
(2014) 09 RAJ CK 0104

In the Rajasthan High Court

Case No : Sales Tax Revision Petition No. 71/2009

Assistant Commissioner

APPELLANT

Vs

Shiva Construction Pvt. Ltd.

RESPONDENT

Date of Decision : 01-09-2014

Acts Referred:

Finance Act, 1963 — Section 2

Citation : (2015) 77 VST 366

Hon'ble Judges : Alok Sharma, J

Bench : Single Bench

Advocate : K.S. Jhala, OIC, Advocate for the Appellant

Judgement

Alok Sharma, J.—This Revision petition has been filed against the judgment dated 30.06.2008, passed by the Rajasthan Tax Board, Ajmer (hereinafter "the Tax Board") affirming the judgment dated 25.11.2005, passed by the Dy. Commissioner (Appeals), Commercial Taxes, Ajmer (hereinafter "the Appellate Authority") which set aside the assessment order of the Assessing Officer passed on 13.07.2001 whereunder the respondent-assessee (hereinafter "the assessee") was visited with a demand for payment of surcharge on the amount of 1% of its total value of contract paid as a condition for availing exemption from payment of sales tax made u/s 4(2) of the extant Rajasthan Sales Tax Act, 1954 (hereinafter "the Act of 1954").

2. The facts of the case are that vide notification No. 898: F. 4(7) FDGr.IV/92-14 dated 30.04.1993 issued in the exercise of powers conferred by the extant Section 4(2) of the Act of 1954 read with Rule 10B of the then operating Rajasthan Sales Tax Rules, 1955, the State Government exempted from tax the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contracts relating to building bridges, dams, roads and canals on the following conditions:

1. That the contractor undertakes to pay exemption fee @ 1% on the total value

of such contract;

2. That the contractor holds a valid certificate of exemption for such contract;

3. That such contract is awarded (date of dispatch of acceptance of the contract) after the date of publication of this notification in the Official Gazette;

4. That the contractor shall not be entitled to use declaration forms to purchase goods without paying tax or paying tax at concessional rate of tax, for being used in the execution of such contract; and

5. That if the contractor uses declaration forms in purchasing any goods in violation of condition No. 4, apart from paying exemption fee under this notification, he shall be liable to pay tax on the said purchases at the rate notified u/s 5, with interest, subject however, if he has paid any tax at the time of such purchases, tax so paid shall be allowed as set off against the tax payable by him under this condition.

3. The assessee admittedly paid the amounts due to satisfy the conditions upon which the exemption under the notification dated 30.04.1993 aforesaid was to be availed.

4. The Assessing Officer vide order dated 13.07.2001 however took the view that aside of the 1% of the total value of the works contracts paid as a condition of the exemption from payment of tax under the Act of 1954 for the assessment year 1999-2000 (hereinafter "AY 1999-2000") the assessee was also liable to pay surcharge thereon u/s 13 of the Rajasthan Sales Tax Act 1994 (hereinafter "the Act of 1994") which had in the meantime repealed and replaced the Act of 1954 effective 01.10.1995.

5. Section 13 of the Act of 1994 reads as under:

Section 13. Levy of surcharge.

(1) Notwithstanding anything contrary contained in this Act, there shall be paid by a denier a surcharge, from such date and at such rate not exceeding twenty five per cent, as notified by the State Government, on the amount of tax or any fee or sum in lieu of tax, payable by him, but the aggregate of tax, fee or sum and surcharge payable under this Act in respect of the goods declared by Section 14 of the Central Sales Act, 1956 (Central Act 74 of 1956) to be of special importance in inter-State trade or commerce shall not exceed the tax calculated at the rate specified in clause (a) of Section 15 of the aforesaid Central Act.

(2) The provisions as they are applicable to the tax payable under this Act, shall so far as may be, apply in relation to surcharge payable under sub-section (1).

6. Aggrieved of the order dated 13.07.2001, passed by the Assessing Officer, the assessee laid a first statutory appeal u/s 84 of the Act of 1994 before the Appellate Authority. The Appellate Authority in its order dated 25.11.2005 took the view that the exemption of tax under the notification dated 30.04.1993

entailed absolving the assessee of all tax liability whatsoever including surcharge--also a tax--under the Act of 1994. For this the Appellate Authority inter alia relied upon Section 2(41) of the Act of 1994 which defined "tax" to mean "any (tax or other levy by any name, leviable under the provisions of the Act." Also relying upon the judgment of this Court in the case of M/s. Murlidhar Deendayal, Ajmer Vs. Commercial Taxes Officers, Special Circle, Ajmer [(2002) 1 RTR] 59 decided on 07.02.2002 the appellate authority held that surcharge on amounts paid as condition of exemption from payment of tax u/s 4(2) of the then extant Act of 1954 was not leviable. The assessing authority's order to the contrary issued on 13.07.2001 was thus set aside. Aggrieved of the appellate order dated 25.11.2005, the petitioner-Department (hereinafter "the Department") filed a further appeal u/s 85 of the Act of 1994 before the Tax Board. That appeal has been dismissed by the Tax Board vide order dated 30.06.2008. Hence this revision by the Department u/s 86 of the Act of 1994.

