

(2001) 07 AHC CK 0002

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 607 of 2001

West U.P. Sugar Mills Association and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 04-07-2001

Acts Referred:

Constitution of India, 1950 — Article 19

Uttar Pradesh Tax on Entry of Goods Act, 2000 — Section 4(1), 4(2), 4A, 5

Uttar Pradesh Trade Tax Act, 1948 — Section 6, 8, 8D

Citation : (2001) 07 AHC CK 0002

Hon'ble Judges : R.B. Mishra, J; M. Katju, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. By means of this petition the Petitioner has challenged the constitutional validity of U.P. Ordinance No. 6 of 2001 by which a new Section 4A has been inserted in the U.P. Tax on Entry of Goods Act, 2000 (hereinafter referred as to an Act) and also the Notification No. 508 dated 24.2.2001 and Notification No. 636 dated 26.2.2001.

We have heard learned Counsel for the parties.

2. The Petitioner No. 1, 2 and 3 are Association of Sugar Mills and other Petitioners are the individual Sugar Units manufacturing sugar is a Scheduled Industry under the provisions of the Industrial Development and Regulation Act 1951 and it comes under Item No. 25 of the First Schedule of the Act. Since the whole field in respect of sugar is occupied by the Central Legislation, it is only parliament that can levy any on sugar and the State Government is not empowered to do so. However, Entry 52 of list 2 of the seventh Schedule to the Constitution permits a tax by the State Legislature on entry of goods into a local area for consumption, use or sale therein. Acting under this entry the U.P. Government issued Ordinance No. 21 of 1999 which came into force on 1.11.1999 vide Notification dated 31.10.1999, copy of which has been annexed

as Annexure-3 to the petition. u/s 4(1) of this Ordinance tax was levied on the entry of any goods specified in the Schedule into a local area; within U.P. u/s 4(2) the Entry Tax was payable by a dealer who brings into a local area any such goods. u/s 5, every dealer is to get himself registered under the Trade Tax Act and Section 6 provides for penalty.

3. By Notification dated 31.10.1999. The Governor of U.P. imposed levy of Entry Tax on sugar at 2%. True copy of the Notification is annexed as Annexure -4 to the petition. However, soon after the promulgation of the ordinance the State Government decided not to impose the same, and hence the Commissioner, Trade Tax issued a circular dated 18.9.1999 conveying the decision of the Cabinet that the collection of Entry Tax will be deferred till further orders. Copy of the Circular is annexed as Annexure -5 to the petition. Subsequently the Ordinance was converted into an Act being No. 12 of 2000 after assent of the Governor. A copy of the Act has been annexed as Annexure-6 to the petition. Copy of the Rules framed under the Act are Annexure -7 to the petition.

4. The U.P. Government by Notification dated 23.8.2000 changed the word "Sugar" appearing at Serial No. 11 of the Schedule to "Non-levy Sugar". True copy of this Notification has been annexed as Annexure -8 to the petition. Immediately thereafter the licensed sugar dealers started an agitation against the levy and the entire sugar trade remained suspended for sometime. Thereafter an agreement with the sugar traders was entered into by the Government and the Minister for Institutional Finance announced that the Entry Tax would be charged from sugar mills owner and not from traders. After this announcement the traders called off their strike. True copies of the news item are annexed as -9 and 10 to the petition. Thereafter, the impugned Section 4 A was added to the Act which casts a liability on the manufacturer to collect the entry tax from dealers at the time of sale of sugar to them. Section 4 A reads as follows:

4-A- Realisation of tax through manufacture (1) Notwithstanding anything contained in any other provisions of this Act, any person who intends to bring into a local area from any area within the State, such goods Specified in the Schedule as may be notified by the State Government shall at the time of taking delivery of the goods from the manufacturer, pay to the manufacturer the tax payable on entry of such goods into the local area and the manufacturer shall receive the tax so paid.

(2) The manufacturer receiving the tax under Sub-section (1) shall submit to the assessing authority a return in respect of the goods supplied, and the tax received by him under Sub-section (1) and the deposit the tax so received in such manner and within such time as may be prescribed.

(3) Where any manufacturer refuses to receive or fails to deposit the tax under this section he shall be liable to pay the tax alongwith the interest and penalty, if any, payable thereon which shall be recoverable as arrears of land revenue.

(4) Where the assessing authority is satisfied that only goods referred to in Sub-section (1) is lost or destroyed after its delivery by the manufacturers and before its entry into the local area, it shall direct that the tax paid in respect of such goods shall be refunded to the person who had paid the tax under Sub-section (1): Provided that no claim for such refund shall be entertained after the expiry of six months from the date of the loss or distribution of the goods.

