
(1974) 06 GUJ CK 0005
In the Gujarat High Court
Case No : Sales Tax Reference No. 11 of 1973

Deepak Industries

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 26-06-1974

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 10, 11, 12, 12(1), 13

Citation : (1975) 35 STC 183

Hon'ble Judges : T.U. Mehta, J;J.B. Mehta, J

Bench : Division Bench

Advocate : S.L. Modi and N.I. Modi, for the Appellant; G.N. Desai, Government Pleader and N.V. Chhatrapati, of Bhaishanker Kanga and Girdharlal, Additional Government Pleader, for the Respondent

Judgement

T.U. Mehta, J.—The Tribunal has referred to us in this reference the following three questions for our opinion :

"(1) Whether, on the facts and in the circumstances of the case, and for the grant of set-off, draw-back or refund under rule 42 of the Bombay Sales Tax Rules, 1959, de-oiled cakes and oil-cakes are different commercial commodities and there is no resale of oil-cakes, when after extracting oil therefrom, the resultant de-oiled cakes are sold by the applicant ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal has erred in holding that bardans cannot be deemed to have been sold along with the de-oiled cakes packed therein u/s 15A of the Bombay Sales Tax Act, 1959, for the purpose of granting set-off, draw-back or refund under rule 43 of the Bombay Sales Tax Rules, 1959, in respect of the tax paid on the purchases of oil-cakes ?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the applicant should not be allowed to plead an agreement either express or implied for sale of bardans at the stage of second appeal and to adduce a fresh evidence before the Tribunal to support such

agreement ?"

2. Out of these three questions, questions Nos. (1) and (3) now do not survive to be considered because they are not pressed by the petitioner-assessee. We are, therefore, left only with question No. (2) and in the following portion of this judgment, we shall refer only to those facts which are relevant to this question.

3. The facts of the case are that the petitioner-assessee is running a solvent extraction plant and for the purpose of that plant, it makes the purchases of oil-cakes from registered dealers on payment of tax. It is stated that it is usual for the petitioner to make the purchases of oil-cakes and the bardans (containers) separately. After the oil-cakes so purchased go through the process of solvent extraction, the petitioner gets the resultant products in the form of oil and de-oiled cakes. It is found that thereafter the de-oiled cakes are packed in different bardans and they are sold by the petitioner in inter-State trade or commerce or in the course of export.

4. During the course of the assessment of the petitioner's turnover for the financial year 1966, under the Bombay Sales Tax Act, 1959 (which is hereinafter referred to as "the Act"), the petitioner claimed set-off under rule 43 of the Bombay sales Tax Rules, 1959 (which are hereinafter referred to as "the Rules"), for the tax paid by it on the purchase of empty bardans used in packing the de-oiled cakes. This claim of the petitioner was disallowed by the Sales Tax Officer on the ground that when the goods are sold in packing materials, no separate sale of packing materials is involved. The petitioner thereupon approached the Assistant Commissioner in appeal but there also it failed. The matter was thereupon carried by the petitioner to the Appellate Tribunal. It contended before the Tribunal that since section 15A of the Act creates a fiction that, when goods are sold packed in packing materials, the said packing materials are also "deemed" to have been sold, it should be held that the transaction involves the sale of the packing materials also. According to the petitioner, if once it is held that the packing materials on which tax is previously paid are sold the provisions of rule 43(1)(a)(i) would be attracted, provided of course, that the other conditions of rule 43 are satisfied. Even the Tribunal rejected this contention of the petitioner principally on the ground that in such cases no separate sale of packing materials is involved. The petitioner's contentions in this reference are the same which were raised by it before the Tribunal.

5. Rule 43 of the Rules provides for draw-back, set-off, etc., of tax paid on goods sold in the course of inter-State trade or of export. The application of this rule is subject to several conditions, but reference to these conditions is not necessary for the purpose of this case because it is not the case of the revenue that they are not satisfied. The case of the revenue, however, is that rule 43 has no application to the facts of this case because that rule postulates the sale of those very goods which were purchased previously on payment of tax. According to the revenue, in this case there has not been any sale of bardans on the purchase of which tax was previously paid because when the goods are sold packed in

packing materials the sale is the sale of goods only and the property in the packing materials passed only incidentally. In reply to the petitioner's contentions regarding section 15A the revenue has contended that the fiction contemplated by this section is only for the purpose of fixing the rate of tax and hence it cannot be carried further for the purpose of showing that there was the sale of bardans within the meaning of rule 43.

