**(2015) 03 MP CK 0173**

**In the Madhya Pradesh High Court**

**Case No :** Writ Petition No. 11097 of 2012

Sayaji Hotels Ltd. APPELLANT

Vs

State of M.P. and Others RESPONDENT

**Date of Decision :** 16-03-2015

**Acts Referred:**
Central Sales Tax Act, 1956 — Section 8
Constitution of India, 1950 — Article 14, 19(1)(g), 226

**Citation :** (2015) 83 VST 191

**Hon'ble Judges :** P.K. Jaiswal, J;D.K. Paliwal, J

**Bench :** Division Bench

**Advocate :** P.M. Choudhary, for the Appellant; Mini Ravindran, Deputy Government Advocate, Advocates for the Respondent

## Judgement

P.K. Jaiswal, J—By this writ petition under article 226 of the Constitution of India, the petitioner is questioning, inter alia, retrospective date of enforcement of Notification No. 31 dated March 3, 2006, (annexure P/2, Notification No. 69 dated September 15, 2006, (annexure P/3), whereby curtailing the exemption granted earlier (November 5, 1996 to November 4, 2006) up to April 1, 2006, instead of granting the benefit up to November 4, 2006. They also prayed to hold that making amendment retrospectively denying/limiting incentives to hoteliers being ultra virus under articles 14 and 19(1)(g) of the Constitution. According to the petitioner, it is a company incorporated and registered as a public limited company under the Indian Companies Act, 1956, having its registered office at Vadodara (Gujarat). It has established a hotel at Indore, in the Vijay Nagar area in the name and style of "Sayaji Hotels Ltd." and it''s business operation commenced in the year 1996. It is registered as a dealer under the Commercial Tax Act, 1994, Central Sales Tax Act, 1956 and M.P. Hotel Tatha Vas Grihon me Vilas Vastuon Par Kar Adhiniyam, 1988 (for short, "the Luxury Tax Act, 1988").

2. The Government of M. P. in order to promote the tourism in the State had framed new Tourism Policy, 1995. A special package of incentives for the tourism

 

industry was prepared. The policy provided specific incentive by way of providing land, exemption from luxury tax, sales tax and entertainment tax.

3. Notification No. A-3-7-95-ST-V (72) dated September 5, 1995 under Luxury Tax Act, exempted hotelier or class of hoteliers for the period of 10 years from payment of tax under the Luxury Tax Act, who have established or likely to establish in the State a new hotel under the new Tourism Policy 1995, having made a capital investment of not less than 50 lakhs in which at least 10 rooms have been constructed from the date of commercial operation. Later on vide Notification No. A-3-30-96-ST-V(39) dated July 3, 1998, the exemption was made effective from the date of issue of certificate of eligibility.

4. Accordingly, the petitioner-hotelier was granted eligibility of certificate for exemption for a period of 10 years with effect from November 5, 1996 to November 4, 2006.

5. Notification No. A-3-7-95-ST-V(73) dated September 5, 1995 under section 17 of the Commercial Tax Act, 1995, was issued exempting hotelier from payment of tax under section 9 of the Commercial Tax Act on the sale of food and other articles for human consumption or any non-alcoholic drink for a period of 10 years from the "date of operation" later on changed to "date of issue of eligibility certificate".

6. Subsequently, the notification-Notifications No. A-3-38-2000-ST(55) and (56) dated August 5, 2000 were issued under the Luxury Tax Act and Commercial Tax Act providing exemptions to the hoteliers, but such exemptions were optional at the hands of the hoteliers. The aforesaid exemption is allowable to the hotel, which has to be a registered dealer under the Commercial Tax Act, which had commenced their commercial operation on or before January 31, 1995. The duration of exemption was prescribed to be from January 31, 1995 to January 31, 2005. Accordingly, the case of the petitioner under the aforesaid notification was considered and eligibility certificate was issued in its favour by the competent authority of the Commercial Tax Department dated July 17, 2001 (annexure P/4). The petitioner was held eligible to avail of the facility of exemption from payment of tax payable under section 9 of the Commercial Tax Act, 1994 and the eligibility certificate was issued subject to the following expressed conditions:

"(i) The dealer complies with the restrictions and conditions specified in column (3) of the Schedule appended to the said notification.

