
(2002) 10 RAJ CK 0025

In the Rajasthan High Court

Case No : Special Appeal (Writ) No's. 1007, 1008 and 1009 of 2000

Mumal Marbles Ltd.

APPELLANT

Vs

State of Rajasthan and Another

RESPONDENT

Date of Decision : 30-10-2002

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2003) 130 STC 160 : (2003) 1 WLC 665 : (2003) 2 WLN 523

Hon'ble Judges : N.N. Mathur, J;H.R. Panwar, J

Bench : Division Bench

Advocate : Dinesh Mehta, for the Appellant; Sanjeev Johari, for the Respondent

Final Decision : Allowed

Judgement

N.N. Mathur, J.—These three special appeals are directed against the judgment of the learned single Judge relegating the petitioner to alternate remedy under the Rajasthan Sales Tax Act.

2. The petitioner-company is carrying on the business of manufacturing and selling of marble slabs and tiles. It was granted benefit of deferment of tax under the Deferment Scheme of 1989 with effect from November 17, 1992. The State Government under the notification dated December 1, 1986 permitted shifting of point of tax. The relevant notification is extracted as follows :

"S.No.647 : F-5(118) FD / Gr. IV/71, dated December 1, 1986.

S.O. 131.--In pursuance of Rules 15 of the Rajasthan Sales Tax Rules, 1955, and in supersession of Finance Department Notification No. F.5(40)FDRT/63-2, dated March 23, 1963 (S. No. 53), as amended from time to time, the State Government hereby directs that with immediate effect the tax payable u/s 5 of the Act on the sale of goods manufactured in Rajasthan by any manufacturer holding a certificate of registration under the Act shall be at the following points, namely :

(a) When sale is made by such manufacturer to--

(1) an unregistered dealer,

(2) a consumer,

(3) a registered dealer for purposes other than sale within the State or sale in the course of inter-State trade or commerce, or

(4) a registered dealer who is entitled to claim exemption under Sub-section (2) of Section 4 of the Act on the sale of such goods within the State,

at the point of sale by the manufacturer himself ; and

(b) When sale is made by such manufacturer to a registered dealer for purposes of sale within the State, whether or not to a department of the State or Central Government, on which tax under the Act either at full rate or otherwise or at the rate according to Section 5C, 5CC or 5CCCC of the Act is paid, or sale in the course of inter-State trade or commerce on which tax under the Central Sales Tax Act, 1956 (Central Act 74 of 1956) is paid, at the point of sale by such registered dealer on the condition that he undertakes to pay such tax and a declaration, which shall be furnished to the assessing authority, to that effect in form S.T. 17 prescribed under the rules is obtained by such manufacturer from such registered dealer."

3. The State Government by another notification dated 20th November, 1991 amended the said notification by adding the Explanation to the effect that a dealer who has been granted exemption from tax or deferment of tax under the incentive/ deferment scheme shall not be entitled to shift the liability to pay the tax under the said notification. The relevant notification is extracted as follows :--

Deputy Secretary to Government

FINANCE (GR. IV) DEPARTMENT

Notification Jaipur, November 20, 1991.

S.O. 212.--In pursuance of Rule 15 of the Rajasthan Sales Tax Rules, 1955, the State Government being of the opinion that it is expedient in the public interest so to do, hereby makes the following amendments in this Department Notification No. F.5(118) FD/Gr. IV/71, dated December 1, 1986, namely :

AMENDMENTS.--(1) In the said notification, for the existing expression "5C, 5CC or 5CCCC" in Clause (b), the expression "5C or 5CC" shall be substituted.

(2) At the end of the said notification the following Explanation shall be inserted, namely :--

"Explanation.--A dealer who is granted exemption from tax or deferment of tax under the Incentive/Deferment Schemes, shall not be entitled to shift the liability to pay tax under this notification.

[No. F.4(90) FD/Gr. IV/91-62]"

The said amendment was deleted by notification dated March 27, 1995. The notification of deletion is extracted as follows ; .

"S. No. 975 :F,4(II)FD/Gr. IV / 95-96 dated March 27, 1995,

S.O. 406.--In pursuance of Rules 15, Rajasthan Sales Tax Rules, 1955, the State Government hereby makes the following amendment in this Department's Notification No. F.5(118) FD/Gr.IV/71 dated December 1, 1986 (as amended from time to time) (S. No. 647), namely :--

AMENDMENT.--The existing Explanation at the end of the notification shall be deleted."

A reading of both the notifications, i.e., dated November 20, 1991 and March 27, 1995 indicates that the Explanation added was deleted.

4. The petitioner availed of the benefit of deferment of tax under the Departmental Scheme of 1989. It opened the required declaration form S.T. 17 as provided under Rule 15 read with notification dated December 1, 1986 and effected the sales for the years 1992-93, 1993-94 and 1994-95.

