2024 TAXONATION 3062 (BOMBAY)

BOMBAY HIGH COURT

WRIT PETITION NO. 11583 OF 2023

Schulke India Pvt. Ltd.-Appellant

Versus

Union of India, The Directorate General of GST Intelligence, Surat, The Additional Commissioner CGST & C. Ex., Navi Mumbai.-Respondent

Coram: M. S. SONAK & JITENDRA JAIN, JJ

Date of order: 11/11/2024

Decision-In Favour of Assessee

Held That: The Court partially granted the petition by quashing the impugned Press Release dated 15.07.2020, which classified alcohol-based hand sanitizers as “disinfectants” attracting an 18% GST rate. The Court held that this executive directive overstepped into judicial functions, influencing tax classification decisions reserved for judicial or quasi-judicial authorities. The impugned show cause notice may proceed independently, but the Court emphasized that classification should be determined without reliance on the now-quashed Press Release.

Appearance:

Mr Bharat Raichandani along with Ms Priyanka Rathi, Mr Prasad Avhad, Ms Ashwini Chandrasekaren i/by Mr Kuldeep Nikam, Advocates. for the Petitioner.

Mr Subir Kumar along with Mr Ram Ochani, Mr Abhinav Palsikar and Ms Ashita Aggarwal, Advocates. for the Respondent.

JUDGMENT

1. Heard the learned counsel for the parties.

2. Rule. The rule is made returnable immediately at the request and with the consent of the learned counsel for the parties.

3. The Petitioner is engaged in trading of hand rubs/sanitisers and antiseptics. The Petitioner claims that such hand rubs/sanitisers and antiseptics are used as pharmaceutical aid (solvent) or as antibacterial/antisepsis solutions in the hospitals and have been sold as a “medicament” under the erstwhile excise/VAT regime as well as the GST regime. The Petitioner claims that the products they deal with have been consistently classified under HSN 3004.

4. The first Respondent has, however, issued a Press Release dated 15.07.2020 purporting to classify alcohol-based hand sanitisers, which would include hand sanitisers that the Petitioner deals in as “disinfectants”, thereby attracting a GST rate of 18%. This press release issued by the Ministry of Finance, Union of India, is in Exhibit B (page 124) of this petition.

5. Based upon the above Press Release, the second Respondent issued a show cause notice cum demand notice dated 17.04.2023 requiring the Petitioner to show cause why the differential tax/duties along with interest and penalties be not recovered from the Petitioner alleging alcohol-based hand rubs/sanitisers and antiseptics were not “medicaments” but were “disinfectants” exigible to tax at the rate of 18% per annum.

6. The Petitioner has paid the differential duty under the protest and, after that, instituted this petition to challenge the impugned Press Release dated 15.07.2020 and the impugned show cause notice cum demand notice dated 17.04.2023.

PETITIOENR’S CONTENTIONS

7. Mr Raichandani, learned counsel for the Petitioner, submitted that the impugned Press Release was without authority of law and, in any event, was manifestly arbitrary. He submitted that the issue of whether the products the Petitioner was dealing with constituted “medicaments” or “disinfectants” was an issue to be adjudicated by judicial and quasi-judicial authorities and not by the first Respondent purporting to exercise its executive powers. The impugned Press Release, assuming it is indeed relatable to Article 73 of the Constitution as was alleged, transgresses the limits imposed by the doctrine of separation of powers. He submitted that the impugned Press Release has the tendency to foreclose fair adjudication by adjudicating authority in the discharge of their judicial and quasi-judicial functions. Mr Raichandani, learned counsel, relied on ***Parle Agro Pvt. Ltd. Vs Union of India (2023) 12 Centax 199 (Mad.). Association of Technical Textiles Manufacturers and Processors Vs Union of India (2023) 12 Centex 195 (Del.), and Phonographic Performance Limited Vs State of Goa and ors. 2024 SCC OnLine Bom 2713,*** in support of his above contentions.

8. Mr Raichandani referred to the clarification issued by the Directorate General of Health Services, Government of India, on 21.09.2020 regarding hand sanitisers for external use being covered under the definition of “Drug” as per Drugs and Cosmetics Act, 1940 and that such products cannot be classified as disinfectant or cosmetic. He submitted that two departments of the Union of India should not be allowed to take up contradictory pleas, and the impugned Press Release and the impugned show cause notice cum demand notice issued based thereon are, therefore liable to be set aside.

