

(2007) 05 GAU CK 0042
In the Gauhati High Court
Case No : Writ Petition (Civil) No. 3107 0/2002

J.Trans Power (P.) Ltd.

APPELLANT

Vs

State of Assam and Ors.

RESPONDENT

Date of Decision : 02-05-2007

Acts Referred:

Constitution of India, 1950 — Article 226, 226

Citation : (2007) 3 GLT 422

Hon'ble Judges : Ranjan Gogoi, J

Bench : Single Bench

Advocate : J.Bora , R.Dubey, Advocates appearing for Parties

Judgement

1. The petitioner is a Private Limited Company having its registered Office at Bharali Complex, G.S. Road, Guwahati. The company is, infer alia, engaged in the business of execution of works contracts relating to the design, fabrication, erection and foundation works of high tension transmission lines and sub station structures.

2. For the assessment year 199394 (1.7.1993 to 31.3.1994), the petitioner furnished the requisite returns under the provisions of The Assam General Sales Tax Act, 1993 and the Rules framed thereunder (hereinafter referred to as the Act and the Rules respectively). Pursuant to a notice issued, under section 17(2) of the Act, the petitioner, in the course of the assessment proceeding, produced its books of accounts for the period in question. Thereafter, the jurisdictional superintendent of taxes by an orderdated 31.3.1997 completed the assessment of the petitionercompany under the provisions of the Act. In the said assessment order the assessing officer specifically recorded that during the period in question the petitioner company, apart from executing works contracts, had also effected independent sales of iron angles. Accordingly, the turnover of the petitioner on account of direct sales of iron angles to registered as well as unregistered dealers which was determined at Rs. 1 1,76,642.00 and Rs. 7,74,357,00 respectively was assessed to tax at nil and 6%. The assessing officer while making the

assessment in question held that the iron angles sold by the petitioner fell within the purview of Item No. 3 of Schedule IV of the Act. By the assessment order dated 31.3.2007 the turnover of the petitioner arising out of the works contracts was also assessed at the rate stipulated in Item No. 3 of Schedule VI of the Act.

3. The petitioner assessee did not file any appeal against the aforesaid assessment order dated 31.3.2007. Thereafter, by a notice dated 11.11.1997, the Deputy Commissioner of Taxes, Guwahati, Zone A informed the petitioner that under the provisions of the Act the company was liable to pay tax @ 12% on its turnover of iron angles sold to unregistered dealers to the extent of Rs. 7,74,357.00 and @ 6% on the turnover of sales of iron angles to registered dealers amounting to Rs. 11,70,642.00. It was further mentioned that as the superintendent of taxes in the assessment Order dated 31.3.1997 had levied tax @ 6% on the turnover relating to unregistered dealers and had not levied any tax on the turnover in respect of registered dealers the assessment order in question is liable to be revised under section 36(1) of the Act. The petitioner was accordingly asked to show cause by the aforesaid notice dated 11.11.1997. By a subsequent letter dated 6.12.1997, the petitioner was again informed of the matter and given a further opportunity to submit its explanation in writing as to why the assessment order dated 31.3.1997 should not be revised, as proposed.

4. The aforesaid two notices dated 11.11.1997 and 6.12.1997 issued by the Deputy Commissioner of Taxes were not responded by the petitioner. Accordingly, an ex parte order dated 12.2.1998 was passed by the Deputy Commissioner of Taxes, Guwahati, Zone A by holding that as the turnover of sales of iron angles to unregistered dealers was assessed to tax @ 6% instead of 12% and the turnover in respect of registered dealers was assessed at Nil rate of tax against 6%, as statutorily required, the order of assessment dated 31.3.1997 was erroneous and prejudicial to the interest of the Revenue. Accordingly, the Deputy Commissioner of Taxes, in exercise of his suo motu power of revision under section 36(1) of the Act, set aside the aforesaid assessment order dated 31.3.1997 and directed a fresh assessment to be made by levy of tax @ 6% on the turnover of sales made to registered dealers and 12% on the turnover of the sales made to unregistered dealers. It may also be noticed, at this stage, that insofar as the assessment of tax in respect of the turnover relating to works contracts is concerned, no interference was made by the suo motu revisional order dated 12.2.1998. Thereafter, following the directions contained in suo motu revisional order dated 12.2.1998, the jurisdictional superintendent of taxes by an order dated 1.4.1998 determined the liability of the petitioner at Rs. 6,38,949.00 inclusive of interest of Rs. 3,09,594.00.

