HIGH COURT OF GUJARAT *(D.B.)*

DARSHAN HOSIERY WORKS
V/S
UNION OF INDIA

Date of Decision: 11 April 1980

Citation: 1980 LawSuit(Guj) 70

Hon'ble Judges: S H Sheth, S L Talati

Eq. Citations: 1981 GLR 533, 1980 (6) ELT 390

Case Type: Special Civil Application

Case No: 2881 of 1979

Subject: Constitution, Customs, Excise

Head Note:

Constitution of India, 1950 Art.226 Central Excise & Salt Act (I of 1944) S.35 Under sec.35 of the Excise Act no appeal preferred Whether such Order can be challenged in petition under Art.226 If notice is without any foundation and failure to comply it results in penal consequences it can be challenged under Art.226. Central Excise & Salt Act (I of 1944) S.3 Central Excise Rules R.8(1) Notification under rule 8(1) granting exemption from duty Liability to pay duty removed No necessity of taking of license. Central Excise & Salt Act (I of 1944) Sch.1 Item No.22(D), Item No.68 Central Excise Rules Articles of ready-to-wear apparel Expression is wider than articles of hosiery Articles of hosiery statutorily exempted from taxability under Art.22(D) Once the article is specifically mentioned residuary provision as in Item 68 not applicable Such residuary provision does not render such goods to taxability Banians & Jangias being articles of hosiery statutorily exempted under Art.22D.

Merely because the petitioners have not exhausted the remedy of challenging the impugned notice in appeal under sec. 35 of the Central Excise & Salt Act it cannot be said that the petitions are not maintainable because failure or omission on the part of the petitioners to take not the licence leads to prosecution against them. If therefore a notice has been served upon a petitioner to do a certain thing and if that notice has no foundation whatsoever in law under which it purports to have been issued then such a notice can be challenged in a petition under Art. 226 of the Constitution because failure or omission to comply with such a notice results into penal consequences (Para 3) Central Excise & Salt Act (I of 1944) - Sec. 3 - Central Excise Rules - Rule 8(1) - Nullification under rule 8(1) granting exemption from duty - Liability to pay duty removed - No necessity of taking of licence. Exemption from payment of excise duty under a notification issued under rule 8 of Central Excise Rules is very much different basically and qualitatively from the statutory exemption from payment of excise duty granted under the statute. If the statute grants the exemption in respect of a particular article that article is not excisable at all. If the notification issued under Rule 8(1) grants exemption then though the article is excisable liability to pay excise duty is removed for the time being. If an article which a manufacturer manufactures does not fall under any of the Items specified in the Schedule it is not necessary to take out the licence. (Para 5) Central Excise & Salt Act (I of 1944) - Sch. I Items 22D 68 - Central Excise Rules - Articles of ready-to-wear apparel - Expression is wider than articles of hosiery - Articles of hosiery statutorily exempted from taxability under Art. 22D - Once the article is specifically mentioned resi- duary provision as in Item 68 not applicable - Such residuary provision does not render such goods to taxability- Banians & Jangias being articles of hosi- ery statutorily exempted under Art. 22D. The expression Articles of Ready-to-Wear apparel in Item 22D in the First Schedule to the Central Excise & Salt Act has much wider width than the express articles of hosiery. Articles of ready-to-wear apparel will ordinarily include ready-made shirts bush-coats bush-shirts trousers shorts and even coats. Under-garments and body-supporting garments which have been included in the expression Articles of Ready-to-Wear Apparel may be tailor made articles or may not be tailor-made articles. Therefore the articles of ready-to-wear apparel not only include tailor-made articles but also articles which may be straightway used for wearing without applying to it any tailoring process after they have been produced by the machine. It is therefore clear that whereas the articles of ready-to-wear apparel constitute the genus articles of hosiery constitute a species. It is this species which has been statutorily excluded from the genus so far as its

