(2009) 21 VST 386

Karnataka High Court

Case No: Writ Petition No. 562 of 2008

R.K. Corporation		APPELLANT
	Vs	
Government of Karnataka and Another		RESPONDENT

Date of Decision: Sept. 17, 2008

Acts Referred:
Karnataka Value Added Tax Act, 2003 â€" Section 4 (1) (b), 59 (4)

Citation: (2009) 21 VST 386

Hon'ble Judges: N. Kumar, J

Bench: Single Bench

Advocate: R.V. Prasad and Vasan Associates, for the Appellant; Vasan Associates, Shivayogi Swamy, High Court Government Pleader, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

N. Kumar, J.
The petitioner in this petition is seeking a writ of certiorari for quashing of annexure C, the clarification dated December 11,

2007 and in the alternative for a declaration that it would apply prospectively and not retrospectively.

2. The petitioner is a dealer registered under the provisions of the Karnataka Value Added Tax Act, 2003 (for short, hereinafter referred to as ""the

Act""). He is a commission agent carrying on the business as a distributor for sale of aluminum composite panel among other products. In order to

have an absolute clarity on the aspect of the appropriate rate of tax applicable on the sale of goods he filed an application u/s 59(4) of the Act to

the second respondent requesting for clarification of the rate of tax applicable on aluminium composite panel and PVC flexible film on December 8,

2005. Along with the application he also enclosed copies of the bill of entries relating to import of these goods in which the commodity imported

was described as ""aluminum (plastic composite) panel sheet interior"". It falls under Chapter 39 of the Central Excise Tariff Act, 1985 (for short,

hereinafter referred to as, ""the Tariff Act"") under Heading No. 3920, sub-heading No. 1019 and sub-heading No. 4900. The said goods find a

place under entry 51 of the Third Schedule appended to the Act. The second respondent issued a clarification dated February 2, 2006 clarifying to

the effect that PVC flexible film and aluminium panel sheets covered under the Central Excise Tariff Act Code 3920.49.00 and 3920.10.19,

respectively, fall under serial No. 144 of the Notification bearing No. FD 197 CSL 2005(6) and would consequently be liable to tax at the rate of

four per cent, of the Act. Annexure B is the said clarification dated February 2, 2006. Subsequently, the second respondent served notice on the

petitioner dated May 29, 2007 calling upon the petitioner to show cause as to why the clarification dated February 2, 2006 ought not to be

withdrawn since the aluminium composite panel was excisable to tax u/s 4(1)(b) of the Act at the rate of 12.5 per cent, and not at four per cent, as

clarified earlier.

3. The petitioner appeared through the authorised representative and contested the said show-cause notice. However, the second respondent

overruled the objections of the petitioner and withdrew the clarification dated February 2, 2006 and issued a fresh clarification dated December

11, 2007. According to the subsequent clarification, aluminium panel sheets and aluminium composite panel sheets are taxable at the rate of 12.5

per cent, in terms of Section 4(1)(b) of the Act. It was also made clear that the earlier clarification dated February 2, 2006 stood withdrawn from

the date of its issue. Annexure C is the said clarification. Aggrieved by the same, the petitioner has preferred this writ petition.

4. The respondents have filed a counter. It was contended that on a thorough examination of the goods in question by the second respondent, it

revealed that the commodity in question is made of aluminium sheets on either side and thick plastic sheet in the middle. It is sold/dealt by the

dealer in building materials/decorative tiles materials. It is not dealt by the petitioner as plastic goods. It is used for fixing on the wall in building and

used as industrial input. Central Excise Tariff Code 3920.10.19 relates to plastic articles combined with other material. Hence, for a commodity to

fall under this code, it should predominantly be a plastic article and known in trade and dealt as an article of plastic. The commodity dealt by the

petitioner is aluminium panel sheets and aluminium composite panel sheets falling under the Central Excise Tariff Code 7606.11.90. Therefore, it

cannot be classified as plastic articles. Therefore, the clarification dated February 2, 2006 was issued on the representation made by the petitioner

that the commodity in question falls under the Central Excise Tariff Code 3920.10.19, which was found to be incorrect and the same was

withdrawn. As the said clarification was based on misrepresentation made by the petitioner, the same was withdrawn with retrospective effect after

providing sufficient opportunity of hearing to the petitioner. An entry cannot have two meanings, one prior to the clarification and subsequent to the

clarification. The Commissioner has authority in law to withdraw the clarification. Subsequent clarification is nothing but rectification of the earlier

clarification. The modification made to the clarification relates back to the date of issuance of the clarification. Therefore, the petitioner cannot

challenge the clarification dated December 11, 2007 on the ground that it cannot be given retrospective effect from the date of notification. The

said clarification is applicable to the entry from the date of its incorporation in the Act. Therefore, the respondents have sought for dismissal of the

writ petition.

