

(2003) 06 GAU CK 0048

In the Gauhati High Court

Case No : Writ Petition (C) No's. 1997 and 1998 of 1999

Herbertsons Ltd. and Another

APPELLANT

Vs

Commissioner of Taxes and Others

RESPONDENT

Date of Decision : 26-06-2003

Acts Referred:

Assam General Sales Tax Act, 1993 — Section 2(30), 36(1)
Assam General Sales Tax Rules, 1993 — Rule 12, 4

Citation : (2003) 3 GLR 214 : (2003) 132 STC 597

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Advocate : Ashok Saraf, S. Saikia, D. Baruah, S.K. Agarwal and Kavita Jain, for the Appellant; B.J. Talukdar, for the Respondent

Judgement

I.A. Ansari, J.—By this common judgment and order, I propose to dispose of Writ Petition (C) Nos. 1997 of 1999 and 1998 of 1999, for, both these writ petitions have raised common questions of law and fact.

2. By making these applications under Article 226 of the Constitution of India, the petitioners have approached this Court seeking appropriate writ/writs setting aside and quashing, inter alia, the impugned orders, dated 22.3.1999 passed by the respondent No. 2, namely, Deputy Commissioner of Taxes, Zone-B, Guwahati in the purported exercise of powers u/s 36(1) of the Assam General Sales Tax Act, 1993, (for short, the Act of 1993) and directing the respondent No. 4, namely, Superintendent of Taxes, Unit-B, Panbazar, Guwahati to make fresh assessment as per the provisions of Section 17(4) of the Act of 1993, aforementioned.

3. Put in nut-shell, petitioner's case runs as follows :

(i) The petitioner is a registered dealer under the Assam General Sales Tax Act, 1993 and is engaged in the business of sale and supply of liquor. The petitioner company has one distillery unit in Rajasthan and it is not possible for the solitary

unit of the petitioner company to cater to the entire requirement of the petitioner company. Since excise duty in respect of the Indian made foreign liquor is a subject under List II (i.e., State List) of the Constitution of India and since on the movement of the Indian made liquor from one State to another, exercise duties are charged by both the importing and exporting States and that too at different rates, it is not commercially viable to manufacture and supply Indian made foreign liquor brands from one destination. To overcome these difficulties, the petitioner company entered into agreements with various distillery units of the country for manufacturing and supplying of foreign liquor with requisite brands. In Assam, the petitioner company owns only one wholesale licence and, accordingly, the petitioner company entered into an agreement with one of its dealers, namely, Nanak Singh Sujan Singh Sana in Assam (hereinafter referred to as "NSSSS"), who owns a bonded warehouse located presently in the district of Kamrup. The said dealer holds a bonded warehouse and has also got various infrastructure facilities, which are very essential for carrying out the business activities of the petitioner company. The petitioner company entered into an agreement with the said owner of the bonded warehouse, vide agreement, dated 1.4.1993, for utilizing the bonded warehouse as well as the other infra-structural facilities of NSSS. In consideration of the facilities, so received, and for utilization of the bond licence, the petitioner company had to pay various charges as per the agreement entered into and calculated on the basis of per case of the liquor purchased and sold by the petitioner company in the State of Assam. In the said agreement, it was agreed upon that the petitioner company would pay the changes for providing of trained staff as well as infrustructural facilities.

(ii) The assessments of the petitioner company for the assessment years 1993-94 and 1994-95 were completed by the respondent No. 3, namely, Superintendent of Taxes after the due examination of books of account and documents vide orders of assessment passed u/s 17(4) of the Assam General Sales Tax Act, 1993. However, after completion of the assessment, respondent No. 3, namely, the Superintendent of Taxes, vide notice, dated 6.8.1996, directed the petitioner company to show cause as to why the assessment for the assessment years 1993-94 and 1994-95 should not be rectified and interest as leviable under the Act of 1993 should not be levied on the ground that the re-sale price of the products had exceeded 40 per centum of the purchase price, which was taxed at the first point and thereby the second sale should be deemed to be first point of sale and the entire amount would be taxed as first point of sale under Schedule II at the prescribed rate. At the relevant point of time, liquor was taxable at the point of first sale within the State of Assam. The petitioner company submitted a detailed reply to the aforesaid notice issued by the Superintendent of Taxes and produced before him the relevant documents and papers. In their reply, it was submitted by the petitioner company that after taking into account the various charges paid by them to the owner of the bonded warehouse, namely, NSSSS, which formed part and parcel of the purchase price as per the agreement entered into by the petitioner company with the said owner

