

(2002) 03 GAU CK 0047
In the Gauhati High Court
Case No : Writ Petition (C) No. 348 of 1999

Arunodoi Construction Co. (P) Ltd.

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 26-03-2002

Acts Referred:

Assam General Sales Tax (Amendment) Rules, 1999 — Rule 19(2)
Assam General Sales Tax Act, 1993 — Section 27, 7, 8
Assam General Sales Tax Rules, 1993 — Rule 35, 35(5)
Central Sales Tax Act, 1956 — Section 3, 4, 5
Constitution of India, 1950 — Article 286, 300A

Citation : (2002) 127 STC 561

Hon'ble Judges : R.S. Mongia, C.J.; P.G. Agarwal, J

Bench : Division Bench

Advocate : A.K. Saraf, K.K. Gupta and S.K. Agarwalla, for the Appellant; A.K. Phukan, General and B.J. Talukdar, Government Advocate, for the Respondent

Judgement

P.G. Agarwal, J.—In this batch of 486 writ petitions, the petitioners have challenged the validity of Section 27 of the Assam General Sales Tax Act, 1993, (hereinafter, referred to as "the Act").

2. We have heard Mr. G.K. Joshi, learned Senior Advocate, Mr. D.P. Chaliha, Senior Advocate, Mr. G.N. Sahewalla, Senior Advocate, Dr. B.P. Todi, Senior Advocate, Dr. Ashok Saraf, Senior Advocate, Mr. K.N. Choudhury, Senior Advocate for the petitioners. We have heard Mr. A.K. Phukan, learned Advocate-General, Assam, and Mr. B.J. Talukdar, learned Government Advocate, Assam, on behalf of the respondent-State of Assam.

3. Section 27 of the Act reads as follows :

"27. (1) Notwithstanding anything contained in any other provisions of this Act--

(a) every person excluding an individual, a Hindu undivided family, a firm or a company not under the control of the Government responsible for making any payment or discharging any liability on account of any amount payable for the

transfer of property in goods (whether as goods or in some other form) involved in a works contract specified in Schedule VI or for the transfer of the right to use any goods specified in Schedule VII for any purpose ; or

(b) every person responsible for paying sale price or consideration or any amount purporting to be the full or part payment of sale price or consideration in respect of any sale or supply of goods liable to tax under this Act to the Government or to a company, corporation, board, authority, undertaking or any other body by whatever name called, owned, financed or controlled wholly or substantially by the Government, shall, at the time of credit to the account of or payment to the payee of such amount in cash, by cheque, by adjustment or in any other manner whatsoever, deduct tax therefrom in the prescribed manner at the rates specified in the Schedules to the Act in respect of sale or supply of goods or transfer of the right to use any goods and at the rate of four per centum of such sum being paid in respect of works contract :

Provided that no deduction shall be made under this sub-section where the amount paid or credited by such person in any financial year does not exceed the prescribed amount.

(2) Any tax deducted under Sub-section (1) shall be paid to the account of the State Government in such manner and within such time as may be prescribed.

(3) The person making any deduction of tax under Sub-section (1) and paying it to the account of the State Government shall issue a certificate of tax deduction to the payee in such manner in such form and within such time as may be prescribed.

(4) Any tax deducted under Sub-section (1) and paid to the account of the State Government shall, on production of the certificate of tax deduction under Sub-section (3) by the payee be deemed to be tax paid by the payee for the relevant period and shall be given credit in his assessment accordingly.

(5) No interest or penalty shall be imposed or no recovery proceedings against the dealer/payee shall be initiated in respect of tax deducted under Sub-section (1) :

Provided that the recovery proceeding under Sub-section (9) of Section 26 against the person concerned who has deducted the tax but not deposited into Government treasury shall be drawn up by the assessing officer under whose jurisdiction the office of the person falls with prior approval of the Commissioner of Taxes."