(5) The provisions of Section 5 shall not apply to a person making payment of the tax under Sub-section (1) and such person shall not be assessed or required to submit under this Act.

Rule 7 inserted by U.P. Tax on Entry of Goods (Amendment) Rules 2001 read as follows:

7 Realisation and deposit of tax by the manufacturer: - The manufacturers in Uttar Pradesh responsible for selling, supplying or otherwise dispatching the goods notified by the State Government u/s 4-A to any dealer in Uttar Pradesh shall:

(a) Realise the amount of tax payable on the value of goods through a demand draft in the name of concerned Assessing Authority and shall deposit the same into the Government Treasury before the expiry of the next succeeding month.

(b) Submit to the Assessing Authority before the expiry of the next succeeding month. A monthly returns such turnover in Form "F" giving detailed information in the in the Annexure thereof, alongwith the treasury challan for proof of the deposit of the tax.

(c) Issue a certificate to the dealer in Form G within two months of the realisation and within one month of the deposit of tax. No single certificate shall cover transactions of more than one month.

5. The U.P. Government vide Notification dated 26.2.2001 notified that non-levy sugar shall be the goods notified that non-levy sugar shall be the goods notified for the purpose of Section 4 A. A true copy of the same is annexed as Annexure -2 to the petition.

6. In paragraph 19 of the petition it is alleged that Section 4A and the new Rule 7 makes it clear that entry Tax will be imposed on the sugar manufacturer who has to collect the Entry Tax at the time of sale of sugar by way of demand drafts even though such sugar has not entered the local area outside the local area of the sugar factory. This is alleged to be contrary to Entry 52 of List -2 of the Seventh Schedule. In paragraph 21 of the petition it is alleged that the sugar mills are not dealers, and hence no liability can be imposed on them to collect tax deposit it file returns by virtually making them dealers and assesses. In paragraph 22 of the petition it is alleged that Entry Tax can be imposed on actual entry of goods into a local area for consumption, use of sale therein, and hence it cannot be collected on the declaration of intention to bring the goods a local area. In paragraph 23 of the petition it is alleged that the imposition of tax and

collection of it by the sugar factories at the time of sale of sugar would mean that the tax is being collected at the time of sale of sugar without its entering into a local area. This is alleged to be unconstitutional being ultra vires Entry 52 of List -2 of the Seventh Schedule. In paragraph 27 of the petition it is alleged that by inserting 4 A the State Legislature changed the nature of the Tax itself and Tax can be charged even though there is no event of entry of sugar into a local area.

7. The Petitioners have relied on the decision of the Supreme Court in *Entry Tax officer v. Chandanmal Champalal and company* 1995 STC 5 . They have also relied on *Laghu Udyog Bharati and Another Vs. Union of India and Others*, where it was held that Service Tax can only be imposed on the person rendering the service and not the customer. In paragraph 31 of the petition it is alleged that simply because the sugar traders agitated and did not want to pay the entry tax directly to the Trade Tax Department this was not a valid ground for the State Government to make the sugar factories liable to collect the tax from the traders by way of demand drafts. It is alleged that placing this burden regarding entry tax on the sugar manufacturer is an unreasonable condition imposed on the sugar factories and is violative of Article 19(g) of the Constitution of India and it also conflicts with Rule 6.

8. The Petitioners have relied on the decision of the Supreme Court in *State of Bihar and Ors. v. Bihar Chamber of Commerce* 1996 9 SCC 136 wherein it was held that "what attracts levy under Entry -52 is the entry of the goods into a local area for consumption or for use or for sale within that local area. In paragraph 33 of the petition the Petitioners have also alleged that the Notification dated 31.10.1999 was issued when the U.P. ordinance No. 21 of 1999 was not enforced, and the ordinance came into force on 1.11.1999.

A counter affidavit has been filed on behalf of the State Government.

9. In paragraph 3 f7- of the counter affidavit it is alleged that Section 4 A has not disturbed the Entry Tax imposed by Section 4. All that Section 4 A says is that Entry Tax is to be collected by the manufacturer while giving delivery of the goods to the person who would be liable to pay Entry Tax when he takes the goods into the local area, hence the manufacturer has not been saddled with any liability of tax under the Uttar Pradesh Tax on Entry of goods Act. Section 4 A has only been introduced to facilitate the machinery of collection of the entry tax, the liability of which continues to be that of the person who brings the goods into the local area for consumption, use or sale therein. Section 4 A does not provide that the liability to pay the entry tax is that of the manufacturer. The manufacturer has only the liability to collect the tax from the dealers and deposit it with the Government. If the manufacturer fails to deposit the tax then Interest and Penalty can be levied on him. Sub-Section 4 provides that if after payment of entry tax to the manufacturer the goods in respect of which such tax has been paid is lost or destroyed after their delivery by the manufacturer and before their entry into the local area, the tax paid shall be refunded. Hence it is alleged that