7. The Advocates of this Court are on a strike. Mr. Jhala appears for the Department. None appears for the assessee.

8. This Court in the case of CTO Vs. M/s. Murlidhar Deendayal SBSTR No. 69/2004 decided on 12.04.2006, has held that surcharge on payment of 1% amount of a works contract executed for purposes enumerated in the notification dated 30.04.1993 cannot be levied. But no reasons have been stated-- because the Court found that in the context of quantum of tax in the said case being less than Rs. 10,000/-, a revision u/s 86 of the Act of 1994 could not be filed in terms of the Department's own policy decision.

9. It is therefore desirable to consider the question in detail i.e. whether surcharge is leviable on the amount paid by the assessee as a condition of exemption notification dated 30.04.1993 issued by the State Government at the relevant time under the extant Section 4(2) of the Act of 1954 *pari materia* to Section 15 of the Act of 1994.

10. Section 13 as reproduced hereinabove indeed starts with a non-obstante clause and provides that a dealer would be liable to payment of surcharge at the rate notified by the State Government on the amount of tax or fee or sum in lieu of tax payable by him. It is thus evident that surcharge is payable on (i) tax, (ii) fee, or (iii) sum in lieu of tax.

11. Tax has been defined under the Act of 1994, also referred to hereinabove, to mean any tax or other levy by any name leviable under the provisions of the Act of 1994. The word "surcharge" has been held by the Hon'ble Supreme Court in the case of Common Cause (A Registered Society) Vs. Union of India (UOI) and Others, to mean in the context of taxation, as an additional imposition which results in the enhancement of tax and the character of such additional imposition has been held to be the same as the tax on which it is super added. In the context of the case before it [Sarojini Tea Co.], the Hon'ble Supreme Court held that a surcharge on land revenue would be a mere enhancement of land revenue

to the extent of the imposition of surcharge. Thus effectively surcharge over land revenue only entailed an additional amount of land revenue payable to the State. A similar view has been expressed by the Hon''ble Supreme Court in the case of Indian Aluminium Co. etc. etc. Vs. State of Kerala and others, Therein the Hon''ble Supreme Court held that where the word "surcharge" is not defined in the Act in which it occurs (as is the position both under the Act of 1954 and also the Act of 1994), etymologically, it should inter alia be construed to stand for additional or extra charge over tax charged in the first place. It held that surcharge where provided for in an Act is thus a mere super added charge. Dealing with the word "surcharge" under the Kerala Electricity Surcharge (Levy and Collection) Act 1989, the Hon''ble Apex Court held that surcharge under the said Act was an enhanced levy only. Reference was made by the Apex Court to its own judgment in the case of The Commissioner of Income Tax, Kerala Vs. K. Srinivasan, wherein, dealing with the question whether the term "income tax" as defined u/s 2 of the Finance Act, 1963 would include surcharge and additional surcharge whenever provided, the Hon''ble Apex Court had held that the word "surcharge" included additional tax and the whole proceeds of any surcharge were to form part of the revenue of the State. The Hon''ble Supreme Court also approved C.V. Rajagopalachariar Vs. State of Madras, where the Hon''ble Madras High Court held, in the context of the Madras Land Revenue Surcharge Act, 1954 and the Madras Land Revenue (Additional Surcharge) Act, 1955 that surcharge only entailed an excess or additional burden or the amount of tax otherwise charged towards land revenue.

12. It is thus evident that "surcharge" referred to u/s 13 of the Act of 1994 would only be in the nature of additional tax. Hence in the present case when levy of tax was exempted under notification dated 30.04.1993 in respect of the transactions of the assessee otherwise exigible to tax on sale it would of necessity and also in the context of definition of tax u/s 2(41) of the Act of 1994 include exemption from levy of surcharge.