5. As against the aforesaid assessment order dated 1.4.1998, the petitioner filed a revision application under the provisions of the Act. A reading of the revision application filed by the petitioner, which has been made available by the respondent State along with the original records, would go to show that the only contention advanced in the revision petition is that the turnover relating to sales

of iron angles was not liable to be subjected to payment of any tax inasmuch as the same were a part and parcel of the goods used by the petitioner in the execution of the works contracts. In other words, what the petitioner had contended in the revision application is that there were no independent sale of iron angles. No other point was agitated by the petitioner in the revision petition filed. However, as the petitioner had failed to substantiate the said contention of advanced by production the necessary documents in support, a fact which has been recorded in the order dated 27.9.2001 of the Joint Commissioner of Taxes, the revision petition was dismissed as being without any merit by the aforesaid order dated 27.9.2001.

6. Following the aforesaid order, another fresh assessment order dated 3.10.2001 had been passed by the jurisdictional superintendent of taxes, this time, determining the total liability of the petitioner at Rs. 9,15,607.00 inclusive of interest of Rs. 5,86,252.00. Aggrieved, this writ petition has been filed challenging the suo motu revisional order dated 12.2.1998 and consequential assessment orders as noticed above as well as the order dated 27.9.2001 passed by the Joint Commissioner of Taxes.

7. I have heard Mr. J. Bora, learned counsel for the petitioner and Mr. R. Dubey, learned counsel for the respondents. The pleadings contained in the writ petition have been duly read and considered. The records in original as placed before the court have also received due consideration.

8. Three contentions in the main, have been advanced by Mr. J. Bora, learned counsel for the petitioner. Firstly, learned counsel has contended that the iron angles, the turnover in respect of which was made eligible to tax by the impugned order, is includible under Item No. 45 of Schedule II of the Act attracting 4% tax and not Item No. 3 of Schedule IV on the basis of which the impugned assessments have been made. In this regard, the learned counsel for the petitioner by pointing out the provisions of Item No. 3 of Schedule IV to the Act, as in force at the relevant time, has contended that the said item deals with species of furniture made from aluminium, iron and steel. Consequently, it is argued that the angles referred to in the said item No. 3 has to be understood as angles used in the making of furniture. The petitioner engaged in the business of construction of transmission lines, transmission towers and other ancillary works ; the iron angles dealt with by the petitioner in the course of its business can have nothing to do with furniture items covered by in Item No. 3 of Schedule IV. Therefore, according to the learned counsel for the petitioner, the iron angles dealt with by the petitioner would be covered by Item No. 45 of Schedule II of the Act which deals with iron and steel used as building materials. The next ground urged by the learned counsel for the petitioner is that in the assessment made in respect of the turnover of the petitioner arising out of execution of works contracts, permissible deductions under the provisions of the Act have not been allowed particularly, in respect of declared goods. Lastly, it has been contended by the learned counsel for the petitioner that the levy of interest as

has been made by the impugned assessment orders following the suo motu revisional order, is not authorized by law. In this regard reliance has been placed on a judgment of the Apex Court in J.K. Synthetics Ltd. v. Commercial Tax Officer (1994) 94 STC 422.

9. The contentions advanced on behalf of the petitioner have been refuted by Mr. Dubey, learned counsel for the Respondents, by contending that the grounds now urged before this court had not been advanced by the petitioner in any of the earlier proceedings before the statutory authorities and, therefore, the petitioner must be understood to be estopped in law from raising the said contentions at this stage. Mr. Dubey, learned counsel for the respondent State has also urged that the questions raised by the petitioner involve determination of certain questions of fact which this court must refrain from in exercise of its power under article 226. At best, according to Mr. Dubey, if the grounds urged by the petitioners are found to be of any merit or substance, the same should be left for determination by the departmental authorities.

10. The rival submissions advanced on behalf of the parties have received the due and anxious consideration of the court. It has already been noticed that the petitioner did not file any appeal against the original assessment order dated 31.3.1997 by which its turnover of sales of iron angles to both registered and unregistered dealers have been made liable to tax at the rate stipulated under Item No. 3 of Schedule IV of the Act. In the revision petition filed by the petitioner against the revised assessment order dated 1.4.1998, following the suo motu revisional order dated 12.2.1998, the aforesaid point was also not urged. However, the statute having made the sale of different items at different points/stages exigible to tax at different rates and such enumeration being contained in the different schedules to the Act whether a particular item falls under a particular schedule or another must be understood to be a question of law open for consideration at any stage, if appropriately raised. The question raised being one of liability to pay tax under the statute framed, the court must proceed on the basis that there can be no estoppel against a just determination of the statutory liability to pay tax at a particular rate. Therefore, merely because the petitioner had not raised the question at any earlier stage it cannot be understood that the aforesaid issue now sought to be raised would be foreclosed.

11. Item No. 3 of Schedule IV under which the turnover of the petitioner in respect of iron angles sold by it has been assessed to tax as well as Item No. 45(a) of the Schedule II which item has now been contended to be the appropriate head for determination of the liability of the petitioner may be extracted below along with the provisions of section 14(iv) of the Central Sales Tax Act, 1956 :

Item 3 Schedule IV All Types of aluminium, iron and steel furniture including slotted angles, angles, racks and parts thereof.

