
(1993) 04 OHC CK 0017
In the Orissa High Court
Case No : O.J.C. No. 641 of 1987

Brajendra Misra

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 28-04-1993

Acts Referred:

Constitution of India, 1950 — Article 226
Orissa Sales Tax Act, 1947 — Section 13AA

Citation : (1993) 2 OLR 87

Hon'ble Judges : G.B. Pattnaik, J;B.N. Dash, J

Bench : Division Bench

Advocate : I. Mohanty, for the Appellant; Standing Counsel (C.T.), for the Respondent

Judgement

G.B. Pattnaik, J.—The constitutional validity of Section 13-AA of the Orissa Sales Tax Act, 1947, has been challenged in this writ application. Under the said provision, a person who is responsible for paying any sum to a contractor for carrying out any works contract is liable to deduct an amount towards sales-tax equal to two per cent of such sum in respect of the works contract at the time of making the payment in question and the said deducting authority is required to grant a certificate to the contractor in the form prescribed and send a copy thereof to the Sales-Tax Officer within whose jurisdiction the works contract is executed. The deduction in question will be adjusted by the Sales-Tax Officer towards the sales-tax liability of the contractor. Contravention of the provision authorises the Sales-Tax Officer to impose penalty not exceeding twice the amount required to be deducted by the person responsible for making the payment to the contractor and deduction therefrom. For a proper appreciation of the grounds of challenge, it is appropriate to extract the provision of Section 13-AA ?1 ;the Orissa Sales-Tax Act in extenso :

" 13-AA. Deduction of tax at source from the payment to works contractors.

(1) Notwithstanding anything contained in Section 13 or any other law or

contract to the contrary, any person responsible for paying any sum to any contractor for carrying out any works contract in pursuance of a contract between the contractor and-

(a) Central Government or any State Government, or

(b) any local authority, or

(c) any authority or Corporation established by or under a statute, or

(d) any company incorporated under the Companies Act, 1956 including any State or Central Government undertaking, or

(e) any Co-operative Society or any other Association registered under the Societies Registration Act, 1860, shall at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or any other mode, whichever is earlier, deduct an amount towards sales tax equal to two per centum of such sum in respect of the works contract :

Provided that if the value of the works contract does not exceed rupees one lakh, no such deduction shall be made.

(2) While making deduction as referred to in Sub-section (1), the deducting authority shall grant a certificate to the contractor in the form prescribed and shall send a copy thereof to the Sales- Tax Officer within whose jurisdiction the works-contract is executed.

(3) The amount deducted from the Bills or invoices shall be deposited into the Government Treasury within one week from the date of deduction in such form or challan as may be prescribed.

(4) Such deposit into the Treasury shall be adjusted by the Sales Tax Officer towards the sales tax liability of the works contractor and would also constitute a good and sufficient discharge of the liability of the deducting authority to the contractor to the extent of the amount deposited.

(5) If any person contravenes the provisions of Sub-section (1) or Sub-section (2) or Sub-section (3) of this section, the Sales Tax Officer shall, after giving him an opportunity of being heard, by an order in writing, impose on such person penalty not exceeding twice the amount required to be deducted and deposited by him into Government Treasury."

2. The power to levy sales-tax has been conferred upon the State Legislature under Entry 54 of the State List. By the 4th amendment of the Constitution introducing Clause (29-A)(b) in Art. 366 of the Constitution, it became 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, but that power is subject to the restrictions and conditions mentioned in Art. 286 of the Constitution, as has been held by the Supreme Court in the case of Builders

Association of India and Others Vs. Union of India (UOI) and Others, . In the Builders Association case, the Supreme Court rejected the plea of the State Governments that the 46th Amendment of the Constitution has 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 and the Apex Court decided that the 46th, Amendment does no more than making it possible for- the States to levy sales-tax on the price pf goods and materials used in works contracts as if there was a sale of such goods and materials: The Court, therefore, finally observed :

"...As the Constitution exists today the power of the States to levy tax on sales and purchases of goods under Cl. (29-A) of Art. 366 is to be found only in Entry 54 and not outside it..."

The Supreme Court, therefore, declared that the sales-tax laws passed by the Legislature of the States levying tax 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 Art. 236 of the Constitution.

3. Mr. Mohanty, the learned counsel for the petitioner, in assailing the constitutional validity of v. 13-AA contends that the very fact that no attempt has been made to make any classification and no power has been conferred upon the authority on whom the liability to deduct tax from the sum payable to the contractor to decide whether the impugned transaction is liable for levy of sales tax, infringes the equality clause in Art. 14 and makes the provision confiscatory in character and effect and, therefore, the provision is liable to be struck down. He further contends that while u/s 5(2)(AA) "taxable turnover" in respect of works contract has been defined to be "the gross value received or receivable by a dealer for carrying out such contract, less the amount of labour charges and service charges incurred for the execution of the contract", but u/s 13-AA, there is no provision or mechanism to take into consideration the provisions of Section 52(AA) and in effect, therefore, even in case of a purely labour contract where no tax would be ultimately payable in view of the definition of "works contract" in Sec, 5(2)(AA)(i), but yet, there will be deduction at the rate of two per cent by the concerned authority while making a payment as provided in Section 13-AA. Such a confiscatory provision is, therefore, unconstitutional and cannot be sustained.

