

2019-TIOL-1708-HC-MUM-GST

IN THE HIGH COURT OF BOMBAY

Writ Petition No. 14650 of 2018

MAGMA FINCORP LTD

Vs

STATE OF MAHARASHTRA & ANR

M S Sanklecha & S C Gupte, JJ

Dated: July 19, 2019

Appellant Rep. by: Mr. J K Mittal with Ankita Vashistha

Respondent Rep. by: Ms. Naira Jejeebhoy, Special Counsel for State

GST/VAT - Petition impugns the investigation initiated and steps taken by Assistant Commissioner of Sales Tax against petitioner u/s 64 of the Maharashtra Value Added Tax Act, 2002 - challenge is essentially on the basis that by reason of the Constitution (One Hundred and First Amendment) Act, 2016 r/w the Maharashtra SGST Act, 2017, the State of Maharashtra could not have continued the application and effect of the provisions of the VAT Act and in particular, section 64 thereof, beyond one year after the appointed day or taken steps thereunder; that Section 78 of the Maharashtra Goods and Service Tax Related Laws (Amendments, Validation and Savings) Act, 2017 by which such provisions are so continued is **ultra vires** the Constitution Amendment Act.

Held:

Amendment made by the Constitution Amendment Act has inserted Article 246A as as is apparent from its opening words, overrides Articles 246 and 254 - Section 19 of the Constitution Amendment Act makes transitory provisions - Both Parliament and the legislature of the State of Maharashtra have made laws with respect to goods and services tax (GST), the Parliament by exercising the Central GST Acts and the State by enacting the State GST Act - State legislature has also enacted the State GST Savings Act, section 78 whereof contains validation and savings provisions in various laws and rules, regulations, notifications, etc. made thereunder which were in force immediately before coming into force of the State GST Act - By virtue of section 78 of the State GST Savings Act read with Section 19 of the Constitution Amendment Act, the VAT Act and the rules, regulations, notifications etc. issued thereunder, which were in force on the appointed day under the State GST Act, continue to have effect for various purposes, which **inter alia**

include assessment, re-assessment, production and inspection of accounts and documents and search of premises, and payment and recovery of any tax under the VAT Act or any other connected or incidental purpose, relating to any period before the appointed day of the State GST Act - There is no inconsistency between the provisions of Section 78 of the State GST Savings Act and the Constitution as amended - Constitution Amendment Act provides for concurrent power of the State legislature to make laws with respect to goods and services tax - State GST Act has been enacted by the State legislature under this power - Just as it could enact any law relating to tax on supply of goods or services or both, it could amend or repeal or save any such law - VAT Act is one such law which it had the power to amend or repeal or save - Section 78 of the State GST Savings Act saves the provisions of the VAT Act insofar as they relate to any payment or recovery of tax under the VAT Act and any purpose connected or incidental thereto relating to any period prior to the commencement of the State GST Act - There is no inconsistency or repugnancy here with the Constitution as amended - No such law made or repealed or saved by the State legislature can be said to be inconsistent with Article 246A of the Constitution brought in by the Amendment Act - at any rate, section 19 of the Constitution Amendment Act cannot be said to have taken away the power of the State legislature to amend or repeal or save any law relating to tax on goods or services or on both in force in any State immediately before the Constitution Act, so long, of course, as such amendment, repeal or saving is not inconsistent with the Constitution as amended - Any amendment or saving made in that respect shall continue to be in force even beyond one year of the coming into force of the Constitution Amendment Act - Sections 64 and 14 of the Act are connected with or incidental to collection or recovery of tax under the VAT Act - It cannot possibly be suggested that the subordinate

legislation under the VAT Act such as rules, regulations, notifications etc. issued thereunder has not been expressly saved by section 78 of the State GST Savings Act - wordings of the section leave no manner of doubt that all these are expressly referred to and saved - saving provision is both explicit and expansive and it saves "all rules, regulations, orders, notifications, form, certificate and notices, appointments and delegation of powers issued under" the VAT Act - challenge to the vires of section 78, therefore, has no merit - Writ petition is accordingly disposed of by rejecting petitioner's challenge to the constitutionality of section 78 of the Maharashtra Goods and Services Tax related Laws (Amendments, Validation and Savings) Act, 2017: High Court [para 4, 5, 6, 8, 10, 11, 12, 13]

Petition disposed of

Case law cited :

