

(2005) 10 KAR CK 0043
In the Karnataka High Court
Case No : Writ Petition No. 40353 of 2001

United Breweries Limited

APPELLANT

Vs

State of Karnataka and Another

RESPONDENT

Date of Decision : 06-10-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 19 (1), 301, 304 (b)
Karnataka Tax on Entry of Goods Act, 1979 — Section 3 (1), 30

Citation : (2006) 1 KCCR 44 SN : (2007) 9 VST 594

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : Sreedhar Murthy, for R.V. Prasad and Vasan Associates, for the Appellant; Vedamurthy, High Court Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

D.V. Shylendra Kumar J.

1. Writ petition by a dealer registered under the provisions of the Karnataka Tax on Entry of Goods Act, 1979 (for short, "the Act"), questioning the legality of the Government Notification bearing No. FD 23 CET 2001, dated March 31, 2001 See [2001] 122 STC 67 SC. (copy at annexure B) and for quashing of the same and also for issue of consequential mandamus to the respondent-State and its officers not to take any action as against the petitioner under the impugned notification.

2. The writ petition also prays for a declaration to the effect that entry 103 in the First Schedule to the Act is a provision which can be worked upon only by the State Legislature and not by the executive of the State Government in the exercise of its delegated powers under the provisions of Section 30 of the Act. The petition prays for several other prayers and a residuary prayer.

3. The additional prayer in terms of prayer (i) has also been sought for, for quashing the assessment order and the demand notice both dated September

16, 2002 indicating the liability therein for the assessment year 2001-02 (copy at annexures C and D) in terms of the order dated August 4, 2003 allowing the amendment applications so as to include the challenge to the assessment order also.

4. The challenge to the notification is mainly on the ground that the notification is ultra vires powers of the State Government for issue of such a notification as one beyond the power delegated u/s 3(1) of the Act which is the charging section and which in turn also delegates power to the State Government to issue notifications to effectuate the charge as violative of Articles 14, 19(1), 301 and 304(b) of the Constitution of India; that it is arbitrary, an instance of excessive delegation, a power conferred on the executive without any checks, guidelines, virtually amounting to conferring unguided powers, suffering from vice of excessive delegation, going beyond the permitted restrictions that could be imposed in terms of Clause (b) of Article 304 of the Constitution of India, etc.

5. The entire challenge occurs in the context of the attempt on the part of the State to levy entry tax on items or goods known as "corks" which figure at S1. No. 4 of the impugned notification and which attracts tax at the rate of two per cent of the value of such cork when brought into a local area as contemplated under the Act. The entire exercise in this writ petition is for avoiding this levy. The petitioner, a registered dealer under this Act, as per the petition averments, is a manufacturer of beer, an alcoholic drink, at any rate, the drink which is brewed and which is marketed by the petitioner in bottles, which bottle is sealed by the cork made use of in the lid to the bottle. The writ petition is on the premise that the charging section, i.e., Section 3 read with the First Schedule to the Act does not create a liability for the levy of entry tax on such cork when brought into local area by the petitioner and therefore a Notification No. FD 23 CET 2001, dated March 31, 2001 (copy at annexure B) issued u/s 3 of the Act should be held as unauthorised, illegal and to be struck down, etc.

6. The petition averments also indicate that an attempt to levy tax on such cork when brought into local area by the State authorities, i.e., the Commercial Tax Department was futile on an earlier occasion relating to the very petitioner for the assessment year 1983-84 as the Karnataka Appellate Tribunal in its order dated August 18, 2000 acting as an appellate authority over the assessment order levying such tax on corks, on the strength of entry 16A as it stood then, held that the entry 16A in the First Schedule to the Act which indicated the goods which figure under this entry as packing material being:

(i) Fibre board cases, paper boxes, folding cartons, paper bags, carrier bags and cardboard boxes, corrugated board boxes and the like ;

(ii) Tin plate containers (cans, tins and boxes), tinsheets, aluminium foil, aluminium tubes, collapsible tubes, aluminium or steel drums, barrels and crates and the like ;

(iii) plastic, polyvinyl chloride and polyethylene films, bottles, pots, jars, boxes,

crates, cans, carboys, drums, bags and cushion materials and the like ;

(iv) wooden boxes, crates, casks and containers and the like ;

(v) gunny bags, barden including batars, hessian cloth and the like ;

(vi) glass bottles, jars and carboys and the like ;

(vii) laminated packing materials, such as bituminised paper and hessian-based paper and the like.