Section 4 A does not transfer the liability for payment of Entry Tax on the manufacturer, rather it provides for a simplified mechanism for collection of that tax. There are similar Provisions in other Taxing statutes also e.g. Section 8-d of U.P. Trade Tax Act and various Provisions in the income Tax e.g. The employer making the payment to the employee earning salary has to deduct tax at source, representative assess (Ss.160 to 167 income Tax Act) etc. The person deduction tax at source is required to deposit those amounts with the Central Government, and if they do not discharge their duties penal consequences are envisaged in the event of failure to deduct or pay such tax. Thus 4 A is not a new concept in Tax Laws, It was made only for more efficient mechanism for collection of the Entry Tax. The person bringing the goods into different local areas may not be easily traceable, which may result in poor collection of the entry Tax or tax avoidance. Hence it was necessary to provide for an effective mechanism to collect the Entry Tax. To provide for an effective mechanism to collect the Entry Tax.

A rejoinder affidavit ahs also been filed and we have perused the same.

10. A perusal of Section 4 A shows that the stand of the Government appears to be correct. Section 4A appears to be only a convenient device for collecting the Entry Tax which continues to be imposed on the dealer and not on the manufacturer. What Section 4 A has done is to provide for payment of the Entry Tax by the dealer to the manufacturer. The Legislature in its wisdom may have through that could facilitate the collection of the Entry Tax regarding which the authorities may be having some difficulties. It is settled law that the motive of Legislation cannot be seen, The doctrine of colourable legislation only relates to Legislative competence and not to the motive of the Law. Moreover, because of some hardship, which the sugar manufacturer has to face, this does not mean that the Act is beyond Legislative competence. There are similar Provisions in various Taxing Institutes, which have been held to be valid by the Court e.g. Section 8 D of U.P. Trade Tax Act, Provisions for deduction at source by the Employer, and for Representative Assessors under Income Tax Act, etc. Greater freedom has to be given to the Legislature and the authorities with regard to Tax measures, as these are often complicated. The validity of Section 8D of the U.P. Trade Tax Act has been upheld by this Court in V.K. Singhal and Ors. v. State of U.P. and Ors. 1995 U.P.T.C. 337. It is settled law that the mode of recovery cannot alter the character of the levy nor can it determine the competence of the state Legislature vide Venkateshwara Theatre v. State of Andhra Pradesh AIR 1993 (3) SCC 677 , Buxa Dooars Tea Company Ltd. and Others Vs. State of West Bengal and Others, ; Govind Saran Ganga Saran Vs. Commissioner of Sales Tax and Others, and Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam, ; M.D. Century Cooperative Bank v. 3rd ITO AIR 1975 SC 2016 . The Supreme Court held that the power collect a tax means the power to collect it properly and effectively and the same view was taken in The Orient Paper Mills Ltd. Vs. The State of Orissa and Others, and Chhotabhai Jethabhai Patel and Co. Vs. The State of Madhya Pradesh and Others, In V.K. Singhal v. State of U.P. 1995 UPTC

337 this Court upheld the validity of Section 8 D and observed that the power to impose tax also include the power of collection by means of advance payment of tax or deduction of tax at source to be finally adjusted at the time of filing of the return or the assessment.

11. Sri Sudhir Chandra learned Senior Counsel for the Petitioner submitted that Section 4 A puts the entire liability on the manufacturer and even makes him liable to penalty. We do not agree. In our opinion the liability continues to be of the dealer, but Section 4 A was inserted since the Legislature in its wisdom thought there was some difficulty in collection/realisation of the tax. u/s 4 A manufacturer is in the position of a middle man between the dealer and the Government and this concept is not unknown to Tax Law. For instance under the Income Tax Act the Employer is also in a position of the middle man when deducts tax from the salary of the Employee, or Representative Assesses. The penalty is imposed only if the manufacturer refuses to receive or fails to deposit the tax. If he does not want to suffer the penalty the manufacturer should not fail to receive or deposit the Tax. Moreover, Sub-section (4) of Section 4 A makes it clear that if the goods are lost or destroyed after its delivery by the manufacturer and before its entry into the local area, the concerned authority shall direct that the tax paid in respect of such goods shall be refunded to the person who had paid the tax under Sub-section (1). Sub-section (4) of Section 4-A thus protects the person who had paid the tax in the contingencies of the goods being lost or destroyed after delivery by the manufacturer and before entry into the local area. This provisions make it clear that what is being imposed is Entry Tax and in case the goods never entered the local area the tax has to be refunded.