taxability under Item 22D is concerned. Therefore articles of hosiery which would have otherwise been included in the articles of ready-to-wear apparel have been statute- rily exempted expressly from taxability under item 22D (Para 6) The simple expression not elsewhere specified which the Parliament has used in Item 68 in Sch. I means total omission or failure to specify either for the pur- pose of taxability or for the purpose of exemption from taxability Once an article or goods are found specified in any of the preceding entries irrespective of the purpose for which they are specified Item 68 does not come into play and does not render such goods taxable. (Para 8) Expression not elsewhere specified used in Item 68 means not elsewhere specified either for the purpose of taxability or for the purpose of exemption. In other words in order to attract Item 68 there must be a total omission of specifi- cation of a goods in any of the Items preceding Item 68. (Para 10) Banians and Jangias which are articles of hosiery are statutorily exemp- ted from payment of excise duty under Item 22D and therefore do not attract any provisions of the Central Excise & Salt Act. (Para 17) INTERPRETATION OF STATUTES. Where there are two provisions in an Act one of which is specific or of a special character and the other of a general character the specific or special provis- ion qualifies the general one and ought to be applied in preference to and unaffected by the general one. Thus when there is a specific provision in an Act which covers a particular case it is not proper to apply another general provision the application is not free from doubt. In other words where a special provision deals with a particular thing or clause of things a more general provision even though its terms would cover the particular thing or clause of things is excluded from application thereto by reason of the particular provision. (Para 11) M/s Healthways Dairy Products Co. v. Union of India P. V. Naik & Ors. v. State of Maharashtra & Anr Parekh Hosiery Products v. Dy Commr. of Sales Tax (Appeals) Jaipur & Ors. Commr. of Sales Tax Lucknow v. Verma Hosiery Raka- bganj Ramial & Bros. v. Commr. of Sales Tax U. P. Jaipur Hosiery Mills v. State of Rajasthan referred to.

Acts Referred:

Constitution Of India Art 226

Central Excise Rules, 1944 R 8(1)

Central Excise And Salt Act, 1944 Sec 35

Final Decision: Petition allowed

Advocates: J C Bhatt,K S Nanavati, S B Vakil

Reference Cases:

Cases Cited in (+): **4**

Cases Referred in (+): **6**

Judgement Text:-

S H Sheth, J

[1] The petitioners in all these cases are engaged in the business of manufacturing under-garments and body-supporting garments like "Banians" (upper-underwears) and "Jangias" (lower-underwears). They have been required by the central excise authorities to take out licence for manufacturing "Banias" and "Jangias". They are challenging in this group of petitions the notices issued by the central excise authorities to them to take out the licence.

[2] The petitioners in all these petitions, therefore, contend that "Banias" and "Jangias" are not excisable articles at all and that, therefore, there is no obligation on them to take out the licence.

[3] Before we examine the contention raised by Mr. Bhatt on behalf of the petitioners, it is necessary to deal with the preliminary objection which Mr. Vakil has raised to the maintainability of these petitions. According to him, these petitions are not maintainable because the petitioners have been merely directed to take out licence under the Central Excises and Salt Act, 1944. According to him, such a direction does not give rise to a cause-of-action which can maintain these petitions. Secondly, he has argued that appeal against such a notice lies to the Collector, Central Excise, under sec. 35 of the Central Excises and Salt Act, 1944. It would have been better if the petitioners had exhausted the remedy of appeal. But merely because they have not exhausted the remedy of challenging the impugned notice in appeal under sec. 35, it cannot be said that these petitions are not maintainable because failure or omission on the part of the petitioners to take out the licence leads to prosecu-tion against them. Secondly, if these articles which they have been manufacturing are not excisable articles, then there is no obligation whatsoever on them to take out the licence. If, therefore, a notice has been served upon a petitioner to do a certain thing or to desist from doing a certain thing and

if that notice has no foundation whatsoever in law under which it purports to have been issued, then such a notice can be challenged in a petition under Art. 226 of the Constitution because failure or omission to comply with such a notice results into penal consequences. The preliminary objection raised by Mr. Vakil, the- refore, fails and is rejected.

[4] The second contention which he has raised is that irrespective of whether Item 22D in the First Schedule to the Central Excises and Salt Act, 1944, is attracted or whether Item 68 in that Schedule is attracted, it is necessary for the petitioners to take out the licence. The proposition which Mr. Vakil has advanced is too fallacious to be accepted. If an article falls within the ambit and scope of one Item or another specified in the First Schedule to the Central Excises and Salt Act, 1944, then the argument which Mr. Vakil has raised will be well-founded. But if an article which a manufacturer manufactures does not fall under any of the Items specified in the said Schedule, it is not necessary to take out the licence.

