

(2007) 04 MP CK 0060
In the Madhya Pradesh High Court

M.K.S. Engineering Co. (P) Ltd. and Another	APPELLANT
Vs	
The Assistant Commissioner, Commercial Tax	RESPONDENT

Date of Decision : 27-04-2007

Acts Referred:

Central Sales Tax Act, 1956 — Section 4
Constitution of India, 1950 — Article 226, 227

Citation : (2007) 3 MPHT 256 : (2009) 20 VST 485

Hon'ble Judges : S.R. Waghmare, J; Dipak Misra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Dipak Misra, J.—As common question of law emerges in these two writ appeals, they were heard analogously and are disposed of by this singular order. For the sake of clarity and convenience the facts exposited in W.A. No. 542/2006 are adumbrated herein.

2. The appellants-petitioners invoked the extra-ordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution of India for quashment of the circular dated 30-10-2004 issued by the Commissioner, Commercial Tax. Along with the aforesaid prayer many other ancillary alternative prayers were made. It was put forth in the writ petition that the petitioner No. 1, company is engaged in construction of roads and the petitioner No. 2 is a shareholder of the company. The assessment for the period 1-4-2001 to 31-3-2002 was completed by the Assistant Commissioner, Commercial Tax, Jabalpur on 29-1-2005 and tax amounting to Rs. 11,57,017/- was demanded. In the assessment order the respondent No. 1 had denied the claim of set off and tax paid in respect of purchase from M/s Shriram Enterprises, Indore; M/s. Maihar Chemicals and Fertilizers, Indore; and M/s Renaay, Indore. The material purchased from a dealer registered under the Commercial Tax Act, 1994 (for short "the 1994 Act") is not to be taxed again but the same was taxed because of the circular issued by the Commissioner. It is not in dispute that the assessee-appellants have

preferred an appeal before the Appellate Authority. However, as the circular is in vogue the appellants-petitioners preferred the writ petition for quashment of the same on the ground that the same runs counter to the statute and further the same makes adjudication of appeal a futile exercise in law.

3. The stand of the petitioners-appellants was combatted by the State and its functionaries on the ground that the circular was issued by the Commissioner, Commercial Tax on the report of the Additional Commissioner, Commercial Tax, Jabalpur, dated 30-7-2004 whereby it was informed to the Commissioner, Commercial Tax, Indore that the appellants had purchased bitumen from a firm at Indore. On looking at the bills submitted by the firm when necessary information was called from the Commercial Tax Officer, Indore it transpired that the said three firms had not shown any sale of bitumen in the return and in this manner no tax was paid by the above mentioned firms although the petitioner-firm has shown that he has purchased tax paid bitumen. The said circular has been issued to prevent loss of revenue as the firms whose names find mention in the circular had not shown any sale in the return. Because of the same the set off to the petitioner on the purchase of bitumen had not been granted whereas the set off in respect of purchase of bitumen from the Indian Oil Corporation had been granted as sufficient proof was produced in that regard. Various aspects have been highlighted to show how no tax had been paid by the concerned companies and, therefore, how the appellant is not entitled to the benefit. It is urged that under Rule 3 (5) of the MP. Commercial Tax Rules, 1995 the Commissioner is empowered to issue such directions which are necessary in discharge of the duties to be performed by the officers and as the circular is in consonance with the Rules the same cannot be treated to be one which can be regarded as transgression of the power.

4. At this juncture we think it appropriate to refer to the order passed by the learned Single Judge. The learned Single Judge has disposed the writ petition by stating that merely on the apprehension that Appellate Court shall not decide the appeal independently, no case for interference is made out at this stage. In case appeal had not been decided, the same shall be decided as expeditiously as possible.

5. We have heard Mr. Sumit Nema, learned Counsel for the appellants and Mr. Alok Pathak, learned Govt. Advocate for the respondent/ State.