4. Challenge to Section 27 is on the following counts :

"Section 27 of the Act is beyond the legislative competence of the State Legislature, inasmuch as, it not only includes the turnover which is exigible to tax, which are outside the purview of entry 54 of List II, but also the amounts which are inexigible to sales tax at all under the Act or the Central Act.

That deduction of tax at source by the State authority from the amounts of the bills is violative of articles 265, 286 and 300A of the Constitution of India.

That provisions contained in Section 27 of the Act is confiscatory in nature as the same purports to realise tax on the turnover which is not taxable under the Act."

5. In some of the writ petitions, petitioners have also stated that provisions of Section 8(1)(c) and Section 8(3)(iv) are ultra vires, illegal and violative of Article 286 of the Constitution of India as the above provisions do not provide for deduction of the value of the goods used in execution of the works contract supplied in course of inter-State trade or commerce which falls under sections 3, 4 and 5 of the Central Sales Tax Act, 1956.

6. Before proceeding further it may be beneficial to recapitulate the history and the judicial decisions concerning the impugned provisions of law. In the case of *State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd*, reported in [1958] 9 STC 353, the apex Court held that a works contract is an indivisible contract and the turnover of the goods used in execution of the works contract could not therefore become exigible to sales tax. Parliament amended Article 466 of the Constitution by introducing sub-clause (b) of clause (29-A) to enlarge the scope of "tax on the sale or purchase of goods" so that it may include the transfer of goods referred to in sub-clause (b) of clause (29A) of Article 466 which is deemed to be sale of goods, Thus, in view of the forty-sixth amendment, the works contract by a legal fiction altered into a contract which is divisible, that is, one for sale of goods and the other for supply of labour and services. It thus enables the State to levy sales tax on the value of goods involved in a works contract in the same way in which the sales tax was leviable on the price of goods and materials supplied in a building contract which had been entered into in two distinct and separate parts.

7. The Constitutional validity of the forty-sixth amendment was challenged before the apex Court in the case of *Builders Association of India and Others Vs. Union of India (UOI) and Others*, wherein the apex Court held :

1."What the forty-sixth amendment has done is no more than making it possible for the States to levy sales tax on the price of goods and materials used in works contract as if there was a sale of such goods and materials. It has not conferred on the States a larger freedom than what they had before in regard to their power to levy sales tax under entry 54 of the State List. Sub-clause (b) of Article 466(29A) cannot be read as being equivalent to a separate entry in List II of the Seventh Schedule to the Constitution enabling the States to levy tax on sales and purchases independent of entry 54 thereof. As the Constitution exists today the power of the States to levy taxes on sales and purchases of goods including the "deemed" sales and purchases of goods under clause (29A) of Article 466 is to be found only in entry 54 and not outside it.

(2) In sum, it is declared that sales tax laws passed by the Legislatures of States levying taxes on the transfer of property in goods (whether as goods or in some

other form) involved in the execution of a works contract are subject to the restrictions and conditions mentioned in each clause or sub-clause of Article 286 of the Constitution.

(3) In respect of the validity of the sales tax laws of different States and the rules made thereunder, no opinion is being expressed herein. The petitioners are at liberty to approach the authorities under the Sales Tax Act or the High Court concerned for necessary relief. It is open to them to question the validity of the statutory provisions and the rules made thereunder before the High Courts concerned. When such petitions are filed the High Courts will proceed to dispose of the cases in the light of this judgment."

8. In pursuance of the directions in Builders Association of India and Others Vs. Union of India (UOI) and Others, writ petitions were filed in many States of the country and the decision of the High Courts came up before the apex Court in the case of Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, wherein the apex Court held :

"(1) In exercise of its legislative power to impose tax on sale or purchase of goods under entry 54 of the State List read with Article 466(29-A)(b), the State Legislature, while imposing a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract is not competent to impose a tax on such a transfer (deemed sale) which constitutes a sale in the course of inter-State trade or commerce or a sale outside the State or a sale in the course of import or export.