[5] In that behalf, he has invited our attention to the decision of the Supreme Court in M/s Health-ways Dairy Products Co. v. The Union of India, AIR 1976 S.C. 2221. It was a case of skimmed milk and the question which arose was whether it was necessary for the manufacturer in that case to take out the licence. In that behalf, the Supreme Court has observed that since skimmed milk or condensed skimmed milk is a milk preparation within the meaning of Item IB in the First Schedule, a licence to manufacture such milk is required to be taken out. It has further been observed by the Supreme Court that if any goods specified in the First Schedule are exempted from the levy of excise duty by the Central Government in exercise of their power under Rule 8 (1) of the Central Excise Rules, it cannot affect the provision which requires licence to be taken out for the manufacture of the said goods. The principle laid down by the Supreme Court in that decision has no application to the instant case because exemption of an article from payment of excise duty by a notification issued under Rule 8 (1) of the Central Excise Rules presupposes the basic liability to pay excise duty on that article under the statute. It is that basic liability which the statute casts upon the manufacturer and which is removed for the time being by the Central Government in exercise of its power under Rule 8 (1) of the Central Excise Rules. Thus an article which is otherwise excisable is exempted from payment of excise duty by issuing a notification under Rule 8 (1) of the Central Excise Rules, 1944. The removal of liability to pay excise duty in such a case is only temporary and can be revived at any time by withdrawing that notification. Exemption from payment of excise duty under a notification issued under Rule 8 (1) is

very much different basically and qualitatively from the statutory exemption from payment of excise duty granted under the statute. If the statute grants the exemption in respect of a particular article, that article is not excisable at all. If the notification issued under Rule 8(1) grants exemption, then though the article is excisable, liability to pay excise duty is removed for the time being. Therefore, the principle laid down in the aforesaid decision has no application to the instant case.

[6] The principal contention which Mr. Bhatt has raised in support of the petitions is based upon the "conjoint reading of Item 22D and Item 68 in the First Schedule to the Central Excises and Salt Act, 1944. In order to appreciate the argument which he has raised, it is necessary toreproduce Items 22D and 68 and understand scheme. It reads as follows:

Item No. Description of goods Rate of duty

(1) (2) (3)

22D. Articles of Ready-To-Wear Apparel (Known Commercially as ready-made Garments), including under garments and body-supporting garments but excluding articles of hosiery, in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power. Ten per cent. ad valorem.

Item 68 is the residuary Item and it reads as under :

"All other goods, not elsewhere specified, manufactured in a factory but excluding-

The three exclusions which have been specified in sub-items (a), (b) and (c) of Item 68 are not relevant for the purpose of the present case. The expression "Articles of Ready-to-Wear apparel" appears to us to have much wider width then the expression "articles of hosiery". "Articles of ready-to-wear apparel" will ordinarily include ready-made shirts, bush-coats, bush-shirts, trousers, shorts and even coats. Undergarments and body-supporting garments which have been included in the expression "Articles of Ready-to-

Wear Apparel" may be tailor-made articles or may not be tailor-made articles. We have no doubt in our minds that the "articles of ready-to-wear apparel" not only include tailor-made articles but also articles which are produced by the machine and which may be straightaway used for wearing without applying to it any tailoring process after they have been produced by the machine. It is clear, therefore, that whereas the "articles of ready-to-wear apparel" constitute the genus "articles of hosiery" constitute a species. It is this species which has been statutorily excluded from the genus so far as its taxability under Item 22D is concerned. Worded as it is, Item 22D leaves no doubt in our mind that articles of hosiery which would have otherwise been included in the articles of ready-to-wear apparel" have been statutorily exempted expressly from taxability under Item 22D.

[7] The question which Mr. Bhatt has raised before us is, therefore, whether the Parliament after having granted statutory exemption to articles of hosiery from taxability under Item 22D in the First Schedule to the Central Excises and Salt Act, 1944, intended to include them for the purpose of taxability in the residuary Item - Item 68.

[8] On first principles, it is difficult to imagine that what has been expressly excluded from taxability under Item 22D is included in the residuary Item as if the Parliament wanted to do did it by back-door. The language of Item 68 also does not permit us to adopt the construction which Mr. Vakil has advanced before us and according to which, whatever is not specified in the preceding Items or whatever has been specified therein for exemption is included for taxability in the residuary Item. The expression which has been used in Item 68 is "NOT ELSEWHERE SPECIFIED." Does, this expression means "not elsewhere specified" for the purpose of taxability, or does it mean "not elsewhere specified" either for the purpose of taxability or for the purpose of exemption ? In our opinion, the simple expression "not elsewhere specified" which the Parliament has used in Item 68 means total omission or failure to specify either for the purpose of taxability or for the purpose of exemption from taxability. Once an article or goods are found specified in any of the proceeding entries, irrespective of the purpose for which they are specified, Item 68 does not come into play and does not render such goods taxable.