7. While not containing cork as an enumerated item, the effectuating notification for giving life to this entry in terms of the Notification No. FD 69 CET 92(1), dated April 30, 1992 also did not contain "cork" as an item indicating the rate at which tax can be levied under the provisions of the Act and therefore the present notification also has to meet the same fate.

8. It appears that in the interregnum, while a number of other entries had been added to the First Schedule and what was earlier entry 16A packing material became entry 66 in the year 1995 on Act No. 3 of 1995 becoming effective from May 1, 1995, the contents of entry 66 remained the same as in entry 16-A.

9. It is to be noticed that by the very amendment, many more entries were added to swell it to 102 entries and a residuary entry was also added for a good measure by entry 103 which reads as under:

103. Goods other than those specified in any of entries in Schedule, but excluding those specified in the Second Schedule.

10. It may be noticed that the number of entries which was in the Schedule which were in meagre three when the Act was enacted by the Legislature in the beginning, swelled to as many as 103 by the year 1995.

11. While such exercises were going on in the restructuring of the First Schedule, the Tribunal came up with its judgment dated August 18, 2000 in the case of the very petitioner holding that levy of tax on crown corks and labels packing material as it occurred in entry 16-A of the First Schedule at the relevant point of time, is not permissible as according to the Tribunal.

12. As and when new entries were being added to the Schedule, it was thought desirable to effectuate levy of tax on such goods figuring in the newly added entries, effectuating notifications in terms of Section 3(1) were also being issued and it appears one such notification had been issued in FD 69 CET 92(1), dated April 30, 1992 which notification also had effectuated the levy of tax in respect of packing materials to be at two per cent of the value of the goods, etc., and the impugned notification dated March 31, 2001 (copy at annexure B) being the latest in the series of such notifications and also the earliest which expressly sought to effectuate levy of entry tax on the items crown cork and labels as forming part of packing materials enumerated under entry 66 of the First Schedule to the Act.

13. The judgment of the Tribunal whereby the assessee successfully avoided levy of entry tax on the goods such as corks, caps of all kinds, other stoppers, containers of all kinds, wrapping papers, bubble sheets, adhesives, gums, labels of all kinds, threads, twines, staple tapes and the like used in the packing of goods occurring at SI. No. 4 of this notification virtually deprived the benefit of the judgment of the Tribunal to the petitioner subsequent to the issue of this notification and it is in such context, the petitioner has challenged the validity of the notification on the grounds mentioned earlier.

14. The respondents have defended the writ petition. Statement of objections has been filed.

15. It is urged that though to the extent the petition avers that goods such as crown corks and caps of all kinds, etc., are not covered by entry 66 of the First Schedule to the Act as contended by the petitioner, is correct, it is, nevertheless, covered under entry 103, i.e., the residuary entry in the First Schedule and therefore there is nothing lacking in issue of the notification dated March 31, 2001 in the exercise of the powers delegated to the State Government u/s 3(1) of the Act; that the only limiting factor is the goods mentioned in the Second Schedule and except for the goods enumerated in the Second Schedule to the Act, the State Legislature had expressly evinced interest to levy entry tax on all other goods and the function of selection and effectuation of such levy on the items which comes within the First Schedule to the Act being given to the Government u/s 3(1) of the Act, there is nothing lacking in competence or otherwise in the issue of the impugned notification ; that the challenge is not tenable and therefore the writ petition deserves to be dismissed.

