(2001) 02 RAJ CK 0062

In the Rajasthan High Court

Case No : Civil Writ Petition No. 3468 of 1999

Black Stone Rubber Industries (P) Ltd. APPELLANT

Vs

State of Rajasthan and Another RESPONDENT

Date of Decision : 19-02-2001

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 15, 2, 3, 4
Constitution of India, 1950 — Article 269, 286, 286(1), 366
Rajasthan Sales Tax Act, 1954 — Section 2, 29, 5(3)
Rajasthan Sales Tax Act, 1994 — Section 2(38)
Rajasthan Sales Tax Rules, 1995 — Rule 29

Citation : (2001) 3 RLW 1486 : (2001) 4 WLC 101 : (2001) 3 WLN 98

Hon'ble Judges : Sunil Kumar Garg, J;Rajesh Balia and, J

Bench : Division Bench

Advocate : Rajendra Mehta and Dinesh Mehta, for the Appellant; Sanjeev Johari, for the Respondent

Judgement

Balia, J.

(1). Heard learned counsel for the parties.

(2). The petitioner Company engaged in the business of tyre retreading and incorporated under the Indian Companies Act, 1956, has challenged the notice An-nexure-7 dated 11.2.99 issued u/Sec. 29 of Rajasthan Sales Tax Act, 1954 for the period 1996-97 to be governed by the provisions of the Rajasthan Sales Tax Act, 1994 calling upon the assessee to show the details of the purchase made by him of the raw-materials whether within the State of Rajasthan or in the course of inter-State trade and commerce from outside State of Rajasthan because he intends to include cost incurred by the assessee on manufacturing the tread rubber by one of its units before it is handed over to another unit of it for utilising in re-treading of the tyres for doing job work.

(3). These notices are Annexure 6 and 7 appended to the writ petition. The assessee has filed the writ petition before the Rajasthan Taxation Tribunal challenging the said nolices on number of grounds. One of the grounds is that Explanalion 1 and 11 of Section 2(o) of the Rajaslhan Sales Tax Act, 1954 defining ''sale'' (hereinafter referred to as Act of 1954) as well as Seclion 2(38) (ii) read with Explanation II and IV of the Rajasthan Sales Tax Act, 1994 (for short Act of 1994) cannot be stretched to mean that the word ''sale'' would include inter-Stale sale. These Explanations cannot be construed to mean so as to bring the inter-State sale within the purview of the provision of the Act else it would be ultra vires the competence of the State legislature.

(4). It has been urged by the learned counsel for the petitioner that impugned notices on the face intends to include the value of all the goods involved in the execution of works contract of retreading of tyres by holding that property in goods have been passed in the form of tread rubber within the State of Rajasthan when the same were appropriated in the job work done by the assessee, irrespeclive of the fact that the raw-materials used in doing the job work, the materials used by the petitioner were chemicals and other raw-material purchased by him and it was only incidentally at intermediary stage said materials also passed through the stage of tread rubber, before job work was completed, and irrespective of the fact that the relreaded tyres in whose retreading process the material is so used moved from one State to another under the contract of job work as part of relreaded tyres. It is the value of tread rubber so coming into existence during the course of execution of works as part of the total process of retreading job which is intended to be taxed as sale within the State where the same has been appropriated.

(5). Two fold objections of the assessee to the impugned notice are : firstly that the only goods, which are involved in execution of job work of retreading and property in which can be said to have passed as such goods or in some other form are the raw-materials purchased by the petitioner. Merely because during the process of retreading such raw-material assumes some other form at intermediary stage, at which such goods become identifiable as an other marketable commodity, before retreading is complete with pasting of said material for completing the job work and the retreaded tyre is delivered to the owner, the goods in the form of the tread rubber cannot to treated as goods property in which has passed because of their involvement in execution of works contract. The goods used since the beginning stage of starting process only passes on to buyer though in some other form and he is not liable to be taxed on intermediary product but is liable to be taxed only on the value of goods purchased by him for executing his works contract which are involved in the process of complete work of retreading process and the shape or form in which such goods ultimately pass on to the buyer is irrelevant. Since he has purchased most of the goods as tax paid, he is not liable to pay any Further tax in respect thereof.