(2) The provisions of sections 3, 4 and 5 and sections 14 and 15 of the Central Sales Tax Act, 1956, are applicable to a transfer of property in goods involved in the execution of a works contract covered by Article 466(29-A)(b).

(3) While defining the expression "sale" in the sales tax legislation it is open to the State Legislature to fix the situs of a deemed sale resulting from a transfer falling within the ambit of Article 466(29-A)(b) but it is not permissible for the State Legislature to define the expression "sale" in a way as to bring within the ambit of the taxing power a sale in the course of inter-State trade or commerce, or a sale outside the State or a sale in the course of import and export.

(4) The tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract falling within the ambit of Article 466(29-A)(b) is leviable on the goods involved in the execution of a works contract and the value of the goods which are involved in the execution of works contract would constitute the measure for imposition of the tax.

(5) In order to determine the value of the goods which are involved in the execution of a works contract for the purpose of levying the tax referred to in Article 466(29-A)(b), it is permissible to take the value of the works contract as the basis and the value of the goods involved in the execution of the works contract can be arrived at by deducting expenses incurred by the contractor for

providing labour and other services from the value of the works contract.

(6) The charges for labour and services which are required to be deducted from the value of the works contract would cover (i) labour charges for execution of the works, (ii) amount paid to a sub-contractor for labour and services, (iii) charges for obtaining on hire or otherwise machinery and tools used for execution of the works contract, (iv) charges for planning, designing and architect's fees, (v) cost of consumables used in the execution of the works contract, (vi) cost of establishment of the contractor to the extent it is relatable to supply of labour and services, (vii) other similar expenses relatable to supply of labour and services, and (viii) profit earned by the contractor to the extent it is relatable to supply of labour and services.

(7) To deal with cases where the contractor does not maintain proper accounts or the account books produced by him are not found worthy of credence by the assessing authority the Legislature may prescribe a formula for deduction of cost of labour and services on the basis of a percentage of the value of the works contract but while doing so it has to be ensured that the amount deductible under such formula does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. It would be permissible for the Legislature to prescribe varying scales for deduction on account of cost of labour and services for various types of works contract.

(8) While fixing the rate of tax it is permissible to fix a uniform rate of tax for the various goods involved in the execution of a works contract which rate may be different from the rates of tax fixed in respect of sales or purchase of those goods as a separate article."

9. The provisions of Assam Act more particularly the provisions of Section 27 of the Act, were challenged before this Court in the case of Santosh Kumar Harlalka v. State of Assam reported in [1995] 99 STC 615 : [1995] 2 GLR 95. The challenge was on the ground that the manner of/rate of deduction of tax at source has not been prescribed. This Court finding that the above contentions are correct, allowed the writ petition but provided that "the authority after prescribing the manner and the rate shall be at liberty to deduct tax at source". Similar view was taken by this Court in the case of Gauhati Municipal Corporation Contractors' Association v. Gauhati Municipal Corporation reported in [1996] 102 STC 77 : (1996) 2 GLR 172. Thereafter Section 27 of the Act was amended providing for the manner and rate of tax.

10. The case of the respondent-State is that the provisions of the Assam Act conform to the broad proposition of law laid down by the apex Court. The respondent-State further submits that Section 27 of the Act which provides for deduction of tax at source payable by the works contractor is purely a machinery provision and not a substantive provision for imposing tax. As noted above, the charging section in Section 7 and the incidence of taxation is on sale and

purchase of goods which, inter alia, includes transfer of property in goods involved in execution of the works contract. u/s 8 of the Act, the tax shall be charged on the taxable turnover and contrary to what has been contended by the writ petitioners the State Legislature in providing the mode for recovery of taxes vide Section 27 has not exceeded its jurisdiction. Section 27 provides for a sort of advance tax so that taxes could be recovered right from the inception without waiting till the whole transaction of the works contract is completed.

