside the State was sold again to its manufacturing unit. It is difficult to imagine as to why a person will, and how, a person can sell a thing to itself.

61. In this case, the market fee as well as development cess was ultimately charged on the cut tobacco which remained with the manufacturing unit of ITC at Saharanpur. The case of the ITC is that the cut tobacco left at Sahranpur is used for making cigarettes. Even if this case of the petitioner is not correct, no market fee can be charged; it can be only charged if it is further hold that it was sold. There is no presumption that a thing that remains with a person will be treated as sold.

62. The impugned order does not record a finding that the petitioner has sold

 

this cut tobacco to anyone. Without recording any finding no market fee or cess can be charged. The order shows the bias of the Mandi Samitee, ''come what may, We will charge Mandi fee and development cess even if it is not payable''. Undoubtedly, cigarettes are harmful and if the government thinks proper it may ban but this kind of approach is not correct.

63. In view of abeve, the impugned order cannot be sustained and is quashed, However, it will be open to Mandi Samitee to pass fresh order in accordance with law. This can only be done if the cut tobacco left with the petitioner is sold to any specific person within the market area. Unless the Mandi Samitee records a finding as to whom It is sold, market fee and development cess can not be charged: a sale can not be assumed. Needless to add that this can only be done, after affording opportunity to the petitioner.

POINT-13: THE MONEY WILL ABIDE THE ORDER ON FACTUAL ASPECTS

64. The petitioner has already deposited the money before the District Judge in pursuance of the interim order passed by this Court. This amount has been Invested in fixed deposit of State of Bank of India. As final order has not been passed and the matter is to be decided in respect of transactions from 1.8.1998, it is appropriate that this money should continue in deposit where it is so deposited and the FD may be renewed from time to time. The ITC may appear before the Mandi Samitee, Saharanpur and, if necessary it may file any other document or may supply such other documents as are legally required by the Mandi Samitee. The Sandi Samitee thereafter may finally decide the case by a reasoned order. The money so deposited will abide the result of the decision so taken.

65. We also clarify that so far as future transactions of issuing gate passes are concerned the Mandi Samitee shall abide by our decision on points numbers 9 to 11 and it will not be necessary for the petitioners to deposit any money before the District Judge before getting the gate pass issued.

CONCLUSIONS

66. Our conclusion are as follows:

(a) Cut tobacco is processed form of raw tobacco and is a specified agricultural produce.

(b) The presumption u/s 17(iii) of the Act can be raised against a licensed or unlicensed trader, if the conditions mentioned therein are satisfied.

(c) The explanation to Section 17(iii) of the Act read with Rule 50-A of the Rules is neither violative of Part XIII of the Constitution, nor beyond legislative competence.

(d) In case of no sale--in contradiction to the claim of a sale outside the market area of the mandi samitee--if necessary documents rebutting the presumption are also filed alongwith the declaration then gate pass has to be issued. However, this does not prohibit the Mandi Samitee to exercise any power granted under the Act or to pass reasoned orders holding otherwise after opportunity to the person concerned. In case it is held otherwise then the market fee and development cess can be recovered in accordance with law. In that event, the order can also be challenged in accordance with law.

(e) In the present case the petitioner had filed sufficient documents to rebut the presumption of sale.

(f) The order dated 31.3.2006 is illegal.

67. In view of our findings, the order dated 31.3.2006 is quashed. The petitioner may appear before the Mandi Samitee, Saharanpur on 23.4.2007. The Mandi Samitee may pass fresh reasoned order if any sale of cut tobacco has taken place within the market area. The gate pass shall be issued in accordance with the conclusions mentioned in the preceding paragraph. With these observations and directions both the writ petitions are disposed of.