

(1991) 07 GUJ CK 0022
In the Gujarat High Court
Case No : Sales Tax Reference No. 3 of 1984

K. Rasiklal and Co.

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 01-07-1991

Acts Referred:

Gujarat Sales Tax Act, 1969 — Section 13(B), 21, 69

Citation : (1991) 07 GUJ CK 0022

Hon'ble Judges : S.D. Dave, J;A.P. Ravani, J

Bench : Division Bench

Judgement

A.P. Ravani, J.—In this reference u/s 69 of the Gujarat Sales Tax Act, 1969, three questions have been referred to this Court. One is at the instance of the dealer while other two questions are at the instance of the Revenue.

2. The dealer is manufacturing oil engines and spare parts and sells the same within the State of Gujarat and outside the State of Gujarat. The oil engines and spare parts when sold in the course of inter-State trade and commerce are packed in wooden boxes, price of which is roughly about Rs. 100 or more. In the course of the assessment proceedings for the samvat year 2033, the dealer contended that the wooden boxes were sold along with the taxable goods, that is, the engines and spare parts and there was implied sale of wooden boxes. Therefore it was submitted that the dealer was entitled to set-off under rule 42 of the Gujarat Sales Tax Rules, 1970. It was the case of the dealer that the wooden boxes were purchased on payment of tax. The price of the wooden boxes so purchased was Rs. 11,05,928. The Sales Tax Officer did not grant the set-off on the tax paid on the purchase of wooden boxes. The Assistant Commissioner of Sales Tax in appeal confirmed the decision rendered by the Sales Tax Officer. In second appeal before the Tribunal, the dealer challenged the finding as regards the claim of set-off for certain other articles also. The Tribunal did not allow the set-off regarding wooden boxes, but it allowed the appeal filed by the dealer in respect of purchase of certain goods such as pana-sets, name-plates, wooden

strips, sellac, hose pipes, acetylene gas, diamond dresser, cutting oil, welding rods and other articles mentioned in the order.

3. The dealer submitted an application for making reference to this Court in respect of the claim of set-off regarding the alleged sale of wooden boxes. The Revenue preferred application for making reference to this Court in regard to set-off allowed for certain articles. The Tribunal has referred the following questions to this Court :

Question at the instance of the dealer :

"1. Whether, on the facts and in the circumstances of this case, this Tribunal was right in law in holding that there could not be a resale of wooden boxes when they were sold along with the oil engines duly packed therein ?"

Two questions at the instance of the Revenue :

"(1) Whether, on the facts and in the circumstances of this case, the Tribunal was right in law in applying the ratio of the judgment of the Gujarat High Court rendered in the case of Vasuki Carborundum Works [1979] 43 STC 294 in allowing set-off in respect of purchases of several items like name-plates, wooden strips, cellac, hose pipes, etc., under rule 42 of the Gujarat Sales Tax Rules, 1970 ?

(2) Whether, on the facts and in the circumstances of this case, the Tribunal was right in law in applying the ratio of the judgment in the case of Vasuki Carborundum Works [1979] 43 STC 294 (Guj) in so far as the purchases of acetylene gas, diamond dresser, hardware, emery cloth, colour, ghan, hammer, etc., were concerned and in declaring them as consumable stores ?"

4. It is an undisputed position that the question referred to at the instance of the dealer has been decided by the Tribunal in view of the provisions of section 21 of the Gujarat Sales Tax Act, 1969. This part is not disclosed in the question. Both the sides agree that for bringing out the real controversy between the parties, the question is required to be reframed.

5. As far as the questions referred at the instance of the Revenue are concerned, they need to be reframed so as to specify the articles in relation to which the questions have arisen. Learned counsel appearing for the Revenue has specified all the articles. Therefore, in both the questions, expression "etc." has to be deleted and specific articles need to be mentioned.

