

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.6088 of 2015

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M/s Prabhat Zarda Factory India Pvt. Ltd. (A company registered under Companies Act 1956) represented by its Director Rajesh Kumar Prasad, son of Late Sridhar Prasad, resident of New Area Sikandarpur, P.S. Town, District Muzaffarpur (Bihar).

.... Petitioner/s

Versus

1. The Union of India, through the Secretary, Ministry of Finance, Government of India, New Delhi.
2. The Secretary, Ministry of Commerce, Government of India, New Delhi.
3. The Under Secretary, Ministry of Finance (Department of Revenue), Government of India, New Delhi.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Prabhat Ranjan, Advocate
Mr. Chandan Kumar, Advocate

For the Respondent/s : Mr. S. D. Sanjay, Additional Solicitor General
Mr. Anshay Bhadur Mathur, C.G.C.

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE

And

HONOURABLE MR. JUSTICE DINESH KUMAR SINGH

C. A. V. JUDGMENT

(Per: HONOURABLE THE ACTING CHIEF JUSTICE)

Date: 08-02-2017

The petitioner has sought quashing of the Chewing Tobacco and Un-manufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules 2010 (for short, 'the Rules') notified on 27th February, 2010 and also the amendment in the said Rules vide Notification dated 1st March, 2015 on the ground that it is violative of its fundamental rights under Article 19(1) (g) of the Constitution of India.

2. The petitioner is a manufacturer and exporter of



Zarda and Chewing Tobacco (Schedule Tobacco Products) in the State of Bihar and has extensive market throughout India and foreign countries within the meaning of Section 3(p) of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (for short, 'the Act').

3. The Central Government in exercise of the powers conferred under Section 3A of the Central Excise Act, 1944 (for short, 'the Excise Act') published a Notification on 27th February, 2010 notifying Chewing Tobacco as notified goods. As a consequence of such Notification, the levy and collection of the excise duty was to be done in accordance with the provisions of Section 3A of the Excise Act. In terms of the Rules so notified, the levy and collection of the excise duty on the goods in question was to be done not on the basis of the actual production by the manufacturing unit, rather it was to be done on the basis of total manufacturing capacity of the unit. The total manufacturing capacity was dependent upon number of packing machines installed in the factory by the manufactures. The rates of duty as per packing machines per month was initially prescribed vide Notification published on 27th February, 2010, but subsequently, another Notification was issued on 24th January, 2014 prescribing new rates of duty per packing machine per month by increasing the same substantially. It is thereafter, within 13 months, another Notification



was published on 1st March, 2015 whereby factors relevant to production and the quantity of Notified goods have been re-defined/re-determined. As per the new amended Rules, factors relevant to production of notified goods shall be the number of packing machines in the factory of the manufacturers and the maximum packing speed at which such packing machines can be operated for packing of Notified goods of various retail prices.

4. The grievance of the petitioner is that in terms of the earlier Notification, there was uniformity throughout the country with regard to levy of excise duty on production of the goods in question. The tax impact although was heavy but was bearable. But now, some States, including Bihar, have issued notifications whereby the Chewing Tobacco have been prohibited from being manufactured and treating them to be food products. The stand of the petitioner is that on one hand, the Central Government is significantly raising the excise duty on the product, but on the other hand, even the manufacturing and trading is being prohibited treating them to be food products. Thus, on account of issuance of Notifications by the State Government one after another, the market trend with regard to these products has become very uncertain. The actual production has declined many times on account of loss of market and simultaneously, the manufactures are required to pay the excise duty as per the original deemed production. Therefore, it is alleged that the impugned Notification is violative of



Article 19(1) (g) of the Constitution of India.

