(1987) 11 BOM CK 0040

Bombay High Court

Case No: Writ Petition No. 2413/85

GTC Industries Limited, Bombay and another		APPELLANT
	Vs	
Union of India and another		RESPONDENT

Date of Decision: Nov. 4, 1987

Acts Referred:

- Central Excise Rules, 1944 - Rule 8, 8(1)
- Central Excises and Salt Act, 1944 - Section 38

Citation: (1988) 1 BomCR 256 : (1988) 15 ECC 56 : (1988) 33 ELT 83

Hon'ble Judges: S.M. Daud, J

Bench: Single Bench

Judgement

1. This petition under Article 226 of the Constitution impugns an order passed by the 2nd respondent, viz. the Assistant Collector of Central Excise, rejecting an application for refund of a sum of Rs. 54,40,642.71 P.

2. Petitioners are engaged in the manufacture of cigarettes. They have their factory at Vile Parle Bombay and are required to pay Excise duty on excisable articles produced or manufactured by them as per the rates that prevail under the Central Excises and Salt Act, 1944 (CESAT). The 1st respondent on 1st March, 1979 issued a notification under Rule 8(1) of the Central Excise Rules, 1944 (Rules) granting cigarettes partial exemption from duty of excise leviable vis-a-vis a particular item falling in the first Schedule to Central Excises and Salt Act. By the notification issued on 30th November, 1982 published in a Gazette of the same date, the exemption granted by the notification dated 1st March, 1979 was rescinded. The Excise department on 14th December, 1982 informed the petitioners in common with other cigarette manufacturers, of the withdrawal of exemption granted under the notification of 1st March, 1979. After receipt of the communication there ensued some correspondence between the Excise department and the petitioners. The

latter, on October 30, 1984, applied to the 2nd respondent for a refund of the amount which they had been forced to pay pursuant to a demand made by the Excise department officers. Shortly stated, their case was that though the exemption had been rescinded by notification dated November 30, 1982, the said rescinding had came to the knowledge of the petitioners for the first time when they received the letter dated December 14, 1982. It was from this later date, that they could be asked to pay the full Excise duty. Recovering the full duty from them for the period from November 30, 1982 to December 14, 1982, was not warranted. They were entitled to and sought the refund of the amount which come to Rs. 54,40,645.71 P. The claim made by the petitioners was negatived by the 2nd respondent and his reasons for so doing which need to be reproduced were as below :-

"The above mentioned judgment of the High Court of Judicature at Madras has been stayed by the Division Bench of that High Court on 12-11-1984 in view of the Writ Appeals filed by the Department against the judgment dated 10-8-1984. Therefore this judgment is no more operative for the purpose of claim for refund in this case. Besides there is no evidence produced by G.T.C. to the effect that Notification No. 284/82 was not published in the gazette on 30-11-1982. Section 38 of the Central Excises and Salt Act, 1944 requires that all rules made and notification issued shall be published in the official Gazette. Therefore the law on the subject, is, that once the notification is published in the Gazette, irrespective of the fact that it was made available to the public at large, the notification will be effective from the date of publication in the official Gazette. Messrs G.T.C. have not contended that this notification was not published at all in the Gazette on 30-11-1982. In view of the above I am not inclined to accept their refund claim."

It is the above order which is assailed in this petition.

3. Petitioners'' case is that the exemption would take effect from the date of publication of the notification and that is the requirement of Section 38 of the Central Excises and Salt Act, as also Rule 8 of the Rules. Publication as contemplated by these provisions did not mean mere printing, but availability for perusal by the common people including those in the trade. So far as the petitioners were concerned, that learnt of the withdrawal of the exemption for the first time from the letter dated 14th December, 1982. By a rejoinder they have placed on record a letter addressed by the Controller of Publications, informing another manufacturer of cigarettes of the Gazette in which the notification was published, being made available for sale as from 8th December, 1982. Without prejudice to the claim for refund of the sums claimed in the application made to respondent 2, the rejoinder claim is, that in no case, can the respondents retain sums recovered from the petitioners for the period ending with 8th December, 1982. The total rejection of the application for refund was unwarranted and hence the claim for a writ to quash the impugned order with a consequential direction to the respondents to pay unto the petitioners the sum of Rs. 54,40,642.71 P. The return tendered on behalf of the

respondents is to the effect that the notification withdrawing the exemption was published in the Official Gazette on 30th November, 1982. The exemption was not in force after that date. Therefore, whatever be the deficit the petitioners were liable to pay. This liability had been enforced by their officers, and, rightly so. It was not correct to say that the notification rescinding the exemption came into operation only from 14th December, 1982 or 8th December, 1982.

