(1997) 12 GAU CK 0001

In the Gauhati High Court

Case No : Civil Rule No. 918 of 1997

Bijay Singh Bimal Kumar and Others APPELLANT

Vs

State of Assam and Others RESPONDENT

Date of Decision : 04-12-1997

Acts Referred:

Assam General Sales Tax Act, 1993 — Section 10, 17, 2(17), 2(33), 2(34)
Assam General Sales Tax Rules, 1993 — Rule 38

Citation : (1998) 3 GLT 254

Hon'ble Judges : D.N. Chowdhury, J

Bench : Single Bench

Advocate : O.P. Bhati, R.K. Jain and A. Biswas, for the Appellant; K.H. Choudhury, Addl. Sr. G.A., for the Respondent

Judgement

D.N. Chowdhury, J.—The writ petition is directed against an order of assessment dated 19.9.95 under the Assam General Sales Tax Act, 1993 which was also specifically affirmed by the Joint Commissioner of Taxes on revision.

2. The Petitioner, a registered dealer under the Assam General Sales Tax Act, 1993 (hereinafter referred as Act) submitted his annual return for the period upto 31.3.94 showing the total sale of Rs. 6,70,33,455.46. Sales proceeds of the goods were claimed as having been exempted u/s 9 of the Act. The assessing officer in due course made assessment u/s 17 of the Act and determined the return over all sale of container and levied taxed thereon and accordingly Superintendent of Taxes determined the total sale of container during the period at Rs. 3,62,686.00 being 1% of the total sale and imposed tax @ 8% at Rs. 6448/- totalling to Rs. 33,314/-. Being aggrieved, Petitioners moved a Revision application u/s 36 of the Act before the Commissioner of Taxes read with Rule 38 of the Rules disputing the liability of the Petitioners to pay tax on the containers. The Revisional Authority considered the revision application and heard the learned counsel appearing on behalf of the dealer. The order of assessment was questioned on revision on the ground that since the packing materials were

essential and customary for sale of goods by the Firm having the value of such materials being very marginal in comparison with the value of the goods sold by the Petitioners. The Assessee pleaded that the containers were used as packing materials and those packing materials were not sold and therefore no sales tax was collected by the Petitioners on the packing materials while selling the goods on the assessment year and in facts such packing materials were transferred without any consideration. The revisional authority while considering the grounds of the revision made the following observations:

...It was also observed that the Petitioner dealer purchased the said non-taxable goods in lots and sold the nontaxable goods in lots packed in container. Most of the purchases of nontaxable goods were made on the strength of Central Sales Tax declarations. The Petitioner-dealer, while selling the nontaxable goods along with containers, had maintained the accounts of the numbers of the containers although he had not maintained any separate accounts for value of such containers used as packing materials. In absence of any separate value of containers recorded in books of accounts of the Petitioner-dealer, the assessing authority determined the value of such containers on estimation to the best of his judgment...

Explanation 2 of the Section 2(34) of the AGST Act/93 states, "where any goods are purchased or sold packed in containers or other packing materials of value which is small in comparison with the value of such goods or such packing is essential or customary for the purchase or sale of such goods then, not withstanding any agreement to the contrary such containers or other packing material shall be deemed to have been purchased or sold with such goods and their value, whether charged separately or not, shall be included in the purchase or sale price of such goods.

By virtue of the explanation 2 of the Section 2(34) of the AGST Act/93, it is clear that when nontaxable goods are sold packed in containers, and such containers are essential or customary for the purchase or sale of nontaxable goods, such containers shall be deemed to have been sold alongwith nontaxable goods and the value of such containers even if not separately charged shall be included in the purchase price and sale price of such nontaxable goods...

...The learned Advocate''s argument that the containers were not charged any price in the instant case is not tenable and cannot be accepted as correct for the reason that when weighment is taken place in the weigh-bridge or any other weighing machine of seated commodity, the weight shown in the machine is the sum total of the weight not only of the goods, but also of the containers. This is an established fact. So it is wholly untenable to accept the argument that the seller had charged only the price of the goods and he had not charged any value for containers. This is absolutely untenable. Rather the seller had in fact charged the value of the containers used as packing materials, very cleverly at pre-rate value of the goods, as had been charged (in the instant case) per kg. which is not separated when the sealed containers were put into the weighing machine...

