

(1995) 04 GUJ CK 0042

In the Gujarat High Court

Case No : Special Civil Application No. 2330 of 1995

Gujarat Steel Tubes Ltd.

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 10-04-1995

Acts Referred:

Gujarat Sales Tax Act, 1969 — Section 15B, 16, 2, 2(16), 2(26)

Citation : (1995) 04 GUJ CK 0042

Hon'ble Judges : Rajesh Balia, J;C.K.Thakker, J

Bench : Division Bench

Advocate : K.H. Kaji, for the Appellant; M.G. Doshit and Co., for the Respondent

Judgement

C.K. Thakker, J.—Rule. Mr. M. G. Doshit, learned advocate waives service of rule for the respondents. In the facts and circumstances of the case, the matter is taken up for final hearing.

2. This petition is filed by the petitioner for quashing and setting aside an order of assessment dated January 31, 1995 for assessment year 1991-92 passed by the Sales Tax Officer (I), Division X, being illegal and ultra vires. A prayer is made to restrain the respondents from recovering an amount of Rs. 18,14,512 or part thereof or to take any proceeding pursuant to the impugned order. The matter was placed for admission; notice was issued on March 28, 1995 and ad interim relief against recovery was granted. Today the matter is placed for hearing.

3. It is the case of the petitioner that it is a manufacturing company in galvanized steel pipes and precision tubes. It is a registered dealer under the Gujarat Sales Tax Act, 1969 (hereinafter referred to as "the Act") as also under the Central Sales Tax Act, 1956. A controversy had arisen regarding true ambit and scope of expressions "manufacture" and "resale", as defined in section 2(16) and 2(26) of the Act respectively read with section 7 and item 3 of Part A of Schedule II of the Act and rule 3(xvii) of the Gujarat Sales Tax Rules, 1970

(hereinafter referred to as "the Rules"). According to the department, on correct interpretation of item No. 3 of Schedule II-A read with rule 3(xvii) on iron and steel, if some process is carried out, the product would fall within the term "manufacture" as defined in section 2(16) of the Act. According to dealers, however, if on such process, the resultant product is not taken out of entry 3, such product would not be regarded as manufacture and continue to fall under the definition of "resale" u/s 2(26). Thus, the controversy was as to whether the item of iron and steel on which process is carried out would fall within sub-section (16) of section 2 or sub-section (26) of section 2 of the Act. It appears that the Gujarat Sales Tax Tribunal held that even after the process if the resultant product is not taken out from the description of item "iron and steel", the product would be considered "resale" and not "manufacture". The point was ultimately, concluded by a decision of this Court in *Mohta Ispat Ltd. v. Commissioner of Sales Tax* [1992] 87 STC 125. In that case the Division Bench of this Court after considering the relevant provisions of the Act and the Rules, held that rule 3(xvii) of the Rules excludes from the purview of "manufacture" "any activity carried out in relation to any of the declared goods in any entry in Schedule II as a result of which, the resultant product is not taken out of the description thereof in that entry". It is further held that the words "description thereof" in clause (xvii) of rule 3 should be interpreted as description of any of the declared goods in any entry in Schedule II and similar words used in section 2(26)(iii) should be interpreted as description of goods specified in any entry in Schedule II. Accordingly, if any of the species of declared goods, namely, iron and steel, is subjected to any activity and as a result thereof a new commercial commodity comes into existence, it will not be regarded as manufacture if the resultant products is not taken out of the description of "iron and steel". Thus, the decision in *Mohta Ispat Ltd.* [1992] 87 STC 125 (Guj) finally concluded the point in favour of dealers holding that the item of "iron scrap" does not fall within the definition of "manufacture" even if some process is carried out on it provided the resultant effect does not take it out of the description in entry 3 of Part A of Schedule II.

4. According to the petitioner, the department accepted the above decision of this Court and acted upon the said judgment by issuing a circular on October 9, 1991, which is annexed to the petition. In para 3 thereof it was stated that the view taken by the Gujarat Sales Tax Tribunal came to be confirmed by the High Court of Gujarat in *Mohta Ispat Ltd.* [1992] 97 STC 125 and all the pending cases were, therefore, required to be decided on the basis of the decision of the High Court of Gujarat. Regarding pending cases following instruction were issued by the department.

"(a) As stated in para I above, where the purchase are made by paying taxes from the other registered dealers in the State in such cases, subject to the other provision of law, deduction of resale may be given.

