

M/S. GODREJ SARA LEE LTD.

V.

ASSISTANT COMMISSIONER (AA) & ANR.

Civil Appeal No. 1888 of 2009

MARCH 18, 2009

[S.B. SINHA, DR. MUKUNDAKAM SHARMA AND R.M.
LODHA, JJ]

CONSTITUTION OF INDIA, 1950 :

Article 226 – Writ petition by assessee challenging Notification SRO No. 82/2006 issued by State Government of Kerala notifying mosquito repellants to be taxable at the rate of 12.5% as ultra vires the KVAT Act—High Court declining to entertain the writ petition on the ground of alternative remedy by way of appeal – HELD : It is true that the petitioner in its writ petitions, has not made a specific prayer that the Notification dated 21st January 2006 was ultra vires or otherwise illegal but, a specific ground in that behalf was taken – Even otherwise the question as to whether the said Notification could have a retrospective effect or retroactive operation, being a jurisdictional fact, should have been determined by the High Court in exercise of its writ jurisdiction under Article 226 as it is well known that when an order of a statutory authority is questioned on the ground that the same suffers from lack of jurisdiction, alternative remedy may not be a bar – This is a fit case where High Court should have entertained the writ petition – Order of High Court is set aside – Petitioner be permitted to amend the prayer portion of the writ petition.

Whirlpool Corporation v. Registrar Trade Marks, Mumbai & Ors. (1998) 8 SCC 1; and Committee of Management & Anr. v. Vice Chancellor & Ors. 2008(16) SCALE 310 – relied on.

A **Case Law Reference**

(1998) 8 SCC 1 relied on para 17

2008(16) SCALE 310 relied on para 17

B **CIVIL APPELLATE JURISDICTION : Civil Appeal No.1888 of 2009**

From the Judgement and Order dated 18.12.2007 of the High Court of Kerala at Ernakulam in Writ Petition (Civil) No. 32246 of 2007.

C **Rajiv Tyagi, Chanchal Biswas, Vikas Mishra, for the Appellants.**

M.L. Varma, R. Satish, with him for the Respondents.

D **The following Order of the Court was delivered**

1. Leave granted.

E 2. Appellant is manufacturer of coils, mats, aerosols, liquids/refills etc. which are used for driving away and destroying mosquitoes. Appellant is an assessee under the Kerala Value Added Tax Act, 2003 (for short, 'the Act'). The assessment year in question is 2005-06.

F 3. The State of Kerala, by Notification being SRO No.82/2006 dated 21st January 2006, notified the list of goods specified therein to be taxable at the rate of 12.5%. Item no.66 of the said Notification reads as under :

Sl.No.	Description of Goods	HSN Code
(1)	(2)	(3)
66	Mosquito repellents, electric or electronic mosquito repellents, gadgets and insect repellents, devices and parts and accessories thereof.	8516.79.20

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4. According to the appellant, in this case Section 6(1)(a) of the Act would be applicable, the relevant portion whereof reads as under :

"6. Levy of tax on sale or purchase of goods.-(1) Every dealer whose total turnover for a year is not less than ten lakhs rupees and every importer or casual trader or agent of a non-resident dealer or dealer in jewellery of good, silver and platinum group metals or silver articles or contractor or any State Government, Central Government or Government of any Union Territory or any department thereof or any local authority or any autonomous body, whatever be his total turnover for the year, shall be liable to pay tax on his sales or purchases of goods as provided in this Act. The liability to pay tax shall be on the taxable turnover,-

(a) in the case of goods specified in the Second and Third Schedules at the rates specified therein and at all points of sale of such goods within the State

(c) in the case of transfer of the right to use any goods for any purpose whether or not for a specified period, at the rate of four per cent at all points of such transfer.

5. The Revenue, however, contends that Section 6(1)(d) shall apply. Clause (d) of sub-section (1) of Section 6 reads thus :

"(d) in the case of goods not falling under clauses (a) or (c) at the rate of 12.5% at all points of sale of such goods within the State Government may notify a list of goods taxable at the rate of 12.5%,"

6. Our attention has also been drawn to Entry 3808 of Chapter 38 of the Customs Tariff Act based on HSN Code which was applicable during the said assessment year; relevant portion whereof reads as under :

"3808 Insecticides, rodenticides, fungicides, herbicides,

A anti-sprouting products and plant-growth regulators, disinfectants and similar products, put up in forms or packings for retail sale or as preparations or articles (for example, sulphur-treated bands, wicks and candles, and fly-papers)”

B 7. Indisputably, the Act provides for the Interpretative Rules, the relevant portion whereof reads as under :

C “The commodities in the schedules are allotted with Code Numbers, which are developed by the International Customs Organization as harmonised System of Nomenclature (HSN) and adopted by the Customs Tariff Act, 1975. However, there are certain entries in the schedules for which HSN Numbers are not given. Those commodities which are given with HSN Number should be given the same meaning as given in the Customs Tariff Act, 1975. Those commodities, which are not given with HSN Number, should be interpreted, as the case may be, in common parlance or commercial parlance. While interpreting a commodity, if any inconsistency is observed between the meaning of a commodity without HSN Number and the meaning of a commodity with HSN Number, the commodity should be interpreted by including it in that entry which is having the HSN Number.