16. On behalf of the petitioner, I have heard Sri R.V. Prasad, learned Counsel as also his colleague Sri Sreedhar Murthy and Sri Veda Murthy, learned Government Pleader appearing on behalf of the respondents. The arguments have been heard on September 29, 2005 and again today.

17. The scheme of one of the charging section, i.e., Section 3(1) of the Act which reads as under:

3. Levy of tax.-(1) There shall be levied and collected a tax on entry of any goods specified in the First Schedule into a local area for consumption, use or sale therein, at such rates not exceeding five per cent of the value of the goods as may be specified retrospectively or prospectively by the State Government by notification and different dates and different rates may be specified in respect of different goods or different classes of goods or different local areas.

is that the entry tax shall be levied and collected on entry of goods specified in the First Schedule into a local area for consumption, use or sale up to which stage action is by the State Legislature and where after the selection and effectuation of the charge being by issue of a notification is by the State Government, indicating the specific goods which occur in the First Schedule to the Act and at the rate mentioned in the notification subject to the ceiling of 5

per cent and there being further leverage to the State Government to choose to levy tax on items included in the notification, at the rates specified in the notification and also the local areas within which such goods are brought into.

18. Therefore, the charging section becomes effective only when the State Government issues a notification u/s 3(1) of the Act in respect of any of the goods figuring under the different entries in the First Schedule to the Act.

19. The contentions urged on behalf of the petitioner is two-fold.

20. It is firstly contended that the issue of the notification to include levy on cork under the notification is ultra vires the power delegated u/s 3(1) of the Act, inasmuch as, cork is not goods which comes within the goods specified under entry 66 and it cannot also be fitted into entry 103 of the First Schedule to the Act as even in the presence and availability of entry 103, the State Government gets power to issue a notification u/s 3(1) of the Act only when the Legislature chooses to add in goods under one or the other of the earlier 102 entries. It is in this context the argument that until and unless the Legislature has chosen to add goods going by the description "cork" as a goods within one of the enumerated entries from 1 to 102, whereupon the executive part of the Government can issue a notification u/s 3(1) of the Act and not otherwise and the Legislature having not done such an exercise, the issue of notification becomes ultra vires the provisions of Section 3(1), lacking in competence of the State Government and therefore the notification is bad on such premise.

21. It is alternatively contended that even otherwise the notification becomes bad for the reason that by reference to entry 103, the residuary entry, if the State Government is enabled to pick and choose goods which are not expressly mentioned in the Schedule itself ; and if the State Government can keep on adding any goods as though the Government itself is competent to do and proceed to issue notifications in respect of such goods u/s 3(1) of the Act, the power becomes an illustration that the exercise of such power by the executive part of the State becomes an instance of excessive delegation without proper checks and therefore violative of Article 14 of the Constitution of India and yet again the notification deserves to be quashed.

22. One another contention urged on behalf of the petitioner is that the levy of entry tax in respect of goods like cork is an impediment in free-flow of trade and commerce as cork is invariably brought in by the petitioner from outside the State and therefore the very levy is violative of Article 301 as also Article 304 (b) of the Constitution of India, inasmuch as, the levy is unreasonable and no safeguards have been provided nor any restrictions imposed on the exercise of the powers by the executive part of the State in issuing notification u/s 3(1) of the Act and therefore the impugned notification is bad in law.

23. It is in support of such submission, learned Counsel for the petitioner has placed considerable reliance on the Division Bench decision of this Court in the case of Avinyl Polymers Pvt. Ltd. v. State of Karnataka reported in [1998] 109

STC 26 KAR.

24. Likewise, to drive home the contention of the notification being violative of Articles 301 and 304(b) of the Constitution of India, reliance is placed by the learned Counsel for the petitioner on the decision of this Court in the case of *Jyothi Home Industries v. State of Karnataka* reported in [1987] 64 STC 254 [Ap] : [1984] 1 Kar LJ 394.

