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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 22ND DAY OF OCTOBER, 2019

BEFORE

THE HON'BLE MRS.JUSTICE S.SUJATHA

W.P.Nos.55380 – 55381/2013 (T – EYT)

BETWEEN :

1. M/s GIRIRAJ ENTERPRISES
NO.41, 1ST FLOOR, B WING
BH 103, MANTRI HOUSE
VITTAL MALLYA ROAD
BANGALORE-560001
REP BY ITS SRI ANIL ANIL VITTALRAO TAMBE
AGED ABOUT 37 YEARS
S/O SRI VITTALRAO TUKARAM TAMBE
2. M/s DAMODAR JAGANNATH MALPANI
BH-102, B WING, 1ST FLOOR
NO.41, MANTRI HOUSE,
VITTAL MALLYA ROAD,
BANGALORE-560001
REP BY ITS SRI RANGNATH
CHANGDEO SHINDE
AGED ABOUT 31 YEARS
S/O SRI CHANGDEO VITHOBA SHINDE ...PETITIONERS

(BY SRI G.RABINATHAN & SRI M.THIRUMALESH, ADVS.)

AND :

1. STATE OF KARNATAKA
REP BY PRINCIPAL SECRETARY
TO GOVERNMENT
FINANCE DEPARTMENT
GOVERNMENT OF KARNATAKA
VIDHANA SOUDHA

BANGALORE-560001

2. THE COMMISSIONER OF
COMMERCIAL TAXES KARNATAKA
VANIJYA THERIGE KARYALAYA
GANDHINAGAR
BANGALORE-560009

...RESPONDENTS

(BY SRI T.VEDAMURTHY, AGA.)

THESE WRIT PETITIONS ARE FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE NOTIFICATION DATED 01.10.2013 ISSUED BY GOVERNMENT OF KARNATAKA IN SO FAR AS IT RELATES TO THE AMENDMENT MADE TO THE NOTIFICATION DATED 30.03.2002 FOR INSERTION OF SUB-ITEM (II) IN SL.NO.(5) THEREIN SPECIFYING "UNMANUFACTURED TOBACCO IN SEALED CONTAINER" FOR LEVY OF ENTRY TAX AT 5% WITH EFFECT FROM 02.10.2013 ANNEXURE-B (PUBLISHED IN 2013 (77) KAR.L.J.25(SF)).

THESE PETITIONS HAVING BEEN HEARD AND RESERVED, IS COMING ON FOR PRONOUNCEMENT OF ORDER THIS DAY, THE COURT PASSED THE FOLLOWING:

ORDER

The petitioners have challenged the Notification-III No.FD 208 CSL 2013 dated 1.10.2013 issued by the Government of Karnataka insofar as it relates to the amendment made to the Notification No.FD 11 CET 2002 dated 30.3.2002 for insertion of sub-item (ii) in Sl.No.(5) therein specifying "unmanufactured tobacco in sealed

container” for levy of entry tax at 5% with effect from 2.10.2013.

2. The petitioners are dealers registered under the Karnataka Value Added Tax Act, 2003 ('KVAT Act' for short), Central Sales Tax Act, 1956 ('CST Act' for short) and Karnataka Tax on Entry of Goods Act, 1979 ('KTEG Act' for short).

3. The petitioners are engaged in the business of unmanufactured tobacco in the brand names Ghai Chhap Zarda, Thambaku, Badshaw, Singam. It is submitted that unmanufactured tobacco is obtained by beating, crushing and sieving the raw tobacco. The said unmanufactured tobacco is packed in sachets and sold.

4. It is submitted that the Notification issued by the State Government dated 1.10.2013 amending the Notification dated 30.3.2002 with effect from 2.10.2013 insofar as levying tax at 5% on sub-item (ii) of item No.5

namely “unmanufactured tobacco in sealed container” is against the First schedule to the KTEG Act.

5. Learned counsel for the petitioners submitted that the State Government has no power to levy entry tax on the unmanufactured tobacco in sealed container contrary to Articles 301 and 304 (b) of the Constitution of India. Reliance was placed on the following judgments:

1. ***Avinyl Polymers Pvt. Ltd., Vs. State of Karnataka and others*** reported in **(1998) 109 STC 26;**
2. ***Commissioner of Central Excise, Kanpur Vs. Ravindra and Company*** reported in **2000(120) ELT 699 (Tri) Delhi;**
3. ***M/s. Bellary Steels and Alloys Ltd., and Others V/s. State of Karnataka*** reported in **[2001] 123 STC 189 [Kar.HC]**

6. It was further contended that sub item(i) in item No.5 of the Notification dated 30.3.2002 if to be construed as including all tobacco products of all

description, no sub-item(ii) would have been specified by the State Government in terms of the notification dated 01.10.2013. The action of the State Government in classifying sub item(ii) separately would indicate that the said goods are not part of sub-item (i) of item No.5 described. Unmanufactured tobacco would not come within the ambit of Entry 96 of the First Schedule. It was argued that by Act No.3 of 1995, with effect from 6.9.1994, First schedule to the KTEG Act has received the assent of the President. No sanction of the President is accorded to fix the tax liability on the unmanufactured tobacco in a sealed container. The item Nos.1 to 102 of the First schedule enumerates the goods leviable to entry tax. That being the position, no other goods are exigible to levy of entry tax even under item No.103 unless the assent of the President is accorded to. Further, no sanction is accorded by the President to any of the subsequent amendments post 2.10.2013. Hence, the Notification impugned is hit by Article 304[b] of the Constitution.

