
(2010) 09 GAU CK 0056

In the Gauhati High Court

Case No : Writ Petition (Civil) Nos. 4859 & 4860 of 2009

Kamakhya Plastics (P) Ltd.(M/S) & Anr.

APPELLANT

Vs

State of Assam & Ors.

RESPONDENT

Date of Decision : 06-09-2010

Acts Referred:

Assam General Sales Tax Act, 1993 — Section 9(3), 9(3)

Citation : (2011) 4 GLT 794

Hon'ble Judges : Amitava Roy, J

Bench : Single Bench

Advocate : For the Petitioners : Dr.Ashok Saraf, Sr.Advocate, Ms.N.Hawelia, Ms.M.L.Gope, Mr.S.Chetia & Mr.A.Goyal, For the Respondents: Mr.D.Saikia, SC, F.Deptt., Advocates appearing for Parties

Judgement

Amitava Roy, J.

1. Judicial intervention in exercise of power under Article 226 of the Constitution of India has been sought for in the instant petition to annul the rectified assessments dated 06.03.2009 under Section 37(1) of the Assam General Sales Tax Act, 1993 (hereafter referred to as the Act, 1993) read with Section 109 of the Assam Value Added Tax Act, 2003 (hereafter referred to as the Act, 2003) as well as the clarification provided by the Commissioner of Taxes, Assam, to the notification dated 03.01.2003 issued under Section 9(3) of the Act 1993 as well as the order dated 24.09.2009/30.09.2009 of the said authority dismissing the revision petition filed by the present petitioner preferred against the aforementioned assessment. Consequential demands have also been impeached.

2. I have heard Dr. A.K. Saraf, Sr. Advocate, assisted by Mr. A. Goyal, Advocate for the petitioner and Mr. D. Saikia, learned Standing Counsel, Finance Department for the respondents.

3. The pleaded versions of the parties are essential to lay the preface of the adjudication. The petitioner in WP(C) 4859/2009 has introduced itself to be a

Private Limited Company registered under the Companies Act 1956, engaged in the manufacture, sale and supply of P.V.C. Pipes and Plastic Water Tanks, having its principal place of business at Bonda, Narengi, Guwahati, Assam. It claims to be a small scale industry and registered earlier as a dealer under the Act 1993 and presently under Act 2003 and also the Central Sales Tax Act 1956. According to the petitioner, it had been submitting its monthly returns and paying tax as per the same as due from it.

4. During the assessment year 20042005, it made supply of P.V.C. Pipes to the Government Departments to the tune of Rs.4,26,04,836/ and in terms of the notification No. FTX.189/93/PI/258 dated 3.1.2003 issued under Section 9(3) of the Act, 1993 it charged concessional rate of tax @ 4.4% on the related bills against relevant declaration Forms, furnished by the indenting departments. The above notification in the interpretation of the petitioner was in force on and from 03.01.2003 to 03.01.2006.

5. The assessment proceeding for the aforementioned period i.e. 200405 was completed under Section 17(4) of the Act 1993 on 14.02.2006. It was almost two years thereafter that pursuant to some audit objection, a show cause notice was issued to it by the Superintendent of Taxes, Unit A, Guwahati, requiring it to explain as to why the balance rate of tax (13.2% 4.4%) i.e. 8.8% and the interest thereon would not be levied on the aforementioned turnover. This step was apparently on the comprehension that it had been wrongly allowed concessional rate of 4.4% on the turnover for the year 20042005 for the related supplies as the notification dated 03.01.2003 was intended to be in force for a period of three years w.e.f 01.05.2001. The petitioner accordingly submitted a detailed reply contending in substance that the life of the notification was to be construed to be for a period of three years from the date of its issue i.e. 03.01.2003 and that the proposed additional levy @ 8.8% and interest was totally unwarranted. It also asserted to have made the supply of the PVC Pipes to the Government Departments at the assessed rate of 4.4% for which no objection at any stage was raised. According to the petitioner, neither the departmental authorities nor the dealers were under the impression that the notification would be effective from a date prior to that of its issuance i.e. 03.01.2003 or for that matter, that of its publication on 22.01.2003 in the Assam Gazette Extraordinary.