25. The argument of the notification being violative of Articles 301 and 304(b) of the Constitution of India is called in aid in the context of the defence sought to be raised by the respondents that the notification is one that is sustainable on the strength of entry 103, i.e., the residuary entry, and the argument being that the whole exercise of introducing entry 103 is for the purpose of avoiding the legislation being reserved and securing the assent of the President as and when new entries are added to the First Schedule by the Act being amended and the First Schedule containing an entry like entry 103 having been reserved and having received the assent of the President, any subsequent additions to this Schedule by increasing the number of entries or by adding new goods not enumerated hitherto will not again necessitate the exercise of obtaining the assent of the President to the same and while entry 103 can definitely achieve such object, the addition to the Schedule being only by an Act of Legislature, the executive part of the State by its notification cannot keep on issuing notifications by adding fresh and additional goods to the notification issued u/s 3(1) of the Act on the strength of entry 103, but it can be done only after the Legislature has amended the Schedule and not otherwise ; that in the instant case, the Legislature having not amended the Schedule, in the sense that the scope of earlier entry 16-A now corresponding to entry 66, being the same and what is described as packing material having remained the same, by the issue of mere notification, the goods like cork which has not been hitherto described or coming within the scope of "packing material" as it occurs in entry 66, cannot be subjected to tax under the notification.

26. Apart from the challenge to the validity of the notification, the petitioner has included a prayer for quashing of the assessment order and the consequential demand notice in respect of the assessment year 2001-02 in terms of the order dated September 16, 2002 (annexures C and D). The assessment orders having placed reliance on the impugned notification, quite naturally the assessment order cannot be sustained if the notification itself is held to be invalid on any of the grounds urged by the learned Counsel for the petitioner.

27. Sri Vedamurthy, learned Government Pleader appearing on behalf of the respondents, submits that the notification is a valid one, it is well within the powers of the State Government, as in this case, under Sub-section (1) of Section 3 of the Act, the Legislature having delegated the function of identifying the goods entering the local area and also stipulating the rate with an upper limit of 5 per cent and issue of notification dated March 31, 2001 is well within the power and for such purpose and therefore the notification is neither ultra vires

nor suffers from any other defects, as is sought to be urged by the learned Counsel for the petitioner. In this regard the learned Government Pleader draws my attention to the residuary entry 103 in the First Schedule to the Act and submits that all goods not specifically enumerated in one of the entries from entries 1 to 102 are nevertheless covered by this entry and the only exception being such of those goods which figure in the Second Schedule to the Act.

28. It is also the submission of Sri Vedamurthy that for the purpose of issue of notification under Sub-section (1) of Section 3 of the Act, no distinction has been made from entry to entry occurring in the First Schedule to the Act and that just like entry 86, one of the entries, the entry 103 covers all other goods other than the enumerated goods in the Second Schedule to the Act is one such entry and therefore even for the purpose of effectuating such goods, which comes within the scope of entry 103, a notification as contemplated in respect of any other entry, will suffice to effectuate the levy of tax as is done under the impugned notification ; that it is never the intention of the Legislature to keep adding entry by entry every time certain new goods were sought to be brought within the net of tax; that an entry like residuary entry 103, which was not available earlier, was with a specific purpose and intention and introduced by the amending Act 3 of 1995, which has also been given retrospective effect from May 1, 1992 and when such is the legal position, the question of reading down the entries as one which only seeks to achieve the object of avoiding the need for reserving subsequent amending Acts for the assent of the President as suggested to by the learned Counsel for the petitioner is an argument which is more a guess work or being not available in terms of the language of either in entry 103 or any other entry.

29. It is also the submission of learned Government Pleader that even the language of entry 103 is quite clear and there is no scope to give any unintended or twisted meaning as sought to be urged by the learned Counsel for the petitioner. Therefore, the learned Government Pleader submits that issue of the impugned notification is neither ultra vires nor beyond the contemplation of entry 103 read with Section 3 of the Act.