Air India vs. Union of India (1995) 4 SCC 734.....Para 11

JUDGEMENT

Per: S C Gupte:

This petition, filed under Article 226 of the Constitution of India, impugns the investigation initiated, and steps taken, by Assistant Commissioner of Sales Tax against the Petitioner under Section 64 of the Maharashtra Value Added Tax, 2002 ("VAT Act") including summons issued to the Managing Director of the Petitioner for recording of a statement under Section 14 of that Act for such investigation. The challenge is essentially on the basis that by reason of the Constitution (One Hundred and First Amendment) Act, 2016 ("Constitution Amendment Act") read with the Maharashtra State Goods and Services Tax Act, 2017 ("State GST Act"), the State of Maharashtra could not have continued the application and effect of the provisions of the VAT Act, and in particular, Section 64 thereof, beyond one year after the appointed day or taken steps thereunder. It is submitted that Section 78 of the Maharashtra Goods and Services Tax Related Laws (Amendments, Validation and Savings) Act, 2017 ("State GST Savings Act"), by which such provisions are so continued, is ultra vires the Constitution Amendment Act.

2. The Petitioner is a Non-Banking Finance Company mainly engaged in the business of asset backed financing for purchase of cars, commercial vehicles, etc. The Petitioner has been registered under the VAT Act, filing returns and paying tax thereunder. It is now registered under the Central and State GST Acts and filing returns and paying tax thereunder. The Petitioner's grievance is that on 4 April 2018, its premises were searched by Respondent No.2 – Assistant Commissioner of Sales Tax and his team. The premises were sealed during these operations for a number of days. This was followed by a witness summons issued to the Petitioner's Managing Director purportedly under Section 14 of the VAT Act. The Petitioner claims these actions to be illegal and has challenged them in the present petition.

3. It is submitted that the Constitution Amendment Act has amended the Constitution to facilitate introduction of Goods and Services Tax ('GST') in the country. The amendment simultaneously confers powers upon Parliament and State legislatures to make laws for levy of GST on supplies of goods or services or both. The Union has accordingly enacted the Central Goods and Services Tax Act, 2017 and Integrated Goods and Services Tax Act, 2017 ("The Central GST Act/s"). The State of Maharashtra, on the other hand, has enacted the State GST Act. Various indirect taxes originally levied and collected by the Centre and the State under different laws have been subsumed within these new laws. These include the State VAT earlier levied under the VAT Act. It is submitted that under Section 19 of the Constitution Amendment Act, notwithstanding anything contained in the Constitution Amendment Act, any provision of law relating to tax on goods or services or both in force in any State immediately before the commencement of the Constitution Amendment Act, which is inconsistent with the Constitution, as amended by the Amendment Act, shall continue to remain in force till its amendment or repeal by a competent legislature or authority or until expiration of one year from such commencement, whichever is earlier. It is submitted that the State GST Act enacted by the State of Maharashtra substitutes the VAT Act (which contained provisions for tax on goods and services and which was so in force). It is submitted that the provisions of the VAT Act, after such repeal, cannot operate to the extent that they are inconsistent with the Constitution as amended. It is submitted that, accordingly, to the extent the State GST Act saves the operation of the VAT Act (Section 78 of the State GST Act being the saving provision) after its repeal, the provision (namely, Section 78) is ultravires and cannot form a valid source for taking action against the Petitioner and its director under Section 64 of the VAT Act, which action is impugned in the present petition.

4. Let us at the outset see the effect of the amendment made by the Constitution Amendment Act. The amendment, in the first place, has inserted Article 246A after Article 246 of the Constitution. Article 246A is in the following terms :

"246A. (1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of interState trade or commerce.

Explanation. - The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council.”

Article 246A, as is apparent from its opening words, overrides Articles 246 and 254. Article 246 provides for the power of Parliament and legislatures of States to make laws with respect to matters enumerated in the three lists of the Seventh Schedule. Whereas Parliament has the exclusive power, under Clause (1) of Article 246, to make laws with respect to matters in List I (“Union List”), both Parliament and State Legislatures have power under Clause (2) to make laws with respect to matters enumerated in List III (“Concurrent List”) subject to Clause (1); the State legislatures, subject to Clauses (1) and (2), have exclusive power to make laws for matters provided in List II (“State List”). Article 254 provides for the rules to be applied wherever there is inconsistency between laws made by Parliament and by the legislatures of States in matters covered by the concurrent List. Overriding these two Articles, the newly introduced Clause (1) of Article 246A gives powers to both Parliament and the Legislature of every State to make laws with respect to goods and services tax. These powers are subject to Clause (2) of Article 246A, which provides for exclusive power of Parliament to make laws with respect to goods and services tax in the matter of inter State trade or commerce. “Goods and Services tax”, under Clause (12A) introduced in Article 366, means “any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption”. Consistent with these provisions, some amendments are made in the Union and State Lists in the Seventh Schedule. Section 19 of the Constitution Amendment Act makes transitory provisions in the following words :