[9] The view which we are expressing can also be tested by approaching the question from a different angle. Item 68 we are told, was enacted in 1975. Item 22D was enacted in 1971. Between 1971 and 1975 Item 68 was not there. During the period during which Item 22D operated without there being in the field Item 68, did "articles of hosiery"

attract exemption or not? Without any fear of contradiction, it can be said without hesitation that articles of hosiery attracted exemption during that period. When Parliament enacted Item 68 - the residuary Item - did it mean to take away the statutory exemption granted to "articles of hosiery" under Item 22D ? If the Parliament wanted to do it, nothing would have been easier for it then to delete the "articles of hosiery" from item 22D. Therefore, even though the Parliament enacted Item 68 without in any manner whatsoever touching Item 22D, the "articles of hosiery" enjoyed exemption under Item 22D and were not intended to be brought within the fold of Item 68.

[10] There is one more aspect which has a bearing upon the construction which we are placing upon Item 22D. On 16th March 1976, the Central Government, in exercise of the powers conferred upon it by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, issued a notification exempting "articles of ready-to-wear apparel" falling under Item 22D in the First Schedule to the Central Excises and Salt Act, 1944, from the whole of the duty of excise leviable thereon. The position, therefore, is this. Where as "articles of hosiery" have been enjoying statutory exemption from payment of excise duty, other "articles of ready-to-wear apparel" have been exempted under rule 8 (1) by issuing a notification. We are aware of the fact that we cannot construe a statutory Item with reference to a notification issued under a statutory rule. Even then, it is necessary to note what result would follow if we adopt the construction which Mr. Vakil has canvassed before us. The following will be the result, if the construction placed by him upon Item 22.D is accepted. Where as "articles of ready-to-wear apparel" other then "articles of hosiery" will continue to be exempted from payment of excise duty by virtue of the said notification, "articles of hosiery" which have been enjoying a statutory exemption under Item 22D will not enjoy that exemption by virtue of the fact that they are said to be included in the residuary item. Therefore, whatever has been exempted by an administrative notification will continue to remain exempted and what has been exempted statutorily will cease to be so exempted. We do not think we can place such a construction upon Item 22P. Though we have supported our conclusion by certain analogies, the view which we are expressing is basically founded upon the construction of the expression "Not Elsewhere Specified" used in Item 68. According to us, that expression means not elsewhere specified either for the purpose of taxability or for the purpose of exemption. In other words, in order to attract Item 68, there must be a total omission of specification of a goods in any of the Items preceding Item 68.

[11] Mr. Bhatt has invited our attention to certain principles of con struction of statutes. In P. V. Naik and Others v. State of Maharashtra and Another, AIR 1967 Bom. 482, a

Division Bench of the Bombay High Court was dealing with a case under Maharashtra Zilla Parishads and Panchayat Samitis Act, 1962. In paragraph 24 of the report, it has been observed by the learned Judges that it is well settled that when a specific provision in a statute is applicable to a particular set of facts, any other general provision in respect of the same matter in the same statute cannot be held to be applicable to those facts. The matter must be held to be governed by the specific provision. The applicability of this principle has been canvassed by Mr. Bhatt by arguing that since the exemption specified in Item 22D makes a specific provision for exempting "articles of hosiery" from taxability under the Act, they cannot be held to be included in the residuary Item which is a general provision in relation to Item 22D. He has also invited our attention to the Interpretation of Statutes byN. S. Bindra, Sixth Edition. At page 137, the following principle of interpretation of statutes has been stated :

> "General words do not derogate from special provisions, or, special provisions will control general provisions - Generalia specialibus non derogant."

> He has also invited our attention to paragraph 11.2 in Legislation and Interpretation by Swarup, 1974 Edition. The principle of construction of statutes which has been stated therein is that when there is a law" generally dealing with a subject and another dealing particularly with one of the topics comprised therein, the general law is to be construed as yielding to the special in respect of matters comprised therein. Where there are two provisions in an Act, one of which is specific or of a special character and the other of a general character the specific or special provision qualifies the general one and ought to be applied in preference to and unaffected by the general one. Thus, when there is a specific provision in an Act which covers a particular case, it is not proper to apply another general provision, the application of which is not free from doubt. In others words, where a special provision deals with a particular thing or class of things, a more general provision even though its terms would cover the particular thing or class of things, is excluded from application thereto by reason of the particular provision.