7. Learned counsel for the Revenue would submit that Sl.No.96 of the First schedule is exhaustive and includes tobacco products of all descriptions both manufactured and unmanufactured. There is no cause of action for the petitioners to approach this court challenging the Notifications impugned.

8. Learned counsel referred to the Order of this court in the case of ***M/s Global Associates Vs. Union of India in W.P.Nos.56586-56588 of 2018 disposed of on 24.1.2019.***

9. I have carefully considered the rival submissions of the learned counsel appearing for the parties and perused the material on record.

10. Section 3[1] of the KTEG Act provides that the tax on entry of goods specified in the First schedule into a local area for consumption, use or sale therein shall be levied at such rates not exceeding 5% of the value of the goods as may be specified retrospectively or prospectively

by the State Government by Notification, with different dates and different rates specified in respect of different goods or different classes of goods or different local areas. Thus, the charging Section shall be effective only on the notification issued by the State Government under Section 3(1) of the KTEG Act in respect of any of the goods enumerated under the first schedule to the Act.

11. Entry 96 of the first Schedule reads thus:

"Tobacco products of all description including beedies, cigarettes, cigars, churuts, zarda, quimam, etc.,"

12. Notification dated 30.3.2002 was issued by the State Government levying entry tax on certain goods. Entry 5 of the said notification is extracted hereunder:

"Tobacco products of all description including cigarettes, cigars, churuts, zarda, quimam, etc., but excluding snuff

[i] Gutka

[ii] Beedies."

13. The said Notification has been amended by the Notification dated 1.10.2013 with effect from 2.10.2013. In the table, for Sl.No.5 and entries relating thereto, the following has been substituted.

“(5)	(i) Tobacco products of all description including cigarettes, cigars, churuts zarda, quiman etc., but excluding snuff and beedies;	5%
	(ii) Unmanufactured tobacco in sealed container.	5%

14. The main ground of attack of the petitioners is the substituted entry-sub item(ii) of Sl.No.5 is not in conformity with the goods described in Sl.No.96 of the First schedule and is hit by Articles 301 and 304[b] of the Constitution for want of assent by the President.

15. Sl.No.96 of the First schedule prescribes tobacco products of all descriptions and enlarges the scope of the entry by employing the phrase ‘including’ and ‘etc.,’ The said entry is ex-facie exhaustive. It is the contention of the revenue that sale of gutka was prohibited as per the Notification dated 30.5.2013 issued by the Government of

Karnataka. However, the prohibited gutka has been sold as a different commodity blended with arecanut powder/unmanufactured tobacco in sachets under different trade names. Hence, in the interest of the public, entry tax was fixed on the unmanufactured tobacco in sealed containers at 5% to reduce the consumption of the said unmanufactured tobacco which has nicotine content, hazardous to the health.

16. Article 301 of the Constitution of India contemplates that freedom of trade, commerce and intercourse throughout the Territory of India shall be free. Article 304 deals with restrictions on trade, commerce and intercourse among the States. Sub-clause(a) of Article 304 specifies that impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; Clause(b) of 304 imposes such reasonable restrictions on

the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest provided that no Bill or amendment for the purposes of clause(b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

17. The subject matter of ***Avinyl Polymers case***, supra, relates to the levy of entry tax on the goods imported into the State vis-a-vis the goods manufactured and sold in the State of Karnataka. In the case of ***Avinyl Polymers***, supra, three points were considered which are as under:

"(a) the notifications have been issued in excess of the legislative power delegated to the State Government under section 3(1) of the Act inasmuch as the State Government as a delegatee was competent to only specify the rate or rates "in respect of different goods or different classes of goods or different classes of goods" as specified in the Schedule but it could not have specified the rate of tax by dividing the given commodity into further groups thereby levying tax on similar goods fulfilling

certain condition and leaving the remaining out of the taxing net.

(b) the impugned notifications are also constitutionally invalid as offending article 304(a) of the Constitution since these have resulted in causing discrimination in the matter of levy of entry tax under the Act between similar goods manufactured or produced in the State of Karnataka and those imported from other States;

(c) the second notification to the extent its operation has been retrospective with effect from April 1, 1994 is ultra vires the powers of the State Government since the expressions "retrospectively or prospectively" were inserted by Karnataka Act No. 8 of 1993 which never came into force for want of the President's assent as required under the proviso to article 304(b) of the Constitution of India."

