

The Commnr Of Income Tax, West Bengal Iii vs Varas International (P) Ltd. on 2 March, 2006

Equivalent citations: (2006)204CTR(SC)120, [2006]284ITR80(SC), AIRONLINE 2006 SC 221, AIRONLINE 2006 SC 668

Bench: Ruma Pal, Dalveer Bhandari

ORDER

1. In C.A. Nos. 4286-4287/2000, 4488/2000, 4857-4858/2000, 4907/2000, 5083/2000, 4911/2000, 4912/2000, 4913/2000, 4485-86/2003, 1729/2004, 4002/2004, 4164/2000, 4782/2000, 4929/2000, 5745/2000, 6106/2000, 5080/2000, 558/2000, 130-131/2003, 5492/2003, SLP (C) Nos. 18984/2000, 16743/2000, 17909-11/2000, 11358/2001, 18118/2001, 2412/2003, 2893/2003, 2349/2003, 5912/2003, 5348/2003, 6284/2003, 6286/2003, 6287/2003, 2965/2004, 7047/2004, 9308/2005, 24514- 24517/2002, 2401/2003, 2350/2003, 2347/2003, 5770-5771/2003:

2. Delay condoned. The civil appeals and special leave petitions are dismissed.

3. In rest of the matters delay condoned, leave granted and appeals are disposed of with no order as to costs.

4. In C.A. Nos. 4286-4287/2000, 4488/2000, 4857-4858/2000, 4907/2000, 5083/2000, 4911/2000, 4912/2000, 4913/2000, 4485-86/2003, 1729/2004, 4002/2004, 4164/2000, 4782/2000, 4929/2000, 5745/2000, 6106/2000, 5080/2000, 558/2000, 130-131/2003, 5492/2003, SLP (C) Nos. 18984/2000, 16743/2000, 17909-11/2000, 11358/2001, 18118/2001, 2412/2003, 2893/2003, 2349/2003, 5912/2003, 5348/2003, 6284/2003, 6286/2003, 6287/2003, 2965/2004, 7047/2004, 9308/2005, 24514-24517/2002, 2401/2003, 2350/2003, 2347/2003, 5770-5771/2003:

5. Delay condoned. Having regard to the provisions of Section 17 and 24 of the Karnataka Excise Act, 1965, the conclusion of the Division Bench of the Karnataka High Court cannot be questioned. The civil appeals and special leave petitions are, accordingly, dismissed.

6. In rest of the matters:

Leave granted. The assessment years in question are 1984-85 and 1985-86. The respondent imported spirit from outside West Bengal for the assessment years in question in terms of Rule-6 of the West Bengal (Manufacture of Country Spirit in Labelled and Capsuled Bottles) Rules, 1979 (hereinafter referred to as the 'Rules'). Apart from the fee which is payable by the manufacturer for the privilege of manufacturing of country spirit in labelled and capsuled bottles, an additional fee,

was payable on the import of spirits. Initially, this fee which was introduced for the first time in 1981, was leviable at the rate of Rs. 0.60. The rate was reduced to Rs. 0.50 by subsequent amendment of Rule-6.

7. The respondent/assessment's claim for deduction of the amounts payable was rejected by the I.T.O. on the ground that Section 43B of the Income Tax Act, 1961 applied. The assessee preferred an appeal to the Commissioner. The Commissioner dismissed the appeal holding "fee payable to the Government by whatever name it is called is a duty and hence it is hit by mischief of Section 43B".

8. The respondent/assessee carried the matter by way of an appeal before the Income Tax Appellate Tribunal. The Tribunal notice the submission of the Revenue which appears to have been two fold. It was contended that the additional fee was a fee for the purposes of Section 43B of the Income Tax Act, 1961. It was also contended that it was an excise levy. The Tribunal, however, rejected the submission of the Revenue holding that Section 43B had included the word 'fee' after the assessment years in question and, therefore the same could not be included within the provisions of that Section for the purposes of rejecting the respondent's claim for deduction. The appellant then filed Reference Applications for the two assessment years under Section 256(1) of the Act. The three questions were:

1) Whether, on the facts and in the circumstances of the case and on a correct interpretation of the amendment made by the Finance Act, 1988 to the Section 43B(a) of the Income Tax Act, 1961, which has been explained as clarificatory of legislative intention by the Explanatory notes issued by the Government, the Tribunal was justified in law in not holding that the said amendment will be retrospective in its application?

