

(2009) 03 KL CK 0096

In the High Court Of Kerala

Case No : Writ Petition (C) No's. 17117, 17152, 17196, 18628, 19346, 19355, 19369, 19951, 21696, 21773, 23183, 23980, 24150, 25373, 25394, 27125, 28462, 29961, 29962, 30410, 30457, 33472, 35208 and 35986 of 2007, 7217, 11713, 16232, 26601, 27087 and 30045 of 2008

J and S Granites Company

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 05-03-2009

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 59A, 7(1)

Kerala Value Added Tax Act, 2003 — Section 5(1), 8, 94

Citation : (2009) 2 ILR (Ker) 505 : (2009) 25 VST 424

Hon'ble Judges : Thottathil B. Radhakrishnan, J

Bench : Single Bench

Advocate : Bechu Kurian Thomas, Arikkat Vijayan Menon, Harisankar V. Menon, Meera V. Menon, N. James Koshy, Sojan James, P.S. Sreedharan, S. Subhash Chand, T. Sanjay, S. Anil Kumar Trivandrum, K.S. Hariharan, Thampan Thomas, Jacob Chacko, V.P. Sukumar and Kuryan Thomas, for the Appellant; Vinod Chandran, Special Government Pleader (Taxes), for the Respondent

Final Decision : Allowed

Judgement

Thottathil B. Radhakrishnan, J.—What is the compounded rate of tax applicable to primary crushers in terms of the similarly worded Explanations occurring at the foot of Section 7(1) (b) of the Kerala General Sales Tax Act, 1963, hereinafter, "the KGST Act", and Section 8(b) of the Kerala Value Added Tax Act, 2003, for short, "the KVAT Act" ?

2. The petitioners have granite metal crushing units. They were assessed under the KGST Act till they came to be assessed under the KVAT Act from its introduction on April 1, 2005.

3. On April 2, 2005, the Commissioner of Commercial Taxes issued order No. C3.44514/04/CT, hereinafter, the "Clarification" for short, u/s 59A of the KGST

Act, clarifying that the rate of compounded tax of primary crusher is 50 per cent of the rate mentioned in section 7(1) (b) of that Act, depending on the size of the machinery. While that clarification held the field, on the premise that the assessing authorities are not complying with the statutory position in letter and spirit and that the provision is being misinterpreted though the tax formulation in relation to the primary crushers was clarified on April 2, 2005 as aforesaid, the Commissioner issued Circular No. 11/2007 hereinafter, for short, "the Circular", on February 28, 2007 stating that the statutory provision is that the compounded tax in respect of the primary crushers would be 50 per cent of the total compounded tax arrived for the secondary crushers in a crushing unit. These writ petitions are filed by the dealers seeking to quash the circular and for incidental and consequential relief in the wake of different proceedings on the basis of the circular.

4. The petitioners contend that the impugned circular is issued contrary to the statutory provisions and is in excess of the authority conferred as per Section 59A of the KGST Act and Section 94 of the KVAT Act and is, hence, without jurisdiction. It is argued that the impugned action amounts to prescribing a rate of tax contrary to the statutory prescriptions, to do which, the power is just not available. It is pointed out that the clarification of April 2, 2005 reflects the true position and that the impugned circular is beyond the authority of the Commissioner.

5. The Department contends and argues that the use of the word "rates" in the last limb of the Explanations under interpretation has to be understood to prescribe the rate applicable for primary crusher as 50 per cent of the aggregate of the rates applicable to all the other crushers in the establishment of the dealer and that therefore, the impugned circular is in order and calls for no interference. It is further argued that a provision for payment of tax at compounded rates is essentially one of exemption from the rate of tax that would otherwise apply and hence, the provision calls for strict construction and therefore, even if two views are possible, the one in favour of the assesseees cannot be permitted to prevail at the cost of the exchequer.