6. In order to appreciate the respective contentions of the parties, it would first be necessary to refer to the relevant provisions in the Act as well as the Rules. Section 15A was introduced in the Act by Act No. 25 of 1962. It is found in the following terms :

"15A. Notwithstanding anything contained in section 7, 8, 9, 10, 10B, 13 and 14, where goods packed in any materials are sold or purchased, the materials in which the goods are so packed shall be deemed to have been sold or purchased along with the goods and the tax shall be leviable on such sale or purchase of the materials at the rate of tax, if any, as applicable to the sales, or as the case may be, purchases of the goods themselves.

(2) Where any packing material is purchased on a certificate u/s 12 for resale as packing material but is used in packing any tax-free goods and the goods so packed are sold, then in respect of the material in which the goods are so packed, the tax shall be leviable on the sale of such packing material at the rate applicable thereto under the relevant schedule, as if the material were sold separately."

The non obstante clause which is found in sub-section (1) of this section was introduced in the second by the Gujarat Act No. 19 of 1963. Simultaneously with the introduction of the non-obstante clause in section 15A, the legislature also amended section 3 of the Act, which provides for the computation of turnover of a dealer. Sub-section (5) of section 3 provides for the method of calculating the limit of turnover for liability to tax. To this sub-section, clause (c) was added in the following terms :

"(c) the value of packing materials which is used in packing any goods specified in Schedule A and on which no tax is leviable under sub-section (1) of section 15A shall not be taken into account in computing the value of taxable goods under sub-section (4)."

It should be mentioned here that sub-section (4) of section 3 prescribes the limits of turnover for the purpose of this section 3.

7. Rules 43, under which the set-off is claimed, provides for the drawback, set-off, etc., of tax paid on goods sold in course of inter-State trade or commerce or of export. Its relevant portion for the purpose of this reference states as under :

"(1) In assessing the amount of tax payable in respect of any period by a registered dealer (hereinafter referred to in this rule as "claimant dealer") the Commissioner shall grant him a draw-back, set-off or as the case may

be, refund of the following amounts, that is to say :-

(a)(i) The amount of sales tax or the general sales tax or, as the case may be, both recovered from him by a registered dealer on the purchase of goods made otherwise than against a certificate u/s 11 or sub-section (1) of section 12....."

We are not concerned in this reference with the remaining portion of this rule.

Since rule 43 postulates the sale of goods on which tax was paid previously on their purchase by the concerned assessee, the first question which arises to be considered is what is actually sold in this case. Admitted facts show that what was sold by the assessee in the course of export trade was de-oiled cakes. The passing of property in the bardans in which these de-oiled cakes were packed was only incidental to the sale of de-oiled cakes. The assessee has neither pleaded nor has it led any evidence to show that the transactions in question involved the separate sale of bardans. But to bring its case of sale under rule 43, the assessee puts reliance on the deeming fiction contemplated by section 15A.

8. The first question which, therefore, arises for determination is what is the purpose and function of the fiction created by section 15A of the Act. The consideration of this question would also involve the question whether this fiction is enacted by the legislature only for the purpose of determining the rate of tax in cases where the goods are sold along with the containers, or whether it is enacted for a comprehensive purpose including the purpose of setting the claims of draw-back and set-off under rule 43. A bare perusal of section 15A shows that it was enacted with a view to obviate the necessity of applying two rates of tax under the Act when certain goods are sold along with their containers. It should be noted that, but for section 15A, the assessment of a turnover, wherein certain goods are sold along with the containers, would have to be carried out under sections 7, 8, 9 and 10 of the Act. In the absence of section 15A, therefore, the assessing authority would be required to assess the value of turnover of the goods separately from the value of the containers in which the goods are sold. The said authority would thereupon be required to determine what rate of tax would apply to the goods and what rate would apply to the containers. This would obviously cause good deal of complications and difficulties in the course of the assessment. Therefore, to mitigate these complications and difficulties, section 15A was introduced in the statute with a view to see that only one rate of tax is applied to the cases wherein goods are sold along with the containers. The object of the non obstante clause contained in sub-section (1) of section 15A is also the same, because this clause merely emphasises the position that when goods are sold along with the containers, it is only one rate which should be applied for the purpose of levying sales tax, and that rate would be the rate which is applicable to the goods which are sold along with the containers. We get support for this view from the statement of objects and reasons attached to Bill No. 19 of 1962, which ultimately became Act No. 25 of 1962, and under the provisions of which, section 15A was engrafted into the Act. Clause 4 of the said

statement of objects and reasons, which explains the reason why section 15A was inserted in the Act, is as under :

"4. This clause seeks to make a specific provision as regards the rate of tax on packing materials in cases where goods packed in any material are sold or purchased; such packing material is subjected to the same rate of tax as is leviable on the packed goods."

It is evidence from this clause that section 15A was inserted in the Act only with a view to make a specific provision as regards one rate of tax in cases where goods are sold along with the packing materials. This is one obvious conclusion which can be drawn from sub-section (1) of section 15A.

