
(2013) 05 SHI CK 0023
In the High Court Of Himachal Pradesh
Case No : CWP No. 8170 of 2012-G

M/s. Lloyd Electric and Engineering Ltd. APPELLANT
Vs
State of H.P. RESPONDENT

Date of Decision : 24-05-2013

Acts Referred:

Central Sales Tax Act, 1956 — Section 8, 8(5)(b)
Constitution of India, 1950 — Article 226

Citation : (2013) 2 ShimLC 1009

Hon'ble Judges : A.M. Khanwilkar, C.J.;Kuldip Singh, J

Bench : Division Bench

Advocate : R.N. Sharma, for the Appellant; Anup Rattan and Mr. Romesh Verma, Additional Advocate General with Mr. J.K. Verma, D.A.G., for the Respondent

Judgement

A.M. Khanwilkar, C.J.—Heard counsel for the parties. By this petition under Article 226 of the Constitution of India, the petitioner has not only prayed for issuance of writ of certiorari to the extent of quashing the expression "with immediate effect" occurring in notification dated 18.06.2009 but also the consequential action of the authorities of assessing the petitioner for payment of 2% C.S.T. on inter-State Sales of ` 66,79,03,716/- from the period 01.04.2009 to 17.06.2009 and from realizing interest thereon. The petitioner has challenged Ex. P-9 to P-11 and P-14 to the extent it is repugnant to the Memorandum for consideration of the Cabinet dated 19.05.2009 and the Cabinet decision dated 20.05.2009.

2. The background, in which these reliefs are claimed, briefly stated is as follows:-

The Government of Himachal Pradesh, Department of Industries issued notification dated 30.12.2004 announcing "Industrial Policy" of the State Government titled as Industrial Policy, Rules Regarding Grant of Incentives, Concessions and Facilities to Industrial Units in H.P. 2004 and H.P. Industrial Renewal and Revival Scheme of 2004. Admittedly, as per the said policy Clause

10.3 at Page 84, Central Sales Tax was to be charged at concessional rate of 1% on the goods manufactured by new and existing Industrial Units (as defined under the said Rules) unless provided otherwise elsewhere in the said Rules but upto 31.03.2009. It is indisputable that the said policy by efflux of time lapsed on 31.03.2009. No doubt, the Cabinet of Government of Himachal Pradesh considered the proposal mooted by its Industrial Department to extend the incentive of concessional rate of CST @ 1% for all the industrial enterprises beyond 31.03.2009 till 31.03.2013 or till the CST is phased out by the Central Government. That proposal was mooted keeping in mind that after expiry of the Industrial Policy of 2004, with effect from 01.04.2009, the CST leviable was @ 2% as per the existing norms. The Cabinet examined the said proposal and decided in favour thereof on 20.05.2009. On the basis of the said decision, the Industrial Department issued notification dated 29.05.2009 which reads thus:-

Government of Himachal Pradesh

Department of Industries (A)

No. Ind. A(F)6-3/2008 Dated Shimla-02, 29th May, 2009

NOTIFICATION

In partial modification of this department notification No. Ind. A(F)6-7/2004 dated 30th December, 2004 notifying Industry Policy 2004 regarding grant of Incentives, Concessions and Facilities to Industrial Units Himachal Pradesh-2004, the Governor, Himachal Pradesh is pleased to extend the incentive of validity of concessional rate of CST @ 1% upto 31.03.2013 in Rules 10.3 of Industry

Policy, 2004 or till the time CST is phased out, whichever is earlier.

By Order

Pr. Secretary (Inds.) to the

Govt. of Himachal Pradesh.

However, what is significant to note, is that, eventually, it is the Excise and Taxation Department, in exercise of powers conferred by Clause (b) of sub section (5) of Section 8 of the Central Sales Tax Act, 1956 (Central Act No. 74 of 1956), issued notification, which reads thus:-

EXCISE AND TAXATION DEPARTMENT

NOTIFICATION

Shimla-171002, the 18th June, 2009

No. EXN-F(5)-6/2006-I. - Whereas, the Governor of Himachal Pradesh is satisfied that it is necessary in the public interest so to do.

2. Now, therefore, in exercise of the powers conferred by clause(b) of sub-section (5) of section 8 of the Central Sales Tax Act, 1956 (Central Act No. 74 of

1956), the Governor of Himachal Pradesh is pleased to direct that in respect of the sale in the course of inter-State trade or commerce of the goods (other than those manufactured by the breweries, distilleries, non-fruit/vegetable based wineries and bottling plants (both of country liquor and Indian made foreign liquor) manufactured by the dealers running any existing industrial unit or new industrial unit (other than those new industrial units which are located in the tax free industrial zone) in the State of Himachal Pradesh, and are registered as dealer with Excise and Taxation Department, Himachal Pradesh, the tax levied under sub-section (1) of section 8 of the said Act shall be calculated and payable at the rate of 1% of the taxable turnover of such goods with immediate effect for the period ending 31-3-2013.