(ii) The amount of tax collected by the hotel from the customers from the date of commercial operation and deposited in the treasury, shall not be refundable to the hotelier.

(iii) The amount of tax collected by the hotel from the customers from the date of commercial operation but not deposited in the treasury, shall have to be deposited in the treasury by the hoteliers."

 

7. From the perusal of the aforesaid, it is clear that the petitioner had to collect tax from the customers from the date of commercial operation and to deposit the same in the treasury and such tax collected from the customers shall not be refundable to the hotelier. As per petitioner''s own showing, it started its commercial operation as on January 31, 1995 and, therefore, it is presumed that the petitioner had been availing of exemption as per the terms of eligibility certificate.

8. From April 1, 2006, the M. P. VAT Act, 2002, came into force, certain new concepts like rebate of input tax have been incorporated. Section 14 of the VAT Act provides rebate of input tax to a registered dealer in certain circumstances. The Government of M. P. in exercise of powers conferred by sub-clause (e) of clause (i) of section 72 of the VAT Act 2002 and Sub-section (5) of section 8 of the Central Sales Tax Act, 1956 has notified a scheme in respect of industrial units or hotels eligible to avail of facility of exemption from payment of tax and in the notification aspect of exemption already being availed of by the dealers under the previous notifications has been reconciled.

9. Clauses 2, 3, 4, 5 and 7 of Notification No. A-3-195-2005-I-V(31) dated March 31, 2006 are relevant which reads as under:

"2. The registered dealers who are eligible to avail the facility of exemption from payment of tax under the said notifications immediately before the commencement of the VAT Adhiniyam and would have continued to be so eligible had the VAT Adhiniyam not come into force, and holding an eligibility certificate for the purpose, shall continue to avail the facility subject to the restrictions and conditions specified in para 3 below and the said notifications shall be deemed to have been continued with the amendments accordingly.

3. (1) The facility shall be available for the unexpired period of eligibility certificate or to the extent of balance of cumulative quantum of tax as on April 1, 2006, whichever is earlier;

(2) The dealer shall make purchases from registered dealers after payment of tax and be eligible to collect the tax payable on the goods, including by-products and waste products, manufactured and sold within the State;

(3) If the goods manufactured are the goods including by-products and waste products, specified in Schedule II of the VAT Adhiniyam, the dealer shall compute his tax liability by deducting input tax rebate from tax collected on sales within the State and be eligible to retain the amount of tax collected, which is in excess of the input tax rebate. The amount so retained shall be included in computation of cumulative quantum of tax benefit;

(4) The dealer shall continue to avail the facility of exemption from payment of tax in respect of the goods, including by-products and waste products, manufactured and sold in the course of inter-State trade or commerce. The amount so exempted shall be included in computation of cumulative quantum of

 

tax benefit;

(5) The dealer shall continue to avail the facility of exemption from payment of purchase tax. The amount so exempted shall be included in computation of cumulative quantum of tax benefit.

(7) The dealer shall be eligible to first adjust the balance of input tax rebate, if any, against any other tax liability of self and to transfer the remaining balance for adjustment against the tax liability of any other registered dealer, if desired. The dealer shall make an application to the assessing authority along with return giving details of tax liability of self or the registered dealer in whose favour the balance of input tax rebate is to be adjusted or transferred. The assessing authority shall make the assessment in accordance with the provisions of clause (b) of sub-section (1) of section 20 of the VAT Adhiniyam and after determining the balance of input tax rebate, adjust or transfer the balance by issue of refund adjustment order. The provisions of section 37 of the VAT Adhiniyam shall mutatis mutandis apply to such adjustment."

