
(2009) 09 BOM CK 0002

In the Bombay High Court

Case No : Writ Petition No's. 1940 of 1997 and 2460 of 1998

Inter Gold (India) Limited and Another

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 11-09-2009

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 13AA, 13AA(1), 2(13), 32, 36

Finance Act, 1994 — Section 65(19)

Transfer of Property Act, 1882 — Section 3

Citation : (2010) 29 VST 360

Hon'ble Judges : Ferdino I. Rebello, J; D.G. Karnik, J

Bench : Division Bench

Advocate : M.H. Gani, instructed by, Vinod Mistry and Co, for the Appellant; I. Calcuttawala, A.G.P., for the Respondent

Judgement

Ferdino I. Rebello, J.—In Writ Petition No. 1940 of 1997 the petitioner has challenged an order of assessment dated October 6, 1997 and notice of demand dated October 7, 1997 in respect of the period April 1, 1994 to March 31, 1995 under the Bombay Sales Tax Act, 1959.

2. In Writ petition No. 2460 of 1998 in respect of the period 1995-96, the petitioners are aggrieved by the assessment order dated October 23, 1998 and notice of demand dated October 31, 1998 and have prayed that the same be quashed and set aside. Apart from these prayers, other common prayers in both the petitions are that the petitioners be exempted from payment of purchase tax u/s 13AA and consequent penalties and interest u/s 36 as levied by respondent No 3. The petitioner has also prayed for refund of moneys collected by respondent No. 4 unauthorizedly with interest at the rate of 21 percent p. a. from September 22, 1997 till payment. The other prayer clause is to declare that the phrase "unless the goods so purchased are resold" excludes the Special Import Licence defined in entry 36 in Schedule C, Part I of the said Act in force during the period September 1, 1992 to September 30, 1995 and in the alternative for a declaration that Section 13AA of the Bombay Sales Tax Act,

1959 as void and unconstitutional.

3. The petitioners who are manufacturers of gold and diamond ornaments as a 100 per cent EOU, having the factory in free trade zone (SEEPZ), purchased in the open market what is known as a Special Import Licence. Sales tax was payable on the said SIL. The respondents' case is that as the Special Import Licences were not resold additional purchase tax is leviable u/s 13AA. The petitioners contend that against SIL, goods were imported in the year 1994-95 in Bombay and were sold at Bombay. In the year 1995-96 the SIL were transferred to Delhi, and the goods were imported in Delhi and sold there and taxes have been paid under the Delhi Sales Tax Act.

4. Before proceeding to answer the issue, we may at the outset consider the challenge to Section 13AA as being unconstitutional and void. In our opinion, such challenge would not be available as it would stand concluded by the judgment of the Supreme Court in *Devi Dass Gopal Krishan Pvt. Ltd. v. State of Punjab* [1994] 95 STC 170. One of the sections under consideration was Section 13AA of the Bombay Sales Tax Act, 1959 which came into effect from July 1, 1982. This provision was declared to be beyond the competence of the State Legislature in *Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another*, . With a view to get over the said judgment and in consequence an Ordinance was issued being the Bombay Sales Tax (Amendment) Ordinance, 1989. This was subsequently replaced by an Amendment Act which substituted Section 13AA with retrospective effect from July, 1982. Substituted Section 13AA reads as under:

13AA. Purchase tax payable on goods in Schedule C, Part I, when manufactured goods are not sold.--(1) Where a dealer, who is liable to pay tax under this Act, purchases any goods specified in Part I of the Schedule C, directly or through commission agent, from a person who is or is not a registered dealer and uses such goods in the manufacture of taxable goods, then, unless the goods so manufactured are sold by the dealer, there shall be levied, in addition to the sales tax, paid or payable, if any, or as the case may be, the purchase tax levied or leviable, if any, under the other provisions of this Act, in respect of purchases of such goods, a purchase tax at the rate of two paise in the rupee on the purchase price of the goods so used in the manufacture, and accordingly the dealer shall include purchase price of such goods in his turnover of purchases in his return u/s 32, which he is to furnish next thereafter.

