
(2011) 06 SHI CK 0004
In the High Court Of Himachal Pradesh
Case No : CWP No. 3704 of 2010

VRV Foods Limited

APPELLANT

Vs

State of H.P. and Others

RESPONDENT

Date of Decision : 13-06-2011

Acts Referred:

Constitution of India, 1950 — Article 47

Citation : (2011) 46 VST 417

Hon'ble Judges : Deepak Gupta, J

Bench : Single Bench

Advocate : M.M. Khanna, with Vayur Gautam, for the Appellant; Vivek Singh Thakur, Additional Advocate-General, for the Respondent

Final Decision : Dismissed

Judgement

Deepak Gupta, J.—By means of this petition, the petitioner which is a company engaged in the manufacture of liquor, has prayed that the letter dated June 24, 2009 whereby the benefit of deferment of tax under H. P. General Sales Tax (Deferment of Tax) Scheme, 2005 granted to it was withdrawn be quashed and the State be directed to restore the benefit of deferment to the petitioner. Briefly stated the facts of the case are that the State of Himachal Pradesh framed a scheme where the industries which were set up or substantially expanded would be given benefit of deferment of tax. As per this scheme, eligible industrial units other than those specified in the negative list which came into commercial production before January 7, 2003 and which had undertaken substantial expansion after the said date after prior approval of the Director of Industries or the authorities were entitled to the benefit of deferment of payment of the tax. Tax was not exempted but these units which fell under the scheme were permitted to take advantage of the deferment of this scheme.

2. It is not disputed that the petitioner-company was registered under this Scheme for the grant of benefit of deferment. However, vide impugned letter dated June 24, 2009, benefit of such Scheme was withdrawn pending clarification

from the headquarters. Relevant portion of the letter reads as follows:

Kindly refer to the order of the undersigned dated May 27, 2009 with regard to issuance of deferment certificate in form S.T.-(DP)-II. After the issuance of the certificate it has been noticed that there is inconsistency in the provisions of the HPGST (Deferment Payment of Tax) Scheme, 2005 which would not be reconciled. Because of this inconsistency, the deferment certificate cannot be issued unless this inconsistency is resolved. So the reference to resolve this inconsistency has been sent to learned Excise and Taxation Commissioner, Himachal Pradesh vide letter No. KAN/Sales Act/Deferment/2009-10/7103 dated June 18, 2009. Therefore in view of the above, the Deferment Certificate issued in favour of M/s. VRV Foods Ltd., Sansarpur Terrace, District Kangra (H. P.) is withdrawn pending clarity from the Headquarter.

Assistant Excise and Taxation Commissioner Kangra at Dharamshala.

3. The petitioner challenged this order and according to the petitioner, once the petitioner-company had expanded its unit and was given benefit of deferment scheme, the State was estopped from withdrawing this benefit from the petitioner.

4. The stand of the State on the other hand is that there was a mistake in the original negative list attached to the notification. According to the State, liquor industry is not one of those industries to which such benefit has to be given. Reliance has been placed on article 47 of the Constitution of India which provides that the State should endeavour to introduce prohibition throughout the country. Further the stand of the State is that now the State has introduced liquor industry in the negative list and it has specifically been provided that this amendment shall be retrospective in operation and shall always be deemed to have been in existence.

5. Sh. M.M. Khanna, learned senior advocate appearing on behalf of the petitioner, contends that no retrospective operation can be given to such subordinate legislation especially where a party has changed its stand and has invested huge amount of money for expansion of its unit.

6. Sh. Khanna has placed reliance on the judgment of the apex court in Mahabir Vegetable Oils Pvt. Ltd. and Another Vs. State of Haryana and Others, wherein the apex court held as follows (paras 21-23 at pages 378 and 379 in 145 STC):

22. It is not in dispute that when the appellants herein started making investments, rule 28A was operative. Representation indisputably was made in terms of the said Rules. The State, as noticed hereinbefore, made a long term industrial policy. From time to time it makes changes in the policy keeping in view the situational change.