4. The return of the respondents further takes a contention that the petitioners could not have come to this Court without exhausting the statutory remedy of filing an appeal against the order impugned by them. This contention is without merit. The petition raises a pure question of law, and, in any case, this is hardly the time to direct the petitioners to take recourse to statutory remedy, seeing that near about 2 years have expired since the filling of the petition.

5. To turn to the main point, there is no refutation of the letter of the Controller of Publications dated 23rd April, 1983 referred to in the rejoinder filed by the petitioners. Then Controller in this letter informs another cigarette manufacturer based at Calcutta that the withdrawal notification was published in the Gazette of India, Extra Ordinary dated 30th November, 1982. This Gazette was available for sale to the public on 8th December, 1982. From this it follows that the ordinary public could not have had access to the Gazette in which the withdrawal notification was published prior to 8th December, 1982. Counsel for the petitioners has referred to a number of decisions in support of his contention that the publishing contemplated by Section 38 of Central Excises and Salt Act and Rule 8 of the Rules cannot be equated with mere printing, A case often referred to in this connection is Johnson v. Sargant and Sons, (1918) 1 KB 101. The Order which figured in that decision, though dated 16th May, 1917, was not known to the parties to the action or to the public generally, before 17th May, 1917. A question arose as to whether it would be applicable to transactions which had taken place on 16th May, 1917. Bailhache J. who tried the action opined thus :-

"The order is dated May 16, 1917; the goods were paid for by the three people concerned, within banking hours, on May 16, 1917, although at what precise time on that day is not known. Nor do we know at what time on May 16, the Food Controller signed the order. This however, we do know, that the effect of the order was published on May 17, and in all probability was well-known to all persons interested in the trade on that date. I have no reason to suppose that any one in the trade knew about it on May 16. Being dated May 16, it is said for the plaintiff that it took effect from the earliest moment of that day by analogy to the rule with regard to the construction of statutes. While I agree that the rule is that a statute takes effect on the earliest moment of the day on which it is passed or on which it is declared to come into operation, there is about statutes a publicity even before they come into operation which is absent in the case of many orders such as that with which we are now dealing; indeed, if certain orders are to be effective at all, it is essential that

they should not be known until they are actually published. In the absence of authority upon the point I am unable to hold that this order came into operation before it was known, and, as I have said, it was not known until the morning of May 17."

This judgment in Sargant''s case was roundly criticized by Prof. C.K. Allen in his Law and Orders (Second Edition) at page 132. The criticism has merited the remark of having "great force" by the Supreme Court in the State of Maharashtra Vs. Hans George, . Rajagopala Ayyangar J. in the said case observed -

"We see great force in the learned author''s comment on the reasoning in Sargant''s case."

It may be argued, as it was by the Counsel for the respondent, that the disapproval recorded by Prof. Allen had been approved by the Supreme Court, for which reason, the decision in Sargant''s case and all those which followed it should not be accepted by me. Counsel for the petitioners submits that the point was left undecided which is evident from the following passage in the Supreme Court judgment at page 743 :-

"In a sense the knowledge of the existence or content of a law by an individual would not always be relevant, save on the question of the sentence to be imposed for its violation. It is obvious that for an Indian law to operate and be effective in the territory where it operates viz. the territory of India, it is necessary that it should either be published or be made known outside the country. Even if, therefore, the view enunciated by Bailhache, J. is taken to be correct, it would be apparent that the test to find out effective publication would be publication in India, not outside India so as to bring it to the notice of everyone who intends to pass through India. It was "published" and made known in India by publication in the Gazette on the 24th November and the ignorance of it by the respondent who is a foreigner is, in our opinion, wholly irrelevant."

6. It cannot therefore be said that the view in Sargant''s case was specifically disapproved. On the contrary the earliest case on the subject before the Supreme Court indicates an adherence to the view in Sargant''s case. Mr. Justice Vivian Bose speaking for the Bench consisting of himself and Justice Mahajan, had this to say in Harla Vs. The State of Rajasthan, :-

"In the absence of any special law or Customs, we are of the opinion that it would be against the principles of natural justice to permit the subjects of a State to be punished or penalised by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is; or, at the very lease, there must be some special rule or regulation or customary channel by or through which such knowledge can

be acquired with the exercise of due and reasonable diligence ..... In the absence therefore of any law, rule, regulation or custom, we hold that a law cannot came into being in this way. Promulgation or publication of some reasonable sort is essential."

