(2011) 03 P&H CK 0813

High Court Of Punjab And Haryana At Chandigarh

Case No: CWP No. 5957 of 2010

M/s Shiv Shanker Industries	APPELLANT
Vs	
State of Haryana and others	RESPONDENT

Date of Decision: March 22, 2011

Acts Referred:

- Constitution of India, 1950 - Article 14, 19(1), 19(5), 304, 31(1)
- Haryana Value Added Tax Act, 2003 - Section 2(1) , 23

Citation: (2011) 3 RCR(Civil) 1

Hon'ble Judges: Ajay Kumar Mittal, J; Adarsh Kumar Goel, J

Bench: Division Bench

Judgement

Adarsh Kumar Goel, J.
This petition seeks quashing of notification dated 13.5.2008 making retrospective amendment from 1.1.2006 to the Schedule to Haryana Value Added Tax Act, 2003 (the Haryana VAT Act) thereby making the goods in question taxable.

2. Case set out in the petition is that the petitioner is a dealer registered under the provisions of the Act. It purchased animal feed in the shape of damaged wheat from government agencies during the year 2005-2006. "Animal feed" which by interpretation included "damaged wheat" being covered by entry 4 of Schedule B", was tax free. The petitioner having paid the tax under mistake sought refund relying upon judgment of this Court in Garg Cattle Feed Industries v. Food Corporation of India and others, (2009) 23 VST 94. Since no decision was being taken on the claim of the petitioner, CWP Nos. 6979 of 2007, 18433 of 2007 and 7222 of 2008 were filed which were disposed of vide orders dated 9.1.2007, 6.12.2007 and 2.5.2008 respectively with directions to take a decision in the matter. In complaisance with the said orders, claim of the petitioner was considered but rejected. According to the petitioner, since the damaged wheat was not earlier taxable, if the same was to be made taxable for the first time, by way of exclusion from "Animal feed", such

provision could not be made retrospective. Reliance has been placed on recent judgment of this Court in Goel Brick Industries and others v. M/s Radha Swami Brick Co., (2010) 37 PHT 440 which in turn relied upon decisions of the Hon''ble Supreme Court in State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others, , Lohia Machines Ltd. and Another Vs. Union of India (UOI) and Others, , Chairman, Railway Board and others Vs. C.R. Rangadhamaiah and others, and Virender Singh Hooda and Others Vs. State of Haryana and Another, .

3. In the reply filed on behalf of the State, the amendment has been defended on the ground that the same was clarificatory. Earlier "damaged wheat" was impliedly excluded from "Animal feed" and now by way of clarification, it was expressly so excluded.

4. We have heard learned counsel for the parties and perused the record.

5. Under the Haryana VAT Act, tax is livable on sale and purchases of goods calculated with reference to taxable turnover Schedule ''B'' to the Act is a schedule of exempted goods as per section 2(1)(p) and one of the entries i.e. Entry 4 mentions "animal feed". The said entry was interpreted by the Hon''ble Supreme Court in Commissioner of Sales Tax, UP v. Ram Chandra Asha Ram (decd.) through LRs., (2001) 123 STC 415 as inclusive of everything that is fed to cattle including damaged wheat. Following the said judgment, a Division bench of this Court in Garg Cattle Feed Industries held that the expression ''cattle feed would include damaged rice. By way of impugned amendment, damaged wheat has been excluded from "Animal feed" from retrospective effect.

6. The original entry and the amendment entry are as under:-

Unamended entry	Amended entry
Animal feed, that is to say aquatic feed, poultry feed and cattle feed including supplements, concentrates and additives to these foods, husk of pulses and de-oiled cakes (including de-oiled rice bran).	Animal feed, that is to say, aquatic feed, poultry feed and cattle feed (but not including damaged wheat) including supplements, concentrates and additives to these feeds, husk of pulses and de-oiled cake (including de-oiled rice bran).