Item 45(a) Schedule II Iron and steel as defined in clause (iv) of section 14 of

CST Act, 1956 (Central Act 74 of 1956)

Section 14 of CST Act, 1956 (iv) Iron and steel that is to say

(i) (pig iron, sponge iron and) cast iron including (ingot moulds, bottom, plates) iron scrap, cast iron scrap, runner scrap and iron skull scrap.

(ii) steel semis (ingots, slabs, blooms and billets of all qualities, shapes and sizes)

(iii) skelp bars, tin bars, sheet bars hoe bar and sleeper bars ;

(iv) steel bars (rounds, rods, squares, flat, octagons and hexagons, plain and ribbed or twisted, in coil form as well as straight lengths)

(v) steel structural (angles, joists channels, tees, sheet piling sections,

Z sections or any other rolled sections).

(vi) Sheets, hoops, strips and skelp. Both black and galvanized, hot and cold rolled plain and corrugated in all qualities, in straight lengths and in coil form , as rolled and in rivetted condition ;

(vii) Plates both plain and chequered in all qualities ;

(viii) discs, rings , forgings and steel castings ;

(ix) tools , alloy and special steels of any of the above categories ;

(x) steel melting scarp in all forms including steel skull, turnings and borings ;

(xi) Steel tubes, both welded, and seamless of all diameters and lengths including tube fittings;

(xii) Tin plates, both hot dipped and electrolytic and tin free plates ;

(xiii) Fish plat bars, bearing plate bars, crossing sleepers bars, fish plats hearing plates, crossing sleepers and pressed steel sleepers heavy and light, crane rolls ;

(xiv) Wheels, types, axles and wheels sets ;

(xv) Wire rods and wires rolled drawn, galvanized, aluminized, tinned or coated, such as by copper ;

(xvi) Defectives, rejects .cuttings or end pieces of any of the above categories).

12. A reading of the provisions contained in Item No. 3 of Schedule IV to the Act make sit clear that the said Item No. 3 deals with aluminium and iron and steel furniture and includes slotted angles, angles, racks and parts thereof. The aforesaid residuary items must necessarily be understood to be in connection with the making of aluminium or iron and steel furniture. Not only the above is evident from a plain reading lot Item 3 of schedule IV to the Act, the provisions contained in Item 40 of Schedule II makes the position even more clear by including all furniture made of timber, bamboo, cane and plastic and specifically excluding from its sweep aluminium and iron steel furniture.

On the other hand a reading of Item No. 45(a) of Schedule II and the provisions contained in section 14(iv) of Central Sales Tax Act, 1956 leaves the court satisfied that the iron angles dealt with by the petitioner, being used for construction of transmission lines and transmission towers, would be more appropriate for inclusion under Item No. 45(a) of Schedule II instead of Item No. 3 of Schedule IV. Though iron, angles are not specifically mentioned in Item No. 45(a) of Schedule II, yet a meaningful and practical approach must be adopted to understand the different species of iron and steel covered by Item 45(a) of Schedule II, particularly in the context of the fact that the said items are meant for use as building materials. Such an approach leads to the obvious conclusion that iron angles used for construction of transmission lines and towers should be excluded from the purview of furniture items dealt with by Item 3 of Schedule IV to the Act and held to be more liable for inclusion under Item 45(a) of schedule II. The basic fact on which the aforesaid question of appropriate inclusion under one or the other schedule to the Act hinges being undisputed, i.e., the use of the iron angles dealt with by the petitioner, the court finds no difficulty in coming to the above conclusion, notwithstanding the reliance placed by Shri Dubey, learned counsel for the respondents, on the Judgment of the Apex Court in the case of State of U.P. and another v. Chemtreat Chemicals and Another (2002) 10 SCO 593.

13. Insofar as determination of the turnover in respect of works contract is concerned, the matter need not detain the court. By virtue of the judgment of the Apex Court in *Mis. Gannon Dunkerley and Others v. State of Rajasthan and Others* (1993) 1 SCC 364 and as setout in paragraph 47 of the aforesaid judgment, the value of following items of a works contract are liable to be excluded from the (turnover liable to tax:

- (a) Labour charges for execution of the works ;
- (b) amount paid to a sub contractor for labour and services ;
- (c) charges for planning, designing and architect's fees ;
- (d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;
- (e) cost of consumables such as water, electricity, fuel, etc., used in he execution of the works contract the property which is not transferred, in the course of execution of a works contract; and
- (f) cost of establishment of the contractor to the extent it is relatable ,to supply of labour and services ;
- (g) other similar expenses relatable to supply of labour and services ;
- (h) profit earned by the contractor to the extent it is relatable to supply of labour and. Services.

