
(2009) 01 OHC CK 0025
In the Orissa High Court

Bhushan Power and Steel Ltd.

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 19-01-2009

Acts Referred:

Central Sales Tax Act, 1956 — Section 4
Constitution of India, 1950 — Article 245, 246, 286

Citation : (2009) 107 CLT 677 : (2009) 1 OLR 854

Hon'ble Judges : B.S. Chauhan, C.J.; I. Mahanty, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.S. Chauhan, C.J.—This Writ Petition has been filed challenging the validity of assessment Order Dated 8.7.2008 passed by the Assistant Commissioner of Sales Tax, Sambalpur Range, Sambalpur (hereinafter referred to as "the assessing officer") u/s 43 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as "the OVAT Act") on various grounds including the jurisdiction of the assessing officer to levy tax u/s 12 of the OVAT Act on the raw materials purchased from outside the State of Orissa.

2. Shorn of unnecessary details, the facts giving rise to the present Writ Petition are that the Petitioner is a company incorporated under the Companies Act, 1956 having its registered office at 4th Floor, Tolstoy House, Tolstoy Marg, Connaught Place, New Delhi-110001, and plants at Chandigarh, Punjab and Kolkata and branches all over India. Petitioner has set up an integrated steel plant at village Thelkoloi, Rengali in the district of Sambalpur, Orissa and is engaged in manufacturing and sale of sponge iron, iron and steel goods in all forms as well as generation of power. The Petitioner is a registered dealer under the OVAT Act within the jurisdiction of the assessing officer. In course of business, the Petitioner-company has purchased various materials such as capital goods, steel, cement, raw materials and other inputs for manufacturing of desired end products. During the tax period from 1.4.2005 to 30.6.2006, the Petitioner had

effected purchase of raw materials to the tune of Rs. 15,05,96,905 from outside the State of Orissa. The audit assessment was completed by the assessing officer u/s 42 of the OVAT Act on the basis of an audit visit report resulting in a demand of Rs. 9,51,531. Thereafter the Sr. Audit Officer in the Office of the A.G. (C.W. & R.A.), Orissa, Bhubaneswar audited the assessment record and submitted an objection vide its POM No. SRAP-S(VAT)-39/09 Jan-08. On the basis of the said objection, the assessing officer initiated a proceeding u/s 43 of the OVAT Act as he was of the opinion that part of the Petitioner's turnover had "escaped assessment". The Petitioner participated in the said proceeding and filed written objection. However, the assessing officer completed the assessment u/s 43 of the OVAT Act raising an extra demand of Rs. 180,23,28,000 which includes penalty of Rs. 120,15,82,000 imposed u/s 43(2) of the OVAT Act. Hence the present Writ Petition.

3. Mr. N. Venkatraman, Learned Senior Counsel, appearing for the Petitioner-company has assailed the impugned assessment order passed u/s 43 of the OVAT Act on various grounds, however, at the time of making submissions the Learned Counsel contended that the legislative power of the State Legislature is confined/restricted in making laws for the whole or part of the territory within the State under Article 245 of the Constitution of India and any attempt by overstepping the limits of its legislative field through laws that affects men and property outside the State would be invalid for extra territorial operation. Relying on the provisions of Entry 54 of List-II to 7th Schedule, Articles 245 and 286 of the Constitution and Section 4 of the Central Sales Tax Act, 1956, Learned Counsel submitted that neither the State Legislature much less the assessing officer had any power to impose tax on raw materials purchased from outside the State of Orissa. According to him, Section 12 of the OVAT Act would operate only in respect of purchase made within the State of Orissa. The present purchases from outside the State of Orissa are transactions took place outside the State of Orissa in terms of Section 4 of the Central Sales Tax Act, 1956 (hereinafter called "the CST Act, 1956"). Thus, the petition deserves to be allowed.

4. Per contra, Mr R.P. Kar, Learned Counsel for the Revenue, submitted that the Writ Petition raises pure question of law, thus, he prays to be permitted to advance argument on behalf of the State without filing the counter-affidavit, though time to file the counter affidavit has already been given thrice. Mr. Kar has submitted that Section 12 enables the assessing officer to levy tax on purchases effected by the registered dealer under the OVAT Act in course of its business (i) from registered dealer in the circumstances in which no tax u/s 11 is payable by that registered dealer on such goods; or (ii) from any person other than a registered dealer subject to fulfillment of other conditions prescribed in Section 12 of the OVAT Act and the assessing officer has rightly levied the tax on the purchase turnover of raw materials brought from outside the State. Therefore, the Petitioner's case falls under the category (ii) There is no infirmity in the order of the assessment. It was further submitted that after "use or consumption" of the raw materials purchased from outside the State in

manufacture of goods, such manufactured goods were not sold within the State or in course of interstate trade or commerce or in course of export outside India for which the Petitioner has rightly been assessed on the value of raw materials purchased from outside the State of Orissa and utilized in manufacture of finished products.