18. It is beneficial to refer the constitutional bench decision of the Hon'ble Apex Court in ***Jindal Stainless Limited Vs. State of Haryana*** reported in ***AIR 2016 SC 5617***, wherein, it is held thus:-

"129. Restrictions referred to in Article 304[b] are non-fiscal in nature. Constitutional validity of any taxing statute has, therefore, to be tested only on the anvil of Article 304[a] and if the law is found to be non-discriminatory, it can be declared to be constitutionally valid without the legislation having to go through the test or the process envisaged by Article 304[b]. Should, however, the statute fail the test of non-discrimination under Article 304[a] it must be struck down for the same cannot be sustained even if it had gone through the process stipulated by Article 304[b]. That is because what is constitutionally impermissible in terms of Article 304[a] cannot be validated and sanctioned through the medium of Article 304[b]. Suffice it to say that a fiscal statute shall be open to challenge only under Article 304[a] of the Constitution without being subjected to the test of Article 304[b] either in terms of the existence of public interest or reasonableness of the levy."

19. In the light of the law declared by the Hon'ble Apex Court as aforesaid, the arguments of the learned counsel for the petitioner falls to ground. Now there is no scope for examining the validity of the notification on the touchstone of Article 301 or 304 [b] of the Constitution. The judgments relied upon by the learned counsel for the petitioner are not applicable to the facts of the case in view of the ruling of the Hon'ble Apex Court in **Jindal Stainless Limited.,** supra.

20. Entry 96 of the First Schedule - "tobacco products of all description" encompasses both manufactured and unmanufactured tobacco. Hence, the amendment to the Notification impugned is clarificatory in nature.

21. The word 'product' as per Cambridge dictionary reads as under:

"something that is made to be sold, usually something that is produced by an industrial

process or, less commonly, something that is grown or obtained through farming.”

22. ‘Product’ as defined under the Law Lexicon by

P. Ramanatha Aiyar runs thus:

“The word “product” imports an article which is made of something, and which, when made, has characteristics which are apparent to the senses. In judging as to the similarity of products (in Patent law), the material of which a product is made and its appearance when made, may be taken into consideration. According to Webster’s Comprehensive Dictionary, the word ‘produce’ means “anything produced or obtained as a result” of some operation or word whether such derivation is by a simple physical process or by a chemical reaction would not make any different to the end product... Collector of C. E. Coimbatore V/s. M/s. Protein Products of India Ltd., AIR 1989 SC 627, 629. [Central Excises and Salt Act (I of 1946), S. 37]. A thing produced by nature or a natural process [S. 108[a], T.P. Act]. 2. Something produced by physical labour or intellectual effort ; the result of work or thought.”

23. 'Agriculture Produce' is defined under Section 2A(1) of the KTEG Act and the same is quoted hereunder for ready reference:-

"Agricultural produce or horticultural produce" shall not include tea, [beedi leaves] coffee, rubber, cashew, cardamom, pepper and cotton; and such produce as has been subjected to any physical, chemical or other process for being made fit for consumption, save mere cleaning, grading, sorting or drying."

24. In view of the product sold in sachet under a brand name after subjecting raw tobacco to physical process of cutting, shredding and sizing so as to make it fit for consumption including the process of being packed in a sealed container, the unmanufactured tobacco ceases to be an agricultural produce as defined under the KTEG Act and the dictionary meanings as aforesaid.

25. The arguments advanced on behalf of the petitioner that Entry 96 of the First Schedule does not

include unmanufactured tobacco assuming to be accepted, even then, certainly it would fall under the Residuary Entry 103. Entry 103 of First Schedule encompasses all such goods which are not covered under any of the Entries enumerated in Entry No.1 to 102 except the goods mentioned in the Second Schedule. For better clarity, understanding or specification, if the Entries are expressly made, it cannot be held to be beyond the power contemplated under Section 3[1] of the Act otherwise, the Entry 103 would render redundant or innocuous. This view is fortified by the ruling of the Cognate Bench of this Court in the case of **United Breweries Limited V/s. State of Karnataka and Another** reported in **[2007] 9 VST 594**.

26. Viewed from any angle, the challenge to the notification impugned fails.

27. It is submitted by the learned counsel for the petitioners that subsequent to filing of the writ petitions, reassessment orders are passed by the Assessing Authority under the provisions of KTEG Act 1979 relating

to the assessment years 2014-15, 2015-16 and 2016-17 to bring the unmanufactured tobacco sold by the petitioners into the tax net; the statutory appeals filed against the said orders are pending. Without expressing any opinion on the merits or demerits of the pending appeals, the writ petitions deserve to be dismissed.

28. For the reasons aforesaid, the Notification impugned dated 1.10.2013 issued by the Government of Karnataka insofar it relates to the amendment made to the Notification dated 30.3.2002 for insertion of sub-item [ii] in Serial No.[5], specifying unmanufactured tobacco in "sealed container" for levy of Entry Tax at 5% with effect from 02.10.2013 cannot be held to be unjustifiable and is accordingly upheld.

In the result, writ petitions stand dismissed.

**Sd/-
JUDGE**

Dvr/Nc