
(2009) 12 GAU CK 0047
In the Gauhati High Court
Case No : Writ Appeal No. 250 of 2006

Jay Kumar Bardia

APPELLANT

Vs

State of Assam and Ors.

RESPONDENT

Date of Decision : 22-12-2009

Acts Referred:

Assam General Sales Tax Act, 1993 — Section 11, 11

Citation : (2012) 1 GLR 806

Hon'ble Judges : Ranjan Gogoi, J and Hrishikesh Roy, J

Bench : Division Bench

Advocate : Mr. O.P. Bhati, Mr. S.K. Singh, Mr. V.K. Chopra and Ms. R. Joshi for the appellant., Mr. D. Saikia for the respondents., Advocates appearing for Parties

Judgement

Hrishikesh Roy, J.—Heard Mr. O.P. Bhati, learned counsel appearing for the appellant (writ petitioner). Also heard Mr. D. Saikia, learned standing counsel for the respondents.

2.1. Being aggrieved with the judgment and order dated 10.5.2006 in 3847/1999, the unsuccessful writ petitioner has presented this Appeal. The Challenge in the writ proceeding was to the assessment order dated 28.5.1997 for the assessment year 199596 under the Assam General Sales Tax Act, 1993 ("the AGST Act") and also the Appellate order dated 23.3.1999 passed by the Deputy Commissioner of Taxes, Silchar. The petitioner also challenged his compulsory registration as a dealer under section 12 of the AGST Act by contending that his tent house business does not come within the purview of the Act and his business should not be subjected to assessment to tax.

2.2 It may be recorded that the appellant's gross turn over at Rs. 1,47,426 has been determined on best judgment basis and tax liability of Rs.71,144 with interest and penalty have been assessed by the Assessing Authority.

2.3 The Appellate Authority sustained the assessment by rejecting the assessee's contention to the effect that tent house business is not exigible to tax

and that turnover has been determined on imaginary basis, which is nowhere near the actual turnover. It was also recorded that although the assessee deals in several items, but the Assessing Officer has correctly assessed tax on his furniture transactions as furniture of all kinds is a specific entry under Schedule VII of the AGST Act. It has also been held that since the dealer as a tent house owner transfers the right to use goods to other persons in lieu of payment, the assessment order is not liable for interference.

3. The issue as to whether the tent house business of the appellant is liable to tax under the AGST Act would largely depend on the answer as to whether in course of his tent house business, the assessee transferred to the hirer, the right to use the furniture owned by him.

4. It may be recorded that the AGST Act, 1993 defines various expressions and some of the relevant ones are noted below for ready reference :

"Dealer"

"Section 2(10) "Any person who carries on the business of selling or purchasing goods in the State and includes

(i)

(ii)

(iii)and includes a person delivering goods on hire purchase or any system of payment by installment or making any sale within the meaning of Clause (33) of this section ;

(iv) a contractor or a lessor ; "Lease"

Section 2(19)".....arrangement whereby the right to use any goods for any purpose is transferred by one person to another whether or not for a specified purposes for cash deferred payment or other valuable consideration without the transfer of ownership and includes a sublease but does not include any transfer on hire purchase or any system of payment by installments."

"Lessee"

Section 2(20) "lessee" means any person to whom the right to use any goods for any purpose is transferred under a lease.

"Lessor"

Section 2(21) "lessor" means any person by whom the right to use any goods for any purpose is transferred under a lease.

"Sale"

Section 2(33) "sale" with all the grammatical variations and cognate expressions means any transfer of property in goods by any person for cash, deferred payment or other valuable consideration, and includes

(i) any transfer otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;

(ii) .

(iii) any delivery of goods on hire purchase or any system of payment by installments or under a financial lease;

(iv);

(v);

(vi);

and such delivery, transfer or supply of any goods shall be deemed to be sale of those goods by the person making the delivery, transfer or supply and a purchase of those goods by the person to whom such delivery, transfer or supply is made, but does not include a mortgage, hypothecation, charge or pledge."

5. By the 46th amendment, an inclusive definition under article 366(29A)(d) was inserted whereby the concept of "deemed sale" is recognized. Subclause (d) of article 29A provides that "tax on sale or purchase of goods" includes " a tax on transfer of the right to use any goods for cash, deferred payment or other valuable considerations", by deeming the transaction to be a "sale".

6. Whether in a given transaction there has been a transfer of the right to use the goods is a question can be answered by examining the terms of agreement amongst the parties and will, therefore, have to be decided on the basis of the facts of each case. The enquiry should be directed to find out as to whether, the transferee has the legal right to use the goods to the exclusion of the transfer. A mere licence to use the goods will not make the transaction liable to tax.

7.1. In a recent decision of our court in Writ Appeal 138/2007 (Dipak Nath v. ONGC Ltd.) the court referred to the Decisions rendered by the Supreme Court in the 20th Century Finance Corporation Ltd. v. State of Maharashtra, (2000) 6 SCC 12. The Supreme Court recorded that the taxable event occurs on the transfer of the right to use the goods regardless of when or where the goods are delivered for use. The Apex Court also held that "the levy of tax is not on use of goods but on the transfer of the right to use goods".

7.2 The case BSNL v. Union of India (2006) 3 SCC 1 was also referred to where Supreme Court indicated that the decision in 20th Century Finance Corporation Ltd. (supra) cannot be an authority for the proposition that delivery of possession of the goods is not a necessary concomitant for completing a transaction of sale for the purpose of article 366(29A)(d) of the Constitution.