5. In view of the above rival contentions, the question which falls for consideration by this Court is whether in exercise of powers u/s 12 of the OVAT Act the assessing officer can assume jurisdiction to levy tax on value of the raw materials purchased from outside state?

6. At this juncture, it is necessary to know what is contemplated under Sections 1, 2, and 12 of the OVAT Act, Section 4 of the CST Act, 1956, Entry 54-II of Seventh Schedule, Articles 245 and 286 of the Constitution of India. The relevant provisions are reproduced below.

1. Short title, extent and commencement - (1) This Act may be called the Orissa Value Added Tax Act, 2004.

(2) It extends to the whole of the State of Orissa.

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2. Definitions.- In this Act, unless the context otherwise requires.

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(37) "Purchase" with all its grammatical variations and cognate expressions shall be construed from the word "sale".

(45) "Sale" with all its grammatical variations and cognate expressions, means every transfer of the property in goods, other than by way of mortgage, hypothecation, charge or pledge, by one person to another in the course of trade or business for cash, deferred payment or other valuable consideration and includes....

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Explanations: (a) A sale or purchase of goods shall be deemed to have taken place inside the State if the goods are within the State-

(i) In the case of specific or ascertained goods, at the time the contract of sale is made, and

(ii) In the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller, or by the buyer, whether assent is prior or subsequent to such appropriation.

(b) xxxx xxxx xxxx xxxx

Note: A sale or purchase of goods shall not be deemed to have taken place inside the State, if the goods are sold-

- (i) In the course of interstate trade or commerce, or
- (ii) Outside the State, or
- (iii) In the course of import into or export out of the territory of India;

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12. Levy of tax on purchase - Every dealer who, in the course of his business, purchase or receives any goods-

(i) from a registered dealer, in the circumstances in which no tax u/s 11 is payable by that registered dealer on such goods, or

(ii) from any person other than a registered dealer shall be liable to pay tax on the purchase price or prevailing market price of such goods, if after such purchase or, as the case may be, receipt, the goods are not sold within the State or in the course of Inter-State trade or commerce or in the course of export out of the territory of India, but are-

(a) sold or disposed of otherwise; or

(b) consumed or used in the manufacture of goods declared to be exempted from tax under this Act; or

(c) after their use or consumption in the manufacture of goods, such manufactured goods are disposed of otherwise than by way of sale in the State or in the course of inter-State trade or commerce or export out of the territory of India; or

(d) used or consumed otherwise.

and such tax shall be levied at the same rate, at which tax u/s 11 would have been levied, on the sale of such goods within the State on the date of such purchase or receipt.

Section 4 of the CST Act: When is a sale or purchase of goods said to take place outside a State.

(1) Subject to the provisions contained in Section 3, when a sale or purchase of goods is determined in accordance with Sub-section (2) to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States.

(2) A sale or purchase of goods shall be deemed to take place inside a State if the goods are within the State.

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Entry 54, List-II of Seventh Schedule: Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.

Article 245 - Extent of laws made by Parliament and by the Legislature of States.-

(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

Article 286 - Restrictions as to imposition of tax on the sale or purchase of goods.- (1) No law of a State shall impose, or authorize the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place-

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

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7. Thus, the question which falls for consideration is whether in exercise of the power u/s 12 of the OVAT Act the Assessing Officer assumes jurisdiction to levy tax on value of raw materials purchased from outside the State. Section 12 of OVAT Act enables the Assessing Officer to levy tax on purchases effected by a dealer in course of his business from a registered dealer in the circumstances in which no tax u/s 11 is payable by that registered dealer on such goods or from any person other than the registered dealer, if after such purchase the goods are not sold within the State, or in course of inter-state trade or commerce or in course of export out of the territory of India but are sold or disposed of otherwise or consumed or used in manufacture of goods declared to be exempted from tax under this Act or after their use or consumption in manufacture of goods such manufactured goods are disposed of otherwise by way of sale in the State or in course of inter-state trade or commerce or export out of the territory of India or used or consumed otherwise. Such tax shall be levied at the same rate at which tax u/s 11 would have been levied on the sale of such goods within the State on the date of such purchase or receipt. The contention of Mr. Kar, Learned Standing Counsel, is that Section 12(ii) speaks of "any person other than registered dealer" from whom purchases in question were effected. "Any person" includes even persons outside the State of Orissa from whom purchases in question are effected. "Any person" does not mean any person from within the State of Orissa only. This argument of Mr. Kar is fallacious. Firstly, the words "registered dealer" used in Clause (i) and (ii) of Section 12 mean a dealer registered under Sub-section (38) of Section 2 of the OVAT Act. "Person" has also been defined under Sub-section (31) of Section 2 of the OVAT Act. Section 1(i) of the OVAT Act says that the OVAT Act extends to the whole of Orissa. Therefore, the terms "registered dealer" and "person" as defined under the OVAT Act refer to the registered dealer and the person carrying on business in the State of Orissa. This Act does not apply to any person or a dealer who is registered in any other State out side the State of Orissa and is not carrying on any business inside the State of Orissa. The provisions of OVAT Act are applicable only to the transactions and