12. Sri Sudhir Chandra learned senior counsel for the Petitioner submitted that often there is a great delay in refund by the Tax authorities. We are aware of this situation and we are of the opinion that tax refunds whenever a person is entitled to the same must be made promptly. Hence whenever the authority concerned receives an application that goods are lost or destroyed after delivery by manufacturer and before entering into a local area it must decide this application very expeditiously not later than months of the receipt of the application. If the authority is satisfied that such goods were lost or destroyed before entering into the local area the refund must be paid by the State Government within a month of the recording of the satisfaction of the Assessing Authority. Sri Chandra submitted that Section 4 A levies a tax on intention and not on actual entry of goods into the local area. In our opinion Sub-section (4) of Section 4A must be read alongwith Sub-section (1). Sub-Section 4 deals with the situation where despite an intention goods are not brought into the local area. In such a situation the tax has to be refunded as provided by Sub-Section 4. Hence the statute has also catered for this situation.

13. The only objection can be regarding delay in the refund but we have already directed above that this refund, if there is entitlement, must made within the

period specified above.

14. As regards the objection that the tax is only on intention and not on actual entry of goods into a local area, in our opinion the manufacturer obviously cannot predict whether the dealers buying goods will actually bring them into the local area or not. All that the manufacturer can know is what the dealers inform him. However, since the Entry Tax has to be paid by the dealers to the manufacturer at the time of taking the delivery of the goods from the manufacturer obviously no dealer in his senses will pay the tax and will yet not bring the goods into the local area. If the goods are lost or destroyed he can get refund vide Sub-Section 4. The real fear of the Petitioners as also stated expressly by Sri Sudhir Chandra is that Petitioners would be harassed by the Trade Tax Authorities deal with Entry Tax also. It is true that Trade Tax Authorities in our Country have acquired a reputation of harassing even law-abiding businessmen and this is most improper. However, this Court cannot decide the validity of the Statute merely because of a chance of its misuse. It is quite possible that Section 4 A was enacted because of the agitation by the dealers. However, as already stated above, notice of an Act or chance of its misuse cannot be a ground for declaring it unconstitutional.

15. Sri Sudhir Chandra learned senior Counsel for the Petitioner tried to distinguish the decision of this Court in *V.K. Singhal v. State of U.P.* (supra) and submitted that in the present case the manufacturers of sugar have no nexus or connection with the taxable event. For this contention he relied on the decision of the Supreme Court in *Laghu Udyog Bharti v. Union of India* (supra). In that case the Government had framed Rules that not only would the service tax payable by the contractor be collected from them by the contractee (i.e. the person receiving the services and paying for them), but he shall also be responsible for filing returns and also subjected to penalties. The Supreme Court held that this was not valid. We have carefully considered the above decision.

16. In our opinion this decision is clearly distinguishable. It may be noticed that in *Laghu Udyog Bharties* case (supra) what was challenged was the validity of the Rules and not some section of the parent Act itself. The Supreme Court in that case was not concerned with the validity of any Provision of the Act. After interpreting Section 65 to 71 of the Parent Act the Supreme Court was of the opinion that the Rules were in violation of the provisions of the Act itself. On the other hand, in the present case we are not concerned with the validity of any Rule made under the Act but we are concerned with the Constitutional validity of Section 4 A which has become part of the Act itself. Hence the decision in *Laghu Udyog Bhartis* case is clearly distinguishable.

17. As regards the argument on the basis of Article 19(1) (g) of the Constitution we are of the opinion that Section 4 A does not place any unreasonable restrictions on the right of the Petitioners, to do business. Section 4 A, as already observed by us, is only a convenient device for facilitating the collection of the Tax which the Legislature thought would otherwise be evaded. This Court cannot substitute its own wisdom for the wisdom of the Legislature in such matters

relating to fiscal statutes. It is well known that the Legislature and the Government has to think of various contingencies in taxing measures, and this Court can only interfere if there is any Constitutional violation or violation of any Statute. However, we find no Constitutional invalidity in Section 4 A or in the impugned Notification.

The petition is therefore, dismissed.

18. However, before parting with the case we would certainly agree with the apprehension of the Petitioners that they may be harassed by the Trade Tax Authorities and hence we direct the commissioner, Trade Tax U.P. to issue a Circular forthwith directing all Trade Tax Authorities that they must not harass the sugar manufacturers, and if they do so they will be severely punished.