6. The questions reframed by us and the answer to the same are indicated hereinbelow :

The question at the instance of the dealer Answer "Weather, on the facts and in the In negative. In favour circumstances of this case, the Tribunal of the dealer and against was right in law in holding that the Revenue. in view of the provisions of section 21 of the Gujarat Sales Tax Act, 1969, there could not be a resale of wooden boxes when they were sold along with the oil engines duly

packed therein ? The questions at the instance of the Revenue 1. Whether, on the facts and in the In affirmative. In favour circumstances of this case, the Tribunal was of the assessee and right in law in applying the ratio of the against the Revenue. judgment of the Gujarat High Court rendered in the case of Vasuki Carborundum Works

Vasuki Carborundum Works Vs. The State of Gujarat,

in allowing set-off in respect of purchases of several items like name-plates, wooden strips, cellac glue, hose pipes, hardware, packing material and timber under rule 42 of the Gujarat Sales Tax Rules, 1970 ? 2. Whether, on the facts and in the In so far as articles circumstances of this case, the Tribunal was ghan and hammer are right in law in applying the ratio of the concerned, in negative, judgment in the case of Vasuki Carborundum in favour of the Revenue Works [1979] 43 STC 294 in so far as the and against the purchases of acetylene gas, diamond assessee. In so far as dresser, hardware, emery cloth, other articles are color, ghan, hammer, pana-sets, cutting concerned, in affirmative, oil, welding rods, foundation bolts, in favour of the painting brush, pressure guage, emery assessee and against the paper, crank shaft and machine toos were Revenue. concerned and in declaring them as consumable stores ?

7. Question No. 1 at the instance of the dealer :

As held by the Supreme Court it is essentially a question of fact. Even when the provisions of section 21 of the Act are applicable, the appropriate authority is not relieved of its obligation to examine the facts and decide the question. In its judgment, the Tribunal referred to its earlier decision in Second Appeal Nos. 367 to 370 of 1979 decided on April 9, 1981. It was a case in respect of this very dealer. Therein it was held that the wooden boxes used in packing the oil engines could not be deemed to have been resold as wooden boxes. The sole ground on which the Tribunal rested its decision is that in view of the provisions of section 21 of the Act, the resale of wooden boxes by necessary implication was ruled out. Section 21 of the Act provides for rate of tax on packing material. No other ground is stated by the Tribunal while arriving at the aforesaid conclusion.

8. The question as to whether the container in which the article is housed forms part of the article and could be conceived of of, integrated component of a single sale transaction or it is to be considered as separate sale is a question of fact. This is so held by the Supreme Court in the case of Raj Sheel v. State of Andhra Pradesh reported in [1989] 74 STC 379. In that case the provisions of section 6-C of the Andhra Pradesh General Sales Tax Act, 1957, came up for consideration. Section 6-C of the Andhra Pradesh Act is in pars materia with the provisions of section 21 of the Gujarat Act.

9. In the case of Raj Sheel [1989] 74 STC 379, the Supreme Court has, inter alia, observed as follows.

"The question in every case will be a question of fact as to what are the nature

and ingredients of the sale. It is not right in law to pick on one ingredient only to the exclusion of the others and deduce from it the character of the transaction. For example, the circumstance that the price of the product and the price of the container are shown separately may be evidence that two separate transactions are envisaged, but that circumstance alone cannot be conclusive of the true character of the transaction."

In the course of the judgment, after some discussion, the Supreme Court has laid down certain guidelines for determining this question. They are as follows.

"It is, therefore, perfectly plain that the issue as to whether the packing material has been sold or merely transferred without consideration depends on the contract between the parties. The fact that the packing is of insignificant value in relation to the value of the contents may imply that there was no intention to sell the packing, but where any packing material is of significant value it may imply an intention to sell the packing material. In a case where the packing material is an independent commodity and the packing material as well as the contents are sold independently, the packing material is liable to tax on its own footing. Whether a transaction for sale of packing material is an independent transaction will depend upon several factors, some of them being :

1. The packing material is a commodity having its own identity and is separately classified in the Schedule;
2. There is no change, chemical or physical, in the packing either at the time of packing or at the time of using the content;
3. The packing is capable of being reused after the contents have been consumed;
4. The packing is used for convenience of transport and the quantity of the goods as such is not dependent on packing;
5. The mere fact that the consideration for the packing is merged with the consideration for the product would not make the sale of packing an integrated part of the sale of the product."