(6). On the other hand, in this regard the contention of the revenue is that the form of goods at the time of appropriation is liable to be considered as goods involved in execution of work and the valuation of goods in such form is to be considered as taxable turnover whether increased or de-creased. Therefore, what is required to be taken for the purposes of determining turnover of transfer of property in goods involved in the execution of works contract is the value of the goods as at the time of appropriation and not merely value of the initial raw-materials.

(7). So far as the question of determining the identity of goods and value of goods, property in which is transferred due to its involvement in execution of works contract is concerned, we are of the opinion that this matter pertains to investigation of the fact as well as interpretation of statute which, involves no question of jurisdiction and the Assessing Authority must be allowed to reach his own finding on such mixed questions of fact and law. Such findings are subject to be corrected if found to be erroneous through appropriate remedial forums provided under the Act. There is no reason for this Court to invoke extraordinary jurisdiction at this stage for deciding this issue on merit.

(8). So far as the other contention emanating from the notice for levying tax on the purchase of goods made by the assessee, whether within the State or from outside in the course of inter-State trade or commerce only on the basis of its appropriation within the State of Rajasthan with reference to Explanations attached to definition of ''sale'' under the Act of 1994, and competence of State legislative to enact such legal fiction is challenged, needs consideration as it requires consideration of constitutional validity of certain provisions of the Act of 199-1, which questions obviously cannot be decided by an Authority created under the Act.

(9). About Ihis part of the notice learned counsel contends that whether a particular transaction is within the State or in the course of trade or commerce is not domain of State legislature to enact and create the (ax demand by creating legal fiction, notwithstanding limits of field of its taxing authority, by defining the sale in wider terms so as to include even such purchases or sale which properly fall within the purview of inter-State trade or commerce. Such question is to be determined on the basis of law made by the Parliament in exercise of its authority under Entry 92A of the Union List of VII Schedule. The State Legislature has acted in excess of its authority under Entry 54 of List II of VII Schedule and violated legislative field covered under Entry 92A of the List I of the Seventh Schedule and Article 286 of the Constitution of India.

(10). Mr. Johari, learned counsel for the respondent joins issue with Mr. Mehta on this ground also.

(11). The relevant provision of Section 2(38) (ii)(iv) alongwith Explanation II and Explanation IV with which we are concerned reads as under:

Section 2(38): ''Sale'' with all its grammetical variations and cognate expressions means every transfer of property in goods by one person to another for cash, deferred payment or other valuable consideration and includes:-

(i).....

(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract.

(iii).....

(iv) a transfer of the right to use goods for any purpose whether or not for a specified period for cash, deferred payment or other valuable consideration.

(v).....

(vi).....

Explanation I...

Explanation II- A sale or purchase shall be deemed to take place inside the

(a) in a case falling under sub-clause (ii), if the goods are in the State at the lime of their use, application or incorporation in the execution of a works contract, notwithstanding that the agreement for the works contract has been wholly or in part entered into outside the Slate or that the goods have been wholly or in part moved from outside the State; and

(b) in a case falling under sub-clause (iv), if the goods are used by the lessee within the State, whether or not for a specified period, notwithstanding that the agreement for the lease has been made outside the State or that the goods have been moved from outside the State or the goods have been delivered to the lessee outside the Slate.

Explanation III.....

Explanation IV- Where the work under a works contract is spread over in many Slates including the State of Rajas than, the part of the work done within this State shall be deemed to be the sale made in the State, irrespective of the place of agreement for works or the point of movement of goods involved in the execution of that works contract.

(12). A perusal of the aforesaid provision goes to show that vide Clause (a) of Explanation II which concerns transfer of properly in goods involved in execution of a works contract whether as goods or in any other form it is envisaged that a sale shall be deemed to lake place within the State of Rajasthan on the basis of approbation of goods in the execution of works contracl within the State of Rajasthan notwithstanding that the agreement for the works contract has been wholly or in part entered into outside the State or the goods have been wholly or in part moved from outside the State.

(13). Likewise in the case of levy of tax under Clause (iv) of Section 2(38) on transfer of the right to use goods, similar provisions has been made in Clause (b) of Explanation II by bringing within the tax net solely on the basis of situs of use of goods within the State irrespective of the fact that agreement for the lease has been made outside the State and goods have under lease moved from outside the Slate or the goods have been delivered to the lessee outside the State.