10. Clause 3(1) of the notification prescribes that facility shall be available for the unexpired period of eligibility certificate or to the extent of balance of cumulative quantum of tax as on April 1, 2006, whichever is earlier. Clause 3(2) further prescribes that dealer shall make purchase from registered dealers after payment of tax and be eligible to collect tax payable on goods, manufactured and sold within the State. Clause 3(a) further prescribes that all the taxable goods, the dealer shall compute his tax liability by deducting input-tax rebate from tax collected on sales within the State and being eligible to retain amount of tax collected, which is in excess of input-tax rebate, amount to retain shall be included in computation of cumulative quantum of tax benefit. Clause 3(4), (5), (7) makes it clear that dealer shall be eligible to first collect and adjust balance of input-tax rebate if any, against any other tax liability of self and to transfer the remaining balance for adjustment against tax liability of any other registered dealer, if they desire. On doing so, dealer shall make application to the assessing authority along with return giving details of tax liability of self or registered dealer in whose favour balance of input-tax rebate is to be adjusted or transferred. Subsequent notification dated September 15, 2006 has been issued only for the purpose of substituting the words "or hotels" after words "industrial unit" in para 1 of the notification dated March 31, 2006. Thus, dealers who are continuing to avail of facility of exemption, which availed of the facility over the unexpired period of eligibility certificate and they shall also be eligible to first adjust balance of input-tax rebate if any, against any other tax liability of self and to transfer remaining balance for adjustment against tax liability of any other registered dealer, if desired. A hotelier who is continuing with the facility of exemption as on April 1, 2006 will continue to collect tax from its customers, and to compute his tax liability by taking input-tax rebates from the tax collected on sales. Further, he will be eligible to retain tax collected, which is in excess of its input-tax rebate and the amount so retained shall be included in computation of

 

cumulative quantum of tax benefits.

11. It is submitted that curtailing exemption up to March 31, 2006 instead of November 4, 2006 by issuing notification dated March 31, 2006 and September 15, 2006, making retrospective amendment is without authority of law, void, non est and inoperative as a delegated authority cannot make amendment retrospectively.

12. The learned counsel for the petitioner gave an example and submitted that in hotel business the customer stays only for a short period and checks out and as the tax from them was not collected, relying on the exemption notification it is an impossibility to collect the same from numerous persons. The customers paid the tariff as prevalent at the relevant time and they were also not bound to pay anything more.

13. The apex court in the case of Mahabir Vegetable Oils Pvt. Ltd. and Another Vs. State of Haryana and Others, (2006) 3 JT 544 : (2006) 143 PLR 159 : (2006) 3 SCALE 178 : (2006) 3 SCC 620 : (2006) 145 STC 350 : (2006) AIRSCW 1500 : (2006) 2 Supreme 693 had held that there lies a distinction between vested rights and accrued rights. By delegated legislation, a vested right cannot be taken away. Thus, amendments carried out in 1996, cannot take away the rights of dealer with retrospective effect. He also placed reliance on the decision of the apex court in the case of State of Haryana Vs. Anil Pesticides Limited and Another, (2011) 3 RCR(Civil) 875 , Ruchi Fabrics Ltd. Vs. State of M.P. and Others, (2000) 117 STC 273 , State of State of Madhya Pradesh and another Vs. G.S. Dall and Flour Mills and Others, AIR 1991 SC 772 : (1991) 187 ITR 478 : (1990) 4 JT 430 : (1990) 2 SCALE 756 : (1992) 1 SCC 150 Supp : (1990) 1 SCR 590 Supp : (1991) 80 STC 138 and the Division Bench decision of the M.P. High Court in the case of Ambika Refinery (M/s) Vs. State of M.P. and Others, (2012) ILR (MP) 1221 : (2012) 3 MPJR 190 and submitted that the amendment could not be given retrospective effect and could not have taken away the rights of the petitioner with retrospective effect and prayed for its quashment.

