
(2010) 01 RAJ CK 0087
In the Rajasthan High Court

C.T.O.	Vs	APPELLANT
D.N. Steels		RESPONDENT

Date of Decision : 22-01-2010

Acts Referred:

Rajasthan Sales Tax Act, 1994 — Section 40

Citation : (2010) 2 WLN 309

Hon'ble Judges : Vineet Kothari, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Vineet Kothari, J.—The Jodhpur Vidhyut Vitran Nigam Limited (for JVVNL) put up on auction its 3 x 3 MW power plant, by auction notice somewhere in the year 2001 and the respondent - assessee being highest bidder purchased the said old unserviceable power plant which had been closed by the JVVNL (erstwhile RSEB) about 13 years back in the said auction and the controversy which is in hand in the present revision petition filed by the Revenue is that what is the rate of sales tax application to such auction price received by the JVVNL on the sale of said unserviceable power plant. The case of Revenue is that the said commodity, namely, the power plant was sold on "as is where is basis" and therefore, it was a sale of "plant and machinery" attracting 12% rate of tax and 15% surcharge thereon, whereas the case of the respondent-assessee is that it was taxable as "iron and steel scrap" attracting only 4% rate of tax.

2. The respondent-assessee appears to have approached the Commissioner, Commercial Taxes in this regard by way of an application u/s 40 of the RST Act, 1994 dtd. 19.10.001, which empowers the learned Commissioner to decide the disputed questions about the rate of tax applicable on a particular commodity, who vide his order dtd. 22.1.2002 decided the question against the respondent-assessee and held that the commodity sold in auction by JVVNL was plant and machinery like steam turbine, alternator, boiler, chimney, hoppers and crane etc. Which on taken together was power plant and attracted rate of tax @ 12% and

15% surcharge therein.

3. The respondent-assessee being aggrieved by the said order of the learned Commissioner approached the Rajasthan Tax Board, Ajmer who vide its impugned order dtd. 23.1.2003 held in favour of the assessee that the sale in question was that of "iron and steel scrap" as power plant in question was old and unserviceable and the respondent-assessee had to dismantle the same and take it away as iron and steel scrap only. The learned Tax Board also noticed that the respondent-assessee was a registered dealer of iron and steel scrap only and was not a dealer of plant and machinery including power plant. Relying on certain decision of the Hon"ble Supreme Court and other High Courts, the Tax Board held that such auction attracted rate of tax at 4% only and not 12% as contended by the Reenue. In respect of certain items like 20 MT Crane, 11 KV OCB and 300 MT Coal, the Tax Board however, held that since the JVVNL had not issued any certificate, the same would be taxable @ 12% only. However, there is no further challenge in respect of these items from the side of the respondent-assessee and therefore, it is not the question involved in the present revision petition filed by the Revenue.

4. Mr. V.K. Mathur and Mr. Lokesh Mathur, learned counsels appearing for the Revenue vehemently submitted that the auction terms were very clear in this regard and all the clauses of said auction notice made it clear that said power plant was sold on "as is where is basis" as power plant itself and was not sold as scrap. The fact of it being old or being not in running condition accordingly to the learned counsel, was immaterial and if the commodity was sold as plant and machinery, the fact that the assessee had to dismantle the same did not affect the levy of sales tax @ 12% which was applicable on sale of plant and machinery. The learned Counsel for the Revenue has further made following submissions:

i) The learned Additional Commissioner in his order dtd. 22.1.2002 has stated that in the auction notice the goods that were supposed to be auctioned were described as "steam turbine and alternator (stall make) and John Thompson Boilers and related accessories" and nowhere the word "scrap" has been used. Therefore, it cannot be said that there was a sale of scrap.

ii) The sale has not been made on the basis of weight which would make the goods which were sold to fall under the category of scrap.

iii) The condition No. 5 of the terms and conditions of the auction clearly stated that sales tax @ 12% and u surcharge @ 15% would be charged on the sale of power plant.

iv) Merely because the purchaser intends to use the components of said power plant as scrap it would not entitle him to pay tax as applicable on the sale of scrap as it is well settled proposition of law that rate of tax would not depend upon the use, an item is put to but only on the true nature and property of that particular item. In the instant matter, the goods that were sold were components

of power plant and nowhere it has come on record that the said goods were in nature of a scrap.