6. The aforementioned revenue authority, however, rectified the assessment and by applying the rate of 13.2% determined that an additional amount of Rs.6,64,84,414/ as payable by it. Though being aggrieved, the petitioner preferred a revision before the Commissioner of Taxes, Assam, against the rectified assessment as above by the impugned order dated 24.09.2009, the same was rejected. It was during the pendency of the revision petition that it came to light that the respondent No.4 had meanwhile on 05.12.2008 sought for a clarification from the Commissioner of Taxes, Assam, on the issue and that the latter vide communication No. CTS03/1/2009/10 dated 19.02.2009 had

elucidated that it (notification) had been brought into force from 01.05.2001 and thus would be in force till 30.04.2004.

7. Pursuant to the rectified assessment, a notice of demand has in the meantime been issued for an amount of Rs.64,84,414/ by way of tax and interest for the assessment year 20042005 and a Bakijai Case against being No. 60/0910/AGST has been registered. Though the petitioner has submitted its reply to the notice in the Bakijai proceedings, following the dismissal of the revision petition, the Certificate officer (Taxation), Guwahati, vide memo No. 669 dated 07.10.2009 has directed payment of the arrear dues within the period as mentioned therein.

8. The Revenue in its affidavit through the respondent No.3 has pleaded retrospective effect of the notification dated 03.01.2003 on and from 01.05.2001 contending that its life term ran upto 30.04.2004. It has been asserted that the petitioner had paid tax at the concessional rate for the period August, 2001 to January, 2003 which clearly indicated its acceptance of the retrospectively of the notification concerned. According to the Revenue, if the petitioner in fact had charged lower rate of tax from the Government Department for the supplies made by it beyond the validity of the notification, it was at its risk and that the same did not absolve it of its liability to pay tax at the normal rate after the lapse thereof. While endorsing the clarification provided to the notification by the Commissioner of Taxes, Assam, the answering respondent has ratified the validity of the rectified assessment, the decision in the revision petition as well as the consequential demand.

9. The unrefuted pleaded recital of the case of the petitioner in WP(C) 4860/2009 in absence of any affidavit in opposition of the respondents is that it is a Private Limited Company registered under the Companies Act, 1956, with its principal place of business at Industrial Area, Bamunimaidan, Guwahati, Assam. It is engaged in the business of manufacture, sale and supply of P. V.C. Pipes and Fittings. At the relevant time, it was registered as a dealer under the Act 1993 and thereafter under the Act, 2003 and is also so under the Central Sales Tax Act, 1956. During the assessment year 20042005, it inter alia made supplies of P.V.C. Pipes to the Government Departments to the tune of Rs.4,05,88,412/ at a concessional rate of tax i.e. 4.4% in view of the notification dated 03.01.2003. The Superintendent of Taxes, Unit A, Dispur, on following the due procedure relatable thereto, completed the assessment under Section 17(4) of the Act 1993 on 04.04.2007. It was almost after one year thereafter that the petitioner was required to show cause by the State Authority as to why the balance rate of tax @ 8.8% (13.2%4.4%) together with interest accrued thereon would not be levied on its turnover of Rs.4,05,88,412/. In spite of the detailed reply submitted by the petitioner, the respondent No.4 rectified the assessment and recorded an additional demand of Rs. 68,57,820/. The petitioner too unsuccessfully preferred a revision petition before the Commissioner of Taxes, Assam, against the rectified assessment.