10. In view of the aforesaid decision of the Supreme Court, merely by referring to the provisions of section 21 of the Act, it cannot be said that there could not be a resale of packing material, i.e., wooden boxes in this case. The Tribunal ought to have examined the facts of the case and ought to have come to the conclusion on facts as to whether there were two sales - one that of oil engines and another that of wooden boxes. Be it noted that while arriving at this conclusion, the Tribunal should bear in mind the principles laid down by the Supreme Court. Mere fact that two separate quotations, one for oil engines and another for wooden boxes were invited and the fact that the price of two different items were shown in the bills cannot be treated as a conclusive evidence for arriving at a decision that there were two separate sales. We need not repeat or elaborate what has been stated by the Supreme Court in this

connection. The question is essentially a question of fact to be determined on the basis of the principles laid down by the Supreme Court.

11. The learned counsel for the Revenue submitted that the Assistant Commissioner of Sales Tax has given elaborate reasons and has arrived at a finding that there were not two different sales. However, we do not wish to enter into the examination of facts mainly because the Tribunal has not examined the facts. It is for the Tribunal to examine the facts to come to its own finding as regards the question of facts.

12. Question No. 1 at the instance of Revenue :

This question is required to be decided by keeping in view the provisions of rule 42 of the Gujarat Sales Tax Rules, 1970, which, inter alia, provides that while assessing the tax payable by a manufacturer, set-off may be granted to him in respect of the purchase of goods used by him in manufacture of the taxable goods provided the conditions mentioned in rule 47 are complied with. The dealer, in the instant case, manufactures oil engines. It was the case of the dealer that the items referred to in this question have been used by him in the manufacture of the taxable goods. The expression "in manufacture of the goods" also occurs in section 13(1)(B) of the Act. To be entitled to the deduction or set-off, the dealer is required to show that the goods are not prohibited goods and that the goods were purchased or used as raw material or processing material or as consumable stores in the manufacture of taxable goods. Therefore, what we are required to consider is as to whether the goods mentioned in the question have been used by the dealer in manufacture of the taxable goods. We would consider the goods separately.

(1) Name-plates : Unless the name plates are fixed on the ultimate product, the product would not be marketed. Therefore it has got to be held that name-plates are the goods used by a manufacturer in the manufacture of taxable goods in question. This question is concluded by the Supreme Court in favour of the assessee in the case of Collector of Central Excise v. Jay Engineering Works Ltd. reported in [1989] 75 STC 313. It was a case of fan. However, the principle laid down by the Supreme Court would apply even in relation to oil engine also. In view of this settled legal position, as far as this item is concerned, the question is required to be answered in the affirmative in favour of the assessee and against the Revenue.

(2) Wooden strips, cellacglue, hosepipes, hardware, packing material and timber : It may be noted that the Tribunal has followed the decision of the High Court in the case of Vasuki Carborundum Works reported in [1979] 43 STC 294. In that case, this Court held that the goods required in a process or activity, which though not manufacturing itself, but if it is an integral part of the ultimate manufacture of goods and in absence of which the manufacturing activity may not be commercially expedient, that activity may also be treated as manufacturing activity and the goods be treated as used in relation to

manufacture. While arriving at this conclusion, this Court has followed the decisions of the Supreme Court in the case of Incline Copper Corporation Ltd. v. Commissioner of Commercial Taxes reported in [1965] 16 STC 259 and in the case of J. K. Cotton Spinning & Weaving Mills Co. Ltd. v. Sales Tax Officer reported in [1965] 16 STC 563. In the aforesaid two cases, the Supreme Court has held that a process or an activity may not be necessary for actual production of finished goods. But if it is such an integral part of the ultimate manufacture of goods that in its absence the manufacturing may not be commercially expedient, that activity or process must be considered to be manufacturing activity itself and the goods intended for use in that process or activity should be considered to be goods required in the manufacture of taxable goods for sale. This principle has been followed by this Court in the case of Vasuki Carborundum Works [1979] 43 STC 294. The Tribunal has also followed the aforesaid principle while deciding the question as regards the aforesaid articles. Simply because certain articles are packing material, and the article like timber, are used after the oil engine is manufactured, it cannot be said that they are not used in manufacture of the taxable goods, i.e., oil engines. It is not possible to give restricted meaning to the expression "used in manufacturing" as contended by the learned counsel for the Revenue. This very contention has been negated by this Court in the case of Vasuki Carborundum Works [1979] 43 STC 294. For the aforesaid reasons, this question is answered as indicated hereinabove in the column against the question.