(14). In the like manner Explanation IV envisages that where the work under a works contract is spread over in many States including the State of Rajasthan, the part of the work done within this State shall be deemed to be the sale made in the State of Rajasthan irrespective of completion of works in another State and irrespective of the place of agreement for works or the point of movemenl of goods involved in the execution of that works contract is outside the State of Rajasthan in other words where there is transfer in properly of goods involved in execution of an indivisible works contract has been subjected to tax by deeming the contract to be devisible irrespective of the fact that property in goods involved in execution of indivisible contract may pass simultaneously at one point, and the transfer of property in goods involved in execution of part of works within State of Rajasthan shall become liable to sales tax under the Rajasthan Sales Tax Act, and in such event also by dint of operation of provision of Explanatton II the goods shall become subject of charge by deeming provision, irrespective the transaction may involve such movement of goods in pursuance of the contract which brings it within the purview of inter-State trade or commerce. The sole basis thus, for subjecting to charge becomes the deemed situs of transfer of goods liberated from the provisions of Central Sales Tax Act a law made in exercise of power under Entry 92A of the Union List and Article 286 of the Constitution.

(15). It will be apposite to refer to the relevant provisions of the Constitution:

(1) Entry 54 of List 11 of VII Schedule : Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I.

(2) Entry 92A of List I of VII Schedule : Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade and commerce.

(3) Article 286: (1) No law of State shall impose, or authorise me 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.

(2) Parliament may be law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).

(3) Any law of a State shall, in so far as it imposes, or authorises the imposition-
(a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce; or

(b) a tax on the sale or purchase of goods being a tax of the nature referred to in sub-clause (b), sub-clause (c) or sub- clause (d) of clause (29A) of Article, 366, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of tax as Parliament may by law specify.

(16). It is not disputed and cannot be doubted that so far as the competence of State Legislature to impose tax on sale or purchase of goods is concerned flows from Entry 54 of List II (State List) of 7th Schedule of the Constitution. The said entry explicitly excludes from the purview of State Legislation which fall to be within the purview of Parliament under Entry 92-A of List I (Union List). Entry 92-A reserves for the Parliament to enact any law for imposition of tax on sale or purchase of goods in the course of inter-State trade or commerce. Therefore, on the plain reading of the limits of the respective field of legislation by Parliament and State Legislatures, there cannot be any hesitation in coming to the conclusion that enactment of the State Legislation to make mere place of use of goods in works contract within State subject to tax, notwithstanding on the principles governing the inter-State trade or commerce which is laid by the Central Legislation falls within that category is beyond its authority. The State Govt. cannot by making deeming provisions elarge field of the imposition of levy made by it so as to include such transaction which legitimately fall within the purview of inter-State trade or commerce. Authority to impose and collect such tax vest with the Parliament and it is also exclusively for the Parliament to lay down principle for determining when the sale or purchase is to take place in the course of inter-State trade or commerce, outside State or in the course of export or import. Such levy is governed by Centra! Sales Tax Act, 1954, which also lays down the criterion on the basis of which any particular transaction can be treated as sale or purchase made in the course of inter-State trade or commerce and it also provides for situs of sale is to be taken tested on this touch stone. That is clear purport of Art, 286 and Entry 92A of Union List to which Entry 54 of the State List is subject to.

(17). So far as Explanation II is concerned it has already received the attention of the Courts.

(18). In Cannon Dunkerley & Co. vs. State of Rajasthan (1), Section 5(3) of the Rajasthan Sales Tax Act, 1954 was put to test. Sub-section (3) of Section 5 of the Rajasthan Act, 1954 since repealed as under:

"(3) Notwithstanding anything contained in this Act, in the case of a works contract, the turnover of such contract shall be subjected to tax:

Provided that such deductions, as may be prescribed, may be allowed to a contractor while determining his tax liability."

(19). The term ''sale'' was defined u/S. 2(o) of the Act of 1954 as under:

(o) ''sale'' with all its grammetical variations and cognale expressions, means every transfer of the properly in goods (other than by way of mortgage, hypothecation, charge or pledge) by one person to another for cash or deferred payment or other valuable consideration and includes:

(i) ....

(ii) .....

(iii) .....

(iv).....

(v)....

(vi) ....

The expression "turnover" is defined in clause (1) as under:

(I) "turnover" means the aggregate amount of sale prices received or receivable for a sale, transfer, delivery or supply by a dealer in any of the way.