7. Thus, the question is whether the amendment is merely clarificatory or it creates taxability of goods for the first time from a retrospective date.

8. It is well settled that a legislature has power not only to legislate prospectively but also retrospectively. However, there are certain inherent limitations in making retrospective legislation. The limitation has been judicially recognized to give effect

to fundamental right under Article 14. Retrospectively is not permissible if it is unreasonable and arbitrary. It has been held that a legislature cannot legislate today with reference to a situation which obtained 20 years ago ignoring the march of events and constitutional rights accruing in the meanwhile. Whether or not retrospective amendment is arbitrary is to be seen in the light of facts and circumstances under which an amendment is made. (Ramanlal Keshav Lal Soni, Lohia Machines Limited, C.R. Rangadhamaiah and virender Singh Hooda). If retrospectively is only on account of certain omission or by way of clarification, such an amendment can be valid even from retrospective date. Tata Iron and Steel Co. Limited v. State of Bihar, AIR 1958 SC 452 , Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another, , Rai Ramkrishna and Others Vs. The State of Bihar, , Shiv Dutt Rai Fateh Chand and Others Vs. Union of India (UOI) and Another, . In Shiv Dutt Rai Chand, it was observed :-

32. The next point to be considered is whether the imposition and collection of penalty with retrospective effect amounts to an imposition of an unreasonable restriction on the fundamental right of the petitioners to own property and to carry on business guaranteed under Article 19(1)(f) and (g) of the Constitution. We have already indicated above the circumstances under which it became necessary to levy penalties with retrospective effect and to validate all the proceedings relating to levy of penalties and recovery therefore. The scope of the power of a legislature to make a law validating the levy of a tax or a duty retrospectively was considered by this court in Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another, . The court held that Parliament acting within its legislative field had the power and could by law both prospectively and retrospectively levy excise duty under the Central Excises and Salt Act, 1944 even where it was established that by reason of the retrospective effect being given to the law, the assesses were incapable of passing on the excise duty to the buyers. After considering certain American decisions, Ayyangar, J. observed at SCR p. 37 thus:

It would thus be seen that even under the constitution of the United States of America the unconstitutionality of a retrospective tax is rested on what has been termed the vague contours of the 5th Amendment''. Whereas under the Indian Constitution that grounds on which infraction of the rights a property is to be tested not by the flexible rule of ''due process'' but on the more precise criteria set out in Article 19(5), mere retrospectively in the imposition of the tax cannot per se render the Law unconstitutional on the ground of its infringing the right to hold property under Article 19(1)(f) or depriving the person of property under Article 31(1). If on the one hand, the tax enactment in question were beyond legislative competence of the Union or a State necessarily different considerations arise. Such unauthorized imposition would undoubtedly not be a reasonable restriction on the right to hold property besides being an unreasonable restraint on the carrying on of business, if the tax in question is one which is laid on a person in respect of his business activity.

33. The Court was more emphatic in Rai Ramkrishna and Others Vs. The State of Bihar, about the power of the legislature in India to enact retrospective taxation laws. It held that if in its essential features a taxing statue is within the competence of the legislature, it would not cease to be so if retrospective effect is given to it. A power to make a law, therefore, includes within its scope to make all relevant provisions which are ancillary or incidental to it. The provision for levying of interest and to levy penalties retrospectively and to validate earlier proceedings under laws which have been declared unconstitutional after removing the element of unconstitutionality is included within the scope of legislative power. In the abovementioned case of Rai Ramkrishna and Others Vs. The State of Bihar, , a Bihar Act levying a tax on passengers and goods passed in 1950 was declared to be unconstitutional by this court in December 1960. An Act validating the said levy after removing constitutional deficiencies in it was passed with the assent of the President in September 23, 1961 and that Act was given retrospective effect from April 1, 1950 on which date the earlier Act which had been declared as unconstitutional had come into force. The limited challenge mounted against the validating Act was that the provisions contained in Section 23(b) thereof which provided that any proceeding commenced or purported to have been commenced for the assessment, collection and recovery of any amount as tax or penalty under the provisions of the earlier Act which had been declared as unconstitutional or the rules made there under during the period from April 1, 1950 to July 31, 1961, i.e. till the date on which an Ordinance which was replaced by the validating Act in question came into force, should be deemed to have been commenced and conducted in accordance with the provisions of the validating Act and if not already completed should be continued and completed in accordance with the validating Act was opposed to Article 304(b) and Article 19(1)(f) and (g). It was urged in that case on the basis of the observation made in Sutherland on Statutes and Statutory Constructions to the effect that :-

