

Vst Industries Limited Vs. Commercial Tax Officer and ors.

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Court : Andhra Pradesh

Decided On : Nov-21-1995

Reported in : [1998]111STC697(AP)

Judge : P. Ramakrishanam Raju and ;P. Venkatarama Reddi, JJ.

Acts : [Central Sales Tax Act, 1956](#) - Sections 8, 8(2A), 8(3) and 8(5)

Appeal No. : Writ Petition Nos. 19360 and 19376 of 1993

Appellant : Vst Industries Limited;hallmark Tobacco Company Limited

Respondent : Commercial Tax Officer and ors.;commercial Tax Officer and ors.

Judgement :

ORDER

1. The petitioner in Writ Petition No. 19360 of 1993 is a registered company, engaged in manufacture and sale of cigarettes. It is a registered dealer under the State and Central Sales Tax Acts. For the assessment year 1989-90 while assessing the turnover, the first respondent estimated the sale value of the containers at Rs. 16,18,38,000 and subjected to levy of tax at 3 per cent. following G.O. Ms. No. 693, Revenue dated May 18, 1965, and accordingly called upon the petitioner to pay Rs. 48,55,140. Although the petitioner preferred an appeal to the second respondent against the said assessment order and sought for stay of collection of tax pending appeal, the same could not be heard as the post of Appellate Deputy Commissioner, Secunderabad was vacant, and therefore, the

writ petition was filed seeking for stay of collection of the said tax, pending disposal of the appeal, and also to declare that G. O. Ms. No. 693, Revenue dated May 18, 1965 is violative of section 8(2A) of the Central Sales Tax Act.

2. M/s. Hallmark Tobacco Company Limited, Parklane, Secunderabad, is a registered company, engaged in sale of cigarettes. It is also seeking the same relief as the writ petitioner in the other writ petition. For the assessment year 1990-91, the first respondent estimated the sale value of the containers at Rs. 4,68,53,310 and subjected the same to tax at 3 per cent. under the G.O. referred to above, and accordingly, the petitioner was called upon to pay a tax of Rs. 14,05,659. The petitioner preferred an appeal before the second respondent and asked for stay. As the post of Appellate Deputy Commissioner, Secunderabad is kept vacant, no orders of stay are passed. Hence this writ petition seeking for stay of collection of the said tax, pending disposal of the appeal before the second respondent, and also to declare that G.O. Ms. No. 693, Revenue dated May 18, 1965 is violative of section 8(2A) of the Central Sales Tax Act.

3. In the counter-affidavit filed by the Commercial Tax Officer in both the writ petitions, it is stated that the disputed G.O. Ms. No. 693, contemplates levy of tax on containers involved in inter-State sales of the exempted goods at 3 per cent. irrespective of whether they are covered by declarations in form C or not. The petitioners were given show cause notices before levying tax at the rate of 3 per cent. on the containers of cigarettes sold in inter-State sales and after considering the objections, net turnover was determined and on the said turnover three per cent. tax was levied. Under the Central Excise Tariff Act, 1975, tobacco does not include the containers of cigarettes. Section 8 enumerates containers as separate category of goods for purposes of taxation. Hence, the exemption given to any goods will not automatically exempt the containers of those goods. In any event, the non obstante clause in section 8(5) of the Central Sales Tax Act, would hold the field and override section 8(2A) of the said Act.

4. The main question in these writ petitions is about the interpretation and scope of G.O. Ms. No. 693, dated May 18, 1965 read with section 8(5) of Central Sales Tax Act. By an amendment to the Central Sales Tax Act, 1956, section 8(2A) was

added with effect from April 1, 1973. Section 8(2A) was also amended with effect from the same date. Section 8(2A) is to the effect that where sale or purchase of any goods is generally exempted under the sales tax law of the State, the same shall be exempted from the provisions of the Central Sales Tax Act. From June 1, 1970 tobacco was placed as item No. 7 under the Fourth Schedule to the Andhra Pradesh General Sales Tax Act. Under sub-section