It would be pertinent to state that the power to levy a tax must of necessity carry with it incidental powers of recovery of such taxes including a recovery made at the source from where payments representing the turnover subject to taxes flow. A provision made for such deduction at source, is therefore to be distinguished from the charging section and understood as a provision made in the nature of a machinery provision provided for the recovery of the taxes that are validly levied. Such a provision may provide for a recovery on a tentative basis as regards the total amount on which recoveries are made as has been provided under the Act.

11. The first limb of submission on behalf of the petitioners is that Section 27 of the Act is a self contained section and it starts with a non obstante clause and hence it should be read in isolation to the other provisions of the Act. Further, Section 27 does not provide for deduction or exemption in respect of inter-State transaction or in respect of declared goods.

12. In view of the decision of the apex Court in the case of Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, it is well-established that the State has no jurisdiction to levy tax on entire stock of sales covered by sections 3, 4 and 5 of the Central Sales Tax Act. Hence it is submitted that where no deduction or exemption is provided in respect of those sales ; realisation of advance tax by form of deduction of tax at source u/s 27 is not permitted. In the case of Bhawani Cotton Mills Ltd. v. State of Punjab reported in [1967] 20 STC 290, the apex Court held :

"If a person is not liable for payment of tax at all, at any time, the collection of a tax from him, with a possible contingency of refund at a later stage, will not make the original levy valid ; because, if particular sales or purchases are exempt from taxation altogether, they can never be taken into account, at any stage, for the purpose of calculating or arriving at the taxable turnover and for levying tax."

13. Learned counsel for the petitioners in support of their submission have placed reliance on a decision of the apex Court in the case of Steel Authority of India Ltd. v. State of Orissa reported in [2000] 118 STC 297 wherein the provision of Section 13-AA of the Orissa Sales Tax Act regarding deduction of tax at source in respect of works contract was set aside by the apex Court. The above decision was followed in M/s. Nathpa Jhakri Jt. Venture Vs. State of Himachal Pradesh and Others, and in para 4 of the said judgment it is observed :

"A bare perusal of the two provisions will make it clear that in either provision there is an obligation to deduct from transactions relating to works contract on bills or invoices raised by the works contractor an amount not exceeding 4 per cent or 2 per cent, as the case may be. Though the object of the provision is to meet the tax in respect of the transactions on all works contract on the valuable consideration payable for the transfer of property in goods involved in the execution of the works contract, the effect of the provision is that, irrespective of whether the sales are inter-State sales or outside sales or export sales which are outside the purview of the State Act and those transactions in respect of which no tax can be levied even in terms of the enactment itself, such deductions have to be made in the bills or invoices of the contractors. To say that if a person is not liable for payment of tax inasmuch as on completion of the assessment refund can be obtained at a later stage is no solace, as noticed in *Bhawani Cotton Mills Ltd. Vs. State of Punjab* and Another, Further, there is no provision for certification of the extent of the deduction that can be made by the authority. Therefore, we must hold that arbitrary and uncanalised powers have been conferred on the concerned person to deduct up to 4 per cent from the sum payable to the works contractor irrespective whether ultimately the transaction is liable for payment to any sales tax at all. In that view of the matter, we have no hesitation in rejecting the contention advanced on behalf of the State."

14. The learned counsel for the respondent-State further submitted that the provisions of Section 13-AA of the Orissa Act and 12-A of the Himachal Pradesh Act are not in pan materia to Section 27 of the Assam Act which provides specifically that "deduction of tax at source will be in respect of supply of goods which is liable to tax under the Act". There is no dispute at the Bar that the words "any sale" or supply of goods liable to tax under this Act as appearing in Section 27 of the Act were not incorporated or available under the Orissa or Himachal Pradesh Act. Thus, Section 27 of the Act itself provides that deduction of tax at source is to be made in respect of sale or supply of goods which is liable to tax under this Act, that is, Assam Act, which in turn goes to show that Section 27 of the Act is not to be read in isolation in spite of non obstante clause with which the section starts. In our opinion, the non obstante clause means or is to be read as a repugnancy clause only, that is, where the provisions of Section 27 are found to be repugnant to the other provisions or else under the Act, Section 27 will prevail. We find no force in the submission that Section 27 is to be read in isolation only in view of the specific provision that liability to deduct tax at source is confined to any sale or supply of goods liable to be taxed under this Act. It is also submitted that the clause liability to tax under this Act is confined to sale or supply of goods and is not applicable or is not made applicable in respect of transfer of property in goods involved in a works contract. The definition of "sale price" u/s 2(34) of the Act includes consideration received or receivable by the dealer in respect of any works contract. There is no dispute that under the Act, a contractor executing works contract is a "dealer" as defined u/s 2(10) of the Act. The transfer of property in goods under the contract involves supply of goods and