2) Whether, on the facts and in the circumstances of the case and on a correct interpretation of Section 2(10) of the West Bengal Excise Act, 1909 by applying the principles of "Ejusdem Generis" the Tribunal was justified in law in holding that the privileged and specified fee as mentioned in rules 2 and 6 of the Excise Rules cannot be construed as the fee used in Section 43B

(a) of the Income Tax Act, 1961?

3) Without prejudice to question No. (1) and (2) above whether on the facts and in the circumstances of the case, and on a correct interpretation of the Income Tax Law and the State Excise Law, the Tribunal was justified in holding that the fees payable by the assessee was not excise duty and thereby deleting the addition made in the assessment in this regard?

9. The High Court answered the Reference in favour of the assessee holding that the amount paid by the assessee was really neither a duty nor a cess nor fee but was a price for the grant of a privilege.

10. Initially when the appeal was entertained by this Court the appellant had argued that the amount payable on the import of spirits was a fee. That was why the Court was of the opinion that the issue should be heard by a Bench of five learned Judges on the question whether the decision of three learned Judges in the cases of Commissioner of Income Tax, Bombay v. Podar Cement Pvt. Ltd. , Allied Motors (P) Ltd. v. Commissioner of Income Tax 224 ITR 677, Suwalal Anandlal Jain v. Commissioner of Income Tax 224 ITR 753 and the judgment of a bench of two learned Judges in Brij Mohan Das Laxman Das v. Commissioner of Income Tax 223 ITR 825 needed consideration. The question which was framed specifically by the referring Court for this purpose was "For the amendment of a statute to be construed as being retrospective, should not the amended provision itself indicate, either in terms or by necessary implication, that it is to operate retrospectively?"

11. The issue came up before the Constitution Bench on 2nd February, 2006. The Constitution Bench was of the view that there was no conflict which required resolution and that the issue required to be determined in question did not need reconsideration. The matter was accordingly remanded back to this Court for disposal of the matter on merits. When the matter was placed before this Court it was argued by Mr. Mohan Parasaran, learned Additional Solicitor General, that the amount that had been levied on the respondent was in fact a countervailing duty. It was pointed out that the State Government was competent under Entry 51 of List II to levy excise duty and countervailing duty and that the word 'duty' under Section 43B before its amendment would cover both duties. Mr. Joseph Vellapally, learned senior counsel appearing on behalf of the respondent, has submitted that this issue had never been raised at any stage of the proceedings. It was submitted that even before the Tribunal the case of the Department was that it was an excise duty. It is submitted that the questions as framed including question 3 would clearly show that the Department was raising the issue of the impost being countervailing duty for the first time before this Court.

12. We find that the order of the C.I.T. (A) is not very clear on this aspect. As far as the Tribunal is concerned, it is true that the submission of the Department was that the levy was either a fee or excise duty. However, we note that Rule-6 under which the levy is imposed on the import of spirit is contained in the rules which are described as Excise Rules. Additionally we find that in the grounds of the appeal before this Court it has been submitted that the levy was a duty and the duty would include payment on public revenue levied on the import, export, manufacture or sale and that the additional fee was nothing but duty and Section 43B of the Income Tax Act, 1961 was fee on any sum payable by the assessee by way of tax or duty under any law for the time being in force.

13. In any event, the tribunal certainly erred in not dealing with the contention relating to the levy being an excise duty. The High Court also erred in holding that even an excise duty or other duty imposable by virtue of Entry- 51 of List II would be covered by the principle that the amount levied under that Entry should also be treated as a price or consideration for the purposes of the grant of privilege with regard to the manufacture of alcohol.

14. Having said this, we are of the view that the respondent's grievance that the issue has not been squarely raised either before the Tribunal and the reference application is strictly speaking correct. Nevertheless granting the benefit of the doubt to the Department that what was intended to be

argued was that it was a countervailing duty, we cannot shut out what is a pure question of law from consideration. However, we feel that an opportunity should be granted to the respondent of meeting this case fairly. Accordingly, we set aside the decision of the High Court as well as the Tribunal and remand the matters back to the Tribunal for the purposes of deciding this issue alone. We make it clear that we have not decided the issue on merits in any manner whatsoever and it will be open to the parties to raise whatever points on this issue before the Tribunal as they may be advised and they may be entitled in law.

15. The appeals are disposed of accordingly. There will be no order as to costs.