5. In the counter affidavit, it is contended that Section 3A of the Excise Act empowers the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. The Parliament has delegated the power to the Central Government to notify some goods for the purpose of levy and collection of duty of excise on such goods on basis of capacity of production. It is asserted that rationale of classification as also the legislative intent, policy and the guidelines have been laid down in the Act itself. The Excise Act itself provides for safeguards that where a factory producing notified goods did not produce for a continuous period of 15 days or more, then the duty calculated on a proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfills such conditions as may be prescribed. It is also pointed out that vide Notification dated 27th February, 2010, the factor relevant to production of the notified goods have been made as the number of packing machines in the factory of the manufacturers. However, by the amendments carried out vide Notification dated 1st March, 2015, not only the number of packing machines, but the maximum packing speed have also been inserted as a relevant factor for determination of the production capacity. It is also pointed out that Section 3A of the Excise Act provides for alternative schemes of levying duty for specifically notifying certain goods/class of goods.



Such scheme is in respect of excisable commodities which are evasion prone and, therefore, instead of levying excise duty on the basis of quantum of production, the power of levy of excise duty under this provision is for notified goods on the basis of relevant factors of production. The rationale for notification of such goods is to prevent evasion of duty. The Scheme of the Act as well as the Rules provide the safeguards not to levy any excise duty when the factory suspends its production for more than 15 days continuously after adhering to the procedure for availing the abatement from the levy of excise duty. Therefore, there is no unreasonable burden of payment of excise duty on the basis of deemed production when the unit had to suspend the production for any reason. This includes prohibition or ban of production by any other legislations as well.

6. It is also asserted that the Government of India formed an opinion on the basis of material before it that there was rampant evasion of excise duty on *Pan Masala* and *Gutka*, therefore, it was required to be notified as a commodity to be subjected to excise duty in terms of Section 3A of the Excise Act. The scheme of levy of excise duty based on factors relevant to production has been a very important measure not only for preventing evasion of tax, but also to rationalizing the duty and to ensure that the honest tax payers of *Pan Masala and Gutka* industries do not suffer on account of duty evasion by some unscrupulous manufacturers, who do not discharge their



liability of payment of excise duty honestly. Huge quantity of production has been going unaccounted by such unscrupulous manufacturers. Therefore, it was the need of hour to somehow standardize the levy on the basis of factors of production wherein the quantum of production became irrelevant which had the safeguard for checking leakage of excise revenue.

7. It is pointed out that the Directorate General of Central Excise Intelligence in the year 2006-07 alone detected cases involving evasion of excise duty to the tune of Rs.192 Crores in respect of *Pan Masala and Gutka*. As per studies made, the *Pan Masala and Gutka* industry is having a gross turnover of nearly Rs. 25,000 Crores. Hence, the approximate revenue, which could have accrued to the exchequer of the State, should have been at a much higher side, which is indicative of the fact of substantial leakage in revenue due to evasion of duty by unscrupulous manufacturer in this sector. It is also stated that by rationalization and standardization of levy of excise duty, the unscrupulous manufacturers either will pay excise duty or will have to quit the market. The manufacturers, who are honest, are not likely to be affected by the object sought to be achieved as those honest tax payers will continue to pay the excise duty on the basis of the factors of production *de hors* the actual production.

8. It is further stated that the Government of India has



considered all the relevant factors for the purpose of fixing the deemed quantity of production, such as the number of packing machines, the maximum packing speed at which such packing machines can be operated, number of shifts run in the industry, number of working days, number of pouch and size of packages in a day, which has direct bearing with the manufacture of quantity of products and which is in normal course of business linked to the maximum retail price of the product. It is also pointed out that Chewing Tobacco and Un-manufactured Tobacco are non merit goods and also because of hazardous impact on health of citizens, its consumption and use is also to be discouraged. Therefore, the legislative intent and policy are very clear with respect to such goods and that the levy of excise duty has been raised from time to time.

9. The petitioner has filed rejoinder reiterating its stand in the writ application. The petitioner has also filed a supplementary affidavit appending communication dated 5th December, 2016 from the Secretary, Department of Health and Family Welfare, Ministry of Health and Family Welfare, Government of India mentioning the order of the Hon'ble Supreme Court in Transfer Case (C) 1 of 2010 (Central Arecanut Marketing Corpn. & Ors. Vs. Union of India) to enforce Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011. It is, thus, contended that such order is contrary to levy of excise duty which is levied on the



production of the tobacco, whereas by the said letter, the production of the tobacco itself is sought to be curtailed.