(2) A dealer who becomes liable to pay tax under Sub-section (1) shall, unless he has already furnished a return including the turnover of such purchases during the period commencing on the July 1, 1982 and ending on the day immediately preceding the date of commencement of the Bombay Sales Tax (Amendment) Act, 1990 or is exempted from furnishing such return, by a general or special order issued in this behalf by the Commissioner, furnish a consolidated return including the turnover of such purchases for the period

aforesaid, within a period of three months from the date of the commencement of the said Act.

5. The validity of this provision was questioned before this Court. By judgment and order dated August 28, 1990 in Writ Petition No. 477 of 1990 Hindustan Lever Ltd. v. State of Maharashtra [1990] 79 STC 225 (Bom) and another petitions, the petitions were allowed. Against which the appeals were preferred before the Supreme Court. For the reasons given in the judgment the learned court was pleased to allow the appeal by holding that the Bombay Sales Tax (Amendment) Act, 1990 (which replaced Maharashtra Ordinance 9 of 1989) was valid and by a competent Legislature. The court further observed in the light of the discussion in the judgment, the decision in Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, in so far as it declared the original Section 13AA as invalid, must be deemed not to be the correct law. It is no doubt true that the amended provisions was not considered. However, as Section 13AA as it stood, was held to be constitutionally valid, the challenge to the amended section on similar grounds must be rejected. This judgment was pronounced on April 8, 1994. Therefore, in our opinion, the challenge in so far as constitutional validity of Section 13AA will have to be rejected.

6. We will have to consider the other prayer clauses. For answering that issue, we will have to consider whether SIL is "goods" as defined u/s 2(13) of the Act. It is the contention of the petitioners that we will have to consider in entries under Schedule C, Part I, entry No. 26, SIL is not specifically specified or included. The Finance Minister's speech on the Finance Bill 1998-99 will also have to be considered. By legislative enactment by Maharashtra Ordinance 6 of 1998 was replaced by Act which came into effect from May 1, 1988. Entry No. 47 to Schedule A was added which read "Goods of incorporeal or intangible character other than those specified in Schedule C". Similarly original entry 26 of Schedule C was amended which now reads as "Goods of incorporeal or intangible character which includes import licence". From time to time, Explanations were added. From May 1, 1998 it was explained that "it includes Special Import Licence". It is submitted that the provisions will have to be properly construed bearing in mind the rule of contextual and purposive interpretation and mischief rule or Hayden's rule as also the golden rules of literary and strict construction. Various other contentions are also sought to be contended.

7. As reference is made to the Finance Minister's speech, we may gainfully refer to the relevant extract of the speech:

Para 96. The Supreme Court has clarified that it is open to the State Government to levy tax on the sales of intangible goods such as import licences, trade marks, etc. Accordingly the Sales Tax Act has been amended from time to time to specify certain intangible goods to be liable to tax. The question whether the non-specified intangible goods are liable to tax, thus remains open. The Government has no intention to tax intangible goods unless they are specified. 1 accordingly

propose to provide for a full exemption to all intangible goods up to the time they are specified to be liable to tax.

8. Let us proceed to consider whether the SIL are goods within the meaning of Section 2(13) of the Bombay Sales Tax Act (which hereinafter shall be referred to as, "the Act"). The definition of the "goods" reads as under:

"Goods" means every kind of movable property (not being newspapers or actionable claims or money, or stocks, shares or securities), and includes growing crops, grass, and trees and plants (including the produce thereof) and all other things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Part I of Schedule C, entry No. 26 reads as under:

Goods of incorporeal or intangible character, that is to say

- (a) Patents,
- (b) Trade marks
- (c) Import licences.

9. The submission on behalf of the petitioner is that special import licence is not import licence and consequently it would not be covered by the aforesaid entry. We are concerned with the periods from April 1, 1994 to March 31, 1995 and April 1, 1995 to March 21, 1996.