5. The learned Counsel for the petitioner-Revenue further relied upon the following judgments in support of their contentions:

i) Commissioner of Sales Tax Vs. Indian Metal Traders, of the judgment, the Hon"ble Bombay High Court held as under:

The mere fact that the respondents had purchased the said ship for the purpose of breaking and scrapping the same would, in our opinion, not convert the ship into scrap. There is nothing on record to show that the said ship had become unserviceable or had been condemned. As we are of the view that there is nothing to on the record show that the said ship was purchased as scrap or had become unserviceable and on the other hand the evidence brought on record shows that it was purchased as a ship.

ii) Commissioner of Sales Tax, Gujarat v. Bharat Iron and Brass foundaries reported in Commissioner of Sales Tax, Gujarat Vs. Bharat Iron and Brass Foundries, From para 12 of the judgment of the Hon"ble Gujarat High Court, the learned Counsel quoted as under:

As a matter of fact, the old machinery and its spare parts, which have been purchased by the assessee are actually used by the assessee itself for melting and recasting. They have been sold like that by the vendor of the assessee. It is an admitted fact that these articles have been purchased and sold on the basis of their weight and not on the basis of their utility as machinery.

Learned Counsel for the Revenue therefore urged that the facts and circumstances of the aforesaid case are clearly distinguishable from the present case as firstly in the present case the sale was of power plant and not of scrap and secondly the goods were not sold on the basis of weight.

iii) Chitrahah Traders and Neyveli Lignite Corporation Limited Vs. The Commissioner of Commercial Taxes, The Commercial Tax Officer and The Commercial Tax Officer (FAC), of the said judgment, the Madras High Court held as under:

27. The learned Special Government Pleader also referred to tho judgment of the Supreme Court in Rainbow Steels Ltd. and Anr. v. The Commissioner of Sales Tax, U.P. and Anr. (1980) 47 STC 298 SC. In that case, the question came of for consideration was sale of an old thermal power plant, which, at the time of sale by the vendor, was in perfect running condition and therefore, the sale at that time cannot make the consignment a scrap. There, the question that was considered was, what was the definition of the term "old machinery" and it was held that the meaning should be restricted since it is analogous to expressions like, discarded, unserviceable or obsolete. I do no think that this case is of any assistance to the respondents.

28. Ultimately, the goods being what they are, is a real test and labelling it in one way or the other cannot help either side. In the present case, B & C Plant had become unusable and the factory had been closed and the factory licence had been surrendered and it had been sold only with the condition that the purchaser will dismantle and sell it. The fact that it is described as B & C Plant and Machinery will in no way, make it either as a plant in running condition or the plant should be shifted to any other place for use. The intention of the parties was to sell it only as a scrap and even in the Gate Pass, it is described only as a scrap. Further, the authorities themselves have initially directed that it was taxable at 4% and accordingly, the parties have also paid that amount. Thereafter, without there being any real basis to describe it as first sale, to refuse to accept it as scrap by the impugned order is clearly impermissible and contrary to the dictum of this Court in *Raman & Co.'s case* (cited *supra*), which was also affirmed by the Supreme Court.

29. In the light of the same, both the writ petitioner will stand allowed as prayed for and the respondents are hereby directed to restore the tax at 4% and refund the balance to the appropriate parties. This exercise shall be undertaken within a period of eight weeks from the date of receipt of a copy of this order. The parties are directed to bear their own costs. Connected Miscellaneous Petition will stand closed.

Though this judgment is apparently in favour of the respondent-assessee, the learned Counsel for the Revenue however, relied upon the same. This Court does not find any ground in the said cited judgment to support the contention of the learned Counsel for the Revenue.

6. The learned Counsel for the Revenue sought to distinguish the judgment of the Hon'ble Supreme Court in the case of *Rainbow Steels Ltd. Muzaffarnagar and Birla Cotton Spinning and Weaving Mills Ltd., Delhi Vs. C.S.T., U.P. and State of U.P.*, by submitting that in the said matter, the Hon'ble Supreme Court of India while interpreting a particular notification held that word "old" has to be read in restricted sense as analogous to "discarded" "unserviceable" or obsolete. In para 7 of the judgment, the Hon'ble Supreme Court has held as under:

In other words in order to fall within the expression "old machinery" occurring in the entry, the machinery must be old machinery in the sense that it has become non-functional or non-usable.

7. Therefore, that case was for interpretation of a particular entry in the notification and would not help the assessee in contending that since the power plant was old it has to be treated as discarded in as much as in the present case there was no evidence to come to the conclusion that the power plant is discarded as the components such as steam turbine and boilers could have been used again in plant. That case was in particular facts and circumstances.