it is deemed to be a sale. Hence we find no force in the submission that the supply of goods in the matter of transfer of property in respect of works contract is excluded from the purview of Section 27 of the Act. The liability to pay tax at source is limited to sale or supply of goods, whether under the direct supply or under the works contract which are liable to tax under this Act only. We also find sufficient force in the submission that Section 27 is primarily a machinery provision for the purpose of collection of tax and the liability to pay tax is provided in sections 7 and 8 of the Act which are charging section. Dr. Saraf, learned counsel has fairly submitted that neither Orissa Act nor Himachal Pradesh Act contains provisions similar to sections 7 and 8 of the Assam Act. As held in Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, provisions of sections 3, 4, 5 and sections 14 and 15 of the Central Sales Tax Act, 1956, are applicable to transfer of property in goods involved in execution of works contract covered by Article 466(29-A)(b). In Steel Authority of India Ltd. [2000] 118 STC 297, the apex Court quashed the provision of Section 13-A of the Act as the Act did not provide for exemption of inter-State sales or sales in declared goods, etc., etc. Section 7(4) of the Act reads as follows :

"Nothing in sub-sections (1), (2) and (3) above, shall be deemed to render any dealer liable to tax on the sale or purchase of goods where such sale or purchase takes place--

(i) outside the State ;

(ii) in the course of the import of the goods into or export of the goods out of the territory of India ; or

(iii) in the course of inter-State trade or commerce."

Section 8(3) of the Act reads as follows :

"For the purposes of this section, "taxable turnover" means the gross turnover during the year as reduced by--

(i) the turnover during such year of goods exempted u/s 9 ;

(ii) in respect of goods specified in Schedule II, the turnover during such year of goods which is shown, to the satisfaction of the assessing authority, to have been subjected to tax in the State generally at the specified rates or at such lower or zero rate as provided in any other provisions of this Act in respect of sale of such goods ;

(iii) in respect of goods specified in Schedule III, the turnover during such year of sale to registered dealers of goods specified in the purchasing dealer's certificate of registration as being intended for resale within the State or of containers or other materials for the packing of such goods ;

(iv) in respect of goods involved in any works contract specified in Schedule VI--

(a) the turnover relating to declared goods ; and

(b) so much of the labour and other charges incurred by the dealer after the transfer of the property in the goods involved in the works contract or at the option of the dealer such percentage towards labour and other charges of the gross turnover after deducting therefrom the turnover relating to declared goods as is specified in that Schedule ;

(v) such other amount as may be prescribed ; and

(vi) from the resultant balance an amount arrived at by applying the following formula--

$$\frac{\text{Rate of tax} \times \text{Resultant balance as mentioned above}}{100 + \text{Rate of tax}}$$

Explanation.--Where the taxable turnover of a dealer is taxable at different rates or the goods are specified in different Schedules, the aforesaid formula shall be applied separately in respect of each such part of the turnover."

15. In view of what has been stated above we find that the factual matrix of the present case are distinguishable from the facts in Steel Authority of India Ltd. Vs. State of Orissa and Others etc. etc., The provisions of Section 13-AA of the Orissa Act were quashed by the apex Court as the Act did not provide for permissible deductions whereas the benefits of permissible deductions are available when we read Section 27 along with sections 7 and 8 of the Act. Sections 7 and 8 are in aid of Section 27. The next limb of argument is that no machinery has been provided for certification in respect of works contract. Rule 35(5) of the Assam General Sales Tax Rules, 1993, reads as follows:

"No deduction of tax u/s 27 shall be made in case of supply of goods where such sale, is certified by the assessing officer as being not liable to tax. Such certificate shall invariably be embodied in each bill to be presented for payment."