10. We have heard learned counsel for the parties, but before we advert to the respective contentions of the parties, the relevant statutory provisions needs to be extracted.

Section 3A of the Excise Act reads as under:-

“3A. Power of Central Government to charge excise duty on the basis of capacity of production in respect of notified goods - (1) Notwithstanding anything contained in section 3, where the Central Government, having regard to the nature of the process of manufacture or production of excisable goods of any specified description, the extent of evasion of duty in regard to such goods or such other factors as may be relevant, is of the opinion that it is necessary to safeguard the interest of revenue, specify, by notification in the Official Gazette, such goods as notified goods and there shall be levied and collected duty of excise on such goods in accordance with the provisions of this section.

(2) Where a notification is issued under sub-section (1), the Central Government may, by rules,--

(a) provide the manner for determination of the annual capacity of production of the factory, in which such goods are produced, by an officer not below the rank of Assistant Commissioner of Central Excise and such annual capacity shall be deemed to be the annual production of such goods by such factory; or

(b) (i) specify the factor relevant to the production of such goods and the quantity that is deemed to be produced by use of a unit of such factor; and



(ii) provide for the determination of the annual capacity of production of the factory in which such goods are produced on the basis of such factor by an officer not below the rank of Assistant Commissioner of Central Excise and such annual capacity of production shall be deemed to be the annual production of such goods by such factory:

Provided that where a factory producing notified goods is in operation during a part of the year only, the annual production thereof shall be calculated on proportionate basis of the annual capacity of production:

Provided further that in a case where the factor relevant to the production is altered or modified at any time during the year, the annual production shall be re-determined on a proportionate basis having regard to such alteration or modification.

(3) The duty of excise on notified goods shall be levied, at such rate, on the unit of production or, as the case may be, on such factor relevant to the production, as the Central Government may, by notification in the Official Gazette, specify, and collected in such manner as may be prescribed:

Provided that where a factory producing notified goods did not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfils such conditions as may be prescribed.

(4) The provisions of this section shall not apply to goods produced or manufactured, by a hundred per cent. export-oriented undertaking and brought to any other place in India.

Explanation 1.--For the removal of doubts, it is hereby



clarified that for the purposes of section 3 of the Customs Tariff Act, 1975(51 of 1975) , the duty of excise leviable on the notified goods shall be deemed to be the duty of excise leviable on such goods under the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985(5 of 1986) , read with any notification for the time being in force.

Explanation 2.--For the purposes of this section, the expression “hundred per cent. export-oriented undertaking” shall have the meaning assigned to it in section 3.]

11. Rules 4 and 5 of the Rules notified on 27th November, 2010 read as under:-

4. **Factor relevant to production.**- The factor relevant to the production of notified goods shall be the number of packing machines in the factory of the manufacturer.

5. **Quantity deemed to be produced.**- The quantity of notified goods, having retail sale price as specified in column (2) of the Table below, deemed to be produced by use of one operating packing machine per month, shall be as is equal to the corresponding entry specified in column(3) and column (4) of the said Table, as the case may be:-

Table

Sl No.	Retail Sale price (per pouch)	Number of pouches per operating packing machine per month	
		Pouches not containing lime tube	Pouches containing lime tube
Xx	Xxx	Xxx	Xxx

Explanation. - For the purposes of this rule, if there are multiple track or multiple line packing machines, one such track or line shall be deemed to be one individual packing machine for the purposes of calculation of the number of pouches per operating



packing machine per month.