23. The State intended, inter alia, to grant incentive to include industrial units by way of waiver and/or deferment of payment of sales tax wherefor rule 28A was made. The sales tax laws enacted by the State, as noticed hereinbefore, contain

a provision empowering the State to grant such exemption.

24. The relevant provisions of the Act and the Rules framed thereunder indisputably were made keeping in view the industrial policy of the State. Such industrial policies by way of legislation or otherwise, subject, of course, to the provisions of the statute have been framed by several other States.

7. The apex court went on to hold that the doctrine of promissory estoppel operates even in the legislative field. After referring to a number of authorities, the apex court held as follows (paras 37 to 43 at pages 383 and 384 in 145 STC):

38. The promises/representations made by way of a statute, therefore, continued to operate in the field. It may be true that the appellants altered their position only from August 1996, but it has neither been denied nor disputed that during the relevant period, namely, August 1996 to December 16, 1996 not only they have invested huge amounts but also the authorities of the State sanctioned benefits, granted permissions. Parties had also taken other steps which could be taken only for the purpose of setting up of a new industrial unit. An entrepreneur who sets up an industry in a backward area, unless otherwise prohibited, is entitled to alter his position pursuant to or in furtherance of the promises or representations made by the State. The State accepted that equity operated in favour of the entrepreneurs by issuing Note 2 to the notification dated December 16, 1996, whereby and whereunder solvent extraction plant was for the first time inserted in Schedule III, i.e., in the negative list.

39. Both the provisions contained in Schedule III and the Note 2 formed part of subordinate legislation. By reason of the said note, the State did not deviate from its professed object. It was in conformity with the purport for which original rule 28A was enacted.

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

41. We may at this stage consider the effect of omission of the said note. It is beyond any cavil that a subordinate legislation can be given a retrospective effect and retroactive operation, if any power in this behalf is contained 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.

42. 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. See *West v. Gwynne* [1911] 2 Ch. 1

43. A retrospective effect to an amendment by way of a delegated legislation could be given, thus, only after coming into force of subsection (2A) of section 64 of the Act and not prior thereto.

44. By reason of Note 2, certain rights were conferred. Although there lies a distinction between vested rights and accrued rights as by reason of a delegated legislation, a right cannot be taken away. The amendments carried out in 1996 as also the subsequent amendments made prior to 2001, could not, thus, have taken away the rights of the appellant with retrospective effect.

8. Reliance has also been placed on the judgment of the apex court in State of Uttar Pradesh and Others Vs. Vam Organic Chemicals Limited, wherein the apex court held as follows (para 15 at page 9 in 29 VST):

26. ...When a recognition certificate is issued, a benefit of concessional rate of tax is given to the dealer. He arranges his business affairs on those lines. Therefore, that benefit cannot be withdrawn retrospectively. Such benefit can be withdrawn, at the highest, from the date of the show-cause notice when the assessing authority proposes to delete an item from the recognition certificate. In our view, such a show-cause notice has been given in each of the cases before us. Accordingly, we construe such show-cause notice to be for amending the recognition certificate in the facts and circumstances of this case, particularly because, in some of the cases, we find that recognition certificates have been issued as far back as in 1980.

9. Lastly Sh. Khanna has placed reliance on the judgment of the apex court in State of Haryana Vs. Anil Pesticides Limited and Another, wherein again the apex court held that the benefit given to an industrial unit could not be withdrawn with retrospective effect. Relying upon these observations, Sh. Khanna submits that even if liquor is now included in the negative list, the same cannot be given retrospective effect.

10. On the other hand, Sh. Vivek Singh Thakur, learned Additional Advocate-General contends that it is the duty of the State to encourage prohibition. He further submits that at no point, was it the intention of the State to grant benefit to the liquor industry. He submits that the State has taken a specific plea that liquor industry shall be deemed to have been included in the negative list right from the very beginning and, therefore, the petitioner is not entitled to any relief.

