

(1999) 01 KAR CK 0040

In the Karnataka High Court

Case No : Writ Petition No. 31427 of 1998

M/s. E.C.I.E. Private Limited, Bangalore

APPELLANT

Vs

The Additional Deputy Commissioner of Commercial Taxes
(Assessments-ii), City Division, Bangalore and Another

RESPONDENT

Date of Decision : 06-01-1999

Acts Referred:

Constitution of India, 1950 — Article 366(29A)(B)
Karnataka Sales Tax Act, 1957 — Section 5B
Karnataka Sales Tax Rules, 1957 — Rule 6(4)(M)(I)

Citation : (1999) 46 KarLJ 400

Hon'ble Judges : V. K. Singhal, J

Judgement

1. Validity of Explanation III to Rule 6(4)(m) of Karnataka Sales Tax Rules, 1957 have been assailed on the ground that it is beyond the rule making power of the second respondent and is unconstitutional as beyond Entry 54 (wrongly written as 57) of List II of the VII Schedule to the Constitution of India. The Explanation III which is challenged is as under:

"Explanation III.-For the purposes of sub-rule (4), the expression "in the same form" does not include such goods which, after being purchased, are either consumed or used in the manufacture of other goods which in turn are used in the execution of works contract".

2. Arguments have been heard.

Liability of tax in respect of building contract was examined by the Apex Court in the case of State of Madras v M/s. Gannon Dunkerley and Company (Madras) Limited, AIR 1958 SC 560, and it was held that in a building contract the property in material used does not pass to the other party to the contract as movable property. The building contract is one entire and indivisible. There is no sale of goods. In order to overcome the said decision Article 366 of the Constitution was amended inserting Entry 29-A by 46th Constitutional Amendment Act. Entry 54 of List II of the VII Schedule refers to "taxes on the

sale or purchase of goods other than newspaper subject to the provisions of Entry 29-A of List I".

Article 366(29-A)(b) of the Constitution of India authorises the State Legislature to tax on the sale or purchase of goods, on the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract. Section 5-B of the Karnataka Sales Tax Act provides levy of tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract. It is provided that the tax shall be levied on the taxable turnover of transfer of property in goods (whether as goods or in some other form) involved in the execution of the works contract mentioned in column 2 of the 6th Schedule at the rates specified in column 3 of the said Schedule.

Submission of the learned Counsel for the petitioner is that the Article 366(29-A) (b) of the Constitution refers to levy of tax "in some other form" then the Explanation III restricting it to the execution of works contract "in the same form" is beyond the legislative competence.

3. Earlier Rule 6(4)(m) of the Karnataka Sales Tax Rules, 1957 provided that all amounts received in respect of goods specified in the serial numbers mentioned in the Sixth Schedule and falling under the Second Schedule purchased from registered dealers are liable to tax under the Act. In determining the taxable turnover, the amount specified in clauses (a) to (p), shall subject to the conditions specified therein be deducted from the total turnover. This rule was amended on 7-10-1994 w.e.f. 1-4-1993. Rule 6(4)(m)(i) provided the exclusion of all amounts received or receivable in respect of goods specified in various serial numbers of the Sixth Schedule which are purchased from registered dealers liable to tax under the Act. It is the amendment dated 5-8-1995 which has been made retrospective w.e.f. 1-4-1993 in which for the purpose of exclusion it is provided that,- "(i) all amounts received or receivable in respect of goods other than the goods taxable under sub-section (1-A) or (1-b) of Section 5 which are purchased from registered dealers liable to pay tax under the Act and used in the execution of works contract in the same form in which such goods are purchased".

4. Explanation III was inserted by notification dated 5-8-1995 retrospectively from 1-4-1986. The power to amend the rule retrospectively is not in dispute before me and Section 38(4) confers a power to make the rule prospectively or retrospectively and as such that point is not in dispute.

5. The contention of the learned Counsel for the petitioner is that the deductions which have been provided under Rule 6(4) should not have been restricted to "the same form as" the liability of tax is "on the same form or on any other form".

6. Reliance is placed on the decision given in the case of *Media Communications v Government of Andhra Pradesh*, (1997)105 STC 227 (AP). Section 5-F of the

Andhra Pradesh General Sales Tax Act provides for levy of tax on transfer of property in goods involved in the execution of works contract. It was provided that the tax shall be paid by the dealer at the rate of four paise on every rupee of his turnover pertaining to declared goods, if the goods have not suffered tax earlier, and no tax shall be payable on the turnover pertaining to declared goods, if such goods have suffered tax earlier under this Act and are transferred from the contractor to the contractee in the same form in which they are purchased by the contractor.

Validity of this proviso was challenged before the Andhra Pradesh High Court. It was found that it cannot be disputed that any transformation of the goods from one form to another in the execution of the contract, will not amount to the creation of a different or distinct commercial commodity exigible to tax once again. The expression "in the same form" was found contrary to the intention of Section 5-F to tax the goods utilised in the works contract in whatever form it may be transformed during the execution of the works contract. The proviso was struck down as void.

7. The validity of 46th Constitutional Amendment Act was upheld by Apex Court in Builders' Association of India v Union of India, 1989(33) Kar. L.J. 65 (SC).

8. In Builders' Association of India v State of Karnataka and Others, 1993(37) Kar. L.J. 379 (SC), situs of sale was fixed and expenses towards labour charges were exempted. Provisions of Rule 6(4)(m)(ii) were applied. The provisions of the Constitution empowers the State Legislature to levy the tax. Tax has been levied by inserting Section 5-B under the KST Act. Validity of Section 5-B has also been upheld in the Builders' Association's case, referred to above. There is no incongruity so far as the charging section is concerned. The dispute is with regard to the alleged inconsistency in Explanation III to Rule 6(4)(m) which is stated to be contrary to the provisions of Karnataka Sales Tax and the Constitution of India. At the outset it may be observed that the Rule 6 refers to the deduction which is allowed. The delegated authority may allow the exemption or deduction by its discretion. The deduction which has been allowed is restricted only when the item is used in the works contract in the same form in which it has been purchased from the registered dealer. If there is no change of the form, then the deduction cannot be allowed. The rule making authority has not provided for the deduction on an item purchased and converted into another form and thereafter used in the works contract. This Court cannot legislate on that point and can only interpret the provision which has been enacted. The rule which has been made is for the benefit of the assessee and cannot be considered beyond the legislative competence or contrary to the provisions of the Act or the Constitution of India. While giving the deduction the rule making authority could have given the deduction for purchase of an item which is used in the same form and which is used in some other form. Simply because the deduction has not been given to an item used in another form, it cannot be considered to beyond the legislative competence. The works contract under Section 5-B and Article

366(29-A)(b) using the word in "other form" refers to the power of the legislature to levy the tax. The power which has been exercised in enacting the provisions of Section 5-B is in accordance with the constitutional mandate. But to which item, and in what circumstances exemption is to be given is ancillary and incidental to the power to levy the tax is not necessarily to be exercised in respect of the entire material used in works contract used in some other form for which the charge is properly created. As such I do not consider that the provisions of Rule 6(4)(m)(i) could be declared as ultra vires the legislative competence.

Accordingly this petition stands dismissed.

For other points, the petitioner may file the appeal within four weeks from today.