

(2015) 03 CHH CK 0012
In the Chhattisgarh High Court
Case No : Writ Appeal (Civil) No. 8 of 2015

Jayaswal Neco Industries Ltd.

APPELLANT

Vs

State of C.G. and Others

RESPONDENT

Date of Decision : 03-03-2015

Acts Referred:

Transfer of Property Act, 1882 — Section 105

Citation : (2015) 4 CGLJ 219 : (2015) 3 MPHT 1

Hon'ble Judges : Navin Sinha, A.C.J;P. Sam Koshy, J

Bench : Division Bench

Advocate : G.C. Bharukha, Senior Advocate, Devashish Bharukha, Rahul Pandey and H.S. Patel, for the Appellant; A.S. Kachhawaha, A.A.G, Advocates for the Respondent

Final Decision : Allowed

Judgement

Navin Sinha, Acting C.J—We have heard learned Senior Counsel for the appellant and Counsel for the respondents. The present appeal arises from order dated 5-12-2014 dismissing Writ Petition (C) No. 1889 of 2013. The learned Single Judge held that the appellant being the lessee of the electrical power plant owned by M/s. Maa Usha Urja Limited, came within the definition of "producer" as defined in Section 2(d-i) of the Chhattisgarh Electricity Duty Act, 1949 (hereinafter referred to as "the Act") and was liable to pay electricity duty under Section 3 of the Act. The exemption granted to M/s. Maa Usha Urja Limited was not liable to the appellant.

2. Assailing the order, learned Senior Counsel for the appellant contended that Section 3 of the Act provided for levy of duty at the rates specified on sale or consumption of electrical energy on a "producer" or a "distributor" who sold or supplied electricity to a consumer or consumed by itself. The charging section imposed liability to duty with the "distributor" or "producer" of electrical energy. Unless a person fulfilled the definition of either it could not be subjected to duty. The controversy in the present case relates to the definition of "producer".

Section 2(d-i) of the Act defines "producer" as a person who was registered with the State Government according to rules, generated electrical energy at a voltage exceeding hundred volts. The definition clause then itself provided that in the event of generation of electrical energy by a hirer of generator, the owner of the generator shall be deemed to be the "producer". The word "hirer" was wide enough to include a lease, which is also granted on payment basis. The law creates a fiction by imagining a state of affairs, which may not exist factually and then fixes liability to tax on basis of the fiction irrespective of who may be the owner of generator factually. If a fiction is created it must be carried to its logical and irrespective of the conclusion. Reliance was placed on Vol. LVII Indian Appeals 49, Commissioner of Income Tax, Bombay Presidency Vs. Bombay Trust Corporation Limited.

3. It was next submitted that even if the appellant and M/s. Maa Usha Urja Limited were sister concerns and had 31.33% share in the latter, the two companies were distinct and separate legal entities nonetheless relying on 1988 (Supp) SCC 488, Karanpura Development Company Vs. Union of India, and could not be treated as one entity.

4. The demand notice dated 22-6-2012 was itself invalid based on a mere audit objection. The audit objection brought on record by the respondents reveals that even the lease agreement signed between the parties was not examined and it also does not consider the provisions of the Act. The audit objection opined that M/s. Maa Usha Urja Limited had not acted in accordance with law pursuant to the exemption granted to it and had caused revenue loss of Rs. 4.58 crores by wrongly granting lease to a third party. The audit objection did not and could not fix the liability for payment on the appellant. A taxing statute has to be interpreted literally irrespective of the consequences if there is no ambiguity. The definition of the term "producer" being explicit containing no ambiguity, it is not permissible for the respondents to fix liability on any other person than on whom the statute imposes the liability. The appellant never represented itself to be a "producer" in the statutory Form G and on the contrary specifically stated that it had taken the power plant of M/s. Maa Usha Urja Limited on lease for captive consumption as also disclosed by the latter.

5. Learned Additional Advocate General on behalf of the State submitted that the demand raised upon the appellant is based on the audit objection dated 30-3-2012. The exemption granted to M/s. Maa Usha Urja Limited, in the facts, was not available to the appellant. Factually, since the production of energy from the plant in question taken on lease, was being done by the appellant, it was liable to pay the duty. The respondents committed no illegality in raising the demand based on audit objection. The appellant had itself stated that M/s. Maa Usha Urja Limited was a sister concern of the appellant under the same management with the appellant holding 31.63% of shares in the latter. In the G-Form Return submitted by the appellant duly certified by M/s. Maa Usha Urja Limited, the appellant was described as a "producer". The appellant was,

therefore, clearly liable to pay the electricity duty and could not take benefit of the exemption granted to M/s. Maa Usha Urja Limited.

