

(2009) 05 MP CK 0032

In the Madhya Pradesh High Court

S.C. Agrawal and Brothers

APPELLANT

Vs

M.P. State Electricity Board and Others

RESPONDENT

Date of Decision : 06-05-2009

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B
Constitution of India, 1950 — Article 12, 226, 265, 39
Contract Act, 1872 — Section 72

Citation : (2009) ILR (MP) 2557 : (2009) 3 MPHT 507

Hon'ble Judges : R.K. Gupta, J;Dipak Misra, J

Bench : Division Bench

Judgement

R.K. Gupta, J.—The petitioner has invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India seeking a writ of mandamus against the respondents to refund the amount of Commercial Tax unauthorizedly collected/recovered from the petitioner amounting to more than Rs. 12,00,000/- alongwith interest @ 12% per annum from the date of refund made by the respondent Board or State Tax Department till its payment to the petitioner.

2. The facts leading to the present case are that the petitioner is engaged in the business of purchase of mill reject coal from Satpura Thermal Power Station which is run by M.P. State Electricity Board and other units. According to the petitioner it is state within the meaning of Article 12 of the Constitution of India. It is stated in the petition that the electricity is being generated and transmitted and the coal is one of the main ingredients. The coal is being purchased by the Board for its Thermal Power Station, Sarni from nearby coal mines known as Satpura Mine Nos. I and II and also from other mines of Western Coal Fields Ltd.

3. The case of the petitioner is that while purchasing the Coal M.P. Electricity Board is subjected to the commercial tax and accordingly the necessary payment has been made directly to the Western Coal Field Ltd. It is submitted in the petition that the coal including coke in all its forms and charcoal as envisaged in Item No. 22 of Part V of Schedule II of the M.P. Commercial Tax Act, 1994 is a

taxable item and under the said Act the purchaser has to pay 4% commercial tax to the State Government, which has already been paid by the Electricity Board.

4. The coal is required to be processed in the processing unit so that good quality coal is processed and used for electric generation, when the coal is processed, it only adopts the soft and good quality coal and rejects hard coal or hard stones. The rejected quantity of the material, i.e., hard coal and hard stone is being purchased by the petitioner. While purchasing the same the commercial tax @ 4% is collected for its deposit with State Government. It is the grievance of the petitioner that the aforesaid tax being charged without any authority under the law. The petitioner was awarded a contract for sale of mill reject coal of 42,000 cubic meters value of Rs. 2,86,12,300/- from Power House Mill Bay Area and in Reject Yard of Satpura Thermal Power Station, Sarni. The said contract was allotted on 1-11-2000 and the aforesaid contract was required to be carried within a period of 16 months and the validity period of the contract was extended from time to time by the Board.

5. It is the grievance of the petitioner that since the tax was unauthorisedly collected from the petitioner, therefore, earlier a petition was filed before this Court which was registered as W.P. No. 107/2001. The aforesaid petition was withdrawn by the present petitioner on 30th November, 2001 and a liberty was given to file a fresh petition. A letter was written by the Commercial Tax Officer, Betul. By this letter (Annexure P-10) the Commercial Tax Officer has intimated to the Board that if the rejected mill coal is resold then no tax is liable to be recovered. On the basis of the same, the petitioner is claiming the refund of the tax paid by him while purchasing the mill rejected coal.

6. In the return the respondents/Board has supported the case of the present petitioner but has contended that the tax is being collected and is deposited with the State Government and for this reason it has been contended that even though the tax was collected by the respondents they are not liable to the refund the same and the refund has to be made by the State Government.

7. Learned Counsel appearing on behalf of the State Government submitted that in the present case since the petitioner has not stated anything in the petition that he has utilized the mill rejected coal for himself and not for any commercial activity, therefore the petitioner is not liable to claim the refund of the tax.

