(2013) 07 TP CK 0012

In the Tripura High Court

Case No : Rev. Petition No. 3 of 2011 and W.P. (C) No. 400 of 2011

Sri Samir Ghosh VsState of Tripura and Others

Date of Decision : 10-07-2013

Acts Referred:

Citation : (2013) 07 TP CK 0012

Hon'ble Judges : Deepak Gupta, C.J;S.C. Das, J

Bench : Division Bench

Advocate : A.K. Bhowmik and R. Datta, for the Appellant; A.K. Saraf and K. Roy, for the Respondent

Final Decision : Dismissed

Judgement

Deepak Gupta, C.J.—Both the review petition and the writ petition are being disposed of by a common judgment since identical questions of law and fact are involved.

(A) Rev. Pet. No. 03 of 2011.

This review petition has been filed by the assessee seeking recall of the judgment delivered by a Division Bench of the Agartala Bench of the Gauhati High Court on September 9,

: 2010 (2011) 38 VST 441(Gauhati)

whereby the learned Division Bench partly set aside the judgment of the learned single judge

(2000) 120 STC 416 (Gauhati)

and held as follows:

34. From a conjoint reading of the provisions of sections 5 , 7 and 8 along with the Schedules II(a), II(b) and II(c), it is clear that all goods, other than the goods specifically exempted under Schedule III, are taxable under the TVAT Act. Entry 193 of Schedule II(b) of the Act is a residuary entry, which provides that the items, which are not covered in any other Schedule, shall be taxable under

Schedule II(b) at the rate of 12.5 percent. The item ''pea-gravel'' is not included in the list of exempted goods as per Schedule III of the Act. The said item is also not covered by any other Schedule of taxable goods, namely, Schedule II(a), II(b), II(c) or II(d). The said item, although not covered by entries 1 to 192 of Schedule II(b) to the Act, shall being an item, not covered by any of the Schedules, become taxable at the rate of 12.5 percent, as a residuary item, under entry No. 193 of Schedule II(b) to the Act.

2. Sri Bhowmik, learned senior counsel appearing for the assessee-petitioner submits that there was an error apparent on the face of the record. According to him, entry No. 193 of Schedule II(b) of the Tripura Value Added Tax Act, 2004 (hereinafter referred to as, "the TVAT Act") does not entitle the State Government to levy tax on each and every item and it cannot be read in the manner in which it has been interpreted by the learned Division Bench.

3. Briefly stated, the facts of the case are that the assessee is a dealer in pea-gravel. This is a form of gravel, which is small in nature and primarily used as a filtration agent in tube-wells. Under the Tripura General Sales Tax Act 1976 (hereinafter referred to as "the TST Act"), there was no entry covering gravel and pea gravel was sought to be brought within the ambit of the TST Act by including it in the definition of stones, chips, etc. This was challenged by an assessee by filing a writ petition and a Division Bench of the Gauhati High Court held that pea-gravel was a totally different item from stone and, therefore, could not be included in the entry with regard to stone. The judgment of the Gauhati High Court in

Shri Chitta Ranjan Saha v. State of Tripura as reported in (1990) 79 STC 51 (Gauhati) (1989) 2 GLR 101

and the court held thus:

29. Bricks, brick-bats, jhama, metals, stone chips, any other products or sub-products arising out of bricks or stones and tiles (kiln burnt) other then mosaic (masonry tiles).

4. Thereafter the TST Act was amended by the State of Tripura and gravel was included in the Schedule as one of the items which could be taxed. The petitioner then filed another writ petition being W.P. (C) No. 114 of 2000 alleging therein that pea gavel and gravel were two separate items and as such not exigible to tax even after amendment.

5. During the pendency of this petition, the TST Act was repealed and replaced by the TVAT Act. The charging section for levy of tax on sale is section 5 and section 7 provides that the rate of tax will be at the rates satisfied in Schedules II(a), II(b), II(c), VI, VII and VIII of the TVAT Act. Section 5 of the TVAT Act reads as follows:

5. Levy of tax on sale.--(1) The tax payable by a dealer u/s 3 shall be levied on his taxable turnover of sales.

(2) Taxable turnover of sales in relation to a dealer liable to pay tax under sub-section (1) of section 3 shall be calculated from the gross turnover of sales during any period which remains after deducting therefrom--

(a) sales of goods declared as exempt from tax in Schedule III;

(b) sales of goods which are shown to the satisfaction of the Commissioner to have taken place--

(i) in the course of inter-State trade or commerce, or

(ii) outside Tripura,

(iii) in the course of the import of the goods into or export of the goods out of the territory of India.