It was submitted that the above provisions are applicable or made applicable in respect of clause (b) of Section 27(1) of the Act and it has not been extended in the matter of supply of goods covered in works contract. It is also submitted that the concerned authority has issued guidelines/circulars excluding Rule 35(5) in the matter of issuance of certificate in respect of works contract. Provisions of Rule 35(5) are very specific and categorical as they stated about deduction of tax u/s 27 only and does not say that it is limited to clause (b) or (a) of Section 27. Although the definition of the provision of Rule 35 is not satisfactory as different words have been used at different places to mean one and the same thing, however, in view of the specific provisions we find that there is no scope to limit the provision of Rule 35(5) to mere direct sale or supply only and exclude it in respect of works contract. The certificate under Rule 35(5) shall be available in respect of works contract also.

16. Dr. A.K. Saraf and Dr. Todi have submitted that although the petitioners have prayed for quashing of the provisions u/s 27 of the Act, they are more aggrieved

with the manner in which it is executed and acted upon by the State by refusing to grant the reliefs available to the petitioners who are mainly contractors. It is well-settled proposition of law that generally the courts would like to maintain the provision of law, if possible, and even if by reading down the provisions, if required. Following the majority decision in the case of 20th Century Finance Corp'n. Ltd. and Another Vs. State of Maharashtra, we hold that the provision of Section 27 of the Act should be upheld by reading it down as below :

(1) The words sale or supply of goods liable to tax under this Act appearing in Section 27 of the Act cover the supply of goods in works contract also and only those goods which are liable to tax or which are included in the taxable turnover will be subject to deduction of tax at source.

(2) Section 27 of the Act will have to be read together with charging sections, namely, sections 7, 8 of the Act and deductions and exemptions provided u/s 7 and 8 of the Act as regards the inter-State trade, declared goods, exempted goods, etc, etc., shall also be applicable in case of deduction of tax at source u/s 27 of the Act.

(3) The certificate under Rule 35(5) will be available to the contractors executing works contract where deduction of tax at source u/s 27 is made.

(4) In the Schedule of exempted items and taxable items, which were amended vide notifications dated 24th December, 1999 and 27th January, 2000, Schedule I is in respect of exemption of items and Schedule II provides for tax at the point of first sale. Rule 19 was amended during the pendency of this case and Rule 19(2) was amended "omitted" w.e.f. 19th January, 2000. Prior to the omission it read as follows :--

"(2) Notwithstanding anything contained in sub-rule (1), the dealers specified in Section 2(10)(iv) shall not be entitled to use the declaration in form A."

Thus, in the light of sub-rule (2) the contractor or a lessor was not entitled to use the declaration in form A. The effect of exemption of the said sub-rule w.e.f. January 19, 2000, is that, henceforth, the contractor or lessor shall be entitled to use the declaration in form A. Thus, when a declaration at form A is given by the contractor, no tax is charged from him at the time of purchase of goods described in Schedule III and the liability to pay tax shifts to the contractor. In view of the above, after the Assam General Sales Tax (Amendment) Rules, 1999, the works contractors have become eligible to use declaration in form A.

17. In the light of the aforesaid directions we hold that the provisions of Section 27 of the Act and Rule 8(3)(iv) of the Rules are not ultra vires and illegal and that cannot be said to be confiscatory in nature. Deduction of tax at source is permissible under the law and the above provision of law are to be read down as provided above. We may also mention here that deduction of tax at source u/s 27 of the Act is not an end of the matter and the dealers/asses sees are at liberty to claim all permissible deduction if any available to them while final

assessment is being made.

In the result all these batch of writ petitions stand disposed of in the light of the observations as stated above.

No costs.