9. Mr Raichandani also referred to the Notification dated 27.07.2020 issued by the Ministry of Health and Family Welfare accepting that hand sanitisers are drugs under the Drugs and Cosmetics Act and therefore exempted from the requirement of a license for the sale of such hand sanitisers. He submitted that this was on the premise that the hand sanitisers are “medicaments” and, therefore, classifiable under HSN 3004.

10. Mr Raichandani relied on ***Reckitt Benckiser India Ltd. Vs CCT 2023 (384) E.L.T. 616 (S.C.),*** to submit that the Hon'ble Supreme Court had already classified "Dettol antiseptic liquid" as a "medicament" under HSN Code 3004 and since the Petitioner's products were not different, this precedent was binding on the Respondents. He submitted that the impugned Press Release takes a position contrary to the binding precedent of the Hon'ble Supreme Court and, therefore, is manifestly arbitrary and liable to be struck down.

11. Based on the above contentions, Mr Raichandani submitted that the impugned Press Release and the impugned show cause notice cum demand notice may therefore be quashed and set aside.

RESPONDENTS' CONTENTIONS

12. Respondents Nos. 1 and 2 filed an affidavit on 19.01.2024, and Respondent No.3 filed an affidavit on 10.10.2023. They opposed the filing of this petition because the adjudication has yet to be completed. They submit that should the adjudication confirm the show cause notice and the tax demand, the Petitioner has the remedy of appeal. The affidavit cited dictionary definitions, statutory provisions, and precedents to support its contention that the Petitioner's products are not "medicaments" but only "disinfectants," which attract a GST rate of 18% per annum. Mr Subir Kumar, learned counsel echoed the arguments in this affidavit in reply dated 10.10.2023 and submitted that this petition may be dismissed.

13. Mr Subir Kumar submitted that the impugned Press Release is an executive instruction under Article 73 read with Article 77 of the Constitution. He submitted that since this instruction does not conflict with any statutory provisions, the same must be given effect to at least authorities' guidance to levy proper GST rate on alcohol based hand sanitisers. He submitted that the executive action, which does not conflict with any provision of the Constitution or Statute, is intra vires and enforceable. He relied on ***Rai Sahib Ram Jawaya Kapur and others Vs State of Punjab AIR 1955 SC 549 and Bengal Iron Corporation and Another Vs Commercial Tax Officer and others 1994 Supp (1) Supreme Court Cases 310.***

14. Mr Subir Kumar also contended that the impugned Press Release was an exercise under Article 73 of the Constitution. He submitted that the Union of India, by exercising its executive powers, was entitled and empowered to issue Press Releases for the authorities' guidance. He submitted that such a press release was not contrary to but consistent with the applicable legal provisions. Accordingly, he submitted that there was no infirmity in the issue of either the impugned Press Release or the impugned show cause notice cum demand notice demanding differential duty, interest, and penalty.

15. For all the above reasons, Mr Subir Kumar submitted that this petition may be dismissed.

EVALUATION OF RIVAL CONTENTIONS

16. The rival contentions now fall for our determination.

17. In this petition, we do not propose to concern ourselves with whether the products the Petitioner deals in are legitimately classifiable as "medicaments", attracting a GST rate of 8% to 12% or "disinfectants", attracting a GST rate of 18%. According to us, that matter will have to be decided by the adjudicatory authorities under the Act by evaluating the factual position and applying the law. Since the Petitioner has an effective alternate remedy in this regard and since

adjudication would involve examination into disputed factual aspects, we do not propose to undertake this exercise in this Petition.

18. However, in this petition, we propose to concern ourselves with the validity of the impugned Press Release dated 15.07.2020, by which the Ministry of Finance, Union of India, purporting to exercise its executive powers, virtually issued a fiat to the adjudicatory judicial and quasi-judicial authority to classify all alcohol-based hand sanitisers as "disinfectants" attracting a GST rate of 18%. The Judicial and quasi-judicial authorities under the Act may not be able to decide on the validity or otherwise of such a press release. The argument about alternate remedies will, therefore, not apply regarding the challenge to the impugned press release.