10. Dr. Saraf with reference to Section 9(3) of the Act, 1993 has sought to

impress upon this Court that as the notification in terms thereof is to remain valid for a period of three years from the date of its issue, by no means it can be accorded a retrospective effect, the same being obviously impermissible under the statute. According to the learned Sr. counsel, therefore, the clarification to the contrary provided by the Commissioner of Taxes, Assam, is nonest. Not only the impugned order dated 30.09.2009 records erroneously the date of the notification No. FTX 189/92/P/255 as 24.08.1998 instead of 28.4.1998, the Revisional Authority grossly erred in holding that the notification dated 03.01.2003 was effective on and from 01.05.2001 inferring the same from the conduct of the transacting parties including the petitioner charging the tax at concessional rate, he urged. Dr. Saraf has maintained that not only the attempt to accord the notification dated 03.01.2003 a retrospective effect is both incomprehensible and impermissible under the Act 1993, the petitioner having charged tax at the concessional rate during the period beyond 01.05.2004 from the consumers, the interpretation of the respondent authorities, it sustained, would result in colossal loss to it and undue enrichment for the revenue. To reinforce his arguments, Dr. Saraf has led this Court to the relevant provisions of the Act 1993 and 2003 besides pressing into service the decision of the Apex Court in *The Income Tax officer, Alleppy Vs. M.C. Ponnose & Ors. etc.*, (1969)2 SCC 351 and *Bakul Cashew Co. Vs. Sales Tax officer, Quilon*, (1986) 2 SCC 365.

11. In assiduous refutation of the above, Mr. Saikia has asserted that apart from the fact that the notification dated 03.01.2003 is not under challenge, it being apparent on its face that it was intended to be effective on and from 01.05.2001, no contention to the contrary is entertainable. As the petitioner admittedly had reaped the benefit of the concessional rate of tax for the period of three years on and from the date of its enforcement i.e. 01.05.2001, it is estopped from contending otherwise, he urged. As the language of the notification is obvious and outright, the clarification provided by the Commissioner of Taxes, Assam, the rectified assessment and the revisional order are valid and that no interference by this Court is called for, he pleaded.

12. The competing pleadings and the arguments based thereon have received the due consideration of this Court. Some recorded facts having overall and significant bearing on the issues seeking adjudication deserve recapitulation.

13. The assessment year involved is 200405. If the notification dated 01.03.2003 is provided a life term of three years from 01.05.2001, it would expire on 30.04.2004. The notification involved assuredly had been issued in exercise of the power vested in the State Government by Section 9(3) of the Act. The second proviso thereto makes it apparent that the validity thereof shall not exceed a period of three years from the date of its issue. The prepotent and obvious objective of the said legal provision is to limit the power of the State Government to grant exemption or reduction of interest payable under the Act in class of goods as mentioned in the said notification for a period of three years in one phase. In other words, the benefit of exemption or reduction by a

notification cannot be extended beyond three years in one tranche, which has to be reckoned from the date of its issue. The legislative intent is thus unequivocal against sanction of exemption or reduction in excess of three years at a stretch by one notification. The interpretation of such a notification involved has thus to be guided essentially by the above pronounced and express mandate of the Legislature. Admittedly the notification preceding the one in hand was issued on 28.04.1998 to be effective from 01.05.98 and the same spent its force on 30.04.2001. To this extent the observation of the Commissioner of Taxes, Assam, that the said notification was dated 28.08.1998 is obviously erroneous. The same, however, in the estimate of this Court is not of any determinative relevance.

14. That prior to 01.03.2003, no notification had been issued to cover the period 01.05.2001 to 28.02.2003 is also not in dispute. The parties are not at issue that for this period i.e. 01.05.2001 to 28.02.2003, the transactions under the Act drew tax liability at the exempted/reduced rate as envisaged in the notification dated 01.03.2003. This is evident from the pleaded deals with the exempted/reduced rate of tax. Obviously the parties to the transaction have availed the benefit of such exemption/reduction for the said period.

15. Do the words "date of its issue" signify irrefutably and indispensably the initiation of the period of exemption/reduction of the tax rate from the date of the notification and not otherwise is the poser.

