

(2017) 05 BOM CK 0132
In the Bombay High Court
Case No : 4944 of 2013

M/s Amar Agencies Through its Partner Mr. Vikas S/o Kantilal Sahuji, & Ors. APPELLANT

Vs

State of Maharashtra Through Secretary Finance Department, & Ors. RESPONDENT

Date of Decision : 05-05-2017

Acts Referred:

[Maharashtra Value Added Tax Act, 2002](#), [Section 8](#), [Section 9](#), [Section 23\(2\)](#), [Section 29\(5\)](#), [Section 45A](#), [Section 20\(1\)\(a\)](#)

Citation : (2017) 05 BOM CK 0132

Hon'ble Judges : S. V. Gangapurwala, K. L. Wadane

Bench : DIVISON BENCH

Advocate : Rameshwar F. Totala, M. B. Bharaswadkar, Dwarkadas S. Ladda

Judgement

1. Rule. Rule made returnable forthwith. With the consent of parties taken up for final hearing.
2. All these writ petitions are based on similar set of facts and involve common question of law, as such are decided together.
3. The petitioners are aggrieved by the trade circular No. 9T of 2012 dated 30.06.2012.
4. Mr. Totala and Mr. Ladda, the learned counsel for petitioners strenuously contend that, the petitioners sell unmanufactured tobacco. The learned counsel submit that, Sec. 45A of the Maharashtra Value Added Tax Act 2002 (for short "Act of 2002") was amended with effect from 01.02.2006. The learned counsel submit that, the petitioners do not have any objection about levy of Value Added Tax (for short "VAT") on unmanufactured tobacco, as stated in the explanation of the notification dated 31st March, 2012 with effect from 01st April, 2012. According to the learned counsel, the impugned circular dated 30.06.2012 is

contrary to the notification dated 31.03.2012. The learned counsel submit that, when explanation seeks to give artificial meaning and brings about the change effectively in the existing law and in addition states to have come into force with effect from a future date, there is no principle of interpretation, which would justify reading the explanation as operating retrospectively. According to the learned counsel, as per the provisions of the Act of 2002, the manufacturer shall levy the VAT on sell and collect it from the petitioners and then the petitioners shall in turn recover the same from its customers. In these cases neither the manufacturer collected the tax from the petitioners, nor the petitioners have collected the same from its customers.

5. The learned counsel submit that, as per Sec. 9 of the Act of 2002, the powers vest with the State Government to amend the schedule by way of notification and it cannot be by way of circular as sought to be done in the present cases. So also the proviso of Sec. 9 of the Act of 2002 limits the powers of the State Government for enhancement of rate of tax after the expiry of period of two years from the appointed date. The learned counsel relying on Sec. 20(1)(a) of the Act of 2002 states that, no defect notice has been sent by the respondent authorities to petitioners. The learned counsel submits that, powers U/Sec. 22(1) (c) of the Act of 2002 have also not been exercised. The respondent authorities have not carried out the business audit meaning thereby that the authorities have accepted the returns filed by petitioners. The learned counsel submit that, the respondent authorities have not issued any notice U/Sec. 23(2) of the Act of 2002. So also as per proviso to sub Sec. 2 of Sec. 23 of the Act of 2002, no order of assessment under this subsection shall be made after the expiry of three years from the end of the year containing the period to which the return relates. The respondent authorities are claiming VAT from the year 2007. The respondents cannot exercise the powers U/Sec. 29(5) of the Act of 2002 of issuing the show cause notice, as preconditions of Sec. 8 of the Act of 2002 are not available in case of petitioners. The exercise of powers of authority in issuing the show cause notice U/Sec. 29(5) of the Act of 2002 is colourable exercise of powers by the respondent authorities. The trade circular and the impugned notices are contrary to the provisions of law. The learned counsel rely on the judgment of the Apex Court in a case of *Sedco Forex International, Drill, Inc. and others Vs. Commissioner of Income Tax, Dehradun* and another reported in (2005) 12 SCC 717.

6. Mr. Bharaswadkar, the learned Assistant Government Pleader for respondent Nos. 1 to 5 submits that, while challenging the explanation to the trade circular, the petitioners have not considered the note 5 of the said circular. The circular cannot be used for legal interpretation of the provisions of law, as it is clarificatory in nature. The interpretation of the notification shall be independent of the circular. The learned A. G. P. further submits that, entry No. 12 of Schedule D and E covers unmanufactured tobacco. Further Schedule E entry E1 provides that, all goods not covered under any other schedules are covered under the said entry. The petitioners are selling the tobacco under brand name.