5. The regular assessment of the petitioner-company was made on November 30, 1996. However, the petitioner was served with a show cause notice dated October 15, 1997, proposing to levy tax and the interest on the sales made to the various registered dealers on the strength of declaration form S.T.-17. The petitioner filed a detailed reply stating, inter alia, that the Explanation which was inserted with effect from November 20, 1991 has been deleted vide notification dated March 27, 1995, as a result whereof it shall be deemed to have deleted from its inception or in other words as if the Explanation dated November 20, 1991 was never inserted in the statute. The assessing officer rejected the Explanation and passed a fresh order of reassessment dated February 28, 1998. The petitioner challenged the said order of assessment before the Rajasthan Taxation Tribunal by way of an application u/s 8, The application was admitted on July 21, 1998. The Tribunal also granted interim relief in favour of the petitioner. On abolition of the Rajasthan Taxation Tribunal the said original application stood transferred to this Court. As three separate applications for the respective assessment years were filed different writ petitions were registered before this Court. The learned single Judge rejected the petitions on the ground of availability of alternate statutory remedy. The learned single Judge relied on his own judgment delivered in B.S.L. Ltd.'s case (S.B. Civil Writ Petition No. 651 of 2000) dated August 25, 2000. The learned single Judge rejected the contention that the validity of the notification cannot be challenged before the departmental authorities. The learned single Judge observed, thus :

"Issuance of a notification under the Act its validity or otherwise can be considered by the appellate authority while adjudicating upon the appealable order."

It is contended by Mr. Dinesh Mehta, learned counsel for the petitioner that the learned single Judge committed an error in holding that the validity of the notification can be examined by the appellate authority. On the merits of the case it is submitted that the action of the respondents in passing the order of reassessment on the basis of non est notification is hit by Article 265 of the Constitution of India. On the other hand Mr. Sanjeev Johari, learned counsel appearing for the respondents, has supported the judgment of the learned single Judge.

6. We have considered the rival contentions. So far as relegating the petitioner to the alternate remedy under the statute is concerned, it has been the consistent view of the apex Court that no one can challenge before the departmental authorities constituted under the statute validity of a provision of an Act or rule or even a notification and thus in such cases an alternate remedy will not be a bar for invoking the provisions of Article 226 of the Constitution of India. We are buttressed, in our view by the decision of the apex Court in Kanpur Vanaspati Stores, Kanpur v. Commissioner of Sales Tax, U.P., Lucknow reported in [1973] 32 STC 655 . The same view has been taken by the division Bench of this Court in M/s Udaipur Contractors Association Vs. State of Rajasthan and others, The judgment of the learned single Judge in BSL's case (S.B. Civil Writ Petition No. 651 of 2000 decided on August 25, 2000--Rajasthan High Court has not been approved by the division Bench of this Court in Guljag Industries Limited v. State of Rajasthan (D.B. Civil Special Appeal No. 907 of 2000) decided on August 30, 2002, Reported in Guljag Industries Limited Vs. State of Rajasthan and Another, Thus, the learned single Judge has committed an apparent error in dismissing the writ petitions solely on the ground of alternate remedy.

7. A reading of the notifications dated November 20, 1991 and March 27, 1995 extracted as above clearly shows that the Explanation inserted with effect from November 20, 1991 was deleted vide notification dated March 27, 1995. The notification dated November 20, 1991 has not been saved by any saving clause. Thus, on the date of reassessment, i.e., February 28, 1998 the notification dated November 20, 1991 was not in existence. No action under a provision can be taken after the provision has been deleted unless the said provision has been saved by a specific provision to that effect. The apex Court in Kolhapur Canesugar Works Ltd. and Another Vs. Union of India and Others, held that where there is no saving, then proceedings initiated under the old rule becomes non est. The decision of apex Court is based on a decision in Rayala Corporation (P) Ltd. v. Director of Enforcement, New Delhi reported in AIR 1970 SC 494. The general rule is after the temporary provision has expired, no proceeding can be taken upon it and it ceases to have any further effect unless saved by an express provision, i.e., the saving clause. The action taken during the life of the said provision has been saved.

8. In the instant case, the explanation inserted by notification dated November 20, 1991 has been deleted vide notification dated March 27, 1995 without any

specific saving clause. Thus, when the assessing authority passed the reassessment order dated February 28, 1998 the Explanation inserted vide notification dated November 20, 1991 was not in existence being rubbed off or in other words in view of notification dated March 27, 1995 it became non est. Thus, the entire proceedings of re-assessment which includes the notice dated October 15, 1997 and the order of reassessment dated February 28, 1998 are wholly without jurisdiction without authority of law.

9. Consequently, all the three special appeals are allowed. The order of the learned single Judge dated September 12, 2000 is quashed and set aside. The order of reassessment dated February 28, 1998 (annexure 7) is quashed and set aside in each of the writ petitions.