11. It would be pertinent to mention that two Schemes were framed on March 30, 2005. Under the first scheme, there was total exemption from payment of tax but in the preamble to the Scheme itself, breweries, distilleries, non-fruit/vegetable based wineries and bottling plants (both of country liquor and Indian-made foreign liquor) were specifically exempted. Therefore, it is obvious that such incentives were not to be given to the industries engaged in the liquor trade. The benefit of this Scheme was to be given to those industrial units located in the tax-free industrial zone for a period of ten years from the date of commercial production.

12. The preamble of the Scheme reads as follows:

No. EXN-F(1)2/2004(i).--In exercise of the powers conferred by sub-section (1)

of section 42 of the Himachal Pradesh General Sales Tax Act, 1968 (Act No. 24 of 1968), the Governor of Himachal Pradesh is pleased to direct that no tax shall be levied u/s 6 of the aforesaid Act on the sale of goods [other than those manufactured by breweries, distilleries, non-fruit/vegetable based wineries and bottling plants (both of country liquor and Indian made foreign liquor)] manufactured by the dealers running any new industrial units and or existing industrial units as on January 7, 2003 located in the tax-free industrial zone, for a period of 10 years from the date of commencement of commercial production or from the date of this notification, whichever is later.

13. On the same date, i.e., March 30, 2005, another scheme was also framed in which the benefit of deferred payment of tax was given to entrepreneurs setting up new industrial units in the State of H. P. This scheme was applicable to the units set up in areas not falling under the purview of the first scheme. All units were eligible except those included in the negative list.

14. The negative list which is annexure 1 of the Scheme included items such as tobacco and tobacco products, thermal power plants, coal washeries, inorganic chemicals, tanning and dyeing extracts, marbles and minerals not mentioned elsewhere, flour mills, rice mills, foundries using coal, mineral fuels, mineral oils and products of their distillation, synthetic rubber products, cement clinker and asbestos, explosives, mineral or chemical fertilizers, insecticides, fungicides, herbicides and pesticides, fibre glass, manufacture of pulp wood, branded aerated water and soft drinks, paper, plastics, products of firewood, mini steel plants, etc. The list was quite wide but if we see the list as a whole, it is obvious that the list included items which were either environmentally unfriendly or items which were harmful to health such as tobacco and tobacco products including pan masala. Even aerated drinks are in the negative list.

15. The case of the State is that liquor was left out by inadvertence and it was never the intention of the State to give benefit of this scheme to the liquor industry and according to it, giving benefit of this scheme to the liquor industry would be against the directive principles of the State Policy enshrined in the Constitution of India.

16. The main basis of the argument of the petitioner is that on the basis of the promise held out to it, it carried out substantial expansion in its industry and, therefore, the State cannot be permitted to withdraw the benefit that too with retrospective effect. However, in the writ petition, other than giving a narration of various facts, the petitioner has not made out a case as to how it changed its positions to its detriment on account of promise held out to it. The doctrine of promissory estoppel shall apply only where the petitioner makes out a case that the petitioner was made to change its position adversely on account of promise held out to it and now once the position has been changed, the other side cannot withdraw the benefit.

17. I am also of the view that the doctrine of promissory estoppel does not mean

that the State cannot correct legitimate mistakes or even withdraw a promise which is against the established public policy. When private interest and public interest clash, the former has to give way to the latter. On the one hand, we have the request of a person engaged in the liquor industry and on the other hand, we have not only to look at the directive principles of the State Policy but this court cannot ignore the fact that the State is bound not to encourage the liquor industry and to ensure the health of its citizens. The health of the citizens is of paramount importance and in case the State withdraws the benefits to the liquor industry even retrospectively, it cannot be said that the action of the State is illegal and liable to be set aside.

18. As far as the present case is concerned, I am of the considered view that the stand of the State that by mistake, liquor industry was not included in the negative list appears to be correct. There is substantial material on record to show that the State had put in the negative list industries like the tobacco industry and even soft drink manufacturers. When soft drink manufactures are put in the negative list, it would indeed be surprising not to have liquor in the negative list. Therefore, no fault can be found with the notification issued by the State including liquor in the negative list with retrospective effect. In view of the above discussion, I find no merit in the petition which is accordingly rejected. No order as to costs.