10. Before proceeding to answer the issue we may first gainfully refer to the judgments of the Supreme Court in *Vikas Sales Corporation v. Commissioner of Commercial Taxes* [1996] 102 STC 106. The Supreme Court there was considering import licence called replenishment licence (REP licences) or exim scrips under the provisions of the Tamil Nadu General Sales Tax Act, 1959, Karnataka Sales Tax Act, 1957 and the Kerala General Sales Tax Act, 1963. While considering the nature of these licences, the court noted that the Central Government has been issuing, from time to time, what is called the Import and Export Policy, published in the form of a brochure. The Import Policy in vogue during the years concerned herein provided for issuance of what is called "replenishment licences" (for short, "REP licences"). The objective behind the licences was to provide to the registered exporters the facility of importing the essential inputs required for the manufacture of the products exported. The essential idea was to encourage exports and for that purpose import licences called REP licences were issued equal to the prescribed percentage of the value of exports. These licences were made freely transferable. It was provided that the transfer of such licences did not require any endorsement or permission from the licensing authority. It was clarified that they would be "governed by the ordinary law". It only required a letter from the transferor recording and evidencing the trade. On that basis, the transferee became the due and lawful holder of the licence and could either import the goods permitted thereunder or

sell it to another in turn. With effect from July 3, 1991, the name of the licence was changed to *exim scrip* (export-import licence). The provisions governing the *exim scrip* were broadly the same as those governing the REP licence with certain minor variations, which are not relevant for our purposes. Several registered exporters who obtained REP licences/*exim scrips* sold them to others for profit. In fact, these licences/ *exim scrips* were being traded freely in the market and on stock exchanges. The sales tax authorities of certain States proceeded to subject such sales to sales tax under their respective enactments. The assessee immediately protested contending that these licences/*exim scrips* do not constitute "goods" within the meaning of the relevant sales tax enactments and therefore, not exigible to tax. While answering the issue, the Supreme Court noted that entry 54 in List II of the Seventh Schedule to the Constitution of India empowers the State Legislatures to make laws with respect to "taxes on the sale or purchase of goods other than newspapers subject to the provisions of entry 92A of List I". Entry 92A of List I speaks of "taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce". The Supreme Court noted the General Clauses Act, 1895 defines "movable properties" to mean "property of every description except immovable property". The expression "immovable property" is defined to "include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth". We have already referred to the definition of "goods" under the Bombay Sales Tax Act, 1959. After considering the various dictionary meanings as to what would constitute property, the court observed as under (at page 119 of 102 STC):

The above provisions do establish that REP licences have their own value. They are bought and sold as such. The original licensee or the purchaser is not bound to import the goods permissible thereunder. He can simply sell it to another and that another to yet another person. In other words, these licences/*exim scrips* have an inherent value of their own and are traded as such. They are treated and dealt with in the commercial world as merchandise, as goods. An REP licence/*exim scrip* is neither a chose-in-action nor an actionable claim. It is also not in the nature of a title deed. It has a value of its own. It is by itself a property--and it is for this reason that it is freely bought and sold in the market. For all purposes and intents, it is goods. Unrelated to the goods which can be imported on its basis, it commands a value and is traded as such. This is because, it enables its holder to import goods which he cannot do otherwise. With effect from March 1, 1992, of course, the very policy and system under which these licences/*scrips* were being issued, has been discontinued.

11. The court then further observed (at page 121 of 102 STC):

When these licences/*scrips* are being bought and sold freely in the market as goods and when they have a value of their own unrelated to the goods which can be imported thereunder, it is idle to contend that they are in the nature of

actionable claims. Indeed, in *H. Anraj Vs. Government of Tamil Nadu*, , the main contention of the petitioners was that a lottery ticket was in the nature of an actionable claim. The said argument was rejected after an elaborate discussion of law on the subject. We agree with the said decision and on that basis hold that the REP licences/exim scrips are not in the nature of actionable claims.