Explanation.--Sections 3 , 4 and 5 of the Central Sales Tax Act, 1956 shall apply for determining whether or not a particular sale or purchase has taken place in the manner indicated in sub-clause (i), sub-clause (ii) or sub-clause (iii).

(c) in case of turnover of sales in relation to works contract the charges towards labour, services and other like charges are subject to such conditions as may be prescribed:

Provided that in cases where the amount of charges towards labour, services and other like charges in such contract are not ascertainable from the terms and conditions of the contract, the amount of such charges shall be calculated at the prescribed percentage.

(d) such other sales on such conditions and restrictions as may be prescribed.

6. The petitioner thereafter filed yet another writ petition being W.P. (C) No. 355 of 2006 in which his challenge was that even under the TVAT Act no tax was payable on the sale of pea-gravel. Both the writ petitions were disposed of by a learned Single Judge of the Agartala Bench of the Gauhati High Court vide judgment dated June 15, 2007. The Single Judge held that pea gravel was taxable under the TST Act with effect from February 28, 2000 but not taxable under the TVAT Act.

7. The assessee-petitioner was satisfied with this judgment and did not challenge the same. The State of Tripura however, filed an appeal being Writ Appeal No. 79 of 2007

(2011) 38 VST 441(Gauhati)

which was decided in favour of the State by the learned Division Bench and this judgment is sought to be reviewed.

8. A bare perusal of section 7 of the TVAT Act, shows that all goods which are sold within the State of Tripura are exigible to levy of value added tax, unless the goods are exempted in terms of Schedule III or the sale has taken place in the

course of inter-State trade or commerce or if the sale has taken place outside the Tripura or it amounts to import or export of goods outside the territory of India. There are other sections with which we are not concerned.

9. The rate of taxes are provided far in section 7 which reads as follows:

7. Rate of tax.--The value added tax payable by a dealer under this Act shall be levied on his taxable turnover at such rate as specified in the Schedules II(a), II(b), II(c) VI, VII and VIII.

10. Schedule II(a) is the list of goods taxable at the rate of five percent and includes at present as many as 102 items. Schedule II(b) is a list of goods which was previously taxable at 12.5 percent per annum but with effect from May 4, 2011 are taxable at 13.5 percent per annum. The list at present consists of 193 items and entry No. 193 with which we are concerned reads as follows:

193. Miscellaneous items not covered in any other Schedule.

11. Schedule II(c) is the list of items which are taxable at two percent and Schedule II(c)(i) is the list of goods taxable at 1.5 percent. Schedule II(d) deals with those goods where the rate of tax has to be fixed by the State Government by issuing appropriate notification which has to be published in the Official Gazette. Schedule III gives a list of goods which are exempted from payment of tax. Schedule VI is a list of industrial inputs on which tax is to be levied at five percent and Schedule VII is a list of information technology products also exigible to tax at five percent and Schedule VIII is a list of other items which are exigible to tax at five percent.

12. The learned Division Bench held and rightly so that entry No. 193 of Schedule II(b) covers all items not mentioned in any other schedule. The wording of the section and the Schedule is clear and unambiguous. There can be no manner of doubt that the intention of the Legislature was to impose tax on each and every item which is sold except those which were specifically exempted by inclusion in Schedule III. All other goods sold and falling within the ambit of section 5 would be amenable to payment of tax at the rates mentioned in the various Schedules. If an item does not find mention in any of the other Schedules, then it would necessarily fall within the ambit of residuary entry No. 193 of Schedule II(b) and would be exigible to tax at 12.5 percent per annum prior to 2011 and now at 13.5 percent per annum.

13. Sri Bhowmik has relied upon the judgment of the apex court in

HPL Chemicals Ltd. v. Commissioner of Central Excise, Chandigarh (2006) 6 RC 508 (2006) 5 SCC 208

: In para 31, the apex court held as follows:

31. It was submitted by the learned senior counsel appearing for the Revenue that the goods were classifiable under Heading No. 38.23 (now 38.24) as ''residual products of the chemical or allied '' industries'' not elsewhere specified

or included'' which was the last item covered by Heading No. 38.23 the said Heading No. 38.23 is only a residuary heading covering residual product of chemical or allied industries ''not elsewhere specified or included''. In the present case since the goods were covered by a specific heading i.e., Heading 25.01, the same cannot be classified under the residuary heading at all. This position is clearly laid down in rule 3(a) of the Interpretative Rules set out above. As per the said interpretative rule 3(a), the heading which provides the most specific description shall be preferred to the heading providing a more general description. This position is also well settled by a number of judgments of this court. Reference may be made to

Bharat Forge and Press Industries (P) Ltd. v. Collector of Central Excise (1992) 84 STC 414 (SC) (1990) 1 SCC 532

. It was observed in para 4, inter alia, as under ((1990) 1 SCC 534 and (1992) 84 STC 415):

4. The question before us is whether the Department is right in claiming that the items in question are dutiable under tariff entry 68. This, as mentioned already, is the residuary entry and only such goods as cannot be brought under the various specific entries in the tariff should be attempted to be brought under the residuary entry. In other words, unless the Department can establish that the goods in question can by no conceivable process of reasoning be brought under any of the tariff items, resort cannot be had to the residuary item....