30. In this regard, the other argument of Sri Vedamurthy is that issue of notification like the impugned notification is by exercise of power delegated under Sub-section (1) of Section 3 of the Act and unless such delegation which used to be characterised as excessive, itself is challenged, the argument cannot succeed. In other words, the submission is that unless the delegated provisions, viz., Sub-section (1) of Section 3 of the Act is held to be bad, it cannot be said either entry 103 or the notification becomes bad so long as the notification is within the powers conferred under Sub-section (1) of Section 3 of the Act and within scope of entry 103 to the First Schedule of the Act. In this regard, the learned Government Pleader placed reliance on the decision of the Supreme Court in the case of State of Karnataka and Another Vs. Hansa Corporation, , and submits that the Supreme Court having upheld the provisions of the Act including

the charging Section-sub-section (1) of Section 3 of the Act, it is not open to the petitioner to challenge the validity of Sub-section (1) of Section 3 of the Act and it is only because of this limitation, the learned Counsel for the petitioner has chosen the method of attacking the section by calling in aid the theory ultra vires, whereas the notification is well within the power conferred on the executive under Sub-section (1) of Section 3 of the Act and for the same reason, the notification cannot also be challenged as one delegating excessive power or unguided power, etc.

31. It is also the submission of Sri Vedamurthy that the argument on behalf of the petitioner to the effect that the notification is violative of Articles 301 and 304(a) of the Constitution of India is without substance ; that these Articles are not even attracted to the present situation ; that levy of tax on this particular goods cannot become bad, when there is no other difference ; that even when many other goods are subjected to tax under the Act, there cannot be any distinction only in respect of a particular goods which the petitioner uses and as part of his packing material, etc.,; that assuming the goods "cork" is not even part of entry 66 of the First Schedule to the Act, it is definitely covered by entry 103 and therefore the argument fails. In this regard the learned Government Pleader places reliance on the decision of the Supreme Court in the case of Widia (India) Ltd. and Others Vs. The State of Karnataka and Others, , at para 26, and submits that as pointed out by the Supreme Court, in a situation of this nature, there is no scope for examining the validity of the notification on the touchstone of Article 301 or 304 as is urged in the present case.

32. By drawing my attention to paras 27 and 28 of the judgment of the Supreme Court in the case of Widia (India) Ltd. and Others Vs. The State of Karnataka and Others, , Sri Vedamurthy, learned Government Pleader submits that levy of tax under the Act having been recognised to be compensatory, it is no more open to the petitioner to question the impugned notification levying tax on particular goods, viz., cork, when it is brought into a local area for use and consumption, etc., on the premise that the notification is violative of Article 304 of the Constitution and therefore the argument fails on this ground also.

33. Submission of Sri Vedamurthy is very merited. As noticed earlier, the Scheme of levy of tax under the Act is as indicated in the charging section comprised in two parts, first the legislative part and the latter executive part. For effectuating the levy it is inevitable a notification under Sub-section (1) of Section 3 of the Act has to be issued, as otherwise, the charging section is not complete in the absence of specific goods, clear rate and the event. Though the Legislature had earlier thought of having a good number of entries in the First Schedule to the Act, it also chose to include a residuary entry-entry 103-by the Amendment Act 3 of 1995. The language used for this entry leaves one with no doubt that all such goods which are not already covered under any one of the earlier enumerated entries, are now covered under this entry, viz., entry 103. The exception being goods mentioned in the Second Schedule. Entry 103 in fact achieves the object

of the charging section even without existence of entries 1 to 102. But may be for better clarity, understanding or specification, if the entries are expressly made, there is nothing wrong in it. But at the same time, it does not necessarily mean that entry 103 should be totally in effectuated or rendered innocuous if the submission of the learned Counsel for the petitioner is to be accepted.