14. It is clear from the specific provisions contained in the notification dated March 31, 2006 that dealers who are continuing to avail of facility of exemption, which availed of the facility over the unexpired period of eligibility certificate shall also be eligible to first adjust balance of input-tax rebate if any, against any other tax liability of self and to transfer remaining balance for adjustment against tax liability of any other registered dealer, if desired. Therefore, the dealer who was continuing with the facility of exemption under the eligibility certificate earlier issued has not been said to any adverse consequence and rather, sufficient liberty is granted to such dealers for making necessary adjustment of rebate or claiming rebates or exemption. The petitioner who is continuing with the facility of exemption as on April 1, 2006 will continue to collect tax from its customers, and to compute his tax liability by taking input tax rebates from the tax collected on sales. Further, he will be eligible to retain tax collected, which is in excess of its input-tax rebate and the amount so, retained shall be included in computation

 

of cumulative quantum of tax benefits.

15. In reply, it is submitted that, against the impugned order of assessment dated June 22, 2009, the petitioner had preferred an appeal before the Deputy Commissioner of Commercial Tax, Indore Division under section 46 of the VAT Act and the said appeal has already been decided on April 22, 2011, even before filing of the present petition. The petitioner has suppressed this fact in the writ petition.

16. On merits, it is submitted that from April 1, 2006, the eligibility certificate granted to the petitioner was modified allowing the petitioner to claim exemption and input-tax rebate instead of total exemption under the previous notification.

17. It is further submitted that against the appellate order dated April 22, 2011, the petitioner has still alternative statutory remedy of filing of second appeal under section 46(2) before the appellate board.

18. The petitioner has failed to establish any legal ground to question any of the provisions contained in the impugned Notification No. 31 dated March 31, 2006 and also to how enforceability of these notifications with effect from April 1, 2006 is violative of articles 14 and 19(1)(g) of the Constitution. As per terms and conditions of the eligibility certificate the petitioner was entitled to claim the facility of exemption during the life time of eligibility certificate and not after expiry of the same. Initially, the petitioner was granted the benefit for a period of 10 years with effect from January 31, 1995 to January 30, 2005. Thereafter, by way of amendment the State Level Committee amended the period of exemption up to November 4, 2006.

19. We, in this case, are not concerned with the quantum of exemption to which the petitioner may be entitled to, but only with the interpretation of the relevant provision which arise for consideration before us.

20. It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.

21. The honourable Supreme Court held that a subordinate legislation can be given a retrospective effect, if any power is contained in this behalf in the main Act. Rule-making power is a species of delegated legislation. A delegatee therefor can make rules only within the four-corners thereof. No statute can be construed to have a retrospective operation unless such a construction appears very clearly in terms of the Act--by a delegated legislation the right accrued to the petitioner cannot be taken away. Thus, the Supreme Court held that the amendments carried out could not take away the rights of the petitioner with the retrospective effect. In the case in hand, the exemption, which was granted already earlier notification was available to the petitioner up to November 4, 2006, but vide notification dated September 15, 2006, it was restricted up to March 31, 2006, meaning thereby, for a period of near about six months, the petitioner has been

 

liable for payment of tax for which there was no power with the State Government to withdraw such exemption with retrospective effect. The aforesaid exemption could not have been withdrawn by the State Government vide notification dated September 15, 2006 with retrospective effect.

22. In the result, this petition is allowed in part notification dated March 31, 2006 and September 15, 2006, insofar as it relates to the petitioner only, restricting the withdrawal of exemption retrospectively with effect from March 31, 2006 is not sustainable under the law. The petitioner who was extended the benefit of exemption from payment of tax shall be entitled to get the aforesaid exemption till September 15, 2006. The impugned orders are quashed to the extent as indicated hereinabove. With the aforesaid directions, the writ petition is allowed with no orders as to costs.

 