8. On the other hand, Mr. Vikas Balia, learned Counsel appearing for the respondent-assessee submitted that the JVVNL itself had admitted in its letter

dtd. 12.10.2001, which was taken note of by the learned Tax Board also in support of the respondent assessee and in which JVVNL clearly admitted that the aforesaid 3x3 MW power plant and machinery was old and unserviceable power plant and the said plant was brought to shut down during the year 1985 and since then it was not used for generation of electricity. The said letter of Zonal Chief Engineer also permitted the respondent assessee to take away the plant and machinery in any form he desired to do so as already announced before auction. The said letter of Zonal Chief Engineer also clarified that though rate of tax announced at the time of auction was stated to be 12%, but if the assessee brought clarification from the Sales Tax Department, the rate of tax would be charged as certified by the Sales Tax Department. Clause 5 of the auction notice was also amended at the time of auction and in place of words " sales tax as applicable at the relevant time" the words." sales tax as acceptable to Sales Tax Department" were substituted.

9. The learned Counsel for the respondent-assessee, therefore, submitted that admittedly, the JVVNL had sold old and unserviceable power plant closed down 15 years back and the respondent-assessee being registered dealer of the scrap only under the Sales Tax Law with the assessing authority, intended to buy the same only as iron and steel scrap and the assessee was not a dealer of plant and machinery or power plant as such vide its registration certificate under the Sales Tax Law and, therefore, could never intend to purchase the same for resale as power plant. He submitted that the rate of tax applicable on iron and steel scrap is admittedly 4% only and therefore, submitted that the learned Commissioner, Commercial Taxes has clearly erred in deciding the question u/s 40 of the Act against the respondent-assessee and holding that the rate of tax applicable would be 12% including surcharge thereon. Lastly he submitted that the Tax Board was justified in allowing the appeal of the assessee and the present revision petition filed by the Revenue is without any merit and the same deserves to be dismissed.

10. The learned Counsel for the respondent-assessee relied upon the following judgments in support of his submissions:

i) Commissioner of Sales Tax, Gujarat Vs. Bharat Iron and Brass Foundries, of the said judgment, Gujarat High Court held as under:

12. It is an admitted position that the articles which were purchased by the assessee and on which the tax is paid at the time of said purchase, are old and unserviceable machinery and its spare parts. Now in order to bring these articles within the purview of entry 3 of Schedule B, two things are required to be proved: 1) that the goods in question were of iron and steel and (2) that the amount to "scrap". If these two ingredients are satisfied then the goods can be said to be iron scrap or steel scrap, as contemplated by the entry. So far as the first requirement is concerned, we find that at no stage of the proceedings before the Sales Tax Officer, Assistant Commissioner or the Tribunal, it was contended that the goods in question were not made of iron and steel. The only contention

which is found to have been raised by the assessee before the lower authorities as well as the Tribunal was whether they amounted to "scrap" or not. Under the circumstances, we propose to decide this reference on the hypothesis that the goods were of iron and steel. If that is so, the only question which we are called to consider is whether they amounted to "scrap" as contemplated by entry 3. On this question, Shir Pathak, who appeared on behalf of the assessee-opponent, contended that the work "scrap" connotes broken parts of machinery and not the machinery, which is found to be unserviceable as machinery. In other words, his contention was that if it is found that the machinery is for same reason not useful as machinery and, therefore, if it is sold away by weight not on the basis that it is machinery, but on the basis that it is an old useless article of machinery, it would not amount to "scrap" as contemplated by entry 3. We find that this argument is not acceptable. In this connection, we may refer to the dictionary meaning of the word "scrap", which is found in Webster's Dictionary at page 1626. On that page, the dictionary gives 8 different meanings which can be attributed to this word. Out of these eight meanings, only the following are relevant for the purpose of this reference:

- (1) a small piece; a little bit; a fragment; as scraps of meat,
- (2) discarded metal in the form of machinery, auto parts etc; suitable only for reprocessing.

"Scrap" as adjective is defined in this dictionary as "in the form of fragments, pieces, odds and ends, or left-overs, used and discarded."

It is thus evident from these dictionary meanings that broken parts or fragments of a machinery would undoubtedly be considered as "scrap". But the contention of Shri Pathak is that if an old and unserviceable machinery is not broken up or dismantled and is found in its original shape then it would not be covered by the meaning of the word "scrap". We, however, find that this contention is not acceptable because one of the dictionary meanings of the word "scrap" is that it is a discarded metal in the form of a machinery and suitable only for the purpose of reprocessing. Reprocessing here refers to the word "metal" and, therefore, the use to which it can be put is the use as a "material" for the purpose of reprocessing or manufacturing some other article. As a matter of fact, the old machinery and its spare parts, which have been purchased by the assessee, are actually used by the assessee itself for melting and recasting. They have been sold also like that by the vendor of the assessee. It is an admitted fact that these articles have been purchased and sold on the basis of their weight and not on the basis of their utility as machinery. Under the circumstances, we find that discarded machinery of this type which is suitable only for reprocessing or manufacturing some other materials, is scrap within the meaning of entry 3 of Schedule B.