persons within the State of Orissa. It has no application to persons and transactions which take place outside the State of Orissa. Section 4 of the CST Act, 1956 stipulates that a sale or purchase once determined inside a particular State shall be deemed to be outside of other States. In the present case, it is not disputed that purchases in question were effected from outside the State. Thus, it is impermissible for the State of Orissa much less the Assessing Officer to impose tax on any outside State sale/purchase.

8. Apart from the above, the OVAT Act has been enacted in the State of Orissa in exercise of the power under Article 245 read with Entry 54 of the List II of the Seventh Schedule of the Constitution of India, Under Article 245 of the Constitution the legislative power of the State Legislature is confined-(restricted) to making laws for the whole or any part of the territory within the State of Orissa. Therefore, the State of Orissa cannot enact any law affecting men and property and transactions effected outside the State of Orissa. Any attempt by over-stepping the limit of legislative field would be invalid due to extra territorial operation.

9. Legislative power of Entry 54 is subject to two limitations; one flowing from the entry itself which makes the said power "subject to the provisions of Entry 92A of the List I" and the other flowing from prohibitions contained in Article 286 of the Constitution. Article 246 of the Constitution says that Parliament has exclusive power to make laws with respect to any matter enumerated in List I in Seventh Schedule, which is known as Union list Entry 92A. It authorizes the Parliament to make law on taxation on sale or purchase of goods other than newspapers where such sale or purchase takes place in course of inter-state trade or commerce. Article 286(1) of the Constitution says that no law of the State shall impose or authorize the imposition of tax on sale or purchase of goods where such sale or purchase takes place: (a) outside the State or (b) in course of import of goods into or export of goods outside territory of India. Thus, Section 12 of the OVAT Act cannot be construed in such manner that it can authorize the State of Orissa, much less the Assessing Officer to impose tax on raw materials purchased/received from outside State by the Petitioner.

10. Section 12 of the OVAT Act is a charging Section as well as remedial provision and its main object is to plug leakage and prevent evasion of tax.

11. In *Hans Raj Bagrecha Vs. State of Bihar and Others*, , the Apex Court considered the issue of competence of the State Legislature to levy tax on "sale" or "purchase" of goods outside the State and held as under:

The State Legislature is competent in enacting sales tax legislation to make a provision which is ancillary or incidental to any provision relating to levy, collection and recovery of sales tax and purchase-tax. A provision which is made by the Act or by the Rules which seeks to prevent evasion of liability to pay intra - State sales or purchase tax would therefore be within the competence of the Legislature or the authority competent to make the rules. But the State

Legislature has no power to legislate for the levy of tax on transactions which are carried on in the course of inter-State trade or commerce or in the course of export. Section 42 of the Bihar Sales Tax Act, 1959, prevents any person from transporting from any railway station, steamer station, air-port, post office or any other place any consignment of such goods exceeding the quantity specified with a view to ensuring that there is no evasion of tax payable under the Act. But the power u/s 42 can only be exercised in respect of levy, collection and recovery of intrastate sales or purchase-tax. It cannot be utilized for the purpose of ensuring the effective levy of inter-State sales or purchase tax.

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In respect of goods which are purchased in the State of West Bengal and brought within the State of Bihar and then despatched to other States in the course of inter-State transmissions, no question of levy of purchase-tax under the Bihar Sales Tax Act arises.

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The power of the State Legislature is restricted to legislature in respect of intra-State transactions of sale and purchase and to matters ancillary or incidental thereto: it has no power to legislate for levy of tax on sales and purchase in the course of inter-State transactions.

12. The Hon"ble Supreme Court in Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., , while construing a similar provision held that the levy is only permissible in the event of purchase although the levy materializes only when the circumstances enumerated therein occur. The enumerated circumstances do not and would not include purchases outside the respective States.

13. In Onkarlal Nandlal Vs. State of Rajasthan and Another, , the Apex Court considered the meaning of "sale"/"purchase" outside the State and while interpreting the provisions of Section 4(2) of the Central Sales Tax Act, held that the provision has been enacted laying down the principles for determining that when a "sale" or "purchase" of goods would be deemed to have taken place inside the State. Therefore, when it is determining that the "sale" or "purchase" of goods has taken place inside a particular State, it must be deemed to have taken placed outside all other State. Such "sale" or "purchase" can then put only by the State even in which, it must be deemed to have been taken place on the application of the principles set out in the said provision and no other State can impose tax on such "sale" or "purchase" as it would be barred by the provision of Article 286 of the Constitution.