The learned Standing Counsel appearing for the Department, on the other hand, contends that Section 13-AA undoubtedly has not made any provision at the time of deducting two per cent from out of the sum to be paid to the contractor to take into consideration the labour charges and service charges, but that does not make the provision unconstitutional as the deduction in question is in the nature of an advance tax which is to be adjusted finally deciding the ultimate liability of the dealer. He further contends that the fact that Sub-section (4) of Section 13-AA indicated that the deduction in question is towards the sales-tax liability of

the works contractor, it must be held that the question of deduction would arise only when the transaction constitutes a sale and therefore, the provision cannot be said to be confiscatory in nature.

The rival contentions require a careful examination of the provisions in question as well as the points urged by the counsel for parties.

4. In view of the decision of the Apex Court in Builders Association case (supra) a "works contract" in which transfer of property in goods takes place is liable to be taxed is not in dispute. But the question that arises for consideration is whether by conferring power on the person who has to make payments to the contractor to deduct two per cent from the sum due where the contract relates to a works contract can be said to be violative of Art. 14 as it infringes the equality clause. It is well settled in view of the decision of the Supreme Court in the case of Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another, that the Courts are not concerned with the policy underlying a taxing statute, but at the same time a taxing statute is not wholly immune from attack at the ground that it infringes the equality clause in Art. 14. In view of the limitations contained in Art. 265 of the Constitution of the taxing power of the State, the State is not empowered to levy or collect a tax except by authority of law. In other words, tax proposed to be levied must be within the legislative competence of the Legislature imposing tax and authorising the collection thereof, In determining the question of validity or otherwise of a taxing statute, the Court will not strike down the law merely because no classification appears on the face of the statute, but on the other hand, the Court may examine and ascertain if the statute has laid down any principle or policy for the guidance for the exercise of discretion by the appropriate authority in the matter of selection or classification and if on such examination, the Court comes to the conclusion that no principle or policy for guiding the exercise of the discretion has been laid down, then there would be no other option to strike down the provision. If Section 13-AA is examined from the aforesaid stand-point, there cannot be two opinions that it does not provide any mechanism to exclude a transaction from its purview, even if ultimately the transaction is not at all liable to levy of sales tax. In other words, even in case of a pure simple labour contract or service contract where question of sale will not arise, yet the person responsible for making any payment to the contractor has no other option than to deduct two per cent of such sum towards sales-tax. Thus though a transaction which may not be "sale" at all liable for levy of sales-tax, yet in respect of the said transaction power has been conferred to make deduction of two per cent from the amount which should be paid. In the absence of any discretion with the authority or in the absence of any mechanism by which the contractor can approach any authority and obtain a certificate to the effect that the transaction does not amount to sale, deduction of two per cent from the amount due cannot but be held to be grossly discriminatory and confiscatory in nature and therefore, the same must be struck down.

5. If the provision of Section 13-AA of the Orissa Sales Tax Act is compared and

examined in relation to Sec 194-C of the Income Tax Act, it would appear that under the Income Tax Act also a similar provision has been made to deduct an amount equal to two per cent of such sum as Income Tax on income comprised therein. In fact, Sec, 13-AA of the Orissa Sales Tax Act is identically worded as Section 194-C of the Income Tax Act. But under the Income Tax Act, provision has been engrafted in Sub-section (4) of Section 194-C conferring power on the Assessing Officer to give a certificate to the contractor on an application being made by him to the effect that either the deduction of Income Tax in his case should be at a lower rate or that there should be no deduction at all, as would be appropriate, and on production of such certificate, the person responsible for deducting two per cent under Sub-section (1) is not entitled to deduct or deduct at the rate specified in the certificate until the certificate is cancelled by the Assessing Officer. Thus, adequate safeguard has been taken by the Legislature by which Government while enacting Income Tax Act would provide for remedies so that deduction u/s 194-C(1) may not become confiscatory in nature. But under the Orissa Sales Tax Act in absence of any such provision and by conferring arbitrary, unbridled and unchannellized power on the person concerned, to deduct two per cent from the sum payable to the contractor irrespective of the question whether ultimately the transaction is liable for payment of any sales-tax at all or not, cannot be held to be a levy of tax under any valid legal provision. It is no doubt true that the said deduction of two per cent u/s 13-AA is to be ultimately adjusted where the transaction in question is liable for levy of sales-tax, but where the transaction is not at all liable for levy of sales-tax, there the question of adjustment would not arise and, therefore, the said deduction would be confiscatory in character and effect and cannot be held to be a valid provision within the legislative competence of the Legislature imposing a tax and authorising the collection thereof. The impugned provision, therefore is liable to be struck down.

6. The constitutional validity of a statute has to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed and if so judged, it does not pass the test of constitutionality, it cannot be pronounced valid, merely because it is administered in a manner which might not conflict with the constitutional requirements. The argument of the learned Standing Counsel that the provisions of Section 13-AA must be read down and it must be held that "where the transaction is not at all liable for levy of sales-tax, the question of deduction will not arise", is difficult to be accepted, as Sec, 13-AA is not susceptible of any reading down of the provision. It is a well known construction of interpretation of statutes that the Court will not be justified in re-enacting a legislation. A bare reading of Section 13-AA makes it explicitly clear that the amplitude of the incidence of tax had been widened so as to include transactions which are outside the sphere of taxation available to the State Legislature under Entry-54, inasmuch as even in respect of a purely labour contract or service charges, Section 13-AA authorises deduction of two per cent from the bills of the contractor. Such a provision cannot but be held to be

unconstitutional and void. We, accordingly, strike down Section 13-AA of the Orissa Sales Tax Act as unconstitutional.

7. The writ application is allowed. There will, however, be no order as to costs.

B.N. Dash, J.

8. I agree.