

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 9th February, 2021.**

+ **W.P.(C) 5252/2019, CM No.23189/2019 (for stay) & CM No.1712/2021 (for urgent listing of the case)**

**DEL SMALL ICE CREAM MANUFACTURERS
WELFARE'S ASSOCIATION (REG.)**

..... Petitioner

Through: Mr. Sujit Ghosh & Mr. Mohit
Kapoor, Advs.

Versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Vivek Goyal, Adv. for R-1.
Ms. Sonu Bhatnagar, Adv. for R-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MR. JUSTICE SANJEEV NARULA

[VIA VIDEO CONFERENCING]

RAJIV SAHAI ENDLAW, J.

1. The petitioner, claiming to represent the interest of more than 50 small scale ice cream manufacturing units operating in the National Capital Territory of Delhi, has filed this petition impugning the decision dated 18th June, 2017 of the Goods and Services Tax Council (GST Council), in exercise of powers under Section 10(2)(e) of the Central Goods & Services Tax Act, 2017, of exclusion of ice cream from the benefits of Composition Scheme under Section 10 of the Act. It is the contention of the petitioner that the said exclusion is in violation of the spirit of Articles 14 and 19 of the Constitution of India and against the principles of natural justice.
2. The petition was entertained and notice thereof issued.
3. The counsel for the respondent no.2 GST Council states that she has

filed a counter affidavit yesterday only. The same has not come on record.

4. Considering the issue and its urgency, since the season of optimum sale of ice cream is on the anvil, we have asked the counsel for the petitioner, whether he desires to file any rejoinder to the counter affidavit. The counsel for the petitioner replies in the negative. We have next enquired from the counsel for the respondent no.2 GST Council, whether she is in a position to argue the petition today itself. She replies in the affirmative. The counsel for the petitioner however states that in the prayer paragraph of the petition, a inadvertent mistake has occurred and which requires amendment/correction. It is stated that challenge is being made to the minutes of the Sixteenth meeting of the GST Council also and which remained to be made. The counsel for the respondents, on enquiry fairly states that she is not taking any technical pleas and the mistake may be ignored. We have thus proceeded to hear the counsels.

5. Section 10(1) of the Act, notwithstanding anything to the contrary contained in the Act, provides that a registered person whose aggregate turnover in the preceding financial year did not exceed Rs.50,00,000/- may opt to pay, in lieu of the tax payable by him under Section 9(1) of the Act, an amount of tax calculated at such rate as may be prescribed but not exceeding the maximum laid down in the said provision. The first proviso to Section 10(1) of the Act empowers the Government to, by notification, increase the limit of Rs.50,00,000/- to such higher amount not exceeding Rs.1,50,00,000/-, as may be recommended by the GST Council. Section 10(2)(e) of the Act however empowers the Government to, on the recommendation of the GST Council, notify goods manufacturers whereof

though eligible for availing the benefit of Section 10(1), would cease to be eligible to such benefit.

6. The counsel for the petitioner informs that the limit aforesaid of Rs.50,00,000/- was successively increased to Rs.75,00,000/- and Rs.1,50,00,000/-. It is further informed that the respondent no.2 GST Council, in its Seventeenth Meeting held on 18th June, 2017, in exercise of powers under Section 10(2)(e) of the Act, has recommended notification of ice cream and in pursuance to the said recommendation, ice cream has been notified, resulting in the small manufacturers of ice cream having turnover of less than Rs.1,50,00,000/- per annum being not entitled to take the benefit of Section 10(1) of the Act and have to necessarily go under the regime of Section 9 of the Act and to comply with all the requirements.

7. The counsel for the respondent no.2 GST Council states that another petition pertaining to ice cream, claiming the same relief as in this petition, is coming up for consideration on 5th March, 2021; the counsel for the petitioner further informs that since the issue raised in the petition is pan India, similar petitions are pending in several High Courts.

8. On enquiry it is informed that there is no decision of any High Court on the subject as yet.

9. In the circumstances, need is not felt to keep the petition pending and what is decided today, can apply to the writ petition stated to be listed next on 5th March, 2021.

10. The contention of the counsel for the petitioner is that respondent no.2 GST Council, in exercise of powers under Section 10(2)(e) of the Act, has clubbed ice cream with pan masala and tobacco. The counsel for the

petitioner has contended that there is no reason for clubbing ice cream with sin goods like pan masala and tobacco. It is contended that pan masala and tobacco are sin goods and ice cream cannot be clubbed therewith. On enquiry, as to the reasons if any given by the respondent no.2 GST Council in its meeting, for excluding ice cream from benefit of Section 10(1) of the Act, the counsel for the petitioner contends that the reason which prevailed for excluding ice cream was that there is no Goods and Services Tax (GST) on milk, being a large constituent of ice cream and if small manufacturers of ice cream were to be given benefit of Section 10(1) of the Act, there would be large scale loss of revenue.

11. It is the argument of the counsel for the petitioner that ice cream comprises of a large number of other components which are assessable to GST and thus the reasoning emanating from the minutes of the impugned meeting of the respondent no.2 GST Council for excluding ice cream from the benefit of Section 10(1) of the Act, is fallacious.