19. The impugned Press Release at Exhibit-B (page 124) to this petition reads as follows:-

"Ministry of Finance

Clarification on issue of GST rate on alcohol based hand sanitizers

Posted On: 15 JUL 2020 4:46PM by PIB Delhi

The issue of GST rate on alcohol based hand sanitizers has been reported in few sections of media.

It is stated that hand sanitizers attract GST at the rate of 18%. Sanitizers are disinfectants like soaps, anti-bacterial liquids, dettol etc which all attract duty standard rate of 18% under the GST regime.

The GST rates on various items are decided by the GST Council where the Central Government and all the state governments together deliberate and take decisions.

It is further clarified that inputs for manufacture of hand sanitizers are chemicals packing material, input services, which also attract a GST rate of 18%. Reducing the GST rate on sanitizers and other similar items would lead to an inverted duty structure and put the domestic manufacturers at disadvantage vis-a-vis importers. Lower GST rates help imports by making them cheaper. This is against the nation's policy on Atmanirbhar Bharat. Consumers would also eventually not benefit from the lower GST rate if domestic manufacturing suffers on account of inverted duty structure."

20. Regarding the contention about the impugned press release being an executive instruction under Article 73 of the Constitution, at least the impugned Press Release does not indicate that the same is issued or relatable to the exercise of powers under Article 73. This Article provides that subject to the provisions of the Constitution, the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws; and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.

21. Admittedly, in this case, we are not concerned with the exercise of executive powers by the Government of India by virtue of any treaty or agreement. Therefore, even Mr Subir Kumar relied only on Article 73 (1) (a), which states that the executive power of the Union shall extend to matters with respect to which Parliament has the power to make laws.

22. Article 77 of the Constitution provides that all executive actions of the Government of India shall be expressed to be taken in the name of the President.

Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President. The President has the power to make rules for the more convenient transaction of the business of the Government of India and for the allocation among Ministers of the said business.

23. As noted earlier, the impugned Press Release, does not indicate that the same is relatable to either Article 73 or Article 77 of the Constitution. Though that, by itself, may not be a ground to strike down the impugned Press Release, still, in the absence of any such indication or compliance with the provisions of Article 77 of the Constitution, we cannot simply accept that the impugned Press Release is indeed an instance of the exercise of executive power by the Union. In the absence of any compliance with the requirements of Article 77, the burden was on the Respondents to establish this aspect. The Respondents have failed to discharge this burden.

24. However, even though it is assumed that the impugned Press Release is an instance of the exercise of executive power by the Union still, the question is whether, in the purported exercise of such executive power, the Union is competent to direct judicial and quasi-judicial authorities to decide the issue of classification of products in a particular manner. We cannot lightly accept that the Union, in the exercise of executive power, has such authority because the issue of classification, which is essentially an issue of interpretation, must be undertaken by the various judicial and quasi-judicial adjudicatory authorities under the Statute. Though there may not be a very distinct line separating legislative and executive functions, still the line separating the judicial functions from the executive and legislative functions is fairly clear. The executive cannot transgress on the functions within the exclusive province of the judicial or even quasi-judicial authorities.

25. In the State of Jharkhand and Another Vs Govind Singh (2005) 10 SCC 437 the Hon’ble Supreme Court has explained that after enacting a law or Act, the Legislature becomes functus officio so far as that particular Act is concerned, and it cannot itself interpret it. No doubt, the Legislature retains the power to amend or repeal the law so made and can also declare its meaning, but that can be done only by creating another law or statute after undertaking the whole lawmaking process. In Miten Shyamsunder Mohota v. Union of India (2008) 5 Mah. LJ 27, the Division Bench of this Court reiterated that the Legislature is functus officio once the law is enacted and the Court begins interpreting it.

26. This means that the legislature cannot simply issue a press release to explain, post facto, what it meant or intended to do when it enacted the law. Thus, whatever even the Legislature could possibly not do cannot be done by the Union, purporting to exercise its executive power under Article 73 of the Constitution. As noted earlier, the executive power of the Union shall extend to the matters with respect to which Parliament has the power to make laws. The executive power of the Union is only co-extensive with the Union’s legislative powers. Therefore, if the Parliament becomes functus officio when it comes to the interpretation of the law made by it, without undertaking the whole process of law-making, undoubtedly, the Union, in the exercise of its executive powers, cannot claim some powers which even transgress the powers of the Parliament in this regard.