6. The singular question that emerges for consideration is whether the letter circular issued by the Commissioner, Commercial Tax is valid in law. The letter circular dated 30-10- 2004 stipulates that three companies, namely, M/s. Shriram Enterprises, Indore; M/s. Maihar Chemicals and Fertilizers, Indore; and M/s. Renaay, Indore have not shown any sale of bitumen in their return and, therefore, any dealer who claims to have purchased bitumen from the said firms by paying sales tax the claim of set off is not to be accepted. Quite apart from the above, the said circular also lays a postulate that if any one has made such a claim and the same is accepted in appeal or revision then appropriate action may

be taken.

7. In this context, it is profitable to refer certain situations in the field. In *Multi Metal Products v. Commissioner of Sales Tax*, M.P. (1999) 112 STC 605, it has been held as under:

...according to the definition of "tax-paid goods" in Section 2(rr) of the Act, once it is established that the raw material or incidental goods have been purchased from a registered dealer, that shows that the goods are tax-paid. By virtue of Clause (iv) of Rule 20-C of the Madhya Pradesh General Sales Tax Rules, 1959, once the purchasing dealer produced the bill of registered dealer then it had to be presumed that the goods had suffered the incidence of tax. Once the applicant, i.e., the purchasing dealer, produced the bill issued by the registered dealer then his burden was discharged and he could not be held responsible or be forced to collect the material in order to get the rebate.

8. In *Govindan & Co. v. The State of Tamil Nadu* (1975) 35 STC 50, the High Court of Madras has expressed the opinion as under:

...The learned Counsel appears to be right in his submission that the petitioners who claimed exemption from tax on the ground that their sales are second sales are bound to show that there has been an anterior taxable sale and that they need not prove that tax had in fact been paid on those anterior sales. To claim the benefit of tax on the ground that their sales are second sales, the petitioners need not show that their sellers have in fact paid tax and it is enough for them to show that the earlier sales are taxable sales and that the tax is really payable by their sellers.

9. In *State of Tamil Nadu v. Chamundeswari Enterprises* (1983) 51 STC 124, it has been ruled thus:

If a sale effected by an assessee is not a first sale, which is only taxable under the Tamil Nadu General Sales Tax Act, 1959, then under the provisions of the Act that sale cannot be brought within the net of taxation and it is for the revenue to search out the first seller and levy tax on the first sale. It is not for the assessee who is the subsequent seller, to show that the first sale has been taxed. The onus on the subsequent seller is only to point out that there has been a first sale and the onus is on him to show that the first sale has, in fact, suffered tax.

10. In this context we may profitably refer to the Constitution Bench decision rendered in *Filterco and Anr. v. Commissioner of Sales Tax* (1986) 61 STC 318, wherein the Constitution Bench while dealing with determination by Commissioner of disputed question the Commissioner held that only out of the 26 specimens could be classified as "cloth" and granted exemption from tax under Entry 6 of Schedule I to the Act to those 5 varieties and remaining 21 samples would not fall within the exemption but were liable to tax at the rate of 10% opined that the High Court should not have dismissed the writ petition on the ground that it had an alternative remedy. In that context Their Lordships

expressed the opinion as under:

...The order passed by the Commissioner of Sales Tax was clearly binding on the Assessing Authority u/s 42-B (2) and although technically it would have been open to the appellants to urge their contentions before the Appellate Authority, namely, the Appellate Assistant Commissioner, that would be a mere exercise in futility when a superior officer, namely, the Commissioner, has already passed a well-considered order in the exercise of his statutory jurisdiction.

11. In *Sri Rajarajeswari Parboiled Rice Industry v. Commercial Tax Officer, Kodad, Nalgonda Dist. and Ors.* (1999) 115 STC 99, a Division Bench of the Andhra Pradesh High Court has expressed the opinion as under:

In the face of the circular issued by the Commissioner, the assessing and Appellate Authorities under the Act who are subordinates to the Commissioner cannot take an independent view on the interpretation of the relevant provisions. It is true that the Act enjoins that the Commissioner's circular is not binding on the Appellate Authority. But, in effect and in substance the Appellate Authority who is administratively subordinate to the Commissioner and whose orders are also amenable to revision by the Commissioner will be inhibited to take different view. So the validity of the circular of the Commissioner is to be considered in the writ petition, though the petitioners have the remedy of appeal to the Appellate Deputy Commissioner against the order of the Assessing Authority.