of the bonded warehouse, the difference in the purchase price and re-sale price comes to barely 37.9% in respect of assessment for the assessment year 1993-94 and 33.29% for the assessment year 1994-95, which is within the limits prescribed by the Explanation to Section 8(1)(a) of the Act of 1993 read the Rule 12 of the Assam General Sales Tax Rules, 1993. It was further submitted before the Superintendent of Taxes that the aforesaid difference would further go down in case the various credit notes issued to the customers in the subsequent years in respect of the transactions, undertaken during the assessment years 1993-94 and 1994-95, by way of rebate and discount, are taken into consideration. On considering the reply submitted by the petitioner and on examining the relevant papers and documents, the Superintendent of Taxes was satisfied with the contention of the petitioner that the difference between the purchase price and re-sale price for the assessment years 1993-94 and 1994-95 was below 40% and thereby the provisions of Section 8(1)(a) of the Act of 1993 read with Rule 12 of the Assam General Sales Tax Rules, 1993 were not attracted. Hence, the proceedings, which initiated by the Superintendent of Taxes, because of the objections raised by the A.G. Audit party, were dropped by the Superintendent of Taxes, vide order, dated 17.10.1995, the petitioner was also informed by the Superintendent of Taxes that the proceedings initiated, vide notice dated 6.8.1996, had been dropped after considering the reply and after hearing the arguments.

(iii) The respondent No. 2, namely, the Deputy Commissioner of Taxes, however, again, vide notice, dated 15th May, 1998, directed the petitioner company, in the purported exercise of powers u/s 44(1) of the Act of 1993, to produce the books of account mentioned in the said notice for the assessment years 1993-94 and 1994-95 for necessary verification of some particulars allegedly in the possession of the Deputy Commissioner of Taxes. Though the petitioner was not informed of any reason for issuance of the notice u/s 4(1) of the Act of 1993, it produced all relevant books of account and documents before the Deputy Commissioner of Taxes and the same were examined. The Deputy Commissioner of Taxes, thereafter, served on the petitioner, a notice, dated 23.10.1998, directing the petitioner company, in the purported exercise of powers u/s 36(1) of the Act of 1993, to show cause as to why the assessment orders passed by the assessing authority u/s 36(1) of the Act of 1993 for the assessment years 1993-94 and 1994-95 should not be cancelled and/or modified as per the provisions of Section 36(1) of the Act inasmuch as the same were found to be erroneous and prejudicial to the interest of revenue. In the said notice, it was mentioned that since the re-sale value of the products sold by the petitioner exceeded 40 per centum of the original sale or purchase value as shown in the original return, re-sale of the Indian made foreign liquor by the petitioner shall be deemed to be first point of sale within the State of Assam and thereby the petitioner became liable to assessment at the rate of 50% upon the entire sale of locally purchased goods as per Explanation to Section 8(1)(a) of the Act of 1993 read with Rule 12 of the Assam General Sales Tax Rule, 1993. The petitioner company submitted a

reply to the show cause notice issued by the respondent No. 2, namely Deputy Commissioner and reiterated the contentions raised before the Superintendent of Taxes in this regard. It was submitted therein that after taking into account the various charges paid to the bonded warehouse owner, the difference between re-sale price and purchase price came to below 40% and hence, the provisions of Section 8(1)(a) of the Act of 1993 read with Rule 12 of the Assam General Tax Rules, 1993 were not applicable. It was also submitted therein that since the assessing officer was satisfied on examination of the books of account and documents that there was no case for rectification of the assessments, for, the difference between the purchase price and re-sale price was less than 40%, the assessments made on re-examination by the Superintendent of Taxes cannot be disturbed by initiation of a parallel proceedings in exercise of powers u/s 36(1) of the Act of 1993. It was further submitted therein that the power of suo motu revision cannot be exercised to entrench upon the powers reserved for the assessing officer and for making recalculation of the purchase price and re-sale price, which is solely a matter under the domain of the assessing officer. The Deputy Commissioner of Taxes, however, vide order, dated 22.3.1999, set aside the order of assessment for the assessment years 1993-94 and 1994-95 on the ground that the same were prejudicial to the interest of revenue and directed the Superintendent of Taxes to make fresh assessments as per provisions of Section 17(4) of the Act of 1993 read with Rule 12 of the Assam General Sales Taxes Rules, 1993, The Deputy Commissioner of Taxes held that payment of storage charges, special service charges, C & F expenses, claimed by the petitioner as part of the purchase price, could not be allowed in determining the purchase price inasmuch as the same was not allowable in view of the fact that those charges were paid by the petitioner to the bonded warehouse owner for the services received after the sales were made by the owner of bonded warehouse and not for the services or anything done before the purchase of the goods. The Superintendent of Taxes, thereafter, vide notice, dated 13th April, 1999, directed the petitioner company to appear, on 21.4.1999, for the purpose of assessment in view of the suo motu revisional order passed by the Deputy Commissioner of Taxes. Being aggrieved, the present writ applications have been filed by the petitioner company before this Court challenging the validity of not only the suo motu revisional notice and the suo motu revisional order passed by the respondent No. 2 but also the consequential notice issued by the respondent No. 3, namely, Superintendent of Taxes.