It is true that these observations were made by the learned Judge in the context of a statute creating an offence. Nonetheless, they are of the wider application. In the instant case, petitioners were suddenly compelled to make a payment which ran into lakhs of rupees. True, the Government which granted the exemption could rescind the same, as and when it liked. But the rescinding had to be brought to the knowledge of the affected persons, and, from the material on record, it appears that even the department was not aware of the withdrawal of the exemption until as late as 14th December, 1982. It would be penalising the petitioners in the wider sense, as that expressed in Harla''s case. The petitioners had been suddenly called upon to any or deposit sums totalling lakhs of rupees, for the short payments made on the strength of the exemption notification, the withdrawal of which, became known to the department itself as late as 14th December, 1982. A direct decision on the point is the case of G. Narayana Reddy v. State of Andhra Pradesh and Others, 35 STC 319. In exercise of the powers u/s 40(1) of the Andhra Pradesh General Sales Tax Act, 1957, the Government by a G.O. altered the third Schedule regarding the rate of tax. The G.O. was published in the Gazette dated December 1, 1966. The Gazette was printed and released to the public only on 12th December, 1966. It was contended before the High Court that the authorities were not entitled to give effect to the notification with effect from December 1, 1966 and that they were entitled to do so only from 25th December, 1966, when the petitioners received the Gazette. The Bench consisting of Chinnappa Reddy and Madhava Reddy, JJ. (as their Lordships then were), held that the authorities could not give effect to the notification for the period between December 1, 1966 and December 11, 1966 - both days inclusive. This decision was referred to by the Andhra Pradesh High Court in the Yemmiganur Spinning Mills Ltd. v. The State of Andhra Pradesh, 37 STC 314 . However, the point that arose for consideration in Yammiganur case is slightly different and I, therefore, do not think it necessary to go into the details in regard thereto. A decision directly on the point is that of Asia Tobacco Company Ltd. Vs. Union of India and Others, . This decision arises out of the very same notification that figures in the instant case and is on all fours with the facts of this case. However, the same has been appealed against and the appeals are pending. But the reasoning adopted by the learned Judge Nainar Sundaram, J. is in conformity with the many decisions appraised in the course of the judgment. The reliance placed on All India Reported Ltd. and others Vs. Competent Authority, Inspecting Assistant Commissioner of Income Tax and others, , is good only to the extent of the meaning attributed to the word "publication". But on that concept there is the recent judgment of the Supreme Court in B.K. Srinivasan and Others Vs. State of Karnataka and Others, . Chinnappa Reddy, J. speaking for the Bench has this to say on the subject :-

"There can be no doubt about the proposition that where a law, whether Parliamentary or subordinate, demands compliance, those that are governed must be notified directly and reliably of the law and all changes and additions made to it by various processes. Whether law is viewed from the standpoint of the ''conscientious good man'' seeking to abide by the law or from the standpoint of Justice Holmes''s ''Unconscientious bad man'' seeking to avoid the law, law must be known, that is to say, it must be so made that it can be known. We know that delegated or subordinate legislation is all-pervasive and that there is hardly any field of activity where governance by delegated or subordinate legislative powers is not as important if not more important, than governance by Parliamentary legislation. But unlike Parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to the Government or other official dignitary. It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation. Where the parent statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customarily recognised official channel, namely, the official gazette or some other reasonable mode of publication. There may be subordinate legislation which is concerned with a few individuals or is confined to small local areas. In such cases publication or promulgation by other means may be sufficient."

7. Now, so far as the present case is concerned, the notification issued under Rule 8 of the Rules or for that matter u/s 38 of the Central Excises and Salt Act, way of interest only to the administering department and the trade. The publication in the Gazette is a requirement of the rule and the section. That publication cannot be equated with the mere printing. It is the availability of the printed material to the general public that constitutes the publication required by the statute and the rules of natural justice. In the absence of the knowledge of the withdrawal of the notification, even the department permitted the petitioners to avail of the concession granted by the notification dated 1st March, 1979. This went on till as late as 14th December, 1982. However, the petitioners cannot contend that they should be permitted to avail of the concession right till December 14, 1982, when the withdrawal of the concession was brought to their notice by a letter from the Excise department. The withdrawal notification had been published in the Gazette and the Gazette was on sale as from 8th December, 1982. Therefore, recoveries made on the basis of the withdrawal application as from 8th December, 1982

onwards were perfectly valid. What respondents cannot retain, is, the alleged excess recoveries made for the period 30th November, 1982 to 7th December, 1982. Counsel for the respondents contended that when the manufacturers seek exemption, they do so from the date of the notification rather than the date of which the notification-containing-gazette is made available to the general public. Perhaps, the manufacturers are in the wrong for so doing. But one wrong cannot be set off against another which is sought to be perpetrated by the respondents in the present case. The result of the foregoing discussing is that the rule will have to be partly allowed. Respondents shall make a refund of the alleged excess recovery made from the petitioners for the period from 30th November, 1982 and ending with 7th December, 1982. The amount refundable comes to Rs. 35,57,094.74 P. according to the petitioners. Subject to verification, whatever amount be found due, respondents shall refund unto the petitioners within four months from today. Amount refundable shall be paid along with interest at the rate of 6% per annum from today until payment. Costs as incurred. Rule in the above terms made absolute.