9. Another conclusion which flows from the provisions of sub-section (1) of section 15 is that, though technically speaking, the transaction wherein the goods are sold along with the packing materials involves two types of sales, viz., the sale of goods and the sale of packing materials, both the sales are to be treated as one integrated sale. It is in the background of these two conclusions, which could legitimately be drawn from the provisions of sub-section (1) of section 15A, that was should appreciate the contentions raised by Shri Modi on behalf of the petitioner.

10. Since for showing the sale of bardans, Shri Modi puts reliance on the fiction created by section 15A, the question which immediately arises for our consideration is whether this fiction can be carried beyond the purpose for which it was created. Though it is true that every legal fiction should be carried to its legal consequences, it is equally true and well-settled that logical fictions are created only for definite purposes and they are limited only to the purposes for which they are created and, therefore, could not be extended beyond their legitimate filed. We have already noted above the purpose for which the fiction contemplated by section 15A was created. That purpose was to fix one rate of tax in cases where goods are sold in packing materials. If that be so, it is difficult to agree with the contention raised by Shri Modi that this fiction should be utilised even for the purpose of deciding the set-off contemplated by rule 43. Such a use of the fiction would amount to carrying it beyond its legitimate filed. In this connection, we would also recall that, on a correct interpretation of section 15A, though the property in the goods sold passed to the buyer along with the property in the packing materials, the sale in question is to be treated as one integrated sale, and if that is so, the sale would be of the goods which are sold, and not of the packing materials. Under these circumstances, unless there is some definite evidence to show that at the time of making the sale of goods in question the parties contemplated even the sale of the packing materials, separately from the sale of goods, it would not be open to an assessee to rely on the fiction created by section 15A for availing of the advantage of set-off contemplated by rule 43. It should be noted here that in this case, apart from putting reliance upon the fiction, the petitioner-assessee has not either pleader or led any evidence to show that the sale of bardans was separately

contemplated by the parties at the time of sale of the goods. Under the circumstances, we are of the opinion that the fiction contemplated by section 15A would be of no help to the assessee in claiming the set-off under rule 43.

11. Shri Modi put reliance upon the provisions contained in clause (c) of sub-section (5) of section 3, and contended that the introduction of this clause in the statute shows that the fiction as regards the sale of packing materials created by section 15A was not limited only for the purpose of fixing one rate of tax but was meant to operate beyond that limit. What clause (c) of section 3(5) says is that the value of packing materials used in packing any goods specified in Schedule A and on which no tax is leviable u/s 15A, is not to be taken into account in computing the value of taxable goods under sub-section (4) of section 3. In other words, the value of packing materials contemplated by clause (c) of section 3(5) would not enhance the value of total turnover. The argument of Shri Modi was that this clause (c) was required to be inserted in section 3(5) because, in its absence, the effect of the deeming fiction of section 15A would have been to increase the value of total turnover by inclusion of the value of packing materials which are deemed to have been sold. We find no jurisdiction for such a view because clause (c) of section 3(5) has no connection with sub-section (1) of section 15A, as it would come into play only in cases wherein "no tax is leviable u/s 15A". If tax is leviable u/s 15A, one of the main requirements of clause (c) would remain unsatisfied. That being the position clause (c) cannot be linked with sub-section (1) of section 15A. In fact, clause (c) was to give full protection to the goods specified in Schedule A which are altogether exempt from sales tax. This becomes more evident from the provisions of sub-section (2) of section 15A because it contemplates tax on packing materials even in cases wherein tax-free goods are packed therein, provided that the packing materials are purchased for resale on a certificate u/s 12. It follows from a reading of clause (c) of section 3(5) along with sub-section (2) of section 15A that if packing materials are purchased for resale under a certificate contemplated by section 12, then even if tax-free goods are packed therein and sold, the value of packing materials should be taken into account for tax purposes. Thus clause (c) appears to have some connection with sub-section (2) of section 15A, but it has no bearing on the deeming fiction contemplated by sub-section (1) thereof.

12. We further find that sub-section (2) of section 15A lends support to our view that the deeming fiction contemplated by sub-section (1) is not created for treating the sale of packing materials separately from the sale of goods packed therein because according to sub-section (2) such a separate sale of packing materials is to be presumed only when tax-free goods are packed therein and then sold. If they are packed with goods which are not tax-free, then sub-section (1) would apply and in that case no separate sale of packing materials can be deemed to have taken place.

13. In view of this, we are of the opinion that the view taken by the Tribunal on question No. (2) is correct and our answer to that question is, therefore, in the

negative. This reference is accordingly disposed of and it is ordered that the petitioner shall bear the costs of the respondent-State in this reference.

14. Reference answered accordingly.