4. Though the respondents have contested this case, they have not filed any affidavit in opposition.

5. I have perused the materials on record. I have heard Dr. A. K. Saraf, learned counsel for the petitioner, and Mr. P.J. Talukdar, learned State Government counsel, appearing for the respondents.

6. Before entering into the merit of the submissions made before me on behalf of the parties, let me refer to Section 8(1)(a) of the Act of 1993, which is, being

relevant in the present context, reproduced below :

"8. Changes of tax and rates.- (1) The tax leviable Section 7 for any year shall be charged on the taxable turnover during such year -

(a) In respect of goods specified in Schedule II at the first point of sale with State, at the rate or rates specified in that Schedule.

Explanation 1 : Where a person sells a substantial part of the goods manufactured by him or imported by him to another person for sale under the brand name of such other person or for resale as distribution or selling agent or for resale after repacking or subjecting the goods to any other process not amounting to manufacture and the price charged on resale exceeds the sale price by more than such percentage as may be prescribed in respect of such goods or class of goods the resale by such other person shall subject rules if any, framed in this behalf, be deemed to be at the first point of sale within the States, Rule 12 of the Assam General Sales Tax Rules, 1993 provided as under :

Charge of tax and rates u/s 8(1)(a) -

12. (1) Where a person after purchasing goods covered by Schedule II under Clause (a) of Sub-section CD of Section 8 sells such goods in such manner as mentioned in the Explanation to the aforesaid clause and if the price charged on such resale exceeds forty percentum of the original sale or purchase price, in respect of such goods or class of goods, the resale of such goods by such person shall be deemed as first point of sale within the State and the rates of tax shall be as specified in Schedule II for such items."

7. Before proceeding any further, it may be pointed out that the relevant part of the agreement entered into between the petitioner company and NSSSS reads as under :

"NSSSS will provide trained staff as well as infrastructural facilities and shall supervise business transactions of HL prior to taking delivery of the IMFL from them and shall make all efforts necessary for supervision and shall provide all special services necessary prior to taking delivery of the goods which in normal course would not have been their obligation."

"These charges shall be compulsory and shall not be optional. The charges shall have to be paid as per the above referred rates on each case of the IMFL purchased by HL from NSSSS and HL shall be liable to pay the same irrespective of the fact that the services and facilities are required by them or not. The aforesaid charges shall be treated as a part and parcel of the price of IMFL."

8. The term "purchase price" has been defined by Section 2(30) of the Assam General Sales Tax Act, 1993 as under :

"(30) "Purchase price" means the amount paid or payable by a dealer as valuable consideration for the purchase of goods determined in the prescribed manner :

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9. The manner of determination of the purchase price has been laid down by Rule 4 of the Assam General Sales Tax Rules, 1993 which is reproduced below :

"Determination of purchase price

4. Purchase shall be in terms of money or money value of valuable consideration paid or payable by a dealer for any purchase of taxable goods including any sum charged for -

(i) anything done by the seller with or in respect of the goods at the time or before delivery thereof, and

(II) containers or other materials for the packing of such goods.

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10. From a conjoint reading of Section 2(30) of the Act of 1993 and Rule 12 of the Rules of 1993, it is clear that any sums of money or valuable consideration payable or paid by a dealer, such as the petitioner company is, for purchase of taxable goods, shall be the purchase price and this price will include any sum(s) paid or payable by the dealer for anything done by the seller, such as, NSSSS is, with regard to, or in respect of, the goods at the time of or before delivery of the goods. Thus, any such charge/charges, which the petitioner company, as a purchaser, paid or was bound to pay to NSSSS at the time of or before taking delivery of the liquor shall be included within the purchase price. Since the petitioner company, on the basis of the contract, as reflected from the agreement, dated 1.4.1993, paid various charges like storage charges, special service charges, distribution and C&F expenses and inward freight on goods from distilleries of the bonded warehouse, which were all expenses relating to the goods before taking the delivery thereof, the aforesaid charges obviously formed part of the purchase price of the petitioner. This position is not seriously disputed by Mr. Talukdar.