(5) of section 8 of the Central Act, it is seen that notwithstanding anything contained in this section, the State Government may, by notification in the Official Gazette, direct that no tax under this Act shall be payable for the sales effected during the course of inter-State trade or commerce, or that tax shall be calculated at such lower rates than those specified under sub-section

(1) or sub-section

(2) of this section. Basing on this sub-section, the learned counsel for the petitioner contends that power is vested with the State Government to exempt and not to create any tax liability on inter-State sale. Tax on sale of tobacco is exempted under section 8 of the State Act read with corresponding exemption of such sale under section 8(2A) of the Central Act. Packing of cigarettes is integral part of manufacture of cigarettes. The question of imposing tax on the notional value of packing material does not arise. He relies on Chapter XXIV

(2) of the Central Excise Tariff Act, 1985 which is to the effect that in relation to products of heading No. 24.02 which relates to cigars and cheroots and of tobacco or tobacco substitutes, etc., labelling or relabelling of container and repacking of bulk packs to retail pack or the adoption of any other treatment to render the product marketable shall amount to manufacture. Hence packing of cigarettes shall also be deemed to be manufacturing process, and therefore, imposing of tax separately on packing material is wholly unauthorised. He further contends that unless there is a separate agreement of sale of containers, no separate tax can be imposed on them. He relies on certain decisions of the Supreme Court, viz., *Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh* [1966] 17 STC 624, *Commissioner of Taxes v. Prabhat Marketing Co. Ltd.* [1967] 19 STC 84 and *Razack & Company v. State of Madras* [1967] 19 STC 135 in support of his

contention. As the finding of the assessing authority is that the sales of the contents, namely, cigarettes are exempt under section 8 of the Andhra Pradesh General Sales Tax Act and the value of packing material is inseparable from the value of the contents, no tax can be levied under the Central Sales Tax Act in the guise of invoking a legal fiction under the notification issued in G.O. Ms. No.

693. It is vehemently argued that no such legal fiction could arise under section 8(5) of the Central Sales Tax Act or under the terms of the said notification. The learned counsel Mr. C. Natarajan also pointed out the background in which the notification was issued.

5. The learned Government Pleader, on the other hand, contends that section 8(3) differentiates and enumerates containers as separate category of goods for purpose of taxation. Hence, exemption given to any goods does not automatically and ipso facto result in the exemption of containers of those goods. Therefore, the first respondent has rightly assessed the value of the containers involved in inter-State trade of exempted goods, viz., cigarettes at 3 per cent. and the power of the assessing authority in assessing the value of containers is well within the frame work of the Central Sales Tax Act, especially the notification issued under section 8(5) thereof.

6. Though the contentions raised by the learned counsel for the petitioner are not without force, we do not consider it appropriate to decide this issue in the writ petitions at this stage. In these writ petitions, though the validity of the notification issued in G. O. Ms. No. 693, Revenue Department dated May 18, 1965 had been challenged, what is argued is only about the proper interpretation of the notification dated May 18, 1965 in the light of sub-section (5) of section 8 of the Central Act. It is the petitioners' contention that sub-section (5) of section 8 cannot be read as imposing tax, while it only exempts from imposition of tax and the intention of notification is not to levy tax even at lesser rate if the packing materials are not sold separately. Only if the interpretation is held against the petitioner that the question of vires may arise. From the prayer in the writ petition, it is seen that the main intention of filing the writ petitions is to obtain stay; pending appeals. No doubt, the impugned G. O. is also challenged on the ground that it is beyond the