14. In The State of Tamil Nadu Vs. M.K. Kandaswami and Others, , the Apex Court considered the provision of Section 7-A(1) of the Madras General Sales Tax Act, 1959 for the purpose of imposition of purchase tax and observed that "it was a charging Section as well as a remedial provision and its main object is to plug

leakage and prevent evasion of tax".

15. In *Krishna Dal Mills v. State of Haryana* (1982) 52 STC 248 (P&H); and *Commissioner, Sales Tax U.P. v. Allied Chemicals, Kanpur* (1969) 23 STC 165, it has been held that levying taxes on purchases admittedly made outside the State was not permissible.

16. Mr. R.P. Kar, Learned Counsel for the Revenue made an attempt to advance the theory of extra territorial legislative competence placing reliance upon the Judgments of the Apex Court.

A Constitution Bench of the Hon'ble Supreme Court in *The State of Bihar and Others Vs. Charusila Dasi*, , considered the issues as to whether the Bihar Legislature had legislative competence to enact the Bihar Hindu Religious Trusts Act for covering the properties of public trust situated in Bihar simultaneously with all the properties of the trusts situated outside the State of Bihar. The Court repelled the contention that such an Act which tried to bring within its sweep properties of public trust situated outside Bihar, though the trusts were situated within the State of Bihar had extra-territorial operation, the Court observed that there was a general presumption that the legislature did not intend to exceed its jurisdiction, and it was a sound principle of construction that the Act of a sovereign legislature should, if possible, receive such an interpretation as would make it operative and not inoperative. Interpreting Section 3 of the said Act, the Apex Court held that as the Act was applicable to all public religious and charitable institutions, which were situated in the State of Bihar and any part of the property of which was in that State. The Court further interpreted the Item No. 28 of the Concurrent List, i.e. charities, charitable institutions, charitable and religious endowments and religious institutions" and held that in so legislating, the State Legislature had power to affect trust property which may be outside the State of Bihar, but it must appertain to the trust situated in Bihar.

17. Similar view had been taken by another Constitution Bench of the Hon'ble Supreme Court in *The State of Bihar and Others Vs. Bhabapritananda Ojha*, .

18. However, the said cases i.e. *Charusila Dasi* (supra) and *Bhabapritananda Ojha* (supra) had been decided interpreting the provisions of the Bihar Act in a different, context. The ratio of the said Judgment cannot be attracted in the present case. The Legislature dealt with the properties of the trust in Bihar and the fact that said trust also possesses properties outside the State of Bihar did not take away the competence of the Bihar Legislature which it acquired on account of territorial nexus.

19. In *The Tata Iron & Steel Co. Ltd. v. The State of Bihar* AIR 1958 SC 452, dealing with the issue of "extra territoriality of legislation" the Apex Court held that sufficiency of the territorial connection involve a consideration of two elements, namely, (a) the connection must be real and not illusory, and (b) the liability sought to be imposed must be pertinent to that connection. The Court further held as under:

...It is not necessary for us on this occasion to lay down any broad proposition as to whether the theory of nexus, as a principle of legislation, is applicable to all kinds of legislation. It will be enough, for disposing of the point now under consideration, to say that this Court has found no apparent reason to confine its application to Income Tax legislation but has extended it to sales tax and to tax on gambling....

20. In view of the aforesaid settled legal provisions, the instant case is required to be considered.

21. The impugned order, levying taxes on purchases, admittedly made outside the State of Orissa and therefore, we are of the opinion that the Assessing Officer has proceeded on a complete misconception of the OVAT Act, as the Sections thereof would only operate in case of transactions, sale or purchase within the State of Orissa. It cannot have extra territorial operation and cannot bring within its ambit transaction of "sale" or "purchase" made outside the State of Orissa. Levy of tax on said transactions would be violative of provisions of Article 286 of the Constitution of India and even the State Legislature does not have competence to enact the law having operation outside the State in view of the provisions of Article 245 of the Constitution. Such an imposition of tax contravenes Section 4 of the CST Act, 1956 which expressly provides that a "sale" inside a particular State shall be deemed to have been made outside all other States. It also contravene the provision of Section 1 of the OVAT Act, which expressly provides that the Act extends only to the State of Orissa and assessment order is in violation of the true spirit of the definition of "sale" and "purchase" contains in Section 2 of the OVAT Act.

22. Thus the levy of tax by the State of Orissa u/s 12 of the OVAT Act on such purchases is not sustainable in the eye of law.

23. In view of the above, Writ Petition succeeds and is allowed. The impugned order of assessment dated 8.7.2008 (Annex.-4) is hereby quashed.

24. No costs.

I. Mahanty, J.

I agree.