11. However, the respondent No. 2, while passing the impugned order, dated 22.3.1999, totally ignored the agreement entered into between the petitioner company and the owner of the bonded warehouse and simply for the reason that the charges were raised by the bonded warehouse owner on the petitioner company after completion of the sale of the goods and not at the time of the sale of the goods, he held that the same would not form part of the purchase price of the petitioner. Further, the respondent No. 2 came to a palpably erroneous finding that the charges were paid by the petitioner company for the services received after the sales were made by the bonded warehouse owner and not for the services or anything done prior to the purchase of the goods. The revisional authority totally overlooked the fact that in the agreement, in question, it was clearly stated that these charges were raised for the services and facilities provided to the petitioner company prior to taking delivery of the goods and hence, there was no reason for the respondent No. 2 to come to a different

conclusion. There is no dispute before me that if these charges are, taken into consideration, the difference between the purchase price and sale price will be below 40%. Thing will, in fact, be evident from the plain reading of the operative part of the order passed by the learned Deputy Commissioner of Taxes.

12. It has been made clear in agreement, in question, that the aforesaid charges shall not include the charges of reimbursement to the bonded warehouse owner for the service rendered or expenses incurred after the transaction of sale from the bonded warehouse owner to the petitioner is complete. The aforesaid charges raised by the bonded warehouse owner were compulsory and not optional in nature and it had been made specific and clear in the agreement itself that the aforesaid charges shall be treated to be a part and parcel of the price of the Indian made liquor. The agreement also provides that the petitioner company will have to bear the inward freight charges for making available the Indian made foreign liquor at Guwahati, i.e., the freight and other transportation charges paid or payable, while the goods are delivered by the bonded warehouse owner NSSSS to the petitioners, at Guwahati, including the freight paid or payable for bringing the Indian made foreign liquor from the distilleries to the bonded warehouse at Guwahati.

13. It is not in dispute before me that the question as to whether in respect of any transactions of the nature, which is the subject-matter of controversy in this Writ petition, tax is exigible or not has to be determined on the basis of the terms of the agreement. The Bombay High Court in *Commissioner of Sales Tax v. Premier Aerated Water Pvt. Ltd.* (1975) 36 STC 201 held that the question whether in respect of transactions, sales tax is exigible or not may be determined only on the terms of the contract and not from the invoices issued by the person entitled to receive money under the terms of the contract. I respectfully agree with the views so expressed.

14. In the case at hand, the terms of contract are clear and leave no room for doubt that the charges, in question, were raised by the NSSSS against the petitioner company for services rendered and facilities provided to the petitioner company before the transactions of sale were complete and the same were to be paid before lifting of the goods by the petitioner company.

15. I may pause here to point out that the expression "anything done by the dealer", occurring in Section 4, came up for interpretation by the Apex Court in *McDowell & Co. Ltd. v. Commercial Tax Officer* (1977) 39 STC 151. The Apex Court, while dealing with the provisions of the Sales Tax Act, held that the phrase "any sum charged by the dealer" has to be understood in its ordinary popular sense, and so construed, it means, "what is demanded and collected or received by the dealer".

16. Since in the present case, as per the contract entered into between the warehouse owner and the petitioner company, it was obligatory on the part of the petitioner to pay the charges specified therein, the same ought to have been

treated to be a part of the purchase price inasmuch as the same were demanded and collected from the petitioner company by the warehouse owner for completing the transactions of sale.

17. The Andhra Pradesh High Court in *Central Wine v. Special Commercial Tax Officer* (1982) 49 STC 83, while dealing with the term "price", held as under :

"Price" is the amount of consideration, which a seller charges the buyer for parting with the title to the goods. It comprises of the amount, which the dealer himself had to pay for the purchase of goods, the expenditure which he had to incur for transporting these goods from the place of purchase to the place of sale, in duties, if any, levied on the particular goods purchased by him, the octroi duty, which he may have had to pay during the course of the transport of the goods and his own margin of profit after meeting the handling charges including interest on the capital invested. To these several items, he may add the sales tax, which he would be liable to pay as a dealer of goods purchased by him in the event of selling those goods to a third party. The cost price of the goods plus the amount paid by him on these various heads of account including the sales tax would constitute the consideration for which he would part with his title to the goods in favour of the third party who is prepared to pay that consideration. The entire amount of consideration including the sales tax component which the purchases pays therefore, constitute the price of the goods."