power of the executive but that was done only incidentally. We are told that the appeals were withdrawn when stay petitions came up for hearing before this Court in these writ petitions, probably because the petitioners were under the wrong impression that the validity of notification has to be gone into in the writ petitions. The petitioners had thus an effective alternative remedy by way of appeal and, in fact, they invoked the jurisdiction of the appellate authority by filing appeals, but they were subsequently withdrawn. The learned counsel for the petitioners contends that availability of alternate remedy is not a bar always for maintainability of writ petitions. In support of his contention, he relies on *Hirday Narain v. Income-tax Officer* : [1970]78ITR26(SC) and *Bhadrachalam Paperboards Ltd. v. Union of India* (1993) 1 An WR 139. In the first of the cases, the Supreme Court observed that if the High Court had not entertained the petition, the assessee could have moved the Commissioner in revision because by that time, the period prescribed for preferring revision had not expired. But in the present cases, the appeals were filed and withdrawn. At the same time, the assessment orders were not challenged. Only after the arguments were partly heard, it is stated by the learned counsel for the petitioner that the petitions for amendment of the prayer were filed challenging the assessment orders. Thus, for the first time at the time of disposal of the writ petition, attempts have been made to challenge the assessment orders. In such a situation, we do not think that the principle laid down in the aforementioned decisions relied upon by the petitioner will apply. When the assessment order is sought to be challenged for the first time now, it would not be an improper exercise of discretion under article 226 to direct the petitioners to avail of the alternative remedy. In view of the peculiar circumstances of the case, we are however inclined to give an opportunity to the petitioners to file appeals though the time-limit had expired because, under the Act, the appellate authority has power to condone the delay. The Supreme Court as well as this Court repeatedly held that in tax matters where statutory remedies of appeal and revision are available, it is not proper to adjudicate these questions in a writ petition under article 226 of the Constitution. Even if a pure question of law is involved, it is not as if the departmental Tribunals will not be able to decide the same. We are fortified in our view by the Division Bench judgment of this Court to which one of us (Venkatarama Reddi, J.) was a p' (vide W.P. No. 12789 of 1994 dated July 22,

1994 - ITC Limited v. Commercial Tax Officer [1998] 111 STC 694). There, the question arose whether the consideration received by the petitioner in connection with transfer/surrender of replenishment licences and exim scrips were liable to be taxed under the A. P. General Sales Tax Act. After referring to the observations of the Supreme Court in Assistant Collector, Central Excise v. Dunlop India Ltd. : 1985ECR4(SC) , the Division Bench observed :

'The learned counsel has submitted that this is a case where disputed questions of fact are not involved and a purely legal issue has to be settled and it is difficult to expect the statutory authorities to go into the settled questions involved. We do not think that these factors by themselves afford sufficient justification to by-pass the normal remedies under the Act. No doubt, arguable questions do arise, but the appellate and revisional authorities constituted under the Act are not helpless or handicapped to decide these issues.'

In Titaghur Paper Mills Co. Ltd. v. State of Orissa : [1983]142ITR663(SC) , it was observed thus :

'Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of.

The petitioners have the right to prefer an appeal before the prescribed authority under sub-section (1) of section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-section (3) of section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under section 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under article 226 of the Constitution. It is now well-recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.'

Then after referring to the decision in K. S. Venkataraman and Co. (P.) Ltd. v. State of Madras : [1966]60ITR112(SC) , the Supreme Court observed thus :

'No such question arises in a case like the present where the impugned orders of assessment are not challenged on the ground that they are based on a provision which is ultra vires. We are dealing with a case in which the enstrumment of power to assess is not in dispute, and the authority within the limits of his power is a Tribunal of exclusive jurisdiction. The challenge is only to the regularity of the proceedings before the learned Sales Tax Officer as also his authority to treat the gross turnover returned by the petitioners to be the taxable turnover. Investment of authority to tax involves authority to tax transactions which in exercise of his authority the taxing officer regards as taxable, and not merely authority to tax only those transactions which are, on a true view of the facts and the law, taxable.'

We are, therefore, of the view that the petitioners should avoid of the statutory remedy of appeal provided under the Act.

7. For all the above reasons, we are inclined to dispose of the writ petitions with liberty to the petitioners to approach the appellate authority. The petitioners shall file their appeals within a period of four weeks from today and the appellate authority will dispose of the same without raising any question of limitation. Collection of tax was stayed during the pendency of these writ petitions. We direct, having regard to the facts and circumstances of the case, that there shall be stay of collection of tax pending disposal of the proposed appeals. The appeals, if filed within the aforementioned time, shall be disposed of expeditiously.

The writ petitions are disposed of accordingly. No costs.

8. Writ petitions dismissed.