5. Sri R.V. Prasad, learned Counsel for the petitioner, assailing the impugned clarification submits that in the first place the clarification is contrary

to what is contained in Chapter 39 of the Tariff Act and therefore, it is liable to be set aside. Even otherwise, the earlier clarification issued by the

second respondent on which the petitioner has acted upon is binding on the Department till it is withdrawn, modified or rectified and therefore, the

impugned clarification cannot be retrospective, but it can only be prospective.

6. Per contra, learned Government Advocate submitted that the second respondent who had issued the earlier clarification has the power to

withdraw the said clarification. Any clarification issued by the Commissioner is always retrospective, i.e., from the date of incorporation of the said

provision in the Act and it cannot be prospective. Lastly, it was contended that once such a clarification is issued, the dealer is liable to pay tax in

terms of the said clarification and he cannot contend that it has to be only prospective.

7. In the light of the aforesaid facts and rival contentions, it is clear that the petitioner filed an application u/s 59(4) of the Act requesting the second

respondent to clarify the rate of tax applicable to the goods in question. A clarification was given stating that it is four per cent, on the value of the

goods. With the change of incumbent in the office, it was noticed that the said clarification is not proper. According to the second respondent, it

was obtained earlier on misrepresentation of facts. He wanted to review the said clarification. Therefore, he had issued a show-cause notice to the

petitioner calling upon him to show cause as to why the earlier clarification should not be withdrawn. After hearing the petitioner, he has withdrawn

the earlier clarification by giving cogent reasons. The power to withdraw such clarification cannot be disputed.

8. The learned Counsel for the petitioner submitted that he will restrict this writ petition only for a declaration that the impugned clarification should

be prospective.

9. The Supreme Court in the case of State Bank of Travancore Vs. Commissioner of Income Tax, Kerala, has held that the earlier circulars being

executive in character cannot alter the provisions of the Act. These were in the nature of concessions and could always be prospectively

withdrawn. Again the Supreme Court, in the case of Bengal Iron Corporation v. Commercial Tax Officer reported in [1993] 90 STC 47 SC, has

held that the clarification and circular issued by the Central Government and/or the State Government represents merely their understanding of the

statutory provisions. They are not binding upon the courts. It is true that those clarifications and circulars were communicated to the concerned

dealers but even so nothing prevents the State from recovering the tax, if in truth such tax was leviable according to law. There can be no estoppel

against the statute. The understanding of the Government, whether in favour or against the assessee, is nothing more than its understanding and

opinion. It is doubtful whether such clarifications and circulars bind the quasi-judicial functioning of the authorities under the Act. While acting in a

quasi-judicial capacity, they are bound by law and not by any administrative instructions, opinions, clarifications or circulars. Law is what is

declared by the Supreme Court and the High Court. To wit, it is for the Supreme Court and the High Court to declare what a particular provision

of the statute says and not for the executive.

10. Following the aforesaid law, the Supreme Court in the case of K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, and the

learned single judge of this Court in the case of Binani Industries Limited v. Assistant Commissioner of Commercial Taxes reported in [2003] 129

STC 199 SC held that any circular which beneficially affects the rights of dealers as it stood at the beginning of the assessment year will apply to

the entire year and the modification/withdrawal of such circular will not be relevant for that current year but will only apply from the beginning of the

next assessment year.

11. In the light of the aforesaid decisions, it is clear that the second respondent has the power to withdraw the earlier circular issued. As the earlier

circular was beneficial to the petitioner, the benefit that accrued to the petitioner under the earlier circular can be taken away only from the date of

the subsequent circular under which the earlier circular was withdrawn. Though the subsequent circular would have the effect of nullifying the earlier

circular as it is only an interpretation of the provision, it will not have the effect of denial of the benefit of earlier circular. In other words, the

impugned circular has to be only prospective and not retrospective. In that view of the matter, the petitioner is not liable to pay tax at 12.5 per

cent, for the period covered under the earlier circular and is liable to pay tax at 12.5 per cent., which arises only from the date of the impugned

circular.

12. Hence, I pass the following order:

(1) The writ petition is allowed.

(2) The impugned circular at annexure C would apply prospectively from December 11, 2007 only.

(3) No costs.