(20). The Apex Court taking into consideration the relevant provisions of the Rajasthan Sales Tax Act, 1954 in defining taxable turnover and sub-rule (2) of Rule 29 and sub-section (2) of Section 7 permitting deduction at source the fixed percentage from the payments made to a contractor enunciated the principle that legislative power of the State Legislations under Entry 54 of the State List is subject to two limitations -one flowing from the entry itself which makes the said power "subject to the provisions of Entry 92-A of the List I", and the other flowing from the prohibition contained in Article 286. Under Entry 92-A of List 1 Parliament has the power to make a law in respect of taxes on sale or purchase of goods other than newspapers where such sale or purchase takes place in the course of inter-State trade or commerce. The levy and collection of such tax is governed by Arlicle 269. This shows that the legislative power under Entry 54 of the State List is not available in respect of transactions of sale or purchase which takes place in the course of inter-State trade or commerce. Similarly Article 286(1) prohibits the State from making a law imposing or authorising 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 goods into or export of the goods out of the territory of India. As a result of the said provision, the legislative power conferred under En try 54 of the State List does not extend to imposing tax on a sale or purchase of goods which takes place outside the State or which takes place in the course of import or export of goods. In view of the aforesaid limitations imposed by the Constitution on the legislative power of the States under Entry 54 of the State List, it is beyond the competence of the State Legislature to make a law imposing or authorising the imposition of a tax on transfer of properly in goods involved in the execution of a works contract, with the aid of sub-clause (b) of clause (29-A) of Arlicle 366, in respect of transactions which take place in the course of inter-Slate trade or commerce or transactions which constitute sales outside the State or sales in the course of import or export. Consequently, it is not permissible for a State Legislature to frame the legislative enactment in exercise of the legislative power conferred by

Entry 54 in State List in such a manner as to assume the power to impose tax on such transactions and thereby transgress these constitutional limitations......The absence of any amendment in the definition of "sale" contained in Section 2(g) of the Central Sales Tax Act, 1956, so as to include transfer of property in goods involved in the execution of a works contract does not in any way affect the applicability of the sections 3, 4 and 5 and Sections 14 and 15 to such transfers.

(21). With this premise the Court further held:

"The question whether a deemed sale resulting from transfer of property in goods involved in the execution of a particular works contract amounls to a sale in the course of inter-State trade or commerce u/s 3 of the Central Sales Tax Act or an outside sale u/s 4 or a sale in the course of import u/s 5 has to be decided in the light of the particular terms of the works contract and it cannot be decided in the abstract."

So far as sales in the course of inter-State trade or commerce are concerned, the position is well settled that the situs of the sale or purchase is wholly irrelevant as regards its inter-State character. The location of the situs of the sale in sales lax legislation of the State would, therefore, have no bearing on the chargeability of tax on sales in the course of inter-State trade or commerce since they fall outside the field of legislative competence of the State Legislatures and will have to be excluded while assessing the tax liability under the State Legislation. The same is true of sales which are outside the State and sales in the course of import and export. The State Legislature cannot so frame its law as to convert an outside sale or a sale in the course of import and export into a sale inside the State. The question whether a sale is an outside sale or a sale inside the State or whether it is a sale in the course of impor! or export will have to be determined in accordance with the principles contained in sections 4 and 5 of the Central Sales Tax Act and the State Legislature while enacting the sale tax legislation for the State cannot make a departure from those principles."

(22). Applying these principles Section 5(3) of the Act of 1991 was held to be ultra vires by holding that Section 5(3) of the Rajasthan Sales Tax Act, 1954, transgresses the limits of the legislative power conferred on the Slate Legislature under Entry 54 of the State List inasmuch as it enables lax being imposed on de''emed sales resulting from transfer of property in goods whether as goods or in some other form involved in the execution of a work contract which takes place in course of inter-State trade or commerce, or which takes place outside the State or which take place in the course of import and export within the meaning of Secs. 3, 4 and 5, respectively of the Central Sales Tax Act and it does not take into account the conditions and restrictions imposed by Sec, 15 of the Central Sales Tax Act on goods declared to be of special importance in inter-State trade or commerce u/s 14 of the Central Sales Tax Act.

(23). On these principles clause (i) of Rule 29 of the Rajasthan Sales Tax Rules was also declared to be unconstitutional and void.