3. The Revisional Authority also upheld the levied of interest in aid of Section 22 of the Act Hence the writ application.

4. Mr. Om Prakash Bhati, the learned counsel appearing on behalf of the Petitioners/ Assessee assailed the legality and validity of the assessment. Mr. Bhati, the learned counsel for the Petitioner submitted that the taxing authority fell into serious error in assessing the containers used in sale of non-taxable goods on the face of Section 2(34) Sub-clause (d) explanation 2 of the Act. Mr. Bhati, the learned counsel submitted that 1994 amendment could not be made applicable for the assessment year ending on 21.3.94. The learned counsel further submitted that Petitioners used gunny bags in respect of sale of sugar, cereals and pulses and tins in respect of edible and non-edible oils. The packing materials those were used were of negligible value and furthermore, such packing was essential as well as customary for purchase or sale of such goods. The Act itself exempted such packing materials from taxation in view of the explanation 2 of Section 2(34)(d) of the Act. Petitioners also disputed the factual correctness of the finding of the Revisional Court/authority that the Petitioners maintained the account of the numbers of containers, although, the Petitioners did not maintain any separate account for value of such container used as packing materials. The learned counsel in support of his contention referred to the. decision in Raj Steel and Others Vs. State of A.P. and Another, and in Vasavadatta Cements Vs. State of Karnataka and another, Mr. Bhati, the learned counsel further submitted that the explanation 2 of Section 2(34)(d) of the Act was only deeming provision and on a true construction of deeming the clause the Respondents could not have been assessed to tax on the containers. In support of his contention the learned counsel also referred to the decision of Supreme Court in Smt. Parayankandiyal Eravath Kanapravan Kalliani Amma and others Vs. K. Devi and others,

5. Mr. K.H. Choudhury, the learned Addl. Sr. Govt. Advocate appearing on behalf of the Respondents firstly submitted that the issues raised in the writ petition are based on factual evaluation. A Writ Court in exercise of its power of judicial review cannot substitute its opinion like that of an appeal. Mr. Choudhury, the learned counsel further submitted that assessment was make lawfully in the instant case in terms of Section 8 more particularly 8(1) (b) read with Schedule III of the Act. Mr. Choudhury also submitted that taxing authority therefore rightly made the assessment and therefore there was no merit in the writ petition.

6. With a view to amalgamate, consolidate and amend the laws relating to the levy of tax on the sale or purchase of goods in the State of Assam, the Assam General Sales Tax Act, 1993 was enacted. The relevant provisions of Section 2(17), 2(33), 2(34) and explanation 2 are quoted below:

...(17) ("gross turnover") in respect of any period means the aggregate of the sale prices received or receivable or purchase prices paid or payable by the dealer in respect of all sales or purchases of goods effected by him during such period;

2(33) "sale" with all the grammatical variations and cognate expressions means any transfer of property in goods by any person for cash, deferred payment or other valuable consideration, and includes:

(i) any transfer otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;

...

...

2(34) "sale price" means:

(a) in respect of a sale falling under Sub-clause (ii) of Clause (33) the consideration received or receivable by the dealer in respect of any works contract executed or under execution by him as increased by the market price of any goods supplied or to be supplied to him free of cost or the excess of the market price over the price charged on any goods supplied or to be supplied to him at a confessional rate by the contracted or any other person for use, application or appropriation in the works contract.

Explanation - For the purposes of this sub-clause, all contracts in relation to the same works, whether between the same or different persons, shall be deemed to be single contract, and the persons, shall be deemed to be a Commissioner has served a notice of his intention so to treat him, shall be deemed to be the contractor and all the other persons shall be deemed to be sub-contractors of such contractor;

Explanation 2 - Where any goods are purchased or sold packed in containers or other packing materials of value which is small in comparison with the value of such goods or such packing is essential or customary for the purchase or sale of such goods, then notwithstanding any agreement to the contrary such container or other packing material shall be deemed to have been purchased or sold with such goods and their value, whether charged separately or not, shall be included in the purchase or sale price of such goods....