12. The Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 were amended on 1st March 2015. The amendments read as under:-

(i) for rule 4, the following rule shall be substituted, namely:-

“4. Factors relevant to production.— The factors relevant to the production of notified goods shall be the number of packing machines in the factory of the manufacturer and the maximum packing speed at which such packing machines can be operated for packing of notified goods of various retail sale prices.”;

(ii) in rule 5,--

(a) for the portion beginning with the words “The quantity of notified goods” and ending with the words “as the case may be”, the following shall be substituted, namely:-

“The quantity of notified goods, having retail sale prices as specified in column (2) of Table-1 or Table-2 below, deemed to be produced by use of one operating packing machine, having maximum packing speed at which it can be operated for packing of notified goods as specified in column (3) or column (4) or column (5) of the said Table-1, or column (3) or column (4) of the said Table -2 , as the case may be, per month shall be as is equal to the corresponding entry specified in column (3a) or column (3b) or column (4a) or column (4b) or column (5) of the said Table-1, or column (3) or column (4a) or column (4b) of the said Table -2, as the case may be”

13. Rule 6(5) of the Rules notified on 27th February, 2010 contemplates that the machines which the manufacturer does not intend to operate shall be uninstalled and sealed by the Superintendent of Central Excise and removed from the factory premises under his



physical supervision. Rule 10 contemplates that in case a factory did not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period provided the conditions specified in the said Rules are complied with. Rule 13 contemplates that in case a manufacturer does not intend to further operate a packing machine, he shall intimate to the authorities which shall then be uninstalled and sealed by the Superintendent of Central Excise and removed from the factory premises under his physical supervision.

14. In pursuance of 39th and 43rd World Health Assemblies in which the World Health Organization (WHO) urged its member States including India to consider in their tobacco control strategies, plans for legislation and other effective measures for protecting their citizens with special attention to risk groups such as pregnant women and children from involuntary exposure to tobacco smoke, discourage the use of tobacco and impose progressive restrictions. The Act was enacted in pursuance of the resolutions of the World Health Assemblies.

15. Learned counsel for the petitioner has raised two fold arguments. Firstly, that there is frequent change in the factors to be considered for levy and collection of excise duty and such frequent changes of parameters brings uncertainty in the trade. It is further contended that levy has been increased many folds in the Notification



dated 1st of March, 2015 which Notification will put the manufacturers of the Chewing Tobacco and Unmanufactured Tobacco out of the business which affects their rights under Article 19(1) (g) of the Constitution of India. The levy of excise duty on the basis of maximum speed of manufacturing is arbitrary and unreasonable as the manufacturer is not bound to achieve optimum utilization of the machine at any given point of time. Therefore, the factors to impose compound levy is arbitrary and unreasonable.

16. The learned counsel for the petitioner relied upon the judgment of the Hon'ble Supreme Court reported as (1985) 1 SCC 641 (Indian Express Newspapers. Versus Union of India). Learned counsel for the petitioner has also referred to another judgment of the Hon'ble Supreme Court reported as (1995) 3 SCC 23 (Moti Laminates Pvt. Ltd. v. Collector of Central Excise, Ahmedabad) to contend that the goods are liable to excise duty only if they are marketable or capable of being marketed. Therefore, the imposition of compound levy on the manufacturing capacity of a manufacturer without ensuring that the goods manufactured are marketable commodity or not is not sustainable in law.

17. We have heard learned counsel for the parties and find no merit in the present writ petition. In Indian Express Newspapers' case (supra), the imposition of import duty has the direct effect of crippling the freedom of speech and expression guaranteed by



the Constitution as it has led to the increase in the price of newspapers and the inevitable consequence of reduction of their circulation. Though the learned counsel for the petitioner relied upon paragraph 75 of the judgment wherein it has been observed that subordinate legislation may also be questioned on the ground that it is unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary. The argument is that the factors for determining levy have no reasonable nexus with the objective to be achieved and, thus, cannot be sustained. However, in the said judgment, the Hon'ble Supreme Court further observed as under:-

“77. In India arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. In India any enquiry into the vires of delegated legislation must be confined to the grounds on which plenary legislation may be questioned, to the ground that it is contrary to the statute under which it is made, to the ground that it is contrary to other statutory provisions or that it is so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution.