8. In this reference before we advert into the question with respect to the entitlement of the petitioner for the refund of the tax paid it would be appropriate to refer the judgment passed by the Full Bench of this Court which is reported in 2008(4) M.P.H.T. 251 (FB) : ILR 2008 (MP) 2156, Additional Commissioner of Sales Tax and Ors. v. S. Kumar Ltd., wherein this Court has held that "Coal Ash" is "cinder" and covered by the term "Coal" in Entry No. 22 in Part V of Schedule II and there is no exigible to tax under Entry No. 39 in Part IV. The Full Bench has overruled the earlier judgment passed in 1988 (71) STC 101 , Hukum Chand Mills Ltd. v. Commercial Tax M.P., and Full Bench held that the

Cinder (Coal Ash) being different commodity from its parent coal. On this basis the rate of tax on sale of Coal Ash would be the same as that of Coal and not prescribed under residuary entry.

9. On the basis of the same, now the question arises whether the petitioner is entitled to seek writ of mandamus against the respondents for the refund of the commercial tax collected by the Board from the petitioner ? In this reference on the behalf of the petitioner a judgment passed by the Apex Court which is reported in *Salonah Tea Co. Ltd. and Others Vs. Superintendent of Taxes, Nowgong and Others*, . has been relied upon wherein the Supreme Court held that if the payment of tax has been made under mistake of law then the Writ Court may direct for the refund of the tax.

10. The question with regard to the entitlement of the refund of the Tax has directly been considered by the Apex Court in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, . In the said judgment the question with regard to the entitlement of the refund of the tax paid wrongly or collected without authority is considered. Paragraph 346 is relevant which is reproduced as under:

For the sake of convenience, I shall summarise my conclusions as hereunder:-
(in case of doubt, the body of the judgment should be looked into)

(A) If the excise duty paid by the assessee was ultimately passed on to the buyers or any other person, and that the assessee has suffered no loss or injury, the action for restitution based on Section 72 of the Contract Act, is unsustainable. (This is the legal position even under general law, without reference to Section 11-B of the Central Excises and Salt Act as amended by Act 40 of 1991.)

(B) The decision in *Kanhaiya Lal* case and the cases following the same cannot be understood as laying down the law that even in cases the liability has been "passed on", the assessee can maintain an action for restitution. If the decision in *Kanhaiya Lal* case, and the cases following the said decision, enables such a person to claim refund (restitution), with great respect to the learned Judges, who rendered the above decisions, I express my dissent thereto. In this context, the observations in Paras 329-331 - Clause III shall also be borne in mind.

(C) Article 265 should be read along with the Preamble and Articles 39 (b) and (c) of the Constitution and so construed in cases where the assessee has passed on the liability to the consumer or third party, he is not entitled to restitution or refund. The fact that the levy is invalid need not automatically result in a direction for refund of all collections made in pursuance thereto.

(D) The presumption is that the tax-payer has passed on the liability to the consumer (or third party). It is open to him to rebut the presumption. The matter is exclusively within the knowledge of the tax-payer, whether the price of the goods included the "duty" element also and/or also as to whether he has

passed on the liability since he is in possession of all relevant details. Revenue will not be in a position to have an in-depth analysis in the innumerable cases to ascertain and find out whether the tax-payer has passed on the liability. The matter being within the exclusive knowledge of the tax-payer, the burden of proving that the liability has not been passed on should lie on him.

(E) It is not possible to conclude that any and every claim for refund of illegal/unauthorised levy of tax, can be made only in accordance with the provisions of the Act (Rule 11, Section 11-B etc., as the case may be), and an action by way of suit or writ petition under Article 226 will not be maintainable under any circumstances. An action by way of suit or a petition under Article 226 of the Constitution is maintainable to assail the levy or order which is illegal, void or unauthorised or without jurisdiction and/or claim refund, in cases covered by Propositions (1), (3), (4) and (5) in Dhulabhai case, as one passed outside the Act, and ultra vires. Such action will be governed by the general law and the procedure and period of limitation provided by the specific statute will have no application.