And charged to tax at the rate, if any, applicable to such goods "deleted by the Assam Act XXII of 1994 w.e.f. 6.1.1994.

Section 7(i) Subject to the other provisions of this Act every dealer liable to pay tax under any of the laws repealed by this Act shall with effect from the appointed day for the purpose of this section be liable to pay tax under this Act on all sales or purchases of goods other than goods specified in Schedule 1.

...

Section 8(1) The tax leviable u/s 7 for any year shall be charged on the taxable turnover during such year:

(a) in respect of goods specified in Schedule 11 at the first point of sale within the State at the rate or rates specified in that Schedule.

...

(b) in respect of goods specified in schedule III at the point of last sale within the State, at the rate or rates specified in that Schedule;

7. The interest is levied u/s 22 of the Act on the failure of a dealer to deposit tax within time specified by law and in default of paying the full amount of tax imposed the liability on the dealer to pay interest by operation of law. Sale under the Act means any transfer of property in goods by any person for cash, deferred payment or other valuable consideration. "Sale price" among others envisages the amount received or receivable by a dealer as valuable consideration for the sale of goods including any sum charged, whether stated separately or not for anything done by the dealer in respect of the goods at the time or before delivery thereof or undertaken to be done after delivery whether under the contract of sale or under a separate contract barring (i) the cost of outward freight, delivery or installation or interest when such cost of interest in separately charged, subject to such conditions and restriction and (ii) any sum allowed as a cash discount according to ordinary trade, practice. Explanation 1 envisioned that any tax or cess or duty, which is liable to be paid in respect of any goods before the buyer can obtain delivery and possession of such goods and all costs and expenses and charges incurred before the goods are put in deliverable state, shall not withstanding any agreement, covenant or understanding that such tax, cess, duly, cash expenses or other charges be borne or paid by the buyer or any other person, be included in the sale price. Explanation 2 embodied that where any goods are purchased or packed or sold packed in containers or other packing materials of value which is small in comparison with the value of such goods or such packing is essential or customary for the purchase or sale of such goods then notwithstanding any agreement to the contrary such container or other packing materials shall be deemed to have been purchased or sold with such goods and their value, whether charged separately or not, shall be included in the purchase or sale price of such goods. The fiction was introduced with a view to include the containers or other packing materials comprising with the goods purchased or sold to be included in purchase or sale price of such goods. If by the fiction enumerated in the explanation 2, the container or the packing material is to be reckoned to have been purchased or sold with such goods and their value is to be included in the purchase or sale price of the goods. Full effect of the legal fiction must be given effect to attain the purpose for which the fiction was created. The legislative mandate is to be given full effect to and the fiction introduced by the statute is required to be carried to its logical conclusion. In this context it is worthwhile to recall the celebrated quotation of Lord Asquith in East End Dwelling Company Ltd. v. Finsburry Borough Council reported in 1951 2 All ER 587 (House of Lords):

...If you are bidden to treat an imaginary state of affairs as real you must surely unless prohibited from doing so, also imagine as real the consequence and incidents which, if the punitive state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

8. The explanation 2 of Section 2(34) of the Act furnishes an example of legal fiction which extends the meaning of the word. The assessing authority assessed the value of the container to the best of its judgment and levied taxed thereon.

On perusal of the materials on record it thus emerges that the authorities on consideration of the available material were not persuaded with the contention of the Petitioners that the containers were not charged with any price. No materials whatsoever manner was ever produced before the taxing authority that the seller did charge only price of the goods without charging any value of the container. The burden was undoubtedly on the Assessee. A person who seeks to relieve itself from the liability of the tax imposed by law is required to prove and establish the necessary ingredients of exonerating itself from the burden of tax in the case of any doubt the benefit will go to the State since it represents the public interest. Section 10 of the Act lends supports to the view subscribed. Whether a seller charged the value of a container used in packing materials is a pure question of fact and the same cannot left to be determined by assumption and presumption. The legislature by introducing the explanation added a legal fiction. The decision in Rajsteel, followed in Vasavadatta Cements does not come to any assistance to the Petitioners.

On overall consideration of all the aspects of the matter, I do not find any merit in this petition and accordingly the writ petition is dismissed. The interim direction dated 10th March, 1997 stands dissolved.