Tax statutes may be retrospective if the legislature clearly so intends. If the retrospective feature of a law is arbitrary and burdensome the statute will not be sustained.

that the length of retrospectively, that is, 11 years was an unreasonable restriction on the rights guaranteed under Article 19(1)(f) and (g). The contention was rejected by this court at SCR pp. 915 and 916 of the Report as follows :-

We do not think that such a mechanical test can be applied in determining the validity of the retrospective operation of the Act. It is conceivable that cases may arise in which the retrospective operation of a taxing or other statute may introduce such an element of unreasonableness that the restrictions imposed by it may be open to serious challenge as unconstitutional; but the test of the length of time covered by the restrospective operation cannot, by itself, necessarily be a decisive test. We may have a statute whose retrospective operation covers a comparatively

short period and yet it is possible that the nature of the restriction imposed by it may be of such a character as to introduce a serious infirmity in the retrospective operation. On the other hand, we may get cases where the period covered by the retrospective operation of the statute, though long, will not introduce any such infirmity. Take the case of a Validating Act. If a statute passed by the legislature is challenged in proceedings before a court, and the challenge is ultimately sustained and the statute is struck down, it is not unlikely that the judicial proceedings may occupy a fairly long period and the legislature may well decide to await the final decision in the said proceedings before it uses its legislative power to cure the alleged infirmity in the earlier Act. In such a case, if after the final judicial verdict is pronounced in the matter the legislature passes a validating Act, it may well cover a long period taken by the judicial proceedings in Court and yet it would be inappropriate to hold that because the retrospective operation covers a long period, therefore, the restriction imposed by it is unreasonable. That is why we think the test of the length of time covered by the retrospective operation cannot by itself be treated as a decisive test.

Take the present case. The earlier Act was passed in 1950 and came into force on April 1, 1950, and the tax imposed by it was being collected until an order of injunction was passed in the two suits to which we have already referred. The said suits were dismissed on May 8, 1952, but the appeals preferred by the appellants were pending in this Court until December 12, 1960. In other words, between 1950 and 1960 proceedings were pending in court in which the validity of the Act was being examined, and if a Validating Act had to be passed, the legislature cannot be blamed for having awaited the final decision of this Court in the said proceedings. Thus the period covered between the institution of the said two suits and their final disposal by this Court cannot be pressed into service for challenging the reasonableness of the retrospective operation of the Act.

9. In the present case, the damaged wheat was covered by ''cattle feed'' and was exempted from tax being in tax free goods. It is only for the first time that the same has been excluded from the said category vide impugned notification dated 13.5.2008 operating retrospectively w.e.f. 1.1.2006. No reason has been given as to why retrospective amendment became necessary. There was no dispute about interpretation during the relevant period. In these circumstances, we have to hold that the impugned notification to the extent of retrospectively is arbitrary and beyond the competence of rule making authority exercising power of delegated legislation. Limitation on exercise of retrospective power applicable to plenary legislature obviously applies to a subordinate legislature. If plenary legislature cannot exercise retrospective power in certain situations, obviously it cannot authorize delegated authority to do. Contention of the petitioner has, thus, to be upheld.

10. As regards refund, the matter can be gone into in appropriate proceedings in accordance with law. This aspect is left open.

11. The writ petition is disposed of accordingly.