6. In so far as it is relevant, Section 59A of the KGST Act reads as follows:

59A. Power of Commissioner of Commercial Taxes to issue clarification.- (1) If any dispute arises, otherwise than in a proceedings before any appellate or revisional authority or in any court or Tribunal, as to whether, for the purpose of this Act,:

(a) to (c)...

(d) any tax is payable in respect of any sale or purchase, or if tax is payable, the point and the rate thereof; or

(e)...

such dispute shall be decided by the Commissioner of Commercial Taxes on application by a dealer or any other person.

7. Section 94 of the KVAT Act, in so far as it is relevant, is as follows:

94. Power of Commissioner to issue clarification.-(1) If any dispute arises, otherwise than in a proceedings before any appellate or revisional authority or in any court or Tribunal, as to whether, for the purpose of this Act,:

(a) to (c)...

(d) any tax is payable in respect of any sale or purchase, or if tax is payable, the point and the rate thereof; or

(c)

such dispute shall be decided by the Commissioner on application by a dealer or any other person.

8. Having in mind the statutory titles of those provisions, to wit, "power to issue clarification", the power of the Commissioner to decide a dispute is to be understood as a power to clarify : to resolve the dispute as to the application of the statutes in question and not beyond. The provisions in Section 59A of the KGST Act and section 94 of the KVAT Act amount only to the statutory recognition of the authority, to clarify, meaning thereby, to make clear; to elucidate; to explain; its antonym being, "to confuse". The scope of any exercise with reference to those provisions is only to remove the confusion, if any. Such a provision is intended only to provide a statutory declaration as to the identity of the executive statutory functionary who would be the repository of the authority to clarify, in case of any confusion. In the executive realm, this is necessary. The word "power" does not appear to be the proper word to describe that authority, having regard to the different shades of what is called "authority" that go into the legal sense of the term "power". In the situation in hand, the "power" to issue clarification does not include the authority to issue any clarification or circular contradicting the provisions of the Acts and Rules framed thereunder. The KGST Act and the KVAT Act are primary legislations. They contain the will of the sovereign, namely, We, The people; expressed through the authorized legislative limb; which is not to be watered down by the executive. That is why no subordinate legislation is to contradict it. Even if it were to be argued that the legislative power includes the power to delegate the power to impose tax, or to fix the rate of tax, no power is conferred on the Commissioner under the KGST Act or the KVAT Act, to impose tax. An authority to clarify is given to a statutorily chosen authority, like the Commissioner, to exclude incongruous misunderstandings and mis-applications of the primary legislation and the subordinate rules. That authority does not include the power to interpret the Act and the Rules contrary to the legitimate run of those statutory materials. When statutory provisions govern the field, there is no room for any executive decision, including by the issuance of statutory circulars or orders, which deviate from the effect of the provisions of a statute or statutory rules framed thereunder. Therefore, any clarification, issued contradicting the legal effect of the Act and the Rules, would be plainly ultra vires those primary and secondary legislations.

9. In *Jhunjhunwala and Others Vs. State of U.P. and Others*, , the apex court reiterated that circular issued by the Commissioner could not create any liability where the statutory definition does not provide so and that it needs no emphasis that the circular cannot create tax liability. Administrative instructions cannot override statutory rules. Administrative instructions, circulars, orders, etc., have to be consistent with the statutory provisions. The power to make a piece of subordinate legislation is itself a power to act within the purview of the primary legislation. Even that power has to be worked out within the statutory frame of the parent legislation. See the decisions in *Paluru Ramkrishnaiah and Others Vs. Union of India (UOI)* and *Another*, , *State of Orissa and Others Vs. Mamtarani Sahoo and Another*, and in *Kerala Samsthana Chethu Thozhilali Union Vs. State of Kerala and Others*, . This Court held in *M. Anandavally v. President* [2008] 3 KHC 878, that though they may have a statutory flair, circulars cannot override or alter the prescriptions of the primary legislation and the power is only to give effect to the provisions of the Act and not to act de hors it.