27. The issue of whether a product falls within a particular class after the law is already enacted and the classification is already made falls within the province

of the judicial and quasi-judicial authorities created under the Act. Such powers must be exercised by the judicial and quasi-judicial authorities independently and without any goading from any party, including the executive. Any press release or executive instruction meant to influence or, worse still, require the judicial or quasi-judicial authorities under the Act to exercise their judicial or quasi-judicial functions in a particular manner would interfere with their judicial or quasi-judicial functions. This cannot be allowed. The executive powers of the Union do not extend to this.

28. In the case of Parle Agro Pvt. Ltd. (supra), the challenge was to the decision of the GST Council classifying "flavoured milk" under HS Code No.2202 instead of HS Code No. 0402. The argument was that such classification by the GST Council was contrary to the decision of the Hon'ble Supreme Court in CCE Vs Amrit Food (2015) 63 taxmann.com 153. The learned single Judge of the Madras High Court held that though the Goods and Services Tax Council may be a Constitutional body still, it is a recommendatory body. By referring to Union of India Vs Mohit Minerals (P) Ltd. (2022) 138 taxmann.com 331, the Court held that the recommendations of the GST Council are not binding on the Union and States. Besides, the Court held that while a GST Council may recommend "rates of taxation", it does not have the power to determine the classification of goods and services. Similarly, in Association of Technical Textiles Manufactures and Processors (supra), the Division Bench of Delhi High Court quashed the Circular issued by the Tax Research Unit (TRU) of CBIC, holding that it did not have authority or jurisdiction to clarify the classification of goods purporting to exercise the powers under Section 168 of CGST Act.

29. In Phonographic Performance Limited (supra), the Bombay High Court at Goa was concerned with a Circular dated 30.01.2024 issued by the State of Goa, purporting to clarify that no hotel or any copyright society shall insist upon any permission/NOCs for the performance of musical works or other musical recordings for religious ceremonies/festivals including wedding/marriage events and other social festivities associated with marriage. For this, the State of Goa placed reliance on a Public Notice dated 24.07.2023 issued by the Ministry of Commerce and Industry, Government of Goa. The Circular directed the field units to take strict action against any hotel or copyright society raising such illegal demands of royalties/fees for the performance of musical works or other musical recordings at religious ceremonies/festivals, including wedding/marriage events and other social festivities associated with marriage. The State of Goa had contended that the State issued this Circular in the exercise of its executive power, and since the same was consistent with the provision of Section 52 (1) (a) of the Copyright Act, the same was intra vires.

30. The Division Bench of this Court rejected the State's contention inter alia holding that the impugned Circular travelled beyond the scope of Section 52 (1) (za) and, in any event, the question of whether a particular Act constitutes an infringement of Copyright Act has to be decided on a case to case basis by the adjudicating authority under the Act. The rival claims may arise for determination, and the State, by issuing such a Circular, cannot prevent the copyright societies from exercising their rights under the Copyright Act. The argument based on Article 162 of the Constitution was not gone into. Still, the Court rejected the argument that the impugned Circular was only an informational document and, therefore, did not tend to interfere with the rights of parties that had to be determined by the Courts and other authorities constituted under the Act.

31. In Commissioner of Income Tax, A.P.-I, Hyderabad Vs Autofin Limited 1984 SCC OnLine AP 330, the Division Bench of Andhra Pradesh High Court held that the Circular issued by the Ministry of Law, Justice and Company

Affairs cannot be said to have been issued under any provision of the I.T. Act or the Rules. It cannot override or qualify the statutory provisions without being issued under a statutory authority. The Circular is accordingly liable to be ignored. A Circular issued by the Ministry of Law, Justice and Company Affairs does not stand on the same footing as a Circular of the CBDT issued under Section 119 of the Act, which section empowers the Board to issue appropriate orders, instructions and directions as it may deem fit for the proper administration of the Act. Indeed, this Circular has not even been issued by the Ministry of Finance, which can be said to be directly concerned with implementing the I.T. Act.