That apart, as already held by the Apex Court in *Gannon Dunkerley* (supra), it

will be necessary to make the further deductions as laid down in paragraph 48 of the judgment, which may be conveniently extracted below :

48. We may, however, make it clear that apart from the deductions referred to above, it will be necessary to exclude from the value of the works contract the value of goods which are not taxable in view of sections 3, 4 and 5 of the Central Sales Tax Act and goods covered by sections 14 and 15 of the Central Sales Tax Act as well as goods which are exempt from tax under the sales tax legislation of the State. The value of goods involved in the execution of a works contract will have to be determined after making these deductions and exclusions from the value of the works contract.

14. The question with regard to the liability of the petitioner to pay interest, as raised, may now be considered. The provisions contained in the Act and the Rules with regard to filing of returns, payment of tax, assessments required to be made and levy of interest and penalty will have to be noticed in some details. The Act and the Rules required a dealer to submit monthly, quarterly and annual returns within the time stipulated. All such returns are required to be accompanied by proof of payment of the tax payable, i.e., the bank receipt or the tax itself in the form of A/C payee cheque or Bank Draft, as may be. What is required to be paid by the dealer is the tax "payable", an expression that must be attempted to be understood in the context of the provisions of the Act and the Rules. Assessments under the Act, it maybe noticed, are contemplated on an annual basis though provisions exist both for provisional assessment as well as assessments for a shorter period.

Levy of interest under section 22 of the Act, either as now in force or prior to the amendment made in the year 1999 (the present case will be covered by the pre1999 position) is attracted if tax payable" has not been paid by a dealer. As already noticed, tax, self assessed by a dealer on the turnover, returned in the periodical statements, is required by the Act and the Rules to accompany the returns filed: Until" the final assessment is completed, normally, at the end/ expiry of the year, it is the self assessment procedure and payment of tax on that basis which is to continue. It is in the above context that the question of liability to pay tax from an anterior date, i.e., date of filing of the returns, following the determination of a higher liability upon completion of the assessment has to be answered.

Binding judicial opinion on the point has varied with time. Initially the view was that a return filed must be accurate to the extent of the final assessment which is to follow. Any other view, it was felt, would provide an impetus to the unscrupulous trader to pay less, at least, till the completion of the yearly assessment. Accordingly, the view was that if a higher liability accrues at the time of final assessment, the difference between the tax paid and to be paid must carry interest from the date when the tax was due. This is the majority view in *Associated Cement Company v. C.T.O.* (1981) 48 STC 466. The said view was departed from in *J.K. Synthetics Ltd. v. C.T.O.* (1994) 94 STC 422, wherein,

after an illuminating debate on the various alternatives open it was held that ".....it is. Difficult on the plain language of the section to hold that the law envisages the assessee to predict the final assessment and expect him to pay the tax on that basis to avoid the liability to pay interest. That would be asking him to do the near impossible...". In this regard the provisions for levy of penalty can, perhaps, be usefully noticed as an inbuilt safeguard to take care of the hypothetical unscrupulous traders.

The view expressed in J.K, Synthetics (supra) has been followed in a further pronouncement of the Apex Court in Frick India Ltd. v. State of Haryana (1994) 95 STC 188) and in a recent pronouncement in E.I.D. Parry (India) Ltd. v. Asstt. Commissioner of Commercial Taxes, Chennai (2005) 141 STC 12. Both the questions posed, i.e., meaning of the expulsion "tax payable" and the liability to pay interest from an anterior date, therefore, stands self answered on the doctrine of binding precedent. It must also be emphasized that what has been found above is on the basis of the principles evolved in J.K. Synthetics Ltd. (supra) and not on the subtle nuances appearing in different statutory provisions ; not that there is any marked difference between the provisions of the Assam Act and the Rajasthan Sales Tax Act, as considered in J.K. Synthetics (supra).

15. In the present case it is not the stand of the Revenue that there has been any default on the part of the petitioner to pay the tax payable as per the returns submitted. In fact, in the assessment order dated 1.4.1998, following the suo motu revisional order dated 12.2.1998, it is clearly mentioned that interest amount to Rs. 3,09,594 is being levied for the period 1.4.1994 to 31.3.1998. The said amount of interest has been carried forward to be added to further interest made payable by the assessment order dated 3.10.2001. This could not have been done in view of the law laid down by the Apex Court in J.K. Synthetics, Frick India and E.I.D Parry (supra), as noted above.

16. In view of the foregoing discussions this writ petition is allowed. The impugned order dated 12.2.1998 and 16.9.2001 are hereby set aside and so are the consequential assessment orders dated 1.4.1998 and 3.10.2001. The respondent will now redetermine the liability of the petitioner to payment of tax under the Act for the period in question by passing necessary consequential orders in the light of the present directions.