(24). These principles were again applied by the Apex Court while considering the validity of clause (b) of Explanation 2 of Section 2(38)(iv) to be not applicable because of the legislative incompentence of the State to legislate in that regard. In 20th Century Finance Corpn. Ltd. vs. State of Maharashtra (2), the Court was unanimous in its conclusion that through the said Explanation the definition of "sale" is enlarged and it includes sales outside the State or sales which are inter-State sates have been made chargeable if the goods are used within the State. Therefore the said Explanation is in excess of legislative power under Entry 54 of List II of the Seventh Schedule. There was difference of opinion on another issue with which we are not concerned here. To accord with conclusion that the provision in Explanation 11 was in excess of legislative competence of the State leading judgment contained direction that the Explanation II(b) of Section 2(38)(iv) shall be read down to this effect that it would not be applicable to the transaction of the transfer of right to use any goods if such deemed sale is (i) an outside sale, (ii) sale in course of the import of the goods into or export of the goods out of the territory of India and (iii) an inter-State sale.

(25). The other judgment too held the provision to be ultra vires the legislative competence of State Legislation, The result was that the provision of Explanation stood nullified unanimously.

(26). Following the aforesaid two decisions, this Court has struck down clause (a) of Explanation II of Sec. 2(38) for the very same reason that the definition of sale by dint of clause (a) of Explanation II of Section 2(38) has been enlarged to include sales outside the State or sales which are inter-State trade or commerce or sales in the course of export or import has been made chargeable on the basis of being their user within the State irrespective of the provisions of the Central Sales Tax Act, 1954 in that regard.

(27). The purport of Explanation IV in our opinion is no different from the purpose of Explanation II which has already received judicial interpretation to fall outside the legislative competence of the State Legislature. Explanation IV of Section 2(38) also brings the part of execution of works within the ambit of definition of sale without the sale being an independent contract or devisable from the main contract solely on the basis of execution of part of contract within the State of Rajasthan and appropriation of some of the goods involved in execution of works contract within the State without reference to the provisions of Central Sales Tax Act on determining the transaction of transfer of property of goods in the execution of such contracts on the anvil of Secs.3, 4 and 5 of the Central Sales Tax Act, 1954 and irrespective of fact whether in pursuance of agreement for works contract the goods involved in execution of works contract whether as goods or in some other form moves from one State to another. In our opinion the Explanation IV is also inflicted with the vice of beyond competence of State Legislature for the same reason for which Explanation II has been held to be ultra vires.

(28). To the extent the impugned notice requires the petitioner- dealer to show cause against the proposed inclusion of sales or purchase of raw-material in the taxable turnover solely on the basis of situs of its appropriation within the State of Rajasthan cannot be held to be valid and the question of nature of transfer of properly in goods involved in execution of works must be determined in accordance with provision of Central Sales Tax Act particularly Sections 3, 4, 5 and 15 of that Act.

(29). Moreover it is to be kept in mind what is envisaged under levy of tax on transfer of properly in goods involved in execution of works is not on the basis of form in which goods pass on to buyer, but on the value of goods involved in execution of works, notwithstanding the goods involved in such execution may change their shape and form when the property passes from seller to buyer.

(30). We may clarity that provision of the Act referred in the notice is to Explanation IV but primary it appears to be an intent to invoke clause (a) of Explanation II to Section 2(38) which already stands declared ultra vires by the decision in M/s. Triveni Engineering 7 Industries Ltd. vs. State of Rajasthan & Ors. (3). Even in determining the turnover with reference to deemed sale within State of Rajasthan clause (a) of Explanation II is to be invoked inherenlly.

(31). As a result this petition is partly allowed. The impugned notices to that extent it proposes to include the value of goods involved in the execution of works contract within the taxable turnover by invoking Explanalion II/IV to Section 2(38) of Rajasthan Sales Tax Act, 1994 is concerned is held lo be ultra vires. The Assessing Officer is Free to decide the question the value of goods involved in execution of works contract and property in which has been transferred in the execution of works contracts for the purpose of levy under the Rajasthan Sales Tax Act. Such value has to be determined only to the extent such transaction falls within the legislative competence of State, by applying the principle governing the determination of nature of transaction falling in the category of saies (i) outside State or (ii) in the course of inter-State trade or commerce or (iii) in the course of export or import outside India only in accordance with the provision of Central Sales Tax Act and without reference to Explanation II and IV to Section 2(38) of the Act of 1994.

(32). There shall be no order as to costs.