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F HSN Numbers are allotted in the Schedules either in four digits or in six digits or in eight digits. The four digit numbers indicate the heading in the HSN classification, six digit numbers indicate the sub-heading and the eight digit numbers indicate the specific commodity number. While interpreting the commodities in the Schedules, the following guidelines may be followed.

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III. The commodities which are given eight digit HSN Number shall mean that commodity which bears that HSN Number.”
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8. However, so far as the Revenue is concerned, it relies on clause IV thereof which reads as under :

“IV. As an exception to the above rules, there are certain entries in the Schedules, which bear eight digit numbers but the four digit heading numbers of such commodities are given for some other commodities mentioned elsewhere. In such cases, the four digit heading shall include only those commodities under that heading excluding that commodity for which the eight digit numbers are given. Similar cases are available in the case of six digit numbers also. In such cases the above principle shall apply mutatis mutandis.”

9. The appellant contends that if the said entry viz., 3808 of the Customs Tariff Act is read with Entry 66 of the Notification, it will be evident that the same is distinct and different from the item which is at serial no.66 of the Notification being HSN Code 8516.79.20.

10. However, the contention of the Revenue, on the other hand, is that as the language employed in the Notification itself is clear and unambiguous, it is not necessary to refer to the HSN at all.

11. Appellant was assessed for the said assessment year for which value added tax at the rate of 12.5% was levied on the products of the appellant in terms of the Notification dated 21st January 2006.

12. It filed a writ petition, inter alia, contending :

“K. If SRO No.82/2006 seeks to amend and enhance the rate of Tax on Pesticides and Insecticides from 4% to 12.5%, it is ultra-vires the provisions of KVAT Act and void and illegal. This is so, because by virtue of 6(1)(d), the Entry and rate of tax under Schedule-I & III cannot be altered.”

13. The reliefs prayed for in the said writ petition are as under :

- A "i) To issue a writ of Certiorari or other appropriate writ, order or direction to call for records leading to Ext.P11 final Assessment Order for 2005-06 under the KVAT Act and quash the same;
- B ii) To issue a Writ of Mandamus or any other appropriate Writ, order or direction, directing the respondents to refrain from enforcing the Assessment Order Ext.P11 and demand pursuant thereto against the petitioner, pending disposal of the writ petition;
- C iii) To declare that the sales turnover of products falling within the description Insecticides and Pesticides which are manufactured under licence under the Insecticides Act and falling within the description of Entry 44(5) of III Schedule of KVAT Act is liable to be taxed only at 4% and levy of tax at 12.5% is illegal and unauthorised.
- D iv) To stay the operation of Ext.P11 final Assessment Order for the Assessment Year 2005-06, pending disposal of the W.P.(C);
- E And
- v) To grant such other and further reliefs as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case, including the cost of this proceeding to the petitioner."
- F 14. By reason of the impugned judgment, the High Court, however, refused to entertain the said writ petition opining that the appellant has alternative remedies available to it as an appeal against the order of assessment was maintainable.
- G 15. Mr. Tyagi, the learned counsel appearing on behalf of the appellant would submit that the High Court committed a serious error in refusing to entertain the writ petition as the validity of the Notification was in question which could not have been determined by the Revenue authorities.
- H 16. Mr. Varma, the learned senior counsel appearing on

behalf of the respondents, on the other hand, would support the impugned judgment, inter alia, contending that the appellant did not pray for a declaration that the said Notification dated 21st January 2006 was invalid in law or otherwise could not have been given a retrospective effect.

17. It is true that the appellant, in its writ petition, has not made a specific prayer that the said Notification dated 21st January 2006 was ultra vires or otherwise illegal but, as indicated hereinbefore, a specific ground in that behalf had been taken in respect thereof. Even otherwise, in our opinion, the question as to whether the said Notification could have a retrospective effect or retro-active operation being a jurisdictional fact, should have been determined by the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India as it is well known that when an order of a statutory authority is questioned on the ground that the same suffers from lack of jurisdiction, alternative remedy may not be a bar. [See: Whirlpool Corporation v. Registrar Trade Marks, Mumbai & Ors. (1998) 8 SCC 1] and Committee of Management & Anr. v. Vice Chancellor & Ors. 2008(16) SCALE 310].

18. For the reasons aforementioned, we are of the opinion that it is a fit case where the High Court should have entertained the writ petition. The impugned order is set aside accordingly and the appeal is allowed.

19. The appellant may be permitted to amend the prayer portion of the writ petition.

20. We, however, make it clear that we have not gone into the merit of the matter and all the contentions of the parties, both on facts and in law, shall remain open.

R.P.

Appeal allowed.