12. The Supreme Court yet again had an occasion to consider the meaning of words "goods" under other Sales Tax Acts in *Yasha Overseas v. Commissioner of Sales Tax* [2008] 17 VST 182. The Supreme Court was considering whether the judgment in *Vikas Sales* [1996] 102 STC 106 which held that transfers/sales of import licences called REP licences granted in 1992-97 exim policy was exigible to sales tax stand impliedly overruled by the Constitution Bench decision in *Sunrise Associates Vs. Govt. of NCT of Delhi and Others*, which took a view that lottery tickets were actionable claims and were, therefore, excluded from the definition of "goods" under the Sales Tax Act and hence, the sale of lottery tickets was not subject to sales tax and the earlier two-judge Bench decision of the court in *H. Anraj Vs. Government of Tamil Nadu*, holding otherwise did not lay down the correct legal position. The Supreme Court was dealing with REP licences/Duty Entitlement Passbook (DEPB). The court was therefore considering two questions, firstly whether the decision in *Vikas Sales Corporation and another, etc. etc. Vs. Commissioner of Commercial Taxes and another, etc. etc.*, was impliedly overruled by the Constitution Bench decision in *Sunrise Associates Vs. Govt. of NCT of Delhi and Others*, and secondly whether *Vikas Sales Corporation and another, etc. etc. Vs. Commissioner of Commercial Taxes and another, etc. etc.*, would also apply to sale of DEPB. The court also considered the definition of "actionable claims" u/s 3 of the Transfer of Properties Act which is defined as under:

"Actionable claims" means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the civil courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

13. After considering the nature of lottery ticket, the court went on to observe that on producing the ticket, one merely gets conditional interest in the prize money which was not in the purchaser's possession and would therefore fall squarely within the definition of "actionable claim". The court then hold that they were unable to see how the decision in *Sunrise Associates Vs. Govt. of NCT of Delhi and Others*, can be said to alter the position in regard to the sale of REP licence as held by the earlier decision in *Vikas Sales Corporation and another, etc. etc. Vs. Commissioner of Commercial Taxes and another, etc. etc.*, . It may thus be noted that the Constitution Bench in *Sunrise Associates Vs. Govt. of NCT of Delhi and Others*, firmly and expressly declined to go into the question whether REP licences (or DEPB which replaced REP licences) were "goods". The

court noted that the Constitution Bench in *Sunrise Associates Vs. Govt. of NCT of Delhi and Others*, did not approve the decision in *Vikas Sales Corporation and another, etc. etc. Vs. Commissioner of Commercial Taxes and another, etc. etc.*, and it gave their free marketability as an additional reason to hold that REP licences were not actionable claim but "goods" properly so-called. This observation the court held did not in any way change the position in so far as REP licences are concerned. The court noted that the REP licences/exim scrip fell within the definition of "goods" quite independently. The court found and held that REP licences had their own value, they were freely bought and sold in the market for their intrinsic value and for that reason alone, those were goods.

14. Specifically referring to Bombay sales tax and definition of "goods" the court held that the definitions of "goods" and "sale" under the Delhi, Bombay and Kerala Acts are much the same as the definitions of the two expressions in the Tamil Nadu, Karnataka and West Bengal enactments. Hence, what is said in *Vikas Sales Corporation and another, etc. etc. Vs. Commissioner of Commercial Taxes and another, etc. etc.*, and *Sunrise Associates Vs. Govt. of NCT of Delhi and Others*, in regard to the legal provisions fully applies to the cases in hand. The court then finally observed as under:

DEPB has an intrinsic value that makes it a market commodity. Therefore, DEPB like REP licence, qualifies as "goods" within the meaning of the sales tax laws of Delhi, Kerala and Mumbai and its sale is exigible to tax.