13. Shri Pathak however contended that while appreciating whether this machinery and spare parts amount to "scrap" or not, we should apply the

common parlance test, which was applied by the Supreme Court in *Ramavatar Budhaiprasad v. The Assistant Sales Tax Officer, Akola*. We find that even if this test is applied, the case of the assessee does not improve. Applying this test the question is what is meant by the word "Scrap" in common parlance or what by the persons, who are usually associated with "scrap" of unserviceable machinery meant when they use the word "scrap" in relation to the said machinery. We are of the opinion that the machinery which is totally unserviceable as such, is referred to even in common parlance as "scrap". A piece of machinery, which is admittedly unserviceable and which cannot be put to any use even after some repairs, is always referred to as "scrap" in common parlance. When every hope of putting it to its original use even after repair is given up, the only use to which it can be put to use is as a "scrap". Therefore, when such machinery is made of some metal, it is purchased not as machinery but as metal and is also put to use as metal simpliciter. Speaking of the facts of this case, the old machinery and spare parts on which the assessee is found to have paid tax, at the time of their purchase have actually been put to use as metal and not as machinery because it is an admitted position that they have been melted and recast. Under the circumstances even applying the common parlance test, machinery which is totally unserviceable as machinery can be treated as scrap.

ii) *The State of Madras v. Raman & Co. and Ors.* (1974) 33 STC 1. In the said case, the Hon'ble Madras High Court has held as under: (From the Head Note)

The assessee, a dealer in scrap iron, purchased in auction condemned railway coaches sold by the railway department and also component of Nissen huts sold by the Director of Supplies and Disposals. The assessee later dismantled the condemned railway coaches as also the Nissen huts and sold the resultant timber and iron material in bulk. The question for consideration was whether the sale of scrap by the assessee was the first sale taxable under the provisions of the Madras General Sales Tax Act, 1959, as contended by the revenue, or whether it was a second sale exempted from tax as contended by the assessee. The assessee's contention was upheld by the Tribunal. On a revision to the High Court:

Held, that though the sales by the railways and the Director of Supplies and Disposals were not sales of scrap iron as such, the intention of the sellers and buyers could be taken to be sell or buy condemned articles only for the purpose of acquiring the property in the old materials contained in those condemned articles and, therefore, what the assessee purchased in those condemned articles and, therefore, what the assessee purchased in the auction was scrap and when he sold the scrap later, he was only a second seller.

iii) *Rainbow Steels Ltd. Muzaffarnagar and Birla Cotton Spinning and Weaving Mills Ltd., Delhi Vs. C.S.T., U.P. and State of U.P.*, In the said case, the Hon'ble Supreme Court has held as under: (p. 301 of Reports)

Dealing with the entry in question, in the first place it cannot be disputed that

the four adjectives which are susceptible to analogous meaning are clubbed together while qualifying "machinery" in the entry. Secondly, it cannot be disputed that the first adjective "old" is clearly more general than the other three and as such all the four would take their colour from each other, the meaning of the more general adjective "old" being restricted to a sense analogous to that of the less general, namely, "discarded, unserviceable or obsolete. Thirdly, it is true that all the four adjectives which qualify the word "machinery" have been used disjunctively but it is precisely for that reason that the adjective "old" becomes vague, imprecise and ambiguous, being too general. The adjective "old" by itself is certainly vague, imprecise and ambiguous for there is no indication as to how much old the machinery should be before it could be described as "old machinery". A machinery could be one day old, one month old, one year old, five years old or even ten years old (the degree of oldness being a relative concept) and which one is intended to be included in the entry has not been made clear at all. And, lastly, there is nothing in the entry to indicate that the adjective "old" has been deliberately used in a wider sense. In the absence of any indication to that effect and when the expression "old" is by itself vague, imprecise and ambiguous, being too general, the principle of *noscitur a sociis* will have to be applied, i.e., all the associated words like take colour from other, the meaning of the more general adjective, viz. "old", being restricted to a sense analogous to the less general adjectives "discarded, unserviceable or obsolete". In other words in order to fall within the expression "old machinery" occurring in the entry, the machinery must be old machinery in the sense that it has become non-functional or non-usable. In our view, therefore, on a true construction the sale of the thermal power plant which at the time of sale by appellant No. 1 to appellant No. 2 was in perfect running condition and which was sold as such would not fall within the aforesaid entry No. 15 of the concerned notification dated May 30, 1975.