[12] It has been argued by Mr. Vakil that if a special provision applies, it cannot be said that a general provision does not apply. The argument which Mr. Vakil has advanced is

misconceived and indefensible. If a special provision is applicable, then a general provision in respect of the same subject matter cannot apply because the special provision carves out an exception inasmuch as special treatment is given to the subject-matter of the special provision. In the instant case, to say that both Items 22D and 68 come into play is to place them in juxtaposition with the object of contradicting them and of nullifying the special provision. Such an interpretation will militate against all canons of construction.

[13] The last argument which Mr. Vakil has raised is that the expression "Not Elsewhere Specified" has been used in several Items in the First Schedule to the Central Excises and Salt Act, 1944. He has in that behalf invited our attention to Items IB, 9, 14, 18E, 22A, 22AA, 22B, 33B, 33C, 34A, 37A, 46 and 68. The expression "not elsewhere specified" used in all these Items except Item 68 indeed refers to residuary Items belonging to the particular groups. All these Item indeed provide for the taxability cf the residuary Items falling under those groups. But, merely because they so provide, we cannot say that express statutory exemption granted to "articles of hosiery" by hem 22D is either nullified or oblite rated from the field. The question which we are deciding relates to the interpretation of residuary Item 68 in the context of the statutory exem ption enacted in Item 22D. Therefore, the considerations which prevail are different and ought to be different from the considerations which would prevail with us if we are merely to construe the expression "not elsewhere specified" without any reference to any statutory exemption in light of the final residuary item.

[14] The next question which must be answered is whether "Banians" and "Jangias" are "articles of hosiery." The Oxford English Dictionary, Vol. V, defines "hosiery" at page 405 in the following terms : ' 'House collectively; extended to other frame-knitted articles of apparel, and hence to the whole class of goods in which a hosier deals." This meaning makes it abundantly clear that frame-knitted articles of apparel which can be used without the intervention of any tailoring process for suppo-rting human body are articles of hosiery. There is no doubt or dispute before us that "Banians" and "Jangias" are both frame-knitted articles which can be used for supporting human body without any intervention of he tailoring piocsss. Therefore, they are included in the "articles of hosiery."

[15] He has in this behalf invited our attention to the decision of the High Court of Rajasthan in Pareek Hosiery Products v. Deputy Commissioner of Sales Tax (Appeals), Jaipur and Others, (1962) 13 Sales Tax Cases 722. What is included in the hosiery

goods has been elucidated in that decision. Hosiery goods are "garments" and include cotton vests, underwears, mufflers and "topas."

[16] In Commissioner of Sales Tax, Lucknow v. Verma Hosiery, Rakab-ganj, Lucknow, (1972) 30 Sales Tax Cases 606, the Allahabad High Court has observed that "garment" means an article of clothing and that it is a very wide term which includes everything that can be called an article of clothing. In that sense, even hosiery goods would be covered by the term "garments." It has been further observed that the term "hosiery" originally meant knitted garments like socks and stockings which were meant to cover the feet and the legs. However, this term has now come to acquire a wider meaning and means knitwear. "Topas" and mufflers are knitted garments and, as such, would fall in the category of hosiery goods. Reference in that decision has been made to the earlier unreported decision of that Court in Ram Lal and Brothers v. Commissioner of Sales Tax, U. P. in which it has been held that "hosiery" means an underwear or underclothing, i.e., articles which are used next to the skin. The Allahabad High Court in that decision has also referred to the decision of the Rajasthen High Court in Jaipur Hosiery Mills v. State of Rajasthan, (1967) 19 Sales Tax Cases 416. The Rajasthen High Court has in that decision held that "hosiery" means machine-knitted garments.

[17] We are, therefore, not impressed by thearguments which Mr. Vakil has raised before us. We are of the opinion that "Banians" and "Jangias" which are "articles of hosiery" are statutorily exempted from payment of excise duty under Item 22D and, therefore, do not attract any provisions of the Central Excises and Salt Act, 1944, and we declare accordingly.

[18] In some of these petitions, applications for amendment have been made. The principal contention which the petitioners seek to raise by the proposed amendments relates to violation of Article 14 of the Constitution. In light of the view which we have expressed, it is not necessary to grant the proposed amendments.

[19] In the result, all the petitions succeed. It is declared in each of the cases that "articles of hosiery" in or in relation to the manufacture of which any process is ordinarily carried on "with the aid of power" are exempted from the provisions of the Central Excises and Salt Act, 1944. It is not in dispute before us that all the petitioners have been manufacturing "Jangias" and "Banians" "with the aid of power." There fore, the impugned notices are quashed. Rule is made absolute in each case with casts. In light of the reasons which we have stated, all applications for amendment are rejected.

Petitions allowed.