18. The above decision of the Andhra Pradesh High Court was affirmed by the Apex Court in *Central Wines v. Special Commercial Tax Officer* (1987) 65 STC 48. In the aforesaid decision, the Apex Court held that the amount of money, which goes from the pocket of the purchaser to the pocket of the dealer as a condition of consideration for passing of the property in the goods, is, the sale price and not liable to be taxed. The Apex Court further held that the consideration obtained by the dealer from the purchaser would, in the eye of law, be the sale price regardless of what nomenclature is given to a part of the price charged by him.

19. For what have been discussed above, it is abundantly clear that the conclusion of the Deputy Commissioner of Taxes to the effect that the charges paid by the petitioner to the bonded warehouse owner as per the agreement, dated 1.4.1993, cannot be treated to be part of the purchase price is wholly incorrect and untenable in law and when such charges are taken into consideration, the difference between the purchase price and re-sale price comes to below 40%. Hence, the provisions of Explanation to Section 8(1)(a) will not be applicable to such cases. Logically, therefore, the orders of assessment passed by the Superintendent of taxes cannot be termed as erroneous and/or prejudicial to the interest of revenue.

20. We may pause here and take note of the relevant part of Section 36(1) of the Assam General Sales Tax Act, 1993, which is reproduced below :

"Revision of order by the Commissioner :

36. (1) The Commissioner may call for and examine the records of any proceeding under this Act and if he considers that any order passed therein by any person appointed under Sub-section (1) of Section 3 to assist him is erroneous insofar as it is prejudicial to the interest of the revenue, he may, after giving the dealer or the person to whom the order relates an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order as the circumstances of the case justify, including an order enhancing or modifying the assessment of tax or penalty or cancelling such order and directing that a fresh order should be made :

Provided that no order under this sub-section shall be made after the expiry of eight years from the end of the financial year in which the order sought to be revised was made.

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21. It may also be pointed out that the power of the suo motu revision of the Commissioner of Taxes under Sub-section (1) of Section 36 is in the nature of supervisory jurisdiction and can be exercised only if two conditions and circumstances specified therein exist, namely, that the order to be revised is erroneous and by virtue of the order being erroneous, prejudice has been caused to the interest of revenue. The second condition of Section 36(1) that the order must also be prejudicial to the interest of revenue comes into play only when the revisional authority finds that the order is erroneous and must record specific finding in that regard. This finding shall be reached in the light of the terms and conditions of the agreement between the parties as well as the law relevant thereto. Erroneous assessment refers to an assessment that deviates from the law and is, therefore, invalid. The defect must be jurisdictional in nature and does not refer to the judgment of the assessing officer in fixing the amount. An order cannot be termed as erroneous unless and until it is not in accordance with law. The revisional authority has no power to initiate suo motu revisional proceedings with a view to start roving inquiries in the matters and orders, which already stand concluded. The suo motu revisional authority is not empowered to substitute its own judgment for that of the subordinate officer unless the decision of the subordinate officer is held to be erroneous or perverse or contrary to law. Reliance placed, in this regard, by Dr. Saraf on the decision of this Court in *Rajendra Singh Vs. Superintendent of Taxes and Others*, and the decision of the Punjab & Haryana High Court in *Commissioner of Income Tax Vs. Kanda Rice Mills*, is not misplaced.

22. From a reading of the order, dated 17.10.1996 passed by the Superintendent of Taxes in the rectification proceedings, it will be clear that the said proceedings were initiated on the basis of the objections raised by the A.G. audit party and though the said proceedings were dropped after due examination of documents and records, the learned Deputy Commissioner of Taxes, again, initiated the suo motu revisional proceedings on the same basis and passed the impugned orders, but while passing the orders, the revisional authority, it is clear, failed to

correctly apply its independent judicial mind as to whether the orders passed in the rectification proceedings were erroneous and prejudicial to the interest of revenue. The impugned order, therefore, suffer from serious infirmities of law and cannot be allowed to stand good on record.

23. In the result and for the reasons discussed above, this writ petitions succeed. The impugned orders, dated 22.03.1999 aforementioned, are hereby set aside and quashed.

24. Considering, however, the entire facts and circumstances of the case, the parties are left to bear their respective costs.