“19. Notwithstanding anything in this Act, any provision of any law relating to tax on goods or services or on both in force in any State immediately before the commencement of this Act, which is inconsistent with the provisions of the Constitution as amended by this Act shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until expiration of one year from such commencement, whichever is earlier.”

5. Both Parliament and the legislature of the State of Maharashtra have made laws with respect to goods and services tax ('GST'), the Parliament by exercising the Central GST Acts and the State by enacting the State GST Act. The State legislature has also enacted the State GST Savings Act, Section 78 whereof contains validation and savings provisions in respect of various laws and rules, regulations, notifications, etc. made thereunder, which were in force immediately before coming into force of the State GST Act. Section 78 is in the following terms :

“78. (1) Notwithstanding the amendments made in the Mumbai Municipal Corporation Act, the Maharashtra Entertainments Duty Act, the Maharashtra Municipal Corporations Act, the Maharashtra Motor Vehicles Tax Act, the Maharashtra Village Panchayats Act, the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965, the Maharashtra State Tax on Professions, Trades, Callings and Employments Act, 1975 and the Maharashtra Value Added Tax Act, 2002 by this Act, those laws and all rules, regulations, orders, notifications, form, certificates and notices, appointments and delegation of powers issued under those laws which are in force immediately before the appointed day of the Maharashtra Goods and Services Tax Act, 2017 shall, subject to the other provisions of this Act, in so far as they apply, continue to have effect after the appointed day of the Maharashtra Goods and Services Tax Act, 2017 for the purposes of the levy, returns, assessment, reassessment, appeal, determination, revision, rectification, reference, limitation, production and inspection of accounts and documents and search of premises, transfer of proceedings, payment and recovery, calculation of cumulative quantum of benefits, exemption from payment of tax and deferment of due date for payment of tax, cancellation of the certificate of Entitlement, collection or deduction of tax at source, refund or set off of any tax, withholding of any refund, exemption from payment of tax, collection of statistics, the power to make rules, the imposition of any penalty, or of interest or forfeiture of sum where such levy, returns assessment, reassessment, appeal, determination, revision, rectification, reference, limitation, payment and recovery, calculation of cumulative quantum of benefits, exemption from payment of tax and deferment of due date for payment of tax, cancellation of the certificate of entitlement, collection, deduction of tax at source, refund, setoff, withholding of any refund, exemption, collection of statistics, the power to make rules, limitation, production and inspection of accounts and documents and search of premises, transfer of proceedings, penalty, interest or forfeiture of any sum relates to any period ending before the appointed day of the Maharashtra Goods and Services Tax Act, 2017 or for any other purpose whatsoever connected with or incidental to any of the purposes aforesaid and whether or not the tax, penalty, interest, sum forfeited or tax deducted at source, if any, in relation to such proceedings is paid before or after the appointed day of the Maharashtra Goods and Services Tax Act, 2017.

(2) Without prejudice to the provisions contained in the foregoing sub-section, the provisions of section 7 of the Maharashtra General Clauses Act, shall apply in relation to the repeal of any of the provisions of the Acts referred to in sub-section (1).”

6. By virtue of Section 78 of the State GST Savings Act read with Section 19 of the Constitution Amendment Act, quoted above, the VAT Act and the rules, regulations, notifications, etc. issued thereunder, which were in force on the appointed day under the State GST Act, continue to have effect for various purposes, which inter alia include assessment, reassessment, production and inspection of accounts and documents and search of premises, and payment and recovery of any tax under the VAT Act or any other connected or incidental purpose, relating to any period before the appointed day of the State GST Act.