3. The Governor of Himachal Pradesh is further pleased to direct that the concessional rate of central sales tax specified in para 2 of this notification shall be levied only if the existing industrial unit or new industrial unit, as the case may be,-

(i) has been registered as a dealer under the Himachal Pradesh Value Added Tax Act, 2005, for manufacture of goods for sale;

(ii) complies with the provisions of (a) Himachal Pradesh Value Added Tax Act, 2005 (b) the Central Sales Tax Act, 1956 and (c) the rules including the Scheme, if any made, the notifications and orders issued under these Acts;

(iii) not only manufactures but also sells goods by themselves and it shall not be open for finished goods purchased or acquired by concerned industrial units for re-sale;

(iv) has obtained a certificate in Form "I" prescribed under this Department notification No. EXN-F(1)-2/2004 (iii) dated 30th March, 2005 from the General manager, District Industries Centre of the Department of Industries of the Government of Himachal Pradesh where the industrial unit is registered or in other case from the Director of Industries, Himachal Pradesh or his nominee duly authorized, in writing, in this behalf, and has furnished the same certificate to the Assessing Authority for the grant of certificate in form "E" appended as Annexure "A" to this notification;

Explanation I.- For the purposes of this notification-

(i) "new industrial unit" means an industrial unit located in Himachal Pradesh which commenced/commences commercial production on or after 31.12.2004, but will not include any industrial unit which is formed as a result of reestablishment, mere change of ownership, change in the constitution, restructuring or revival of an existing industrial unit;

(ii) "existing industrial unit" means an industrial unit which commenced production before 31.12.2004; (iii) "substantial expansion" in respect of the industrial unit existing before 7-1-2003, means substantial expansion undertaken by way of increase in installed capacity of the existing unit by not less than 25%

of the capacity, which should be the result of installation of additional plant and machinery and the Industrial unit comes into commercial production from such expanded period of the capacity, not later than 31-3-2007 subject to the fulfillment of the condition that such expansion shall result in additional employment of atleast 25% (excluding employment contractual/on sub-contractual basis) of the existing manpower employed on regular basis and further that it will continue to employ at all levels, atleast 70% of its total manpower whether on regular basis or daily basis or contractual/sub-contractual basis or by any other mode from amongst the bonafide Himachalis;

(iv) the expression "negative" list shall have the same meaning as assigned to it by this Department notification No. EXN-F(I) 2/2004 (iii) dated 30th March, 2005.

(emphasis supplied)

From the plain language of this notification, it is evident that the concession, as obtained under the 2004 Industrial Policy was sought to be "reintroduced with immediate effect from the issuance of notification" for the period ending 31.03.2013.

3. The challenge in this petition and the thrust of the argument canvassed before us, is that, the Authorities have committed manifest error in proceeding on the assumption that the notification dated 18.06.2009 has prospective application. For, the Cabinet of the Government of Himachal Pradesh having resolved to extend the concession beyond 31.03.2009 till 31.03.2013 vide decision dated 20.05.2009, the inevitable consequence was to introduce the said concession with retrospective effect from 01.04.2009, if not of extending the existing Industrial Policy of 2004 for further period upto 31.03.2013 as such.

4. Having considered the rival submissions, we have no manner of doubt that the notification issued by the Excise and Taxation Department dated 18.06.2009 would prevail. In that, the same has been issued in exercise of statutory powers u/s 8(5) (b) of the Act, 1956 in the name of and by the Governor of the State. Reliance cannot be placed on the decision of the Cabinet or the proposal of the Industrial Department to extend the concession rate of CST at 1% for all the Industrial Enterprises from 31.03.2009 till 31.03.2013.

5. The plain language of notification dated 18.06.2009, in our view, leaves no manner of doubt that it is intended to give prospective effect, as the expression used is "with immediate effect". Even in absence of that expression, ordinarily, the notification will have to be understood as having prospective application. Be it a case of delegated legislation or conditional legislation, in absence of express intention therein, it must have prospective application only. Further, for introducing retrospective delegated or conditional legislation, as the case may be, the Act under which it is issued must provide for the same.

6. Be that as it may, counsel for the petitioner was at pains to persuade us to take the view that the expression "with immediate effect" being contrary to the