(b) In cases where the dealer has made purchase by saving tax at the time of

purchase by tendering forms "LL", "OO" according to the notification, entry No. 86, issued u/s 49 on the sale of articles manufactured out of such purchases, assessment should be made and in respect of the purchase made against this form, no proceedings be initiated."

5. Keeping in mind the above instructions, the cases were ordered to be disposed of.

6. Subsequently the Gujarat Sales Tax Act came to be amended with effect from April 1, 1992 and the definition of "resale" in section 2(26) came to be substituted. However, in the present proceedings we are not concerned with the amendment inasmuch as the question raised in the present proceedings relates to the assessment year 1991-92. According to the petitioner from the circular issued by the department, it was clear that the decision in Mohta Ispat Ltd. [1992] 87 STC 125 (Guj) was accepted by the department. Therefore, in accordance with the above decision as also the circular, the petitioner treated itself as manufacturer for a period between April 1, 1991 to September 30, 1991 and for the remaining period between October 1, 1991 to March 31, 1992 as reseller buying goods after paying full tax and without issuing forms LL or OO. According to it, since iron and steel items were falling under the head "declared goods" there was no liability for additional purchase tax in respect thereof. Regarding other items such as zinc, paints, hardware, tools, etc., which were not declared goods would fall within the purview of section 15B but the petitioner was entitled to set-off under rule 42 if the manufactured goods were sold within the State.

7. The department also issued another circular dated July 2, 1992 after referring to the judgment in Mohta Ispat Ltd. [1992] 87 STC 125 (Guj) and the amendment made in the Act with effect from April 1, 1992. By the said circular it was clarified that as a result of the amendment, activity formerly falling within the meaning of resale after the amendment would fall within the definition "manufacture" and the declares will be treated accordingly. Para 6 of the said circular, however, clarified the position for intervening period between February 20, 1991 and June 8, 1992 and it is stated as under :

"1. In the intervening period the transactions carried out by the dealer will be accepted and assessment will be made in consonance therewith. Entry 86 u/s 49(2) of the Sales Tax Act is continued. Therefore, if the conditions contained therein are complied with, forms "LL", "OO" can be given for the purchase made during this period.

2. Those who have made purchases on the basis of tax exemption against forms "LL", "OO" and appropriate tax is paid by making the sales taxable, in such cases, assessment will be made as manufacturer by accepting the purchases made against the forms. If such dealers have made purchases of processing materials against form No. 19, the same will be accepted. For such purchases, if form No. 19 is not given, subject to the conditions enumerated in rule 42,

compensation will be given.

3. Those who have paid sales tax without giving forms "LL", "OO" for purchase of iron and steel, no tax will be levied on such local sales of goods. If tax is recovered or shown in the return on such sales, penalty will be levied equivalent to the tax recovered under the provision of section 46(2). Assessment of such dealers will be made as resellers. If such dealers have made purchases of processing materials against form No. 19, for breach of condition, purchase tax will be levied u/s 16 and penalty will be imposed u/s 45(1). For such purchases without form, refund will be given under rule 42."

8. According to the petitioner, therefore, during the intervening period the department clarified its position by stating that it would treat a dealer either as "manufacture" or as "reseller" according to how the dealer himself has treated his activity. If he treated himself as "manufacturer", he would be assessed as "manufacture" and if he has treated himself as "reseller", he would be treated as "reseller". In course of the assessment proceedings two question arose in connection with the assessment of the petitioner. Firstly as regards liability of the petitioner to pay additional purchase tax u/s 15B and secondly regarding levy of purchase tax u/s 16 for violation of form No. 19 for zinc and other items. With regard to the first question it is the contention of the petitioner that the point was finally concluded by a decision of this Court in *Mohta Ispat Ltd.* [1992] 87 STC 125 as also the circular issued by the department. Though legal position was amply clear the respondent-authorities committed an error of law in passing the impugned order in January 1995, holding that the petitioner has committed breach of the provisions of law and was liable to pay tax as "manufacture". Regarding purchase of other items, according to the department, there was violation of form No. 19, and the petitioner was liable to pay purchase tax u/s 16. It is this order which is challenged by the present petitioner in this petition.