7.3 In the BSNL case the Supreme Court laid down several attributes in a transaction to make it one where transfer of the right to use the goods can be inferred. The relevant amongst those attributes for the present case are

"(a) .

(b);

(c) The transferee should have a legal right to use the goods consequently all legal consequences of such use including any permissions or licences required therefor should be available to the transferee;

(d) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor this is the necessary concomitant of the plain language of the statute, viz., "a transfer of the right to use" and not merely a licence to use the goods;

(e) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."

7.4 By referring to the Supreme Court decision in *State of A.P. v. Rashtriya Ispat Nigal Ltd.* (2002) 3 SCC 314, this court recorded that whether there has been a transfer of the right to use the goods has essentially to be answered on a construction of the terms of the contract between the parties.

7.5 Accordingly this court in *Dipak Nath* (supra) referred to the contract agreement between the parties which indicated the clear dominion and control, of ONGC over the Crane, i.e., the goods in question, during the period of contract. Accordingly the court, on considering the agreements, held that as the contractor does not have exclusive and dominion control over the leased goods, it is a case of transfer of the right to use the goods.

7.6 Therefore, the test of dominion control of the goods is indicated by our court in *Dipak Nath* (supra) to be determinative factor for answering the issue.

8. In the present case, it is submitted on behalf of the appellant (writ petitioner) that there is no finding either of the Assessing Officer or of the Appellate Authority that right to use the goods was transferred by the tent house owner and it is argued that without a specific finding on this aspect, the appellant cannot "be held liable to tax under the AGST Act.

9.1. Appearing for the Revenue it is argued by Mr. D. Saikia that tax is to be charged on turnover during a year under section 8 of the AGST Act, in respect of goods specified in ScheduleVII and since under Entry 8 of the Schedule, "furniture of all kind" have been inserted, leasing of furniture and electronic goods etc. under Entry9 of ScheduleVII, even for a brief period would make the appellant liable for tax under the AGST. Act and, therefore, it was obligatory for the appellant to have himself registered as a dealer under section 11 and since he failed to get himself registered as required, the authorities have rightly ordered compulsory registration of the appellant as a dealer under section 12 of the AGST Act.

9.2 The learned counsel further submits that despite giving opportunities, the appellant had failed to produce his Books of Accounts and had also failed to respond to the notices issued by the Tax Authorities, and since the cash and

ledger book were not available at the time of seizure, the transactions of the appellant have been examined on the basis of available documents such as Challan Books, Money Receipt Books and Stock Books and the assessment has been made as per the best judgment of the Assessing Officer (respondent No.4) under section 17(5) of the AGST Act.

9.3 It is further contended that it was open to the appellant to show cause that he is not liable to levy of tax or for compulsory registration as a dealer by referring to the terms under which furniture and electronic goods are made available to his customers and since the appellant failed to show the nature of the transactions, his business has been rightly held exigible to tax, under the AGST Act and no interference of the court is called for.

10. In order to decide whether the appellant's transactions have been rightly assessed to tax under the AGST Act, the court has to decide on the terms and the nature of the transactions between the appellant and his customers who hire goods (furniture or electronic goods) from him. But in this case neither from the assessment order nor from the appellate order, the terms under which the goods are leased out by the appellant can be gathered.

While assessing the transactions of the appellant, the Assessing Officer has not indicated anywhere as to the terms of the transactions or the specific nature of the petitioner's tent house business. The Appellate Authority also proceeded on the basis that since furniture is made a specific entry in Schedule VII of the AGST Act, the Assessing Officer has rightly assessed the furniture to tax and not the other goods hired out by the appellant.

11. While there is no difficulty in understanding that only certain kinds of transactions would be exigible to tax under the AGST Act, to give a finding specifically as to whether the transactions of the appellants in course of his tent house business are exigible to tax, it would be necessary to have recourse to the basic facts and also the terms covering such transactions. It would be necessary to know what is the agreement between the appellant and his customers and whether the terms of the agreement show that the appellant has transferred his right to use the goods to the exclusion of his own rights over the such goods during the period of the transactions. Unfortunately the basic facts, i.e., the terms and conditions of the transactions are not available to this court and the same are not discernible from the assessment order and the order passed by the Appellate Authority. There is no finding by any of the said authorities by reference to the terms of the transactions as to whether in the instant case, there has been a deemed "sale" and whether the right to use the goods, (i.e., furniture of all kinds and electronic goods) were transferred to the petitioner's customers, to the exclusion of the owner.

12. Even in the absence of the basic information as noted above, the court on its own understanding of the nature of the trade practices may gather the terms of the transactions of a tent house business. But whether it would be correct way to

adjudicate on the issue is another thing altogether, as terms of the transaction may differ on deal to deal basis or each businessman may have his own manner of doing business. In such situation, assuming anything on the factual aspects about the possible terms of the business and thereafter deciding the case on the basis of such assumption, may lead to injustice for the litigating parties.

13. In the above circumstances, we feel handicapped in pronouncing on the legality or otherwise of the impugned orders. Accordingly the court is left with no choice but to remand this case to the original Assessing Authority for a fresh assessment by bringing on record the relevant materials to gather the terms, under which goods are transacted by the appellant in course of his tent house business. It is ordered accordingly.

14. The Writ Appeal is disposed of without any order on cost.