decision of the Cabinet dated 20.05.2009, be disregarded. Instead, the benefit of the Cabinet decision should flow to the petitioner with effect from 01.04.2009 and continue until 31.03.2013. This argument does not commend to us. To buttress this argument, however, learned counsel for the petitioner, placed reliance on the decision of the Apex Court in the case of State of Bihar and Others Vs. M/s. Suprabhat Steel Limited and Others, In our opinion, this decision will be of no avail to the petitioner. The question involved in the said decision was whether the Industrial Units, which have started production prior 01.04.1993 whose investments on plant and machinery did not exceed ` 15 crores on April 1, 1993 would be entitled to the facilities of sales tax exemption on the purchase of raw material for a period of 7 years from April 1, 1993 in accordance with Clause 10.4(i)(b) of the Industrial Incentive Policy, 1993; and whether the notification issued by the Government of Bihar dated April 2, 1994 in exercise of powers u/s 7 of the Bihar Finance Act, 1981 to the extent it indicates, who has not availed of any facility or benefit under any industrial promotion policy is invalid being contrary to the Policy Resolution of 1993. The Apex Court after due analysis found as of fact that a right had vested in the assessee, which was being taken away because of the subsequent notification. In the present case, however, from the chronology of events already adverted to, it is evident that the right under the 2004 industrial policy came to an end by efflux of time on 31.03.2009. There was no pre-existing right when the notification dated 18.06.2009 was issued. That notification, therefore, in no way, impacted pre-existing right. Assuming that the petitioner is justified in relying on the decision of the Cabinet dated 20.05.2009, in our opinion, that would not create any right in favour of the petitioner, much less a pre-existing right, which has been affected by the impugned notification dated 18.06.2009.

7. Reliance was then placed on the decision of the Division Bench of our High Court in the case of Gujarat Ambuja Cement Ltd. and Another Vs. Assessing Authority-cum-Assistant Excise and Taxation Commissioner and Others, Even the exposition in this decision, in our opinion, will have to be understood in the context of the fact situation of that case. The Court found as of fact that the notification issued by the Government on 31.07.1992 affected the pre-existing and vested right of the assessee.

8. Reliance was also placed on another decision of the Apex Court in the case of I.T.C. Bhadrachalam Paperboards and Another Vs. Mandal Revenue Officer, A.P. and Others, , to contend that the notification dated 18.06.2009 will have to be construed as conditional legislation and exercise of such power by the State Government will have to be in conformity with the decision of the Cabinet and moreso will have to be understood to mean that benefit which was available to the petitioner under 2004 industrial policy was extended and continued beyond 31.03.2009 to subsist till 31.03.2013. It is not possible to countenance this submission. In our opinion, in the fact situation of the present case, no subsisting right much less pre-existing right, has been impacted by issuance of the notification dated 18.06.2009. On the other hand, the notification has been

issued in exercise of statutory powers u/s 8 of the Act by the Competent Authority. It "introduces" the concession to the assessee with immediate effect from the date of the notification. The fact that similar concession was made available to the petitioner under the industrial policy of 2004, which was in vogue till 31.03.2009, cannot be the basis to assume that the notification dated 18.06.2009 has retrospective or retroactive effect as is sought to be contended; and moreso in the face of express language contained in the said notification - Providing for "with immediate effect". In case, the notifications were to be issued to affect the preexisting right, the argument that it ought to be in conformity with the decision of the Cabinet would have been relevant. Admittedly, when the Cabinet decision was taken on 20.05.2009, the concession was not available to the assessee having already lapsed on 31.03.2009. Therefore, even this decision, pressed into service will be of no avail.

9. The petitioner has then pressed into service another decision of the Apex Court in the case of Pournami Oil Mills and Others Vs. State of Kerala and Another, For the reasons, already noticed hitherto, even this decision will be of no avail. Because, it is not a case of affecting any pre-existing and subsisting right vested in the petitioner. In the present case, the right, if any, came to an end with efflux of time on 31.03.2009, in terms of the industrial policy of 2004 itself. The fact that similar concession was given after coming into force of notification dated 18.06.2009, cannot be the basis to assume that it is extension of the old regime. It is nevertheless a new dispensation albeit on the same terms, which obtained under the policy of 2004. A priori, it cannot be assumed that the benefit should be given retrospective effect from 01.04.2009, inspite of the express language of the notification in question.

10. Reliance was then placed on the decision of the Apex Court in the case of W.P.I.L. Ltd., Ghaziabad Vs. Commissioner of Central Excise, Meerut, U.P., In this case, the Court was called upon to examine the explanatory notification in the context of the controversy raised in that case. The Court noted that the submission of the appellant that the Government was satisfied about the policy which was in vogue not to impose excise duty on parts of power driven pumps used in the factory premises for manufacture of power driven pumps and to clarify the position was well founded. The Court further opined that the Authorities were in error in upholding the demand and in directing the appellant to pay excise duty, notwithstanding the clarificatory notification having retrospectivity. In the present case, it is not a case of clarificatory notification but subsequent or new notification dated 18.06.2009 introducing concession @ 1% CST with effect from the issuance of the notification, to be paid on inter-State sales. If that is the basis on which the Authorities have proceeded to consider the matter and concluded that the petitioner is liable to pay Central Sales Tax @ 2% on the inter-State sales, for the period from 01.04.2009 to 17.06.2009, in our opinion, the same is unexceptionable and no interference in that behalf is warranted.

11. The argument of the petitioner that the petitioner relying on the Cabinet decision refunded the amount to customers, cannot create any right in favour of the petitioner, much less, to claim any exemption from payment of tax in terms of the policy in vogue. Taking any view of the matter, the petition is devoid of merit. The same is dismissed.