9. Mr. Kaji, learned advocate for the petitioner contended that both the points have been decided by the third respondent illegally and erroneously. There is an error apparent on the face of record in holding that the petitioner has manufactured goods as defined in section 2(16) of the Act and was not covered by section 2(26) of the Act. In our opinion, the contention raised by Mr. Kaji is well-founded and must be accepted. Looking to the decision in *Mohta Ispat Ltd.* [1992] 87 STC 125 (Guj) and also the circulars issued by the department, it is clear that the process does not include any manufacturing activity carried out in relation to the declared goods in any entry in Schedule II if the resultant product is not taken out of the basic description of entry 3 of Schedule II-A. In fact, Mr. Kaji is right that that was the interpretation made by the Tribunal in earlier cases and has been upheld by this Court in the above decision. Accepting the ratio laid down by this Court, circulars came to be issued. It was, therefore, not open to the third respondent to ignore the said decision and to hold that the petitioner had manufactured goods falling within the mischief of section 2(16) of the Act. Though the definition of "resale" in terms has not been applied to section 15B,

reading of three provision, viz., section 2(16) 2(26) and rule 3(xvii) leaves no room of doubt that what is to be construed as "resale" within the meaning of section 2(26)(iii) must necessarily go out of the definition of "manufacture" as defined in section 2(16) of the Act read with rule 3(xvii) of the Rules. This is to ensure that what constituted "resale" with the meaning of section 2(26) must necessarily be excluded from the term "manufacture" as defined in section 2(16). Section 15B applies in case where goods are manufactured out of raw material produced through applying the same process. Hence, apparently the assessing authority erred in applying section 15B to a case covered by section 2(26)(iii) in terms of decision of this Court in *Mohta Ispat Ltd.* [1992] 87 STC 125. The first contention of Mr. Kaji, therefore, must be accepted.

10. So far as second point is concerned, in our opinion, it cannot be said that the third respondent has committed any error in not accepting bald assertion of the petitioner regarding violation of form No. 19. No doubt, it is contended by the petitioner that he has not committed breach of any provision of law and zinc purchased by the petitioner against form No. 19 was utilized only for galvanised steel pipes which were sold in the State of Gujarat and the third respondent could not have levied purchase tax thereon. But no materials, whatsoever was place on record in support of the said assertion. In absence of necessary materials and evidence, it was open to the third respondent not to accept the case of the petitioner and to pass an appropriate order in accordance with law. In fact after considering the submissions of the petitioner, it was observed as under :

"This submission of the dealer has not been accepted because in such purchases identification is not possible and taking into consideration the aforesaid, purchase tax u/s 16 has been assessed."

11. Almost identical situation arose before this Court in *Jayant Extraction Industries v. State of Gujarat* [1992] 85 STC 3. In that case also a similar contention was raised by the company which was not accepted by the department and levy of purchase tax was ordered. The said action was challenged in this Court urging that the sale was effected within the State and, hence, the petitioner was not liable to pay purchase tax, Negating the contention, this Court observed that when the entries in the register were notional and the register could not be relied upon to indicate that a particular raw material was used in the manufacture on a particular date, the only reasonable method of calculating the user of goods purchased against declaration in form 19 was pro rata basis method. Following the decision of the High Court of Bombay in *Commissioner of Sales Tax v. Berar Oil Industries* [1975] 36 STC 473, this Court held that such method was proper and formula applied in estimating the turnover of purchases was rational. The court also held that in view of the finding of fact that the production register reflected only national entries, there was not escape from the conclusion that the pro rata basis adopted by the authorities was the only method available to the authorities. It was stated that the dealer had not purchased goods for storing purpose. It was purchased against form No. 19 for

using the same in taxable goods. If he did not use them he had to show by positive evidence that they were not used in the manufacture of taxable goods. If he wanted to get relieved of the obligation undertaken by him he ought to have produced positive and unimpeachable evidence showing use of different ingredients in different lots of products. Merely by saying that he had not used for manufacture purpose, the dealer cannot get relieved of a statutory obligation. In that case, in such cases, he was bound to pay tax.

12. In our opinion, the second point is thus concluded against the petitioner in the case of Jayant Extraction Industries [1992] 85 STC 3 (Guj). Hence, to that extent the order cannot be said to be illegal or contrary to law.

13. In the result, the petition is partly allowed and the rule is made absolute accordingly. The petitioner cannot be held manufacturer and is not liable to pay purchase tax u/s 15B of the Act. But in connection with purchases made against form No. 19, since no necessary material and evidence was produced by the petitioner, it was open to the authorities to decide the case on pro rata basis and no fault can be found against such course being adopted by the department. The impugned order, dated January 31, 1995, is quashed and set aside. It is, however, open to the authorities to effect recovery from the petitioner in the light of observations made hereinabove. In the facts and circumstances, there is no order as to costs.

14. Petition partly allowed.