These are covered under clause 2 and 3 of Chapter 24 of the Central Excise Tariff Act under the head 2401. As such cannot be termed as unmanufactured tobacco. The explanation is of clarificatory nature. For incorrect assessment the remedy of appeal is provided and appeals are either decided or pending. The petitioners have alternate remedy, which they can avail.

7. Upon consideration of the arguments canvassed by learned counsel for respective parties, it is manifest that we will have to deal with Entry 45A, it's explanation, so also entry 2401. For the sake of convenience the same are reproduced below.

MAHARASHTRA VALUE ADDED TAX ACT 2002

SCHEDULE-A

1.

Before amendment

45A (a) unmanufactured tobacco covered under tariff heading No. 2401 of the Central Excise Tariff Act, 1985. Nil 1.4.2007 to 31.3.2012

After amendment

45A (a) unmanufactured tobacco covered under tariff heading No. 2401 of the Central Excise Tariff Act, 1985. Nil 1.4.2012 to date

Explanation. For the removal of the doubts, it is hereby declared that, the unmanufactured tobacco shall not include unmanufactured tobacco when sold in packets under the Brand name.

Tariff Item Description of goods Unit Rate of Duty

-1 -2 -3 -4

2401 Unmanufactured tobacco; tobacco refuse

2401 10 Tobacco, not stemmed or stripped; kg 10.00%

2401 10 10 Flue cured Virginia tobacco kg 10.00%

2401 10 20 Sun cured country (natu) tobacco kg 10.00%

2401 10 30 Sun cured Virginia tobacco kg 10.00%

2401 10 40 Burley tobacco kg 10.00%

2401 10 50 Tobacco for manufacture of biris, not stemmed kg 10.00%

2401 10 60 Tobacco for manufacture of chewing tobacco kg 10.00%

2401 10 70 Tobacco for manufacture of cigar and cheroot kg 10.00%

2401 10 80 Tobacco for manufacture of hookah tobacco kg 10.00%

2401 10 90 Other Tobacco partly or wholly stemmed or stripped:
kg 10.00%

2401 20 10 Flue cured virginia tobacco kg 10.00%

2401 20 20 Sun cured country (natu) tobacco kg 10.00%

2401 20 30 Sun cured virginia tobacco kg 10.00%

2401 20 40 Burley tobacco kg 10.00%

2401 20 50 Tobacco for manufacture of biris, not stemmed kg 10.00%

2401 20 60 Tobacco for manufacture of chewing tobacco kg 10.00%

2401 20 70 Tobacco for manufacture of cigar and cheroot kg 10.00%

2401 20 80 Tobacco for manufacture of hookah tobacco kg 10.00%

2401 20 90 Other kg 10.00%

2401 30 00 Tobacco refuse kg 10.00%

8. The moot question would be reading the explanation, as a substantive amendment or clarificatory.

9. Entry 45A of the Act of 2002 was amended by notification dated 31.03.2012 by the Government exercising its powers U/Sec. 09 of the Act of 2002. Entry 45A as it stood prior to amendment of 31.03.2002, it contained Clause B with no explanation. Vide notification dated 31.03.2012 Clause B which dealt with biris is deleted and an explanation is added. The bone of contention between the parties is the date of applicability of amendment. By the explanation, it is declared that the unmanufactured tobacco shall not include unmanufactured tobacco when sold in packets under the brand name. Prior to 31.03.2012, the legislature did not make any distinction between unmanufactured tobacco sold in brand name or otherwise. The entry 45A is part of Schedule A, which details the list of goods for which the rate of tax is nil. The unmanufactured tobacco covered under tariff heading No. 2401 of the Central Excise Tariff Act, 1985 is not taxable i. e. it's tax is nil as per Entry 45A(a).

10. The Trade Circular under challenge lays down that the said explanation is clarificatory in nature. If the explanation is interpreted as a mere clarificatory, then the question of its applicability prospectively or retrospectively may not arise. When the explanation serves the purpose of clarification of the existing law, there is no question of its prospective or retrospective operation, as the said explanation would only explain and clear any mental cobwebs surrounding meaning of statutory provision and to prevent controversial interpretation. Explanations generally are intended more as a legislative exposition or clarification of the existing law than as a change in it. If we go to the literal words employed in the explanation, then the said explanation is introduced for

the removal of the doubts. The language of the explanation depicts such intention. If the explanation is interpreted as merely clarificatory, then the trade circular cannot be held to be erroneous.

11. Yet, we will have to bear in mind that, the taxing statutes have to be interpreted strictly. We will have to consider whether the incorporation of explanation to Entry 45A of the Act of 2002 has altered the law as existing prior to the amendment dated 31.03.2012. While adding the said explanation, the entry 12 to Schedule D is also amended.