34. If as suggested by the learned Counsel for the petitioner that for adding any further goods to the Schedule, it should necessarily be under one of the enumerated entries, is to be accepted, the very purpose and object of entry 103 would be defeated. Therefore, the argument on behalf of the petitioner fails.

35. One other reason is that the argument proceeds on the premise that entry 103 was introduced by the Legislature for the purpose of avoiding the need for reserving a subsequent Amendment Act for the assent of the President by introducing entry 103 and it cannot be anything more. But this argument again is rather presumptive inasmuch as in terms of the decision of the Supreme Court in the case of *Widia (India) Ltd. and Others Vs. The State of Karnataka and Others*, the levy under this Act itself being a levy in the nature of compensatory tax, the provisions of Article 304 are not even attracted. If that is so, there is no question of Legislature having thought about it. It is no doubt true that the decision of the Supreme Court in *Widia (India) Ltd. and Others Vs. The State of Karnataka and Others*, is later, i.e., in the year 2003, but the subject-matter was validity of the very provisions of the Act as amended by the Amendment Act 3 of 2003, which had been given effect to from an earlier period, viz., May 1, 1992. One fundamental principle is that though the decision of the courts interpreting a particular provision is much later in point of time, the meaning to be attributed to the particular provision of Legislature is from the date such law was made and not from the date of such interpretation as placed by the courts on the provision. In any view of the matter, the argument that introducing entry 103 is only for a limited purpose, as is suggested by the learned Counsel for the petitioner, cannot be accepted and there is no rationale to make a distinction between this entry and other entries for the purpose of Sub-section (1) of Section 3 of the Act and if so, so long as the particular goods-cork-can be one covered under entry 103 in the First Schedule to the Act, there is nothing wrong with the authority or the power of the State in issuing one such notification dated March 31, 2001.

36. Though considerable reliance is placed by the learned Counsel for the petitioner on the decision of a Division Bench of this Court in the case of *Avinyl Polymers Pvt. Ltd. v. State of Karnataka* [1998] 109 STC 26 KAR, it is also not of much avail to the petitioner, inasmuch as the examination was in the context of notification dated March 30, 1994 which was the subject-matter in the decision in *Avinyl Polymers Ltd.* [1998] 109 STC 26 (Kar), and the validity of the notification whereunder imposition of levy in respect of goods which were brought into the local area from the outside State was concerned and the levy being only in respect of such goods which were brought from outside the State into the local area. This Court examined the validity of such levy under this notification on the

touchstone of Article 304. This Court also noticed that the language of the notification goes far beyond the scope of Section 3 itself, as under the notification a distinction was sought to be made as between the goods brought into a local area within the State and goods brought into the local area from outside the State.

37. While the situation is not the same under the present notification, though incidentally in the case of petitioner, it may so happen the petitioner may bring particular goods from outside the State, the decision in the case of Avinyl Polymers Ltd. [1998] 109 STC 26 (Kar), is also of not much consequence or avail in the light of the decision of the Supreme Court in the case of Widia (India) Ltd. and Others Vs. The State of Karnataka and Others, , wherein it has been held that Article 304 itself is not of much significance in the context of examination of the validity of the present Act.

38. The challenge to the notification on the premise of it being violative of Article 14 ; that it creates an invidious classification is also, while not made good, not tenable inasmuch as no such classification has even been attempted under the impugned notification and the notification being bad on the ground of being violative of Article 19(1)(g) of the Constitution is yet again a futile argument, as there is nothing to indicate that the notification has the effect of coming in the way of the petitioner carrying on its business activity. The levy of tax in accordance with law cannot by itself be characterised as a provision violative of Article 19(1)(g) of the Constitution.

39. In the result, the challenge to the notification fails and the writ petition has to be dismissed. The challenge to the notification having failed, there is no question of the consequential relief of quashing the assessment order and the demand notice pursuant to the assessment order. This prayer is also rejected. Writ petition is dismissed. Rule discharged.