78. That subordinate legislation cannot be questioned on the ground of violation of principles of natural justice on which administrative action may be questioned has been held by this Court in *Tulsipur Sugar Co. Ltd. v. Notified Area Committee, Tulsipur*, (1980) 2 SCR 1111: (1980) 2 SCC 295: AIR 1980 SC 882, *Rameshchandra Kachardas Porwal v. State of Maharashtra*, (1981) 2 SCR 866: (1981) 2 SCC 722: AIR 1981 SC 1127, and in *Bates v. Lord Hailsham of St. Marylebone*, (1972) 1 WLR 1373: (1972) 3 All ER 1019 (Ch D). A distinction must be made between delegation of a legislative function in the case of which



the question of reasonableness cannot be enquired into and the investment by statute to exercise particular discretionary powers. In the latter case the question may be considered on all grounds on which administrative action may be questioned, such as, non-application of mind, taking irrelevant matters into consideration, failure to take relevant matters into consideration, etc, etc. On the facts and circumstances of a case, a subordinate legislation may be struck down a arbitrary or contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19(1)(a) of the Constitution. It cannot, no doubt, be done merely on the ground that it is not reasonable or that it has not taken into account relevant circumstances which the Court considers relevant." (Emphasis supplied)

18. Thus, even the judgment referred to by the learned counsel for the petitioner does not support the argument raised as there is no challenge to the Notifications on the ground that it is contrary to statutory provisions. Challenge is not on the ground that it is beyond legislative competence of the Central Government. What is alleged is that it is arbitrary violative of Article 14. It has been held that the subordinate legislation cannot be questioned on the ground of violation of principles of natural justice on which administrative action may be questioned. The Court drew distinction between the delegation of legislative function in which the question of reasonableness cannot be enquired into and the investment by statute to exercise particular



discretionary powers. It is only in the case of investment by statute to exercise particular discretionary powers, the question may be considered in all grounds on which administrative action may be questioned, otherwise, a subordinate legislation may be struck down if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the Statute or by the Constitution.

19. The primary challenge is to the amendments in the 2010 Rules is to the clause, wherein speed of manufacturing packing machines has been made the relevant consideration for determining the production capacity of a factory. We do not find that such factor is unreasonable. The different manufacturers may use packing machines having varied manufacturing speed. A manufacturer can have one packing machine with specific manufacturing speed whereas; another manufacturer can have another machine with another packing speed. The manufacturing speed is relevant for determining the production capacity of a factory. It is not unreasonable or arbitrary without any nexus of the objective to be achieved. The objective for compound levy is to avoid evasion of excise duty.

20. A manufacturer choosing to suspend manufacturing for continuous 15 days has a liberty to seek abatement of the duty on fulfillment of the conditions. The manufacturer has the liberty to un-install any packing machine at any point of time, but subject to



fulfillment of conditions. Even, liberty is given to manufacturer to suspend manufacturing for any other factor beyond the control of the manufacturer. The liberty has been given to manufacturer to seek abatement of excise duty if the unit is not producing the notified goods during any continuous period of fifteen days or when any packing machine is to be uninstalled etc. In other words, if a packing machine is in working condition, then, its speed is a relevant consideration for imposition of excise duty. Such levy cannot be said to be arbitrary or unreasonable which may warrant intervention by this Court under power of judicial review.

21. The judgment in Moti Laminates Pvt. Ltd.'s case (supra), is not applicable in the present case. The levy of excise duty is on manufacturing of Chewing Tobacco or Unmanufactured Tobacco. The product is a marketable good. Merely because that some States prohibited the manufacturing of tobacco, it will not cease to be marketable commodity if the manufacturing process in a factory is continuing. The compound levy of excise duty is on the condition of a working packing machine having a manufacturing speed to produce pouches of chewable tobacco or Unmanufactured tobacco. Therefore, the capacity of a packing machine is the base of marketing chewing tobacco and Unmanufactured tobacco. The legislative intent in terms of the World Health Organization is to discourage the consumption of tobacco progressively. Therefore, the levy of excise duty with the



factor of manufacturing speed of packing machine cannot be said to be violative of fundamental rights enshrined under Article 19(1) (g) of the Constitution.

22. Thus, we do not find any merit in the writ application. It is thus dismissed.

(Hemant Gupta, ACJ)

Dinesh Kumar Singh, J. I agree.

(Dinesh Kumar Singh, J)

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CAV DATE	N. A.
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