10. Hence, the correctness or Otherwise of the view in the impugned circular that the compounded tax in respect of primary crushers would be 50 per cent of the total compounded tax arrived for the secondary crushers in a crushing unit would depend upon the question whether that is in accordance with, or, is contrary to the relevant provisions of the KGST Act and KVAT Act.

11. Section 7(1)(b) of the KGST Act provided as follows:

7. Payment of tax at compounded rates.-(1) Notwithstanding anything contained in Sub-section (1) of Section 5:

(a)...

(b) any mechanical crushing unit producing granite metals may, at its option, instead of paying tax in accordance with the provisions of that sub-section, pay tax at the following rates, namely:

(i) for each crushing machine of size not Rs. 30,000 per annum exceeding 30.48 cm x 22.86 cm. (ii) for each crushing machine of size exceeding Rs. 90,000 per annum 30.48 cm x 22.86 cm., but not exceeding 40.64 cm x 22.86 cm. (iii) for each crushing machine of size exceeding Rs. 1,80,000 per annum 40.64 cm x 22.86 cm.

12. By the Kerala Finance Act, 2001, the following Explanation was added with effect from July 23, 2001.

Explanation.-Primary crusher shall also be reckoned for the purpose of computation of the quantum of compounded tax.

13. Later, that Explanation was substituted with effect from April 1, 2004 as per the Kerala Finance Act, 2004 as follows:

Explanation;- For the purpose of this clause primary crusher shall also be reckoned for computation of the quantum of compounded tax and the rate of

compounded tax applicable to primary crusher shall be 50 per cent of the rates mentioned in items (i), (ii) and (iii) above.

14. On the introduction of the KVAT Act from April 1, 2005, the petitioners are assessed under the provisions thereof. Section 8(b) of that Act read as follows:

8(b). Any dealer producing granite metals with the aid of mechanized crushing machine may, at his option> instead of paying tax in accordance with the provisions of the said sections, pay tax at the following rates, namely:

(i) for each crushing machine of size not Rs. 30,000 per annum exceeding 30.48 cm x 22.86 cm. (ii) for each crushing machine of size exceeding Rs. 90,000 per annum 30.48 cm x 22.86 cm., but not exceeding 40.64 cm. x 22.86 cm. (iii) for each crushing machine of size exceeding Rs. 1,80,000 per annum 40.64 cm x 22.86 cm.

Explanation.-Primary crusher shall also be reckoned for the purpose of computation of the quantum of compounded tax.

15. The aforesaid Explanation at the foot of Section 8(b) of the KVAT Act was substituted by Act 10 of 2005 to read as follows:

Explanation.-For the purposes of this clause, primary crusher shall also be reckoned for the purpose of computation of the quantum of compounded tax and the rate applicable for primary crusher shall be fifty per cent of the rates mentioned in items (i), (ii) and (iii) above.

16. The question boils down to the interpretation of the Explanation occurring at the foot of Section 7(1)(b) of the KGST Act as it stood after April 1, 2004 and the Explanation to Section 8(b) of the KVAT Act as it now stands. At the risk of repetition, they are quoted hereunder, for immediate reference:

KGST Act-Section 7(1) (b)-Explanation .-For the purpose of this clause primary crusher shall also be reckoned for computation of the quantum of compounded tax and the rate of compounded tax applicable to primary crusher shall be 50 per cent of the rates mentioned in items (i), (ii) and (iii) above.

KVAT Act-Section 8(b)-Explanation,-For the purposes of this clause, primary crusher shall also be reckoned for the purpose of computation of the quantum of compounded tax and the rate applicable for primary crusher shall be fifty per cent of the rates mentioned in items (i), (ii) and (iii) above.

17. Though not in *pari materia*, *stricto sensu*, by syllables to their hilt, the aforesaid Explanations have the same legal effect, even according to dealers and the Department. Such similarity is also indisputable.