16. The authorities cited at the Bar in essence propound that the permissibility or otherwise of according retrospectivity to a statutory provision would be contingent on the language employed and the prescription thereof to that effect in express terms or by necessary implication. This analogy applies to a delegated legislation as well. Retrospectivity of a legislation be it parent or delegated is thus not an anathema but is essentially tempered by the empowering statutory edict.

17. Maxwell in the Interpretation of Statutes, Twelfth Edition has adumbrated a few significant aspects of the issue outlined in the following excerpts.

"If, however, the language or the dominant intention of the enactment so demands, the Act must be construed so as to have a retrospective operation, for "the rule against the retrospective effect of statutes is not a rigid or inflexible rule but is one to be applied always in the light of the language of the statute and the subject matter with which the statute is dealing.

Before the presumption against retrospectivity is applied, a Court must be satisfied that the Statute is in fact retrospective. In the words of Craies on Statute Law, a statute is retrospective "which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past".

"The rule under discussion has been applied chiefly in cases in which the statute in question, if it operated retrospectively, would prejudicially affect vested rights or the legality of past transactions, or would impair contracts, or would impose new duties or attach new disabilities in respect of past transactions."

"The rule against retrospectivity operation is a presumption only, and as such it "may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it."

18. The quintessence of the authoritative enunciations synthesised as above proclaims against retrospectivity of a statute or any other instrument of law in absence of express or implied intendment in the empowering legislation more particularly, if the same has the potential of divesting or impairing any vested right acquired under the existing laws or creates a new obligation or imposes a new duty or attaches a new disability in respect of past transactions or considerations. The precept against retrospectivity is however not an obdurate or intransigent proposition and is capable of being dislodged not only by the express words of the enactment involved but also by circumstances persuasively suggestive thereof.

19. The notification dated 01.03.2003 is conspicuous by its language to be effective from 01.05.2001. The period of exemption/ reduction is limited by the Act to be for a period of three years. In the comprehension of this Court though Section 9(3) does not as such in express words permit the State Government to issue a notification with a back date, the words "date of issue" is in no uncertain terms intended to be the starting point of the period of three years to avail the exemption or reduction in the rate of tax. By issuing this notification as is apparent in the contextual facts, the State Government desired a continuity in the exemption/ reduction on and from 01.05.2001 and not 01.03.2003. The date of issue i.e. 01.03.2003, if construed to be the starting point of the grant of the exemption/reduction, it will not only be obviously against the apparent objective conveyed thereby but also lead to unwarranted anomalies and complications visavis the past transactions closed and finalised during 01.05.2001 to 28.02.2003. Admittedly the petitioner and others participating in such transactions have availed the benefit of such exemption/reduction in tax rate and thus if the notification as has been done is construed to have been effective from 01.05.2001, the same would not in any manner prejudicially affect any of its vested rights.

20. The observations in the impugned order of the revisional forum in this perspective cannot be repudiated as unrelated or impertinent. In the opinion of this Court the word "date of issue" have to condition themselves to the cardinal ordainment of the ceiling of three years for the exemption/reduction in tax rate and a notification under Section 9(3) would essentially have to be construed accordingly. The attendant facts and circumstances more particularly the successive notifications dated 28.04.1998 and 01.03.2003 with the period involved manifest that the intention of the State Government was to sustain the

benefit of exemption/reduction in tax rate without any break on and from 1.5.2001 for a period of three years therefrom. The reference of suppression of the notification dated 28.04.1998 in the one dated 01.03.2003 is an unimpeachable index to that effect. The interpretation as suggested by the petitioner would in the contextual facts be patently repugnant to the unambiguous enjoinder of the above provision of the Rules.

21. In the wake of the above challenge to the clarification provided by the revenue, the decision of the Commissioner of Tax, Assam, in the revision proceedings, the rectified assessments and the demands on the basis thereof is hereby negated. The petition lacks in merit and is dismissed. No costs.