12. In this context, it is appropriate to refer to Section 2 (w) of the 1994 Act. It defines "taxable turnover". It reads as under:

2. (w) Taxable turnover in relation to any period means that part of a dealer's turnover for such period which remains after deducting therefrom--

- (i) the sale price of goods declared tax free u/s 15 or exempted in whole u/s 17;
- (ii) the sale price of goods mentioned in Part II to VII of Schedule II which are in the nature of tax paid goods in the hands of such dealer;
- (iii) the sale price of unginned cotton as specified in Part I of Schedule II and such other goods in the said Part as the State Government may from time to time, by notification, specify, sold to a registered dealer who has declared in the prescribed form that the goods are for resale or for use by him in the manufacture of goods for sale by him;
- (iv) the sale price of goods specified in Part I of Schedule II other than those referred to in Sub-clause (iii), sold to a registered dealer who has declared in the prescribed form that the goods are for resale by him;
- (v) the amount arrived at by applying the following formula:

Rate of tax x aggregate of sale prices/100 + rate of tax

Provided that no deductions on the basis of the above formula shall be made if the amount by way of tax collected by a registered dealer, in accordance with the

provisions of this Act, has been otherwise deducted from the aggregate of sale prices.

Explanation :-- Where the turnover of a dealer is taxable at different rates, aforesaid formula shall be applied separately in respect of such part of the turnover liable to a different rate of tax under Sub-section (1) of Section 9;

(vi) such other deductions as may be prescribed.

13. Section 2 (x) defines "tax paid goods". It runs as follows:

2. (x) Tax paid goods in relation to a dealer means any goods specified in Part II to VII of Schedule II which have been purchased by such dealer from a registered dealer inside the State of Madhya Pradesh within the meaning of Section 4 of the Central Sales Tax Act, 1956 (No. 74 of 1956) except

(i) the goods sale whereof by such registered dealer is exempted in whole from payment of tax subject to the condition that such exemption is available only to such registered dealer; and

(ii) the goods manufactured by a registered dealer in his new industrial unit in respect of which such dealer is availing of the facility of exemption from payment of tax in whole under any notification issued under the Act repealed by this Act or under this Act in pursuance of any scheme of the State Government formulated and enforced before or after the commencement of this Act for grant of incentives for the establishment of new industrial units in the State.

14. Mr. Alok Pathak, learned Govt. Advocate for the State submitted that the Commissioner has the authority under Rule 3 of the Madhya Pradesh Vanijyik Kar Adhiniy Act, 1995 (for brevity" 1995 Rules") to issue a circular of this nature. He has invited our attention to Sub-rule (5) of Rule 3. It reads as under:

Rule 3. Appointment.-

(1) *** ***(2) *** ***(5) The authorities specified in Clause (a) to (g) of Sub-section (1) of Section 3, shall, in exercise of the powers and in the discharge of their duties and functions under the provisions of the Act or any Rules made thereunder, follow such direction as the Commissioner may issue from time to time.

15. On a perusal of the power conferred under Sub-rule (5) of Rule 3 of 1995 Rules and the ancillary clause and the pronouncement of law which we have referred to hereinabove, we are of the considered opinion that the circular in question does contravene the provisions of Act and the pronouncement of law. The Commissioner, Commercial Tax, we are disposed to think, could not have issued such a circular as that has binding effect on the subordinate authorities and the said circular entrenches upon the quasi-judicial realm and is not one for giving effect to the purpose of the another. Hence, we quash the circular dated 30-10-2004 as violative of the statute and beyond the power conferred under the 1995 Rules.

16. Though we have quashed the circular issued by the Commissioner, Commercial Tax we would like to make it clear that we have not expressed any opinion with regard to merits of the case. The Assessing Officer has already passed an order of assessment and the appellants-assesseees have assailed the same in appeals. The appeals should be decided on merits within the parameters of the statute.

17. In the result, the writ appeals are allowed. The order passed by the learned Single Judge is set aside and the circular dated 30-10-2004 is quashed with the directions contained hereinabove. There shall be no order as to costs.