7. The Petitioner, however, challenges the vires of Section 78 as regards such validation and saving. The argument is that no such validation or saving could be made in respect of a provision inconsistent with the Constitution as amended by the Constitution Amendment Act, after the State makes its own amending or repealing laws or expiry of one year of the commencement of the Constitution Amendment Act, whichever is earlier. It is submitted that this is the effect of Section 19 of the Constitution Amendment Act. The argument is fallacious for more than one reasons as explained below.

8. In the first place, there is no inconsistency between the provisions of Section 78 of the State GST Savings Act and the Constitution as amended. The Constitution Amendment Act provides for concurrent power of the State legislature to make laws with respect to goods and services tax, i.e. any tax on supply of goods, or services or both. The State GST Act has been enacted by the State legislature under this power. Just as it could enact any law relating to tax on supply of goods, or services or both, it could amend or repeal or save any such law. The VAT Act is one such law, which it had the power to amend or repeal or save. Section 78 of the State GST Savings Act saves the provisions of the VAT Act so far as they relate to any payment or recovery of tax under the VAT Act and any purpose connected or incidental thereto relating to any period prior to the commencement of the State GST Act. There is no inconsistency or repugnancy here with the Constitution as amended.

9. The constitution, as amended, empowers the State legislature to make laws with respect to tax on supply of goods or services. It is under this very power that the State can enact, amend or repeal any law providing for tax on supply of goods. The tax on supply of goods occasioned by sale of goods can be provided for or done away with under this very constitutional power. No such law made or repealed or saved by the State legislature can be said to be inconsistent with Article 246A of the Constitution brought in by the Amendment Act.

10. Secondly, and at any rate, Section 19 of the Constitution Amendment Act cannot be said to have taken away the power of the State legislature to amend or repeal or save any law relating to tax on goods or services or on both in force in any State immediately before the Constitution Act, so long, of course, as such amendment, repeal or saving is not inconsistent with the Constitution as amended. Any amendment or saving made in that respect shall continue to be in force even beyond one year of the coming into force of the Constitution Amendment Act. The provisions of the VAT Act, including Section 64 read with Section 14 of that Act, which were in force immediately before the commencement of the Constitution Amendment Act stand saved to the extent provided by the State GST Savings Act. This latter Act has been passed by a competent legislature, namely, the legislature of the State of Maharashtra; it has been passed before expiration of one year from the commencement of the Constitution Amendment Act; and the savings and validation provision under it makes the provisions of the VAT Act applicable to any collection or recovery of tax under the VAT Act and any purpose connected or incidental thereto in relation to the period prior to the appointed day under the State GST Act. Sections 64 and 14 of the Act are connected with or incidental to collection or recovery of tax under the VAT Act.

11. Learned Counsel for the Petitioner submits that even if the State Act can be said to be saved and thus, to have survived the State GST Act to the extent provided in the State GST Savings Act, subordinate legislation thereunder, in order to survive the repeal of the parent statute, must be specifically referred in the saving provision inter alia by mentioning the title of such subordinate legislation. Learned Counsel submits that there is no such reference to any subordinate legislation under the VAT Act by title in Section 78, which is the saving provision, and hence, no rules, regulations or notifications under the VAT Act could be said to be surviving. Learned Counsel in this behalf relies on the judgment of the Supreme Court in ***Air India vs. Union of India (1995) 4 SCC 734***.

The judgment does not support the Petitioner. What it observes is that any subordinate legislation, in order to survive the repeal of its parent statute, must be referred to in the Saving Act by express words and not by implication. It cannot possibly be suggested that the subordinate legislation under the VAT Act, such as rules, regulations, notifications, etc. issued thereunder, has not been expressly saved by Section 78 of the State GST Savings Act. The wordings of the Section leave no manner of doubt that all these are expressly referred to and saved. The saving provision is both explicit and expansive. It saves "all rules, regulations, orders, notifications, form, certificate and notices, appointments and delegation of powers issued under" the VAT Act. There is, thus, no substance in the contention.

12. The challenge, in the premises, to the vires of Section 78 has no merit. So far as the other grievance of the Petitioner, namely, non-consideration of its application in Form 701 (made on 2 May 2018) is concerned, learned Counsel for the Respondents states that it has already been heard and shall be disposed of within three weeks. The statement is accepted.

13. The writ petition is, accordingly, disposed of by rejecting the Petitioner's challenge to the constitutionality of Section 78 of Maharashtra Goods and Services Tax Related Laws (Amendments, Validation and Savings) Act, 2017 and accepting the Respondents' statement referred to in para 12 above.

14. No order as to costs.

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