12. A reading of Section 10(2)(e) of the Act shows that no parameters, whatsoever, on the anvil of which, the respondent no.2 GST Council may recommend for notification, any goods from the benefit of Section 10(1) of the Act, have been prescribed. The legislature has vested the Government with absolute discretion, to exempt whichever goods it may deem necessary, from the benefit of Section 10(1) of the Act. The only limitation placed on the Government is, to act on the recommendation of the GST Council, established under Article 279A of the Constitution of India. The said GST Council comprises of Union Finance Minister, Union Minister of State in charge of Revenue or Finance and the Minister in charge of

Finance or Taxation or any other Minister nominated by each State Government. It will thus be seen that the GST Council is a high powered constitutional entity. We have thus enquired from the counsel for the petitioner, whether not it is a pure executive power and once the legislature has conferred such a power on the respondent no.2 GST Council, whether the Court can substitute its own decision/opinion, for that of the respondent no.2 GST Council which has a representation not only from the Central Government but also from the State Governments.

13. Recently in *Rajeev Suri Vs. Delhi Development Authority* MANU/SE/0001/2021 Supreme Court has reiterated that courts do not sit in appeal over the decisions of the Government, to do merit review of the subjective decision as such and that Government decisions concerning public resources have an intricate economic value attached with them and to elevate the standard of review on the basis of subjective understanding of the subject matter being extraordinary, would be *de hors* the review jurisdiction. It was further reiterated that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision, as long as no law is violated and people's fundamental right are not transgressed upon and that the court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical or wiser; the wisdom and advisability of the policies are ordinarily not amenable to judicial review. Much earlier, in *S.K. Dutta, Income Tax Officer Vs. Lawrence Singh Ingty* (1968) 2 SCR 165 reiterated in *Ravi Agrawal Vs. Union of India* (2019) 18 SCC 180 it was held that in deciding whether a taxation law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting

persons or objects it will tax and that a statute is not open to attack on the ground that it taxes some persons or objects and not others; it is only when within the range of its selection, the law operates unequally, and that cannot be justified on the basis of any valid classification, that it would be violative of Article 14.

14. In this respect we may record the contention of the counsel for the respondents, that besides pan masala and tobacco, aerated water has also been excluded from the benefit of Section 10(1) of the CGST Act.

15. Else it is well settled that a State does not have to tax everything in order to tax something and it entitled to pick and choose, if it does so reasonably. Mention may also be made of *State of Jammu & Kashmir Vs. Trikuta Roller Flowers Mill (P) Ltd.* (2018) 11 SCC 260 holding that grant of refund on CST paid, to boost entrepreneur investment, was primarily an executive economic policy decision, the scope of judicial scrutiny and interference wherewith is limited to on the grounds of mala fide, unreasonableness, arbitrariness or unfairness and that there is no legal or indefeasible right to claim refund of CST paid. To the same effect is *Ugar Sugar Works Ltd. Vs. Delhi Administration* (2001) 3 SCC 635.

16. The counsel for the respondents also in this context has referred to *Rai Ram Krishna Vs. State of Bihar* AIR 1963 SC 1667, *Union of India Vs. Parmeswaran Match Works* (1975) 1 SCC 305, *Express Hotels Pvt. Ltd. Vs. State of Gujarat* (1989) 3 SCC 677 and *Bajaj Hindustan Ltd. Vs. Sir Shadilal Enterprises Ltd.* (2011) 1 SCC 640.

17. The counsel for the respondent has also drawn our attention to the minutes of the Sixteenth GST Council Meeting annexed with her counter

affidavit, which has been e-mailed to us and has been perused by us.

18. However a perusal of the said minutes also shows the same reason as emanating from the Seventeenth Meeting viz. of the taxation effect, on benefit of Section 10(1) being permitted to be given to ice cream, being enormous.

19. We have enquired from the counsel for the respondent no.2 GST Council, whether any study has been done by the respondent no.2 GST Council, of the tax effect of extending benefit of Section 10(1) to small scale manufacturers of other similar goods and services and whether after considering all the said goods and services, any decision has been taken to exempt all those goods and services from the benefit of Section 10(1) of the Act, the tax effect whereof cannot be absorbed by the State.

20. At least from the minutes of the two meetings placed before us, it does not appear so.

21. The counsel for the respondents contends that besides the tax effect, several other factors including socio political weigh and are taken into consideration in taking such decisions.

22. We, in the circumstances, are of the view that the only direction which can be issued in this petition is, to direct the respondent no.2 GST Council to reconsider the exclusion of small scale manufactures of ice cream from the benefit of Section 10(1) of the Act, including on the aforesaid two parameters i.e. the components used in the ice cream and the GST payable thereon and other similar goods having similar tax effect continuing to enjoy the benefit. We direct accordingly.

23. The respondent no.2 GST Council to take up the aforesaid aspect in its next meeting and to take a decision thereon at the earliest, keeping in view that the ice cream season has just begun, and preferably within three months of today.

24. The petition is disposed of.

RAJIV SAHAI ENDLAW, J.

SANJEEV NARULA, J.

FEBRUARY 9, 2021

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