6. We have considered the submissions on behalf of the parties and also examined the provisions of law. The first principle of interpreting of a taxing statute is to do so strictly and literally. If the language of the statute is clear, the person liable to pay tax is clearly identified and there is no ambiguity of language, irrespective of the consequences that may follow literal interpretation shall have to be done. There is no occasion for the Court to interpret the statutory provision in any other manner and apportion liability on the person other than on whom the statute imposes the liability. We may profitably refer to the observation in (2010) 14 SCC 751, CCE Vs. Doaba Steel Rolling Mills as follows:--

"26. On the principles of interpretation of taxing statutes, the following passage from the opinion of late Rowlatt, J., in Cape Brandy Syndicate Vs. IRC, has become the locus classicus and has been quoted with approval in a number of decisions of this Court: (KB p. 71)

".....in a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used".

7. Section 2(d-i) and Section 3 of the Act reads as follows:--

"2. (d-i) "producer" means, subject to such rules as may be made by the State Government for registration of generators, a person who generates electrical energy at a voltage exceeding hundred volts and, in the event of generation of electrical energy by a hire of generator, the owner of generator shall be deemed to be the producer;

3. Levy of duty on sale or consumption of electrical energy.--(1) Subject to the exceptions specified in Section 3-A, every distributor of electrical energy and every producer shall pay every month to the State Government at the prescribed time and in the prescribed manner a duty calculated at the rates specified in the table below on the units of electrical energy sold or supplied to a consumer or consumed by himself for his own proposes or for purpose of his township or colony, during the preceding month."

8. A bare perusal of the statutory provisions reveals that the liability to pay the duty arises at the rates provided in the Table if a person is a "producer" and sells, supplies or consumes electricity itself, unless exemption has been granted under Section 3-A of the Act. The definition of "producer" stipulates registration with the Government by a person generating electrical energy at a voltage exceeding hundred volts. It then creates a fiction that if electricity is generated by a person who takes a generator on hire, the owner of the generator shall be deemed to be the "producer" irrespective of the fact that the electricity was

actually being generated by another. The provision creates a legal fiction by deeming an imaginary state of affairs from that which may actually exist. A person may be duly registered for generation of electrical energy but may not be producing electricity itself and may have hired out the plant to another. Still, according to the definition of the word "producer" the liability for payment of duty shall rest with the owner of the generator as a deemed "producer" and not on the person who took it on hire. That a legal fiction must be taken to its logical conclusion and the mind must not be allowed to boggle in between was considered in American Home Products Corporation Vs. Mac Laboratories Pvt. Ltd. and Another, AIR 1986 SC 137 : (1985) 2 SCALE 933 : (1986) 1 SCC 465 : (1985) 3 SCR 264 Supp , observing:--

"56. In a celebrated passage Lord Asquith of Bishopstone in East End Dwellings Co. Ltd. Vs. Finsbury Borough Council, said:--

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents, which if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it."

57. In the State of Bombay Vs. Pandurang Vinayak Chaphalkar, this Court held while approving the above passage of Lord Asquith:--

"When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion".

9. Reliance has also aptly been placed on Commissioner of Income Tax Bombay Presidency (supra), observing as follows:--

"Now when a person is "deemed to be" something, the only meaning possible is that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were."

10. Merely, because the appellant may be a sister concern of M/s. Maa Usha Urja Limited, the two companies being separate legal entities, the liabilities of one cannot be fastened on the other.