18. Section 7(1) (b) of the KGST Act and Section 8(b) of the KVAT Act classify crushing machines into three types depending upon their size and thereby prescribe the respective compounded rate at which tax payable for each crushing machine. Any doubt as to whether a primary crusher is also to be reckoned for

the purpose of computation of the quantum of compounded tax stood concluded by the provisions in the Explanation introduced in the KGST Act from July 23, 2001 and by the availability of the Explanation that stood in the KVAT Act from April 1, 2005 to the effect that primary crushers shall also be reckoned for the purpose of computation of quantum of compounded tax. While those Explanations governed the field, the indisputable position was that all crushing machines employed in the process of producing granite metals with the aid of mechanized crushing machines were to be reckoned on the basis of the size of each one of them. The Explanations which fall for consideration, which hold the field from April 1, 2004, retain the provision that stood earlier, viz., that the primary crusher shall also be reckoned for computation of the quantum of compounded tax. They further state that the rate of compounded tax applicable to primary crusher shall be 50 per cent of the rates mentioned in the three items, which are nothing but the classification of the crushing machines on the basis of their respective size. The equation provided by the Explanation is made after the prescription that primary crushers shall also be reckoned for the purpose of computation of compounded tax. This means that the rate applicable for a primary crusher of a particular size shall be 50 per cent of the rate applicable to a crushing machine, depending upon the classification of the crushing machine by size, as provided in the main part of the section. For example, if the primary crusher is one not exceeding the size of 30.48 cm x 22.86 cm, the rate of tax applicable to that crusher will be 50 per cent of the rate mentioned in item No. (i) of the respective sections, viz., Section 7(1)(b) of the KGST Act and Section 8(b) of the KVAT Act.

19. The arguments on behalf of the Department is that the use of the word "rates" in the last limb of the Explanations under interpretation has to be understood to prescribe the rate applicable for primary crusher as 50 per cent of the aggregate of the rates applicable to all the other crushers in the establishment of the dealer. What is prescribed is a rate of tax. The rate of tax applicable for primary crusher is not made dependent on the aggregate of the quantum of tax generated by the application of the rate of tax on the other crushing machines. The word "aggregate" is not provided in the Explanations. It is impermissible to read into the enactment, any provision, which is not there. What the statutes provide is that rate applicable for primary crusher shall be fifty per cent of the rates mentioned in items (i), (ii) and (iii) above. When the crushers are divided into three categories- (i) (ii) and (iii)-on the basis of size and three different rates are prescribed for each of them, the prescription that the rate of tax applicable to yet another category, namely primary crushers, shall be fifty per cent of the rates mentioned in items (i), (ii) and (iii); it only means that the rate of tax for a primary crusher shall be fifty per cent of the respective rate as mentioned in items (i), (ii) and (iii), depending on the size of the primary crusher. The provisions falling for consideration do not provide for such any other interpretation. Therefore, the contention of the Department does not stand.

20. The interpretation as above is that which emanates on a plain reading of the

relevant provisions. This is not a case where two plausible views are possible and hence, there is no question of making any choice, either in favour of the Revenue or in favour of the assessee. Hence, the question whether a provision for payment of tax at compounded rates is, in its essence, a provision by way of exemption, calling for strict construction, or otherwise, does not arise for decision. The ratio of *Tata Iron and Steel Co. Ltd. Vs. State of Jharkhand and Others*, does not, therefore, require to be applied. That argument of the Department is left open.

21. In the result, these writ petitions are allowed, quashing Circular No. 11/ 07 dated February 28, 2007 issued by the Commissioner of Commercial Taxes and it is declared that the compounded rate of tax on primary crusher is 50 per cent of the respective rates mentioned in Clauses (i), (ii) and (iii), respectively of Section 7(1)(b) of the KGST Act and section 8(b) of the KVAT Act, depending upon the size of the primary crusher in each case. It is also declared that the clarification issued by the Commissioner of Commercial Taxes as per order No. C3.44514/04/CT dated April 2, 2005 is in terms of the declaration made herein. All impugned proceedings contrary to the declaration in this judgment are quashed. Any payments made by the dealers contrary to the declaration of law as contained in this judgment will be refunded in accordance with law.