

(2009) 07 BOM CK 0169
In the Bombay High Court
Case No : Writ Petition No. 657 of 1997

Technova Imaging Systems Ltd.	Vs	APPELLANT
State of Maharashtra and Others		RESPONDENT

Date of Decision : 31-07-2009

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 2(17), 28, 52
Constitution of India, 1950 — Article 20

Citation : (2009) 25 VST 277

Hon'ble Judges : Ferdino I. Rebello, J; D.G. Karnik, J

Bench : Division Bench

Advocate : Manoj Sanklecha, instructed by Sunil and Co, for the Appellant; G.W. Mattos, A.G.P., for the Respondent

Final Decision : Dismissed

Judgement

D.G. Karnik, J.—By this petition, the petitioner prays that the amendment to the definition of "manufacture" in Section 2(17) of the Bombay Sales Tax Act, 1959 (for short "the Sales Tax Act") made by the Maharashtra Act No. IX of 1996, be struck down to the extent of its retrospectivity with effect from 1st July 1981.

2. The challenge to the amendment arises under the following circumstances.

3. The 1st petitioner (hereinafter referred to as "the petitioner") is engaged in the business of buying polyester films and selling it after subjecting it to a process of "lacquering". In a proceeding u/s 52 of the Sales Tax Act, the Deputy Commissioner of Sales Tax held that the chemical process of lacquering of the polyester film done by the petitioner amounted to a manufacture as defined u/s 2(17) of the Sales Tax Act and therefore attracts sales tax. An appeal filed against the said order was dismissed. However, on a reference to this Court, by an order dated 2nd February 1995, this Court held that lacquering of a polyester film does not amount to manufacture within the meaning of Section 2(17) of the Sales Tax Act. The Governor of Maharashtra thereafter issued an Ordinance bearing Ordinance No. XII of 1996 dated 4th September 1996 retrospectively

amending the definition of "manufacture" appearing in Section 2(17) of the Act by adding Clause (d) thereto. The Ordinance has been replaced by the Legislature of Bombay by passing Act No. IX of 1996. The effect of the amending definition of "manufacture" appearing in Section 2(17) of the Sales Tax Act is to bring the process of lacquering of polyester film within the definition of "manufacture". Consequently, the petitioner would be liable to pay sales tax retrospectively on the lacquered polyester films sold by it. The petitioner has therefore challenged the Ordinance as well as the Amending Act.

4. Section 2(17) of the Sales Tax Act prior to its amendment read as under:

2. Definitions.- In this Act, unless the context otherwise requires.-

(17) "manufacture", with all its grammatical variations and cognate expressions, include,-

(a) producing, making, extracting, altering, ornamenting, finishing or otherwise processing treating, or adapting any goods, or using or applying any such process, as the State Government may, having regard to the impact thereof on any goods or to the extent of alteration in the nature, character or utility of any goods brought about by such process by notification in the Official Gazette, specify

(b) cutting, saving, shaping, sizing or hewing of timber, and

(c) refining of oil

By Maharashtra Act No. IX of 1996, the Legislature added Clause (d) to Section 2(17) of the Sales Tax Act with retrospective effect from 1st July 1981. Clause (d) reads as under:

(d) Lacquering of polyester film.

5. The petitioner has no grievance to the adding of Clause (d). The petitioner challenges Section 28 of Maharashtra Act No. IX of 1996 amending with retrospective effect Section 2(17) of the Sales Tax Act, two grounds; viz. (i) the effect of amendment of Section 2(17) of the Sales Tax Act is to give a go-by or to over-rule a decision of the court rendered in S.T. Reference No. 42 of 1990 (Technova Graphic Systems Pvt. Ltd. v. Commissioner of Sales Tax) on 2nd February 1995 whereby this Court has specifically held that lacquering of polyester films does not amount to manufacture. Counsel for the petitioner submitted that the Legislature cannot amend the law so as to overrule a decision of the court and any attempt by the Legislature to over-rule or reverse the decision of the court is unconstitutional. (ii) the petitioner contends that in any event, the amendment to Section 2(17) of the Sales Tax Act could not have been made with retrospective effect. The petitioner was not liable to pay tax on sale of lacquered polyester films as this Court held by lacquering of polyester films, no new commodity was brought into existence and the process of lacquering did not involve manufacture. By amending the definition of "manufacture" with

retrospective effect, the petitioner has been brought to tax retrospectively from 1st July 1981. The Legislature is not competent to make the taxing law with retrospective effect.

6. In our view, none of the contentions of the petitioner has any merit. By its decision dated 2nd February 1995, this Court held that process of lacquering of polyester film did not amount to manufacture within the meaning of Section 2(17) of the Sales Tax Act. Section 2(17) of the Sales Tax Act was therefore amended retrospectively by including the process of lacquering of polyester film in the definition of "manufacture". But for this amendment, the tax which was previously collected by the State on sale of lacquered polyester films would have been required to be refunded. In order to protect the revenue and the tax collected which had already been spent on welfare activities of the State, the Legislature amended the definition of "manufacture" by amending Section 2(17) of the Sales Tax Act. The Legislature did not over-rule or reverse the decision of the court by amending Section 2(17) of the Sales Tax Act. The Legislature only removed the flaw in the definition of "manufacture", on account of which lacquering of polyester films was held "not to be manufacture" by this Court. It is settled principle of law that the Legislature cannot reverse or over-rule a decision given by a Court, but can amend the law so as to remove a flaw or lacuna in an Act which leads to a particular interpretation at the hands of the Court. It is possible for the Legislature to alter the premise or the basis on which a decision is based and this is not impermissible under the Constitution. It is also a settled principle of law that such amendment can be made with retrospective effect unless it is specifically prohibited by a provision of the Constitution (like Article 20 of the Constitution which prohibits a criminal law to be retrospective) or where the Legislature lacks the legislative competence.

7. In *Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others*, , the Supreme Court has held thus:

When a legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition is that the legislature must possess the power to impose the tax, for if it does not, the action must ever remain ineffective and illegal. Granted legislative competence it is not sufficient to declare merely that the decision of the court shall not bind, for that is tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A Court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the "rules or both are invalid or do not sufficiently create jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal.

Sometimes this is done by providing for jurisdiction where jurisdiction has not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the legislature gives it own meaning and interpretation of the law under which the tax was collected and by legislative fiat makes the new meaning binding on courts. The legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. If the legislature has the power over the subject-matter and competence to make a valid law, it can at, any time make such a valid law and make it retrospectively so as to bind even past transaction. The validity of a Validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in Validating law for a valid imposition of the tax.

This decision has been followed by the Supreme Court in its recent decision in ITW Signode India Ltd. Vs. Collector of Central Excise, .

8. The passage quoted above is a complete answer to the challenge raised in this petition.

9. For these reasons, there is no merit in the petition which is hereby dismissed.