13. It is also important to take into consideration the fact that exemption of tax u/s 4(2) of the repealed Act of 1954 and pari materia provisions of Section 15 of the Act of 1994 is conspicuously different from payment of lump-sum in lieu of tax provided for u/s 5 of the Act of 1994. It is nobody's case that the notification dated 30.04.1993 entailed payment of lump-sum in lieu of tax. Evidently the language of notification dated 30.04.1993 issued under the extant Section 4(2) of the Act of 1954 clearly resulted in exemption from payment of whole of the tax, albeit with conditions. Reference in this regard can be had to the succeeding Section 15 of the Act of 1994 which deals with "exemption of tax" and provides that notwithstanding anything contained in the Act, where the State Government is of the opinion that it is necessary or expedient in the public interest so to do, it may, by notification in the Official Gazette, exempt fully or partially, whether prospectively or retrospectively from tax the sale or purchase of any goods or class of goods or any person or class of persons, without any condition or with such condition as may be specified in the notification. The

notification dated 30.04.1993 generally provides for an exemption from payment of tax under the Act of 1954 on the condition of payment of 1% of the total value of the works contract executed by the assessee in respect of works enumerated therein. Clearly the amount of 1% of the total value of contract in issue as paid by the assessee was not a payment of lump-sum in lieu of tax u/s 5 of the Act of 1994 as in fact has never been the case of the Department at any stage of the proceedings, but a payment to satisfy the condition for exemption from payment of tax.

14. The question that now remains is as to whether the payment of 1% of the total value of the works contract in respect of enumerated works under the notification dated 30.04.1993 was in the nature of a fee. Under the obtaining state of law, it cannot be so held even though the exemption notification does indeed refer to the payment of 1% of the work contract value as an "exemption fee". Fee is a concept well known in law and has its own legal connotation. It would be desirable to note that nothing turns on the mere use of the word "fee" in a statute rule/circular/or notification. The nature and character of the impost is to be determined to conclude whether the charge is a fee or not. In *Indian Mica Micanite Industries Vs. The State of Bihar and Others*, a fee has been described by the Hon'ble Apex Court as a charge having a reasonable co-relation with the services rendered and an element of quid pro quo for the services rendered being satisfied—generally for a regulatory fee and a little more specifically albeit not mathematically for a compensatory fee. In the context of the legal connotation of a fee as enunciated by the Hon'ble Supreme Court, the payment of 1% of the total value of the works contract under the notification dated 30.04.1993 as a condition to avail the exemption from payment of tax otherwise leviable first under the Act of 1954 and then under the Act of 1994 can in no circumstance be described as a fee.

15. The charge of 1% of the value of the works contract for enumerated purposes was thus not a charge in lieu of fee or a lump sum in lieu of tax u/s 5 of the Act of 1994 but only a condition to avail an exemption from tax in whatever form on the transactions or events otherwise exigible to tax. It is settled that every charge levied by the Government need not necessarily be a tax or a fee or even one in lieu thereof. The Government has the power to require a payment as a consideration *Commissioner of Income Tax, Udaipur Rajasthan Vs. McDowell and Co. Ltd.*, and analogously as a condition of availing benefits its policy--of which exemption from tax is a part.

16. The upshot of the aforesaid discussion is that a payment to satisfy a condition to avail exemption from payment of tax" as under notification dated 30.04.1993 issued by the State under its power to exempt from payment of tax without or with conditions, can in no circumstance take the character of levy of a fee by the State. The question of payment of surcharge u/s 13 of the Act of 1994 over the purported fee cannot therefore arise. Further the amount of 1% of the total value of the works contract under notification dated 30.04.1993 evidently

has never been claimed by the Department as payment of lump sum in lieu of tax as provided for u/s 5 of the Act of 1994. Contrarily the notification dated 30.04.1993 specifically issued by the State Government under its power to exempt, explicitly exempted payment of tax. Tax as defined u/s 2(41) of the Act of 1994 also includes all "other levy by any name"--As otherwise would be due on transfer of property in goods (whether as goods or in some other form) involved in the execution of works contracts relating to buildings, bridges, dams, roads, and canals. In my considered opinion, the invoking of Section 13 of the Act of 1994 to levy a surcharge on the amount of 1% of the total value of the works contract paid by the assessee as a condition to avail the exemption on tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of works contracts relating to enumerated works was wholly misdirected and misplaced. Such a levy was not only on a narrow and erroneous understanding of the exemption notification dated 30.04.1993 but also against a wholistic construction of the statutory provisions of the Act of 1994. The Assessing Authority had made a fundamental error in interpreting Section 13 of the Act of 1994 and in seeking to visit the assessee with liability to surcharge on the amount of 1% of the value of the works contract paid under the exemption notification dated 30.04.1993. The Appellate Authority exercised its jurisdiction justly and fairly in setting aside the aforesaid order. The Tax Board rightly concurred with the Appellate Authority.

17. There is thus no occasion to interfere in this revision petition.

18. The revision petition is consequently dismissed.