15. The law as settled in *Vikas Sales Corporation and another, etc. etc. Vs. Commissioner of Commercial Taxes and another, etc. etc.*, and as confirmed in *Yasha Overseas Vs. Commissioner of Sales Tax and Others*, makes it clear that REP licences are goods. The question is whether special import licences are also goods. Various licences are named differently depending upon the Import Policy for the period for which the Import Policy is issued. All of them are transferable and have intrinsic value of their own, including Special Import Licences. The Special Import Licence was not issued to the petitioners. According to them they have purchased the same from market as it was transferable. In other words, as it had value of its own. Against the licence they have imported goods. Therefore, considering the tests laid down by the Supreme Court for REP/DEPB licence as goods, will have to be applied and considered. It will have to be held that the SIL licences are also goods and consequently liable to sales tax. Once SIL is subjected to sales tax, then by virtue of Section 13AA it will be liable to purchase tax.

16. There is yet another reason. To Explanation II to entry 26, Part I of Schedule C by Mah. Act 21 of 1998, it was explained that for the purpose of the entry, import licence shall include special import licence. By virtue of the Explanation, the doubt if any has been removed an Explanation may be added. *Ex abundanti cautela* to allay groundless apprehension. See AIR 1934 188 (Privy Council) , *Keshavji Ravji and Co. v. Commissioner of Income Tax* : [1990] 183 ITR 1 (SC) : AIR 1991 SC 1806. It is also added sometimes to explain the meaning of the

words contained in the section. From this it would be clear that SIL would fall under entry 26 of Schedule C, Part I.

17. In the instant case, there is no dispute that the petitioners have used the SIL for importing goods. There is no dispute that the licences were purchased in Mumbai and used either in Mumbai or their branch at Delhi. The licence therefore, belonged to the company. The licence was not resold though the goods imported may have been resold. The consequences must follow that the purchase tax was payable on the same. Clearly therefore, levy of purchase tax cannot be faulted with. Once we come to the conclusion that SIL licence is subject to purchase tax, in our opinion, the various other questions need not be considered.

18. Section 13AA considering the facts would apply. Once Section 13AA applies, the dealer would be liable to pay tax under the Act. Reliance placed in the Finance Minister's speech for the purpose of considering entry No. 26 of Part I of Schedule C to our mind is misplaced. The only statement made there was that the Government has no intention to tax intangible goods unless they are specified. In the instant case, the import licences are specified. The REP licences/DEPB licences, SIL licences are all import licences known by different nomenclatures. Against these licences the goods can be imported. Therefore, they are import licences. Consequently the import licences shall clearly fall in entry No. 26 of Part I of Schedule C.

19. The only other contention sought to be advanced was that during the year 1995-96 SIL had been transferred to Delhi Branch and the goods imported were sold over there and necessary taxes as applicable were paid under the Delhi Sales Tax Act. We are really not concerned with the import of goods which is taxable separately. We are only concerned with SIL licences which was purchased by the petitioners and it was used for import of the goods whether at Mumbai or Delhi. There is no dispute that the petitioners purchased the licence in Mumbai. These licences have not been sold by the petitioners. As such the purchase tax u/s 13AA becomes due and payable.

20. Reference was made on behalf of the petitioners to the judgment in Union of India (UOI) and Others Vs. Martin Lottery Agencies Ltd., . An Explanation was added to Clause (2) of Section 65(19) of the Finance Act, 1994 which forms the part of the levy of "service tax". That was an issue under consideration. It has nothing to do with the issue which has been considered in Vikas Sales Corporation and another, etc. etc. Vs. Commissioner of Commercial Taxes and another, etc. etc., or Yasha Overseas Vs. Commissioner of Sales Tax and Others, .

21. The issue then comes whether on the question of penalty and interest. In the instant case, as pointed out earlier, the validity of the law was upheld by the Supreme Court in Devi Dass [1994] 95 STC 170 by the judgment dated April 8, 1994. In these petitions we are concerned with the period April 1, 1994 to March 31, 1995 and April 1, 1995 to March 31, 1996. In other words after the judgment

in M/s. Devi Dass Gopal Krishan Pvt. Ltd., etc. etc., Vs. State of Punjab and another etc. etc., . In these circumstances, after knowing what the position in law would be, it will be difficult to hold that imposition of penalty and interest was without jurisdiction. That contention must be rejected.

22. Rule discharged in both the petitions. In the circumstances of the case, there shall be no order as to costs.