14. We are clearly of the view that this judgment does not support the petitioner and the same in fact supports the stand of the Revenue. It would be pertinent to mention that before the apex court, the stand of the Revenue was that the goods were classifiable under the residuary entry. The stand of the assessee on the other hand was that the goods were specifically mentioned in the Schedule and therefore tax could be levied only at the rate mentioned in the Schedule by which the items were covered and it is in this context the apex court made the observation hereinabove.

15. In the aforesaid case the apex court in no uncertain terms held that only such goods which are not covered by various specific entries in the tariff could be brought under the residuary entry. This leaves no manner of doubt that if any goods are mentioned in any of the Schedules then they cannot be covered by the residuary entry. However, if the goods are not mentioned in any of the Schedules than they would fall within the ambit of the residuary entry. Therefore, we are in total agreement with the findings arrived at by the learned Division Bench that since pea-gravel is not included in the list of exempted goods and also not covered by any other item in any of the other Schedules, the same would fall under entry No. 193 of Schedule II(b) of the TVAT Act.

16. Therefore, we find no merit in the review petition.

(B) W.P. (C) No. 400 of 2011.

17. Coming to the writ petition, after the earlier writ petition was disposed of by the Division Bench, the petitioner filed an SLP which was rejected. The petitioner then filed a review petition which we have rejected hereinabove. The petitioner has also filed a second writ petition and now additional grounds have been raised to challenge the levy of tax on pea-gravel. The assessee has raised the following contentions:

(1) that entry No. 193 of Schedule II(b) is vague and amounts to excessive delegation of authority by the Legislature.

(2) that it is violative of article 285 of the Constitution of India in as much as even those items which are not exigible to tax by the State can be brought within the ambit of the TVAT Act.

18. Sri Biswas has drawn our attention to the judgment of the Privy Council in

Bank of Chettinad Ltd. v. Commissioner of income tax, Madras (1940) 8 ITR 522 (PC) : AIR 1940 PC 183

wherein the Privy Council reiterated the well-known passage from the opinion of Lord Russell of Killowen and held as follows:

...the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is tree, however apparently within the spirit of the law the case might otherwise appear to be.

19. It is apparent that in fiscal legislation such as taxing statute the Court cannot go into the question whether tax is reasonable or unreasonable, it can only decide whether the Legislature had the competence to levy the tax or not. Only in the case of levy of fee can the court go into the question of reasonability. In the present case we find no merit in the contention of the assessee. The Legislature in its wisdom decided to frame the statute in such a fashion that the exempted items are specifically mentioned in Schedule HI. The necessary corollary is that all items not mentioned in Schedule HI would be taxable. The rates of tax as already pointed out above are mentioned in the different Schedules. Schedule II(b) levies the highest rate of tax and the Legislature in its wisdom decided that all items which do not find mention in any other Schedule would be part of entry No. 193 of Schedule II(b) and tax would be levied at the highest rate. Therefore, there is no excessive delegation because it is Legislature which has fixed the rate of tax and no discretion has been left with the authorities as to which items are to be included in which Schedule. Any item not forming part of Schedule II(a), II(c), II(c)(i) and II(d) will be exigible to tax at the rate mentioned in Schedule II(b).

20. As far as the contention of the petitioner that article 285 of the Constitution of India has been violated is concerned we again find no merit in this petition.

One of the salutary principles of interpretation of statute is that the effort of the court should be to uphold every legislation and in case the need arises the statute can be read down to give it legitimacy. From a reading of the legal provisions quoted above, it is apparent that the intention of the State was only to levy tax on those items which were sold within the State of Tripura and it had the legislative competence to tax such items in accordance with the scheme of the Constitution. If in future any assessee is of the view that the item which it is selling is not exigible to tax by the State Government then that question will have to be decided in that particular case, but it cannot be said that the statute is ultra vires the Constitution merely because it levies tax on residuary basis on all items sold within the State of Tripura. We, therefore, find no merit in the review petition or the writ petition. Both are dismissed with costs assessed at Rs. 10,000.