iv) Commissioner of Sales Tax v. Delhi Iron and Steel Co. Pvt. Ltd. (1995) 98 STC 202 (Bom). In the said judgment, the Bombay High Court has held as under: (From the Head Note)

The respondent, a registered dealer, carried on the business, inter alia, of purchasing condemned and unserviceable ships, dismantling them, and selling the parts. It entered into an agreement with the Shipping Corporation of India for the purchase of a condemned and unserviceable cargo vessel with a stipulation therein that the purchase was "for breaking and scrapping purposes". The dealer dismantled the ship and sold the scrap obtained, paying tax. The Sales Tax Officer levied purchase tax u/s 13 of the Bombay Sales Tax Act, 1959, on the purchase price of the condemned ship, on the ground that the breaking of the ship amounted to manufacture. On a reference:

Held, that the ship was condemned and unserviceable at the time of sale which was under the agreement "for breaking and scrapping purposes". The condemned and unserviceable ship purchased by the dealer was not a ship but

re-rollable scrap in the form of an old ship for dismantling. In effect, the dealer acquired only the old materials and articles contained therein which were sold by it in the form in which they were acquired. No process whatsoever was applied to the goods, much less any process of manufacture. The question of using the goods purchased in the manufacture of other goods therefore did not arise and Section 13 of the Act was not applicable.

11. The decision of Madras High Court in the case of State of Madras v. Raman and Co. reported in (1974) 33 STC 1 Mad was affirmed by the Hon"ble Supreme Court in the case of State of Tamil Nadu v. Raman & Co. and Ors. reported in (1994) 93 STC 185 and the appeals of the State were dismissed.

12. From the aforesaid spectrum of judgments, it is very clear that if the power plant in question was intended to be sold as scrap only and the purchaser also purchased the same as scrap, the petitioner-Revenue cannot possibly contend that JVVNL intended to sell it as power plant and thus rate of tax applicable to plant and machinery at 12% was attracted. The mere fact that the said power plant was admittedly lying closed for last 15 years and was not used by the JVVNL itself for generation of electricity as admitted by the Zonal Chief Engineer in his letter dtd. 12.10.2001, this Court is at loss to appreciate the contention of the learned counsel for the Revenue as to how it should be treated as sale of plant and machinery. The ex-post facto situation that the JVVNL permitted the said power plant to be dismantled and taken out as scrap also supports the contention of the learned Counsel for the respondent-assessee that the assessee never intended to buy the said power plant as a plant and machinery from JVVNL. In a contract, consensus ad idem of the parties to the contract is necessary and that only gives rise to a valid contract. Mere writing of description "power plant" in the auction notice does not finally mean that JVVNL sought to sell the same as such. Further the use of words "as is where is basis" also does not change the character of the contract from the one sale of iron and steel scrap to the contract of sale of power plant. Admittedly, JVVNL itself is not a registered dealer under the Sales Tax Laws as a manufacturer and dealer for sale of power plant, but it is a Government of Rajasthan's undertaking for manufacturing and distribution of power within the State of Rajasthan. Earlier the said work was done by the Rajasthan State Electricity Board and now upon incorporation of independent Government Company JVVNL, which took over the assets of erstwhile RSEB sold the said old and unserviceable power plant as it could not itself utilize the same for generation of electricity. One does not have to go a long distance to see the intention of the parties behind such auction further in view of the fact that the respondent -assessee is the registered dealer of Iron and Steel scrap vide registration certificates produced by the learned Counsel for the respondent-assessee before this Court also, this Court is of the firm opinion that the sale in question amounted to sale of iron and steel scrap which attracted the rate of tax at 4% only and not rate of tax at 12% applicable to sale of plant and machinery. The judgments cited by both the sides support this conclusion of this Court and even though the facts obtaining before different High Court arise in

different situations and therefore stand of the Revenue was according to what suited it to fetch more revenue, the conclusions of the Courts are consistent that sale of old and unserviceable either Railway coaches or ships or even a power plant as in the case of Raman & Comp. (supra) was held to be a sale of scrap.

13. Consequently, the Tax Board was justified in allowing the appeal of the respondent-assessee against the order of the learned Commissioner u/s 40 of the Act and it is held that rate of tax applicable on said sale of said old and unserviceable power plant, would be as iron and steel scrap @4%. There is no force in the revision petition filed by the Revenue and the same is accordingly dismissed. No order as to costs.