11. The contention on behalf of the respondents that in the statutory Form-G declaration, the appellant was shown as a "producer" by M/s. Maa Usha Urja Limited is misconceived. The letter dated 10-4-2007 addressed to the Chief Electrical Inspector speaks of generation report of the power plant at Siltara of M/s. Maa Usha Urja Limited. It then mentions the name of the appellant with a clarification given by the appellant that it had taken the generator equipment on lease. The respondents, therefore, rightly did not raise any demand from the appellant from 2007, till the audit objection by the Assistant Accounts Officer. The audit objection is not a final decision and cannot be given the same colour

and meaning as a considered decision arrived at by the Statutory Authority. An audit objection is merely the expression of an opinion or objection in the form of questions, which may be answered to the satisfaction of the objector or else if the objections are found valid corrective action is taken by the concerned. It can never mean and does not mean the final expression or judgment binding against the person with regard to whom it is made. Audit objections itself may be raised in absence of availability of complete materials before the Auditor. In the present case, the audit objection itself states that a copy of the lease agreement between the appellant and M/s. Maa Usha Urja Limited was not available. There is no discussion in the audit objection with regard to the provisions of the Act. The only opinion expressed is that because M/s. Maa Usha Urja Limited was not producing electricity by itself and had leased out the plant, it was not liable to avail the benefit of exemption and had caused revenue loss. If that was so prudence required the respondents to consider the objection report appropriately and proceed against the concerned in accordance with law rather than to read in the audit objection a direction to raise demand against the appellant contrary to statutory provisions. The meaning of an audit objection and its scope was considered in *Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi*, AIR 1979 SC 1960 : (1979) 12 CTR 190 : (1979) 119 ITR 996 : (1979) 4 SCC 248 : (1980) 1 SCR 442 : (1979) 2 TAXMAN 197 : (1980) 12 UJ 305 , observing:--

"11. Under that section, the audit by the Comptroller and Auditor-General is principally intended for the purposes of satisfying him with regard to the sufficiency of the rules and procedures prescribed for the purpose of securing an effective check on the assessment, collection and proper allocation of revenue. He is entitled to examine the accounts in order to ascertain whether the rules and procedures are being duly observed, and he is required, upon such examination, to submit a report. His powers in respect of the audit of income tax receipts and refunds are outlined in the Board's Circular No. 14/19/56-II, dated July 28, 1960. Para 2 of the circular repeats the provisions of Section 16 of the Comptroller and Auditor-General (Duties, Powers and Conditions of Service) Act, 1972. And Para 3 warns that "the Audit Department should not in any way substitute itself for the Revenue Authorities in the performance of their statutory duties." Para 4 declares:--

"4. Audit does not consider it any part of its duty to pass in review the judgment exercised or the decision taken in individual cases by officers entrusted with those duties, but it must be recognised that an examination of such cases may be an important factor in judging the effectiveness of assessment procedure..... It is however, to forming a general judgment rather than to the detection of individual errors of assessment, etc. that the audit enquiries should be directed. The detection of individual errors is an incident rather than the object of audit."

Again in *Arun Kumar Agrawal Vs. Union of India (UOI) and Others*, (2013) 9 AD 57 : AIR 2013 SC 3127 : (2013) 7 JT 218 : (2013) 7 SCALE 333 : (2013) 7 SCC

1 : (2013) AIRSCW 2814 : (2013) AIRSCW 4804 : (2013) 6 Supreme 14 , with regard to the legal effect of an audit objection it was stated:--

"7. The question that is germane for consideration in this case is whether this Court can grant relief by merely placing reliance on the CAG's Report. The CAG's report is always subject to parliamentary debates and it is possible that PAC can accept the ministry's objection to the CAG Report or reject the report of the CAG. The CAG, indisputably is an independent constitutional functionary, however, it is for Parliament to decide whether after receiving the report, i.e., PAC to make its comments on the CAG's Report."

12. The appellant had specifically contended that the lessor was responsible for payment of all taxes including electricity duty on the leased electrical power plant referring to Section 2(d-i) of the Act. The learned Single Judge observed that exemption had been granted to M/s. Maa Usha Urja Limited and it had failed to fulfill the conditions of the exemption. That in our opinion was not a relevant issue in so far as the demand for duty raised upon the appellant is concerned in view of the legal fiction created in the definition of the term "producer" under the Act.

13. The learned Single Judge erred in relying upon the provisions of the Transfer of Property Act regarding lease without discussing the effect of the liability for duty created by the legal fiction under the Act. We are, therefore, unable to uphold the conclusion of the learned Single Judge that since the appellant was enjoying the property by a lease under Section 105 of the Transfer of Property Act, it would be deemed to be a "producer". That would amount to reading into Section 2(d-i) of the Act something, which the legislature did not provide for, clearly impermissible for the Court in the law in view of the clear language of the statute.

14. In conclusion, we are unable to sustain the order under appeal, which is accordingly set aside. The appeal is allowed but without prejudice to the rights of the respondents in accordance with law.