12. As per Section 9(1A) of the Act, the State Government has the powers to amend the schedule by adding or modifying any entry in the schedule. The notification dated 29.03.2007 was in force upto 31st March, 2012. Item B in the entry 45A is deleted with effect from 01.04.2012, that would be interpretation of the fact that, notification dated 31.03.2012 operates prospectively. The trade circular dated 30th March, 2007 clarifies that the unmanufactured tobacco cleared under Chapter Head 2401 of the Central Excise and Tariff Act will be exempted from tax. The trade circular dated 06th August, 2009 also clarifies the same. Incorporation of explanation has amendatory implication with effect from 01st April, 2012. The explanation in the notification dated 31st March, 2012 will have to be held as amendatory and not clarificatory. We are only concerned with the position prior to 31.03.2012. As and from 01st April, 2012, the unmanufactured tobacco sold in brand name is taxable. We are only concerned with unmanufactured tobacco covered under heading 2401 of CETA.

13. Considering the trade circular dated 30th March, 2007 and 06th August, 2009, it would be clear that the Department considered the unmanufactured tobacco covered under Chapter Head 2401 of the Central Excise and Tariffs Act exempted from tax. The said position subsisted till 31.03.2012. It would appear that, no distinction was made between sale of unmanufactured tobacco in packet or in retail or whether branded or not branded. For the first time the said distinction is made by virtue of explanation to Entry No. 45A of the Maharashtra Value Added Tax Act 2002.

14. The explanation no doubt begins with the expression "for removal of doubts", however, the same does not appear to be plain and conclusive in nature. The operative implication of the expression "for removal of doubts" in the explanation does not show nexus to legislative intent of taxing liability. By virtue of explanation a particular class is created. By inserting explanation to Entry No. 45A. New class is created i. e. unmanufactured tobacco sold in packets under a brand name. A distinction is made for the first time by insertion of said explanation between the unmanufactured tobacco sold in retail, loose and those unmanufactured tobacco sold in packets under a brand name. The said distinction has been introduced by way of an explanation. By reason of explanation a substantive law is introduced and if a substantive law is introduced, wherein a class is created thereby making it liable for tax, the explanation will have to be held amendatory to operate prospectively and not

retrospectively.

15. In the light of the above, it will have to be held that the addition of explanation to Entry No. 45A under notification dated 31.03.2012 is substantive provision and it is not merely clarificatory, as such would operate prospectively. It will have to be held that, unmanufactured tobacco sold in packets under a brand name would not be taxable from 01.04.2007 to 31.03.2012. The impugned trade circular 9T dated 30.06.2012 stating that explanation is merely clarificatory is held to be erroneous to that extent.

16. The writ petitions are accordingly allowed holding that the unmanufactured tobacco sold in packets under a brand name covered under Tariff heading No. 2401 of Central Excise Tariff Act would not be taxable upto 31.03.2012. The impugned trade circular 9T dated 30.06.2012 stating that explanation is merely clarificatory is held to be erroneous to that extent. The explanation to Entry 45A of the Maharashtra Value Added Tax would operate prospectively and not retrospectively. The reply to the show cause notices shall be given by petitioners and the authorities shall decide accordingly. The order dated 12.02.2014 passed by Deputy Commissioner of Sales Tax, Ahmednagar Division, Ahmednagar and order dated 26.06.2014 passed by the Maharashtra Sales Tax Tribunal, Mumbai assailed in the Writ Petition No. 8950 of 2014, the order dated 26.03.2014 passed by Deputy Commissioner of Sales Tax, Latur and order dated 19.11.2014 passed by the Joint Commissioner of Sales Tax, Amrawati Division, Amrawati assailed in the Writ Petition No. 11344 of 2014, the order dated 12.02.2014 passed by Deputy Commissioner of Sales Tax, Ahmednagar Division, Ahmednagar and order dated 26.06.2014 passed by the Maharashtra Sales Tax Tribunal, Mumbai assailed in the Writ Petition No. 8998 of 2014, the order dated 31.07.2014 passed by Deputy Commissioner of Sales Tax, Latur and order dated 19.11.2014 passed by the Joint Commissioner of Sales Tax, Amrawati Division, Amrawati assailed in the Writ Petition No. 11343 of 2014, the order dated 26.03.2015 passed by Assistant Commissioner of Sales Tax, Parbhani and order dated 30.06.2016 passed by the Deputy Commissioner of Sales Tax, Mumbai assailed in the Writ Petition No. 9968 of 2016 and order dated 12.10.2015 for the assessment year 2009-2010 and order dated 20.06.2015 for assessment year 2011-2012 assailed in Writ Petition No. 10003 of 2016 are quashed and set aside and the matters are remitted to the Tribunal for deciding it afresh in tune with the judgment delivered in the present writ petition. Rule accordingly made absolute in above terms. No costs.