(F) The attack against the illegal or unauthorised levy as also the relief of refund may fall ordinarily within the three categories specified in Paras 327-331 of the judgment. An action by way of suit or writ petition under Article 226 of the Constitution of India will lie in the cases and subject to the conditions stated in Paras 327-331 and 332 of the judgment.

(G) The jurisdiction of Civil Courts is not barred in entirety regarding the attack against the levy and/or claim for refund; in those cases, coming within the three categories mentioned in Paras 290 and 327-331 of this judgment, the jurisdiction of the ordinary Courts will not be ousted, in the circumstances and subject to the conditions stated therein and in Para 332 (supra).

(H) Section 11-B (2) and (3) cannot be made applicable to refunds already ordered by the Court or the refund ordered by the Statutory Authorities, which have become final. It follows from a plain reading of Section 11-B, Clauses (1), (2) and (3) of the Act. The provisions contemplate the pendency of the application on the date of the coming into force of the Amendment Act or the filing of an application which is contemplated under law, to obtain a refund, after the Amendment Act comes into force. If the said provisions are held applicable, even to matters concluded by the judgments or final orders of the Courts it amounts to stating that the decision of the Court shall not be binding and a will result in reversing or nullifying the decision made in exercise of the Judicial Power. The Legislature does not possess such power. Alternatively, it may be stated that duty paid in cases, which finally ended in orders or decrees or judgments of Courts, must be deemed to have been paid under protest and the procedure and limitation etc. stated in Section 11-B(2) read with Section 11-B(3) will not apply to such cases.

(I) It need hardly be stated, that Section 11-B(1), the Proviso thereto, Section

11-B(2) and Section 11-B(3) read together will apply, only to (1) refund applications made under the statute and filed before the amendment of the Act and still pending on the date of commencement of Amendment Act, 1991 and (2) applications contemplated under law to obtain refund and filed after the commencement of the Amendment Act, 1991. (Cases dealt with in Paras 290 and 327-331 of this judgment will not be covered by the above to the extent stated therein.)

(J) The proviso to Section 11-B(2), provides, that the duty of excise will be refunded in a few specified cases, subject to certain conditions - one of them is the manufacturer - in cases, where he has not passed on the incidence to any other person [clause (d)]. Those provisions will apply only for refunds to be made under the Act. In the totality of the factual situation, it cannot be said, that the provisions ushered in by Amendment Act, 1991 - and the scheme formulated in Sections 11-B and 12-A to 12- D - (in the light of the clarifications made in the body of the judgment, and more particularly in Paras 318-319 and 344-345 above) are a "device" or invalid or arbitrary or unreasonable [except to the extent stated in Para 342 (supra)] or in any way constitutionally infirm. (Of course, the cases dealt with in Paras 290 and 327-331 are excluded to the extent stated therein.)

11. The Supreme Court has laid down various principles by which the refund of the tax wrongly collected could be directed by the High Court in exercise of its powers under Article 226 of the Constitution of India. As we find the present case the petitioner in the petition has not stated anything about the aspect that he has not passed on the liability to the third party which is the necessary condition for the refund of the Tax.

12. In view of the aforesaid, we cannot direct the respondents by issuing a writ of mandamus in favour of the petitioner. The petitioner has already approached the Appropriate Authority and such authority under the provisions of M.P. Commercial Tax Act, 1994 has already passed an order which is Annexures P-4 and P-6 to the petition, whereby the authority has refused to direct the refund of the tax paid. The said authority has held that the petitioner is also a trader. The petitioner has not proved before the said authority while selling coal he has not included the tax already paid as the cost factor for its resale. It is not the case of the petitioner that he has consumed the said coal for himself and has not sold the same to any other third party.

Under the circumstances we are not inclined to grant relief to the petitioner by issuing any writ in its favour.

Accordingly petition stands dismissed.