(2012) 01 P&H CK 0311

In the Punjab And Haryana At Chandigarh

Case No : CWP No. 3396 of 1992

M/s Seth Brothers Leasee Imperial Floor Mills — APPELLANT

Vs

State of Haryana and another — RESPONDENT

Date of Decision : 05-01-2012

Acts Referred:
Constitution of India, 1950 — Article 14, 226, 227, 245

Citation : (2012) 166 PLR 780 : (2013) 59 VST 481

Hon'ble Judges : M.M. Kumar, J;Ajay Kumar Mittal, J

Bench : Division Bench

Advocate : Avnish Jhingan, for the Appellant; Vinod S. Bhardwaj, Additional Advocate General, Haryana, for the Respondent

Final Decision : Allowed

Judgement

Ajay Kumar Mittal, J.—The petitioner has approached this Court under Articles 226/227 of the Constitution of India seeking quashing of Notification Annexure P.1 whereby it gives retrospective effect to the applicability of provisions of the Haryana General Sales Tax Act, 1973 (in short, "the Act") from May 17, 1988 whereas the notification had been issued on March 26, 1991. Consequential prayer has also been made for setting aside assessment order dated 10.7.1991 for the year 1989-90 (Annexure P/3) to the extent it creates liability on that basis. Briefly, the facts as narrated in the petition may be noticed. The petitioner is a partnership firm and a registered dealer under the Act and also Central Sales Tax Act; 1956. It is carrying on the business of flour mill at Ambala City. The petitioner-firm is filing its sales tax returns regularly and depositing the amount of tax. It challenges the legality and validity of the notification dated 26.3.1991 issued by respondent No. 1 under the Act, whereby Schedule ''D'' to the Act has been amended with retrospective effect Prior to the impugned amendment, the petitioner-firm was not liable to pay any tax on the purchase of wheat from within the State and it was only the flour and other by-products manufactured by the petitioner-firm which were liable to tax and on which the petitioner was paying the tax regularly. Section 63 of the Act gives power to the State Government to amend the Schedule but does not give any power for amendment with retrospective effect. In the present case, Schedule ''D'' to the Act has been amended retrospectively with effect from 17.5.1988 vide impugned notification. Hence the present writ petition.

2. Learned counsel for the petitioner submitted that the Government did not have the power, by exercising delegated legislation, to issue notification which was to operate retrospectively from 17.5.1988. Reliance was placed on judgments of this Court in Goel Brick Industries and others v. Ws Radha Swami Brick Co.,1 (2010) 37 PHT 440 (P&H), Ranbir Singh Ram Gopal v. State of Haryana and another,2 (2002) 19 PHT 289 (P&H), Ram Gopal Murli Dhar Juntra v. State of Haryana and others,3 (2010) 37 PHT 438 (P&H), Shiv Shankar Industries v. State of Haryana and others,4 (2011) 39 PHT 220 (P&H), Ws Jiwan Agricultural Implements Workshop, Patiala v. State of Punjab and others,5 (2000) 15 PHT 462 (P&H) and judgment of the Apex Court in State of Uttar Pradesh and Ors.,, AIR 2007 SC 2123) (supra) . It was submitted that the State is empowered to issue prospective notifications and the notification having its applicability retrospectively from 17.5.1988 was bad.

3. It was further submitted that the petitioner prior to amendment was not liable to pay any tax on the purchase of wheat from within the State and it was only the flour and its by-products manufactured by the petitioner which were liable to tax. Now by virtue of retrospective amendment in Schedule ''D'' by notification dated 26.3.1991, Annexure P. 1, the petitioner has been made liable to pay tax on the stocks lying with the petitioner by making it deemed purchases as first purchases in the hands of the petitioner on the purchase value by disallowing the sales to registered dealers. Under the circumstances, it cannot be said that notification is not operating retrospectively.

4. Learned counsel for the State submitted that the notification is not retrospective in nature as Explanation 1 to Schedule ''D'' in the said notification only clarifies the intention of the legislature and adjustment has to be given in the light of provisions contained in the Explanation itself.