13. Question No. 2 at the instance of the Revenue :

As far as the articles covered by this question are concerned, it is required to be decided as to whether they would fall within the expression "consumable stores" occurring in section 13(1)(B) of the Act. While determining this question, the Tribunal has followed the principles laid down by this Court in the case of Vasuki Carborundum Works [1979] 43 STC 294. As indicated hereinabove, this Court has followed the decisions of the Supreme Court in the case of Indian Copper Corporation Ltd. [1965] 16 STC 259 and J.K. Cotton Spinning & Weaving Mills Co. Ltd [1965] 16 STC 563. Therefore we need not reiterate the principles laid down by the Supreme Court and followed by this High Court. We proceed to determine as to whether any error is committed by the Tribunal while applying the principles in relation to specific item.

14. Except in the case of "ghan" and "hammer", we do not find that any error is committed by the Tribunal while considering the other items as "consumable stores". As far as "ghan" and "hammer" are concerned, it is difficult to conceive that they can ever be said to be consumable stores. When oil engine is manufactured, "ghan" and "hammer" are being used in the process of manufacture of oil engine. They are certainly not raw materials or processing materials. Neither "ghan" nor "hammer" is ever used as a part of oil engine. "Ghan" and "hammer" are being used to give shape to certain articles which may be used in the oil engine. It may be that "ghan" and "hammer" may even be

used for giving shape to outer part of the oil engine. But thereby they do not become consumable stores.

15. The contention of the learned counsel for the dealer is that "ghan" and "hammer" are tools and they do not form part of the assets of the dealer. Therefore, it is submitted that these articles should be treated as consumable stores. The submission cannot be accepted for the simple reason that as to whether an article is a consumable store or not is not to be decided by posing a question as to whether it is fixed capital asset or it forms part of the revenue expenditure of the dealer. The question is to be decided by making reference to the use of the item in the manufacture of the taxable goods. By no stretch of reasoning it can be said that "ghan" and "hammer" are at any stage becoming integral part of the taxable goods so as to make the taxable goods marketable. It is true that they are used in relation to manufacture. But to claim set-off u/s 13(1)(B), the dealer must also prove that the goods have been used in manufacture of taxable goods either as raw material or as processing material or as consumable stores. In our opinion the Assistant Commissioner was right in holding that "ghan" and "hammer" are tools and not consumable stores. Even the dealer has shown these items in his account books as tools and not as consumable stores. In this view of the matter, as regards "ghan" and "hammer" the question is answered as indicated hereinabove in the column against the question.

16. The learned counsel for the Revenue submitted that once an article is superscribed as a packing material, it can never be considered to be consumable stores. Similar contention was advanced before this Court in the case of Vasuki Carborundum Works [1979] 43 STC 294 and the same has been negated by this Court. Therefore elaborate discussion on this point is not necessary.

17. The learned counsel for the Revenue submitted that in the case of Deputy Commissioner of Sales Tax v. Thomas Stephen & Co. Ltd reported in [1988] 69 STC 320, the Supreme Court has made observations to the effect that consumption must be in the manufacture as raw material or of other components which go into the making of the end-product to come within the mischief of the section, that is to say, section 5A of the Kerala General Sales Tax Act, 1963. Relying on these observations, it is submitted that the expression "consumable stores" occurring in section 13(1)(B) of the Gujarat Act should also be considered similarly. It is submitted that unless the article or the goods become part of the end-product the article cannot be said to be a consumable store. The contention cannot be accepted for the simple reason that the provision which came up for consideration before the Supreme Court was altogether different. Therein the Supreme Court was required to consider as to whether an article can be said to have been consumed in the manufacture of other goods. The question before the Supreme Court was as to whether cashew shells which were used in kiln, while manufacturing tiles and other goods can be said to have been consumed in manufacturing of tiles and other goods. In that context, the Supreme Court has

made the aforesaid observations. These observations cannot be applied to the provisions of section 13(1)(B) wherein the expression "consumable store" occurs.

18. In view of the aforesaid discussion, our answer to the aforesaid question is as indicated hereinabove in para 6 in the column against the question. The reference is answered accordingly with no order as to costs.

19. Reference answered accordingly.