32. The Division Bench of the Andhra Pradesh High Court took note of the decision of the Calcutta High Court in Tarak Nath Paul Vs CWT (1983) 142 ITR 468 in which it was held that such press notes or circulars issued by the Ministry of Finance, not having been issued under any authority of the Act (in that case, Wealth Tax Act), could not be taken into account by the Wealth Tax authorities either for imposing or for deciding the question of imposition of penalty. The Division Bench of Andhra Pradesh High Court expressly agreed with this view of the Calcutta High Court and held that such circulars cannot be read as overriding or qualifying the Act or the Rules, irrespective of the fact whether they are in favour of the assessee or in favour of the department.

33. At this stage, we do not propose to go into the arguments based on clarification issued by the Directorate General of Health Services, Government of India, dated 21.09.2020 or the Ministry of Health and Family Welfare vide Notification dated 27.07.2020 though, at least prima facie this Notification suggests that these departments of Union of India itself have accepted the hand sanitisers as drugs and not mere disinfectants. Similarly, we do not propose to go into the decision of the Hon'ble Supreme Court in the case of Reckitt Benckiser India Ltd. (supra) concerning the "Dettol" because we believe that such matters will have to be decided by the adjudicating authorities based on facts concerning each of the products and by applying the law without being influenced by the impugned Press Release which, in any event, we propose to quash and set aside. These are all matters that could be looked into by the adjudicatory authorities under the Act.

34. In Rai Sahib Ram Jawaya Kapur (supra)**,** which was relied upon by Mr Subir Kumar, the Hon'ble Supreme Court explained that it may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily, the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive can indeed exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law.

35. Even applying the above principles, it is apparent that where the Legislature, after enacting a law, is functus officio in matters of interpretation of such law, the executive cannot claim such power when, admittedly, the executive power of the Union is only coextensive with its legislative powers. The interpretation of a law is within the province of the judiciary, and to that extent, the doctrine of separation of powers would apply. This is also not a case where the Union of

India has claimed to be empowered to exercise judicial function in a limited way. Therefore, based on Rai Sahib Ram Jawaya Kapur (supra), the impugned Press Release cannot be saved.

36. In Bengal Iron Corporation (supra)**,** again relied upon by Mr Subir Kumar, it was held that even the interpretation contained in the administrative instructions is not binding on Courts. The Court observed that so far as clarifications or Circulars issued by the Central Government and/or State Government are concerned, they represent merely their understanding of the statutory provisions. They are not binding upon the Courts. 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 clarification 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. The 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 does a particular provision of the statute says and not for the executive. Of course, the Parliament/Legislature never speaks or explains what does a provision enacted by it means.

37. The above decision assists the Petitioner rather than the Respondents in the case. The impugned Press Release virtually expresses a firm view on the classification of alcohol-based hand sanitisers as “disinfectants” and not “medicaments”. The impugned Press Release urges the authority to levy tax at 18% based on the premise that alcohol-based hand sanitisers are “disinfectants” and not “medicaments”. Though we do not propose to quash the impugned show cause notice cum demand notice dated 17.04.2023 because such a show cause notice could have as well been issued by the Respondents in the absence of the impugned Press Release or independent of the impugned Press Release. At the same time, we are satisfied that the Petitioner has made out a case for quashing the impugned Press Release so that the judicial and quasi-judicial authorities under the Act can decide on the issue of classification and, consequently, the rate of tax independently without even remotely being influenced by the impugned Press Release.

CONCLUSIONS AND RELIEFS

38. Accordingly, we partly allow this petition by setting aside the impugned Press Release dated 15.07.2020. Further, we direct that if the impugned show cause notice cum demand notice dated 17.04.2023 is to be pursued, then the Respondents must decide the same as per law on its own merits without even remotely being influenced by the impugned Press Release dated 15.07.2020, which in any event we have quashed and set aside.

39. All parties' contentions on merits, i.e. classification, rate of tax, etc., are explicitly kept open only by clarifying that judicial and quasi-judicial authorities must decide such issues independently and without being influenced by the impugned Press Release dated 15.07.2020, which in any event, we have now quashed and set aside.

40. The rule is made partly absolute in the above terms without any cost order.