5. The issue for consideration in this petition relates to whether the State Government is empowered to issue notification amending the Schedule ''D'' retrospectively from 17.5.1988.

6. It would be expedient to refer to relevant entry of Schedule ''D'' of the Act before the amendment and after the amendment. Entry before the amendment reads thus:-

2. Cereals (except paddy and rice) and pulses as defined in section 14 of the Central

i) When sold within the state to a person other than a registered dealer

First Sale by a dealer liable to pay tax under this Act.

Sales Tax Act

use of the authority of his registration certificate.

ii) when purchased within the state from any source without payment of tax; and

a) disposed of whether as such or after manufacturing or processing into other goods in any manner otherwise than by way of sale:-

(1) within the State;

(2) in the course of inter-state trade or commerce

(3) in the course of export out of the First sale by a dealer liable to pay tax under this Act.

After the amendment, relevant entry of Schedule ''D'' reads thus:-

"2. Cereals (except wheat, paddy and rice) and pulses as defined in Section 14 of the Central Sales Tax Act

i) When sold within the state to a person other than a registered dealer making use of the authority of his registration certificate.

First Sale by a dealer liable to pay tax under this Act.

ii) when purchased within the state from any source without payment of tax; and

a) disposed of whether as such or after manufacturing or processing into other goods in any manner otherwise than by way of sale:-

(1) within the State;

(2) in the course of inter-state trade or commerce

(3) in the course of export out of the territory of India; or

(b) use in the manufacture of tax free goods.

Last purchase within the state by a dealer liable to pay tax under this Act

2.A. Wheat

i) when purchased within the stale by dealer liable to pay tax.

First Purchase

ii) in all other cases

First sale within the State by a liable to pay tax

Explanation I - Tax already paid on wheat at the last stage of purchase during the period from the 17th day of May, 1988, to the date of publication of this notification, shall be deemed to have been paid at the first purchase within the state by a dealer liable to pay tax under this Act and the stock of wheat held on the date of publication of this notification in the Official Gazette shall be deemed to be the first purchase within the state on such date.

Explanation II - A purchase by an agent shall be treated as the purchase by the principal if registered under the Act."

7. After giving thoughtful consideration to the respective submissions made by learned counsel for the parties, we find force in the submissions of learned counsel for the petitioner. This Court in Goel Brick Industries''s case (supra) considering the principles whether notification could be issued retrospectively, in paras 9 and 12 held as under:-

9. Even though power of legislature under Article 245 of the Constitution is plenary which also includes power to make law with retrospective effect and even subordinate legislation can be allowed to be made retrospectively, subject to certain limitations, exercise of such power has to be consistent with Article 14 and if arbitrary, the same can be struck down. When exercise of retrospective power of legislation can be held to be arbitrary, has necessarily to be judged on the merits of the amendment in a given fact situation,

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12. Applying the above principles, it is seen that by impugned notification the rates of tax have been revised which has been given effect for a period of nine months prior to the date of notification. In reply, there is no justification as to what was the relevance of the earlier date for fixing higher rate of tax. Conferment of exercise of power of giving retrospective effect in a subordinate legislation can be justified only if it is reasonable. Retrospective legislation may be justified if a provision is clarificatory or provision is for validating an earlier levy which may have been struck down or for any such purpose which may be permissible. In absence thereof, mere fact that there is legislative competence to legislate retrospectively cannot by itself be enough to justify retrospective levy.

8. The petitioner has been burdened with liability only on the basis of the aforesaid amendment by virtue of notification Annexure P. 1 while passing the assessment order to which it was not liable earlier. Under the circumstances, the plea of the State that the amendment is clarificatory cannot be accepted. Further, the State in the written statement nowhere has furnished any justification for amending Entry 2 and inserting Entry 2A and Explanation 1 in the Schedule ''D'' of the Act with effect from 17.5.1988 by notification dated 26.3.1991. In the absence of any reasons enumerated for retrospectivity of the notification, its validity to that extent cannot be upheld. Accordingly, the writ petition is allowed to the extent that the impugned notification shall not operate retrospectively. as a sequel, the